Chapter 7

The Prohibition of the Destruction of Enemy Property in Occupied Territory

1. Introduction

The prohibition of the destruction of enemy property is a well-established principle in customary law. This can be traced back to the 1794 Jay Treaty, which obliged the US and the UK not to confiscate the other nationals’ property even in wartime. Schwarzenberger argues that with respect to the immunity especially of private property from destruction, this principle reflects the Rousseau-Porta- lis doctrine, according to which war was contemplated as an exclusive state of affairs between belligerent states, which ought to minimise detrimental impacts on private citizens as much as possible. The exception to the general rule on the sacrosanct nature of private property is allowed only where such destruction or seizure is “imperatively demanded by the necessities of war”.

Article 23(g) of the 1907 Hague Regulations provides that it is forbidden to destroy or seize the adverse party’s property. This provision embodies a general rule on conduct of hostilities. Under the Hague Regulations, this general clause is subject to lex specialis as stipulated in Articles 52 and 53 relating to occupied territory. The Hague Regulations 1907 contain no specific rule that prohibits

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3 In case of doubt as to the private or public nature of the ownership of property, the presumption is that it is publicly owned until and unless private ownership is established: G. Von Glahn, The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation, (1957), at 179.
the occupying power from destroying public or private property of the occupied state. Yet, this can be implicitly derived from the restrictions on its right to appropriate enemy property as provided in Articles 46, 47 and 53.5 Another methodology is to propose that certain rules on conduct of hostilities enumerated in Section II – Hostilities, including Article 23(g), should serve as an interpretative aid in filling gaps left by specific rules embodied in Section III – Military Authority Over the Territory of the Hostile State of the Hague Regulations, not only in the case of the eruption of small-scale fighting and skirmishes that may be described as (international or non-international) armed conflict, but also in respect of “calm” occupation.

Within the realm of the law of occupation under GCIV, Article 53 reinforces the rule laid down in Article 23(g) of the 1907 Hague Regulations. It broadens the general obligation imposed on the occupying power to prohibit destruction of property. Going beyond the property (real or personal) of protected persons (owned individually or collectively), it covers properties pertaining to the state, or to other public authorities, or to social or cooperative organisations.6 In that way, Article 53 GCIV bolsters the prohibition of destruction already implicit in Articles 46 and 56 of the Hague Regulations. These provisions require the occupying power to respect private property and the property of municipalities respectively.

As Article 53 GCIV prohibits only “destruction”, the occupying power reserves the right to requisition private property. With respect to public property, it is entitled to confiscate any movable property belonging to the occupied State for the purpose of military operations, and to administer real property belonging to that State.7

2. A Scorched Earth Policy

A so-called scorched earth policy involves the systematic destruction of whole areas by occupying forces in their withdrawing phrase before the arrival of the enemy forces. This is a typical example of conduct of hostilities, but it is relevant to highly volatile states of occupation. It may be suggested that the distinction between the general devastation type which is forbidden and the lawful destruction imperatively demanded by military operations is “one of fact and degree

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5 Ibid.
6 See ICRC’s Commentary to GCIV, at 301.
7 Ibid.