Chapter 8

The Prohibition of the Seizure and Use of Public Property in Occupied Territory

1. Introduction: The Distinction between Private and Public Property

With respect to the seizure and use of enemy property, the law of belligerent occupation gives primacy to private over public property. In the 1921 Award in the Cession of Vessels and Tugs for Navigation on the Danube Case, which involved the confiscation of private property during the First World War, the Arbitrator Hines held that “[t]he purpose of the immunity of private property from confiscation is to avoid throwing the burdens of war upon private individuals, and is, instead, to place those burdens upon the States which are the belligerents”. The strict distinction between private and public property under the Hague rules largely reflect the laissez-faire philosophy of the late nineteenth century. Nevertheless, since the Great Depression in the 1920s, the tone of decision-making policies in assessing regulations of economy and property rights in occupied territory has been very much influenced by the idea of a welfare state based on public intervention and joint (public and private) ownerships.

1 2 August 1921, 1 RIAA 97, at 107. Hines added that “[i]n cases where a belligerent State has employed private property for military purposes under arrangements whereby the State undertakes to return the property to its owner, the appropriation of the property by the Enemy State would not place the burden of the loss upon the private owner, but would place it upon the owner’s State, which would be under an obligation to make compensation to the owner”: ibid., at 107–108.

In case there is doubt as to public or private ownership of property found in the occupied territory, such property may be treated as public unless and until it is rebutted by the clear demonstration of its private character. In case both public and private interests in property coexist, the occupying power is entitled to seize or confiscate the property but liable to compensate private individuals as far as the value of their interest is concerned. In this chapter, the appraisal focuses on the seizure and use of only public property.

2. State Property

2.1. Overview

With respect to the property of an occupied state, the Hague law has drawn a distinction between immovable and movable property. Further, it is possible to distinguish between immovable of civilian character and that of military character, albeit this distinction is not expressly provided in the Hague law. Along this line, the UK Manual of the Law of Armed Conflict classifies real property of the occupied State into two categories: the real property which is used for military purposes; and that which is essentially civilian in character.

2.2. Immovable State Property (Land and Buildings) of a Civilian Character

With respect to immovable state property of civilian character found in occupied territory, Article 55 of the Hague Regulations recognises the occupying power only as administrator and usufructuary of such property, and not as its owner. The application of the Roman law concept of usufruct to state immovable property under the law of belligerent occupation was conceived in the Brussels Conference of 1874, which formulated the original draft of Article 55. This concept was applied by the Franco-Chilean Arbitration Tribunal in the Guano case. There, the three Swiss members that formed the tribunal examined the

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3 The UK Manual refers to bank deposits, stores and supplies obtained from contractors as such examples. It also states that in case a public authority possesses property on behalf of a private person, as in the case of private bank deposits in state-owned banks, such property must be treated as private: UK Ministry of Defence, Manual of the Law of Armed Conflict [hereinafter referred to as UK Manual] (2004), at 304, para. 11.90.

4 Ibid., at 304–5, para. 11.90.

5 Ibid., at 303, paras. 11.85–11.86.

6 The Tribunal held as follows:

Attendu que l’occupation militaire d’un territoire ennemi entraîne incontestablement, suivant les principes du droit des gens, certaines conséquences relatives aux propriétés publiques de l’Etat souverain de ce territoire . . . ; qu’on distingue à cet égard . . . entre la propriété mobilière de l’Etat ennemi, qui est considérée comme un butin de guerre, et la propriété immobilière,