Chapter 8

The Laws of Occupation

The laws relating to the occupation of territory after an armed conflict are fundamental for the obligations of international actors involved in post-conflict operations, although their application is often overlooked. The legal authority of peace-building missions and international administrations differs substantially from one case to another. As noted earlier, such missions are often created after an international agreement and/or a Security Council Resolution. The exercise of administrative powers can thus be a result of an explicit authorisation contained in the particular instrument. However, in some cases additional powers and authority result from the laws of armed conflict. Iraq is the most obvious case, but it is often overlooked that in East Timor, for example, the laws of armed conflict were applied before and even for a certain time after the deployment of UNTAET. It is not the purpose of this part to give an extensive overview of the legal rules applicable in occupied territory. We will instead focus first on the content of the laws of occupation, and in particular on those certain rules which may have an influence when the laws of occupation are applicable in peace-building missions. Afterwards, we will address the application of that regime to the UN and other international organisations when engaged in peacekeeping operations, peace-building missions and international administrations.

A. Belligerent Occupation of Foreign Territory

The rules applicable to occupying powers are for the most part incorporated in the Fourth Hague Convention of 1907 and the Regulations annexed to it, the

421 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague (18 October 1907), 187 CTS 227 (1907) [Hereafter referred to as ‘the Hague Regulations’]. The rules concerning occupation are contained in articles 42–56 of the Hague Regulations of 1907.
Fourth Geneva Convention Relative to the Protection of Civilians in Time of War \footnote{Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 75 UNTS 287 [Hereafter ‘Fourth Geneva Convention’], in particular Articles 27–34 and 47–78.} and the First Protocol Additional to the Geneva Conventions.\footnote{Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.} These rules are above all important for the relationship between the occupying powers and the governing authorities, and for when the occupier acts as an administering authority. It should also be added that the laws of occupation, as determined by the Hague Regulations and by the Fourth Geneva Convention, are in essence declaratory of customary international law.

The occupying power assumes responsibility for the administration of the occupied territory, when this occupation is effective.\footnote{Art. 43 Hague Regulations. See also UK Ministry of Defence, \textit{The Manual of the Law of Armed Conflict} (Oxford: Oxford University Press, 2004), n° 11.19, p. 282.} Article 42 of the Hague Regulations defines occupation of territory “when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised”. This definition is mainly based on the traditional idea of a declared war, and the subsequent occupation of the ‘hostile state’. The Hague definition implies the effective and \textit{de facto} submission of the territory and its population to the occupying power.\footnote{Vité, S., ‘L’applicabilité du droit international de l’occupation militaire aux activités des organisations internationales’, 86 \textit{International Review of the Red Cross} 9 (2004), p. 11.} This effectiveness can be proven by the simultaneous fulfilment of two conditions: (1) the former government is unable to exercise its authority in that particular area, and (2) the occupying power is capable of substituting its own legal authority over that part of the occupied territory.\footnote{UK Ministry of Defence, \textit{supra} note 424, n° 11.3, p. 275.} The definition proposed by the Hague Regulations, although consistent with the international legal order of that time, is nevertheless very limited, as military occupation of a foreign territory does not always follow a declared war.\footnote{During the Second World War, there had been several examples of military occupation, which did not begin with war. Several territories had indeed been invaded without any or with a minimum of military resistance, for example Denmark and Czechoslovakia. See Roberts, A., ‘What is a military occupation?’, 55 \textit{British Yearbook of International Law} 291 (1984), p. 252.} A change took place with the adoption of the Geneva Conventions after the Second World War. Article 2 common to the four Geneva Conventions states:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.