



Individual Property and Unlawful Destruction: An Expanded Compensation Model for Civilian Losses During Armed Conflict

Responding to Lea Brilmayer & Geoffrey Chepiga, *Ownership or Use? Civilian Property Interests in International Humanitarian Law*, 49 HARV. INT'L L.J. 413 (2008).

Bonnie Docherty*

Civilians have historically found it difficult to recover damages for property destroyed during armed conflict, but new legal bodies are now making compensation for such loss more feasible. In their article *Ownership or Use? Civilian Property Interests in International Humanitarian Law*, Lea Brilmayer and Geoffrey Chepiga argue that the international community must “plan for a future” that allows for monetary awards to civilian victims of property destruction.¹ They contend that international humanitarian law (IHL) should determine the worth of property differently during times of war than during times of peace, and they propose that civilians should receive compensation for destroyed property based on its civilian use rather than its market value.² The authors do not fully address, however, the realities of war’s destruction and the suffering it causes. Their model should be expanded to encompass individual as well as communal civilian property and to apply the compensation formula to all unlawful damage, not just deliberate destruction.

Through an analysis of IHL’s evolution, Brilmayer and Chepiga show that it protects civilian property in order to protect civilians. The Geneva Conventions of 1949 and their Additional Protocols of 1977 have firmly established the requirement that armed forces respect civilian property, not only because civilians have a right to

¹ Lea Brilmayer & Geoffrey Chepiga, *Ownership or Use? Civilian Property Interests in International Humanitarian Law*, 49 HARV. INT’L. L.J. 413, 416 (2008).

² *Id.* at 417.

their property but also because destruction of property leads to their suffering.³ Belligerents may not legally target any civilian objects, which are defined as all objects that do not “by their nature, location, purpose or use make an effective contribution to military action”⁴ Protocol I grants additional special protection to objects that are indispensable to survival, such as farms and drinking water installations; it prohibits not only destroying but also removing or rendering useless such objects.⁵ IHL privileges the protection of this kind of property because of its function, not its ownership. The authors therefore conclude that humanitarian principles call for assessing property based on its use value to civilians, not on its market value.⁶

Brilmayer and Chepiga base the implementation of their civilian-use model for compensation on a limited definition of property, clear intent, and a workable method for establishing value. They apply their model not to all property, but to property that is determined on a case-by-case basis to meet significant civilian needs.⁷ In order to qualify for compensation, the authors further argue, such property must have been destroyed deliberately during a time of armed conflict.⁸ Brilmayer and Chepiga lay out their formula for calculating civilian-use value using the example of the destruction of a civilian hospital. According to their calculus, compensation should consist of the replacement cost plus “a fixed-sum amount for every individual in a given catchment area.”⁹ The small fixed-sum award would be assigned for each individual within a specified geographic area. Therefore a belligerent that destroyed a hospital would be liable for paying for the facility’s reconstruction and providing a certain amount for each civilian it served.

Brilmayer and Chepiga conclude that their civilian-use model is consistent with the international law of remedies. They argue that their approach does not run afoul of the legal requirement for proximate cause—i.e. the link between the act and harm is not too indirect—because they limit its scope to deliberate destruction. Deliberate harm is foreseeable, and claims commissions usually find that foreseeable harm meets the test for proximate causation.¹⁰ The authors also show that their model does not violate the prohibitions on punitive damages and double recovery in international law. Civilians are merely receiving compensation for the harm they suffered, and that harm comes in two forms, the need for replacement and the loss of use, each of which should be compensated.¹¹

³ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict arts. 52, 54, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

⁴ Protocol I, *supra* note 3, arts. 52(1), 52(2).

⁵ *Id.*, art. 54.

⁶ See Brilmayer & Chepiga, *supra* note 1, at 418–430.

⁷ *Id.* at 433–34.

⁸ *Id.* at 441.

⁹ *Id.* at 435.

¹⁰ *Id.* at 441–43.

¹¹ *Id.* at 444–45.

Brilmayer and Chepiga's article presents an innovative approach to a serious humanitarian problem; however, it has some limitations. By using the destruction of a hospital as their example, the authors focus on communal property that, regardless of who actually owns it, serves a large number of civilians. They gloss over pieces of individual property, such as homes, farms, shops, and personal goods, that serve individuals or families and are also vulnerable to destruction during war. One of the authors' arguments for adopting their civilian-use formula for compensation is that calculating individual claims would be too unwieldy.¹² The authors also exclude a wide range of wartime destruction by restricting the scope of their model to property that is deliberately destroyed.

Field research shows that to compensate civilians adequately for the suffering caused by property loss during war, the civilian-use model must be expanded. Civilians suffer more frequently from destruction of individual than communal property. This destruction occurs in all types of armed conflicts, ranging from international technologically advanced operations, like the major hostilities in Iraq in 2003, to internal interethnic violence, such as that ongoing in Darfur. While belligerents at times attack hospitals, they almost always bomb or burn homes and shops, contaminate farms with unexploded ordnance, or steal personal belongings. Investigators documented each of these kinds of property loss during the war between Georgia and Russia in 2008.¹³

Furthermore, while some wartime destruction is deliberate, other types of unlawful acts cause serious damage, too. Even if aiming at military targets, armed forces often indiscriminately or disproportionately use weapons or methods of warfare that destroy civilian property.¹⁴ In 2003, for example, the U.S. Air Force's fifty failed strikes on Iraqi leadership targets not only killed civilians but also leveled homes. The Air Force was attempting to hit legitimate military targets, but it used a flawed targeting methodology that made the attacks indiscriminate and caused great property destruction.¹⁵ Any proposal to compensate civilians for property loss must take these real-life aspects of armed conflict into account.

A civilian-use model for compensation should be expanded to include individual as well as communal property. Commentators have included the former in discussions of what property loss causes civilian suffering. For instance, a U.S. delegate to the negotiations of the 1949 Geneva Conventions said civilian property should be protected "in order to spare civilian populations the sufferings which might result from the destruction of their houses, clothes, foodstuffs and the means of

¹² *Id.* at 436.

¹³ Human Rights Watch, Summary of Recommendations (October 20, 2008), <http://www.hrw.org/en/news/2008/10/20/summary-recommendations>.

¹⁴ See Protocol I, *supra* note 3, arts. 51(4) and 51(5) (defining types of indiscriminate attacks) and art. 51(5)(b) (defining disproportionate attacks).

¹⁵ HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 21–41 (2003), *available at* <http://www.hrw.org/en/reports/2003/12/11/target>.

earning their living.”¹⁶ Similarly, the Commentary to the Fourth Geneva Convention explains, “The purpose of this Convention is to protect human beings, but it also contains certain provisions concerning property, designed to spare people the suffering resulting from the destruction of their real and personal property (houses, deeds, bonds, etc., furniture, clothing, provisions, tools, etc.).”¹⁷ Although Brilmayer and Chepiga quote these statements, they focus on communal property as a more viable object for compensation. Nonetheless, a fair property compensation scheme should pay civilians for individual losses.

The scope of the civilian-use model should also cover all unlawful acts, not simply deliberate ones. While deliberate targeting of civilian property violates IHL, indiscriminate and disproportionate attacks, which do not distinguish between civilian and military objects, do so too. Much of the devastation of war comes from such attacks. For example, Israel claimed its shelling of northern Gaza from 2005-2007 was intended to combat Palestinian rocket attacks, but it aimed its artillery too close to populated areas and consequently damaged or destroyed many civilian homes.¹⁸ During its January 2009 conflict with Hamas, Israel shelled residential neighborhoods of Gaza City itself, even more densely populated areas.¹⁹ Many of the attacks in both time periods were indiscriminate or disproportionate,²⁰ and under the expanded civilian-use proposal, Israel would be held liable for compensation. This approach would not inappropriately hinder military actions. Instead, it would require belligerents to pay civilians for unlawful destruction and deter acts prohibited under IHL.

While broader than the proposal of Brilmayer and Chepiga, the expanded civilian-use model can adopt their same basic formula for calculating compensation. It should still include both replacement cost and a fixed sum for individuals in the catchment.²¹ The definition of catchment for individual property would differ somewhat from that for communal property. While a hospital’s catchment might encompass all residents of a region, the catchment of a home, shop, or farm would include the owner and his or her family. In both cases, however, the destruction affects civilians beyond the specific owner of the property. Although the individual to whom the property

¹⁶ Brilmayer & Chepiga, *supra* note 1, at 417 (quoting 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE CONVENED BY THE SWISS FEDERAL COUNCIL FOR THE ESTABLISHMENT OF INTERNATIONAL CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS AND HELD AT GENEVA FROM APRIL 21ST TO AUGUST 12TH, 1949, 649 (2004)).

¹⁷ *Id.* (quoting INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 226 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958)).

¹⁸ See HUMAN RIGHTS WATCH, INDISCRIMINATE FIRE: PALESTINIAN ROCKET ATTACKS ON ISRAEL AND ISRAELI ARTILLERY SHELLING IN THE GAZA STRIP 58–68 (2007), available at <http://www.hrw.org/en/reports/2007/06/30/indiscriminate-fire>.

¹⁹ Press Release, Human Rights Watch, Israel: Stop Shelling Crowded Gaza City (Jan. 16, 2009), <http://www.hrw.org/en/news/2009/01/16/israel-stop-shelling-crowded-gaza-city>.

²⁰ See HUMAN RIGHTS WATCH, INDISCRIMINATE FIRE, *supra* note 18, at 9–10; Press Release, Human Rights Watch, *supra* note 19.

²¹ See *supra* pp. 106–07; Brilmayer & Chepiga, *supra* note 1, at 435.

belongs would receive two types of compensation, they would be for two different harms. The replacement cost would pay to restore the property. The fixed sum would compensate for other harms, such as the costs of fleeing one's home and lost harvests. Therefore, as in the hospital example, there would be no double recovery or punitive damages.

The expanded approach to civilian-use compensation presents some challenges, but they are not insurmountable. As Brilmayer and Chepiga note, individualized assessment can be complicated. They write, "Trying to collect individual reports will be prohibitively expensive, take an exceedingly long amount of time, and may be beyond the limited powers of most commissions or tribunals."²² A commission could minimize these logistical difficulties by, e.g., setting up a formula under which all civilian property of the same type received the same compensation, minimizing the need for case-by-case analysis. While broadening the compensable harm from deliberate to unlawful would increase the number of civilians eligible for compensation, it could simplify the determination of the legitimacy of the claim. It is often easier to determine whether destruction was indiscriminate than to enter the mind of a belligerent and prove the intent necessary to establish deliberate harm.

Expanding the scope of Brilmayer and Chepiga's civilian-use model has several benefits. It adapts the authors' mechanism to alleviate more civilian suffering, one of the goals of IHL. It increases the deterrence of the authors' version by discouraging all unlawful conduct rather than only deliberate destruction. Compensating civilians for damage to individual property also obviates some of the difficulties of measuring civilian-use value with regard to communal property. Brilmayer and Chepiga describe the nature of the harm and scope of the catchment as particular challenges.²³ An attack on a hospital causes only potential harm to many of the civilians in the catchment, which makes it hard to quantify damages. By contrast, an attack on a home, shop, or farm causes actual harm to specific individuals. The catchment for individual property is also smaller than that for communal property, and it is therefore easier to identify its members. Such benefits make it harder for belligerents—and commissions or tribunals—to oppose compensation for property loss on the grounds that it is ineffective and/or infeasible.

²² Brilmayer & Chepiga, *supra* note 1, at 436. There is, however, precedent for compensating individual civilians for suffering caused by war. The U.S. military, for example, provides condolence payments to victims or survivors of U.S. or Coalition combat operations in Iraq and Afghanistan. CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT (CIVIC), LOSING THE PEOPLE: THE COSTS AND CONSEQUENCES OF CIVILIAN SUFFERING IN AFGHANISTAN 74–75 (2009), *available at* <http://www.civicworldwide.org/storage/civic/documents/afghan%20report%20final.pdf>; CIVIC, MILITARY CLAIMS SYSTEM FOR CIVILIANS: WHITE PAPER 1 (May 2007), *available at* <http://www.civicworldwide.org/storage/civic/documents/civic%20-%20casualties%20white%20paper.pdf>.

²³ See Brilmayer & Chepiga, *supra* note 1, at 434–35 (discussing difficulties of measuring civilian-use value).

Like Brilmayer and Chepiga's proposal, the expanded civilian-use model aspires to advance IHL, and it is no more "quixotic" than their approach.²⁴ It is put forward at a time when IHL is increasingly providing for remedial measures.²⁵ It falls within the parameters of IHL and the international law of remedies. It avoids significant logistical obstacles to implementation. Finally, it alleviates the suffering most often caused by the destruction of civilian property during armed conflict: that of ordinary individuals who lose their homes, sources of livelihood, or personal belongings.

* Bonnie Docherty is a lecturer and clinical instructor at the International Human Rights Clinic in Harvard Law School's Human Rights Program and a researcher for Human Rights Watch. She has done field missions researching the effects of war on civilians in many places, including Afghanistan, Iraq, Ethiopia, Darfur, Gaza, Lebanon, Israel, and Georgia. She also participated in the negotiations for the new Convention on Cluster Munitions, signed in December 2008. This article reflects her views alone.

Suggested Citation: Bonnie Docherty, *Individual Property and Unlawful Destruction: An Expanded Compensation Model for Civilian Losses During Armed Conflict*, 49 HARV. INT'L L.J. ONLINE 104 (2009), <http://www.harvardilj.org/online/157>.

²⁴ *Id.* at 446.

²⁵ For example, the Convention on Cluster Munitions, which opened for signature on December 3, 2008, includes groundbreaking provisions requiring states to provide assistance to civilian victims of the weapon. Convention on Cluster Munitions, art. 5, Dec. 3, 2008, available at http://www.clusterconvention.org/pages/pages_ii/ia_textenglish.html.