



HARVARD ILJ ONLINE
VOLUME 50 – JULY 17, 2009

Evaluating the Civilian-Use Model of Wartime Property Damage: A Response to Brilmayer and Chepiga

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

Sarah Holewinski* & Erica Gaston#

I. INTRODUCTION

That civilians suffer in war is a historic, global phenomenon; that they deserve more respect during the fighting and more help after the smoke clears is obvious to anyone who has visited Afghanistan, the Democratic Republic of Congo, or Sri Lanka in the past year. The extent of civilian suffering seldom corresponds to the compensation that individuals or communities receive, or when it does, the calculus for such compensation does not take into account the far-reaching implications of the harm done to ordinary people who now must try to pick up the pieces of their lives. Brilmayer and Chepiga argue that deliberate damages to property should be compensated according to “use value” rather than ownership, such that the damages represent the social costs to the entire community. Under this theory, a hospital turned to rubble, a distinct violation of International Humanitarian Law (IHL), would be valued for its far-reaching utility as a community asset for health care and peace of mind, not just for its bricks and mortar. The authors justify this calculus on the grounds that the loss inflicted on potential users of that hospital is greater than its market value.

For practitioners, both advocates and humanitarians, there are two underlying imperatives that must remain at the fore of efforts to fill known gaps or inadequacies in IHL; to neglect the full realization of either imperative is to inadvertently

undermine the interests of civilians. First, practitioners are concerned about improving the welfare of civilians during war, as follows from IHL's baseline assumption that civilians should be spared to the best extent possible the atrocities that war inevitably brings. Our second priority is to add to or strengthen incentives that deter warring parties from harming civilians. The authors argue that a model for damages recognizing the "civilian-use" value of community property would better reflect the real harm done and, consistent with existing IHL provisions, provide additional deterrence against targeting civilian property that is "indispensable to the survival of the civilian population."¹ To understand the value and utility of Brilmayer and Chepiga's "civilian-use" model, we therefore apply this two-part test: (1) Will the "civilian-use" model meet the most critical needs of civilians suffering from armed conflict? (2) Will it change the behavior of warring parties? The answer to both of these questions is a solid maybe.

II. WOULD A CIVILIAN-USE STANDARD BENEFIT CIVILIANS?

In theory, applying Brilmayer and Chepiga's civilian-use standard to assess the value of property would mean more compensation for communities harmed in war; this quite obviously is beneficial to civilians and with this positive aspect we do not quibble. However, from a practitioner's point of view, the real focus of redefining obligations under IHL should be on making warring parties immediately responsive to the consequences of civilian property loss. The civilian-use standard does nothing, for example, to address the fact that tribunals and formal adjudications can take decades to deliver relief. It also, perhaps mistakenly, prioritizes additional relief for community over individual losses, whereas the latter are more likely to be overlooked and go unaddressed within the current IHL framework.

Perhaps tribunals with jurisdiction to require warring parties to compensate civilian victims are becoming more relevant, but because the entire process is so slow, they are unable to address the affected civilians' needs for immediate relief. In cases where civilians actually receive help, greater compensation recognizing the civilian-use value of their losses would certainly be appreciated, but even given the notable developments in international adjudication that the authors point out, this relief is rarely forthcoming from international tribunals.² Most victims of IHL violations never have the opportunity to bring their case in front of a tribunal, and of those cases that do come to trial, adjudication does not take place for years after individuals have suffered the initial losses (though their suffering continues, to be sure). It took the United Nations until 2005 to finally approve \$52.5 billion in compensation to Kuwaitis from Iraq's 1990-91 occupation of that country; much of that money is still owed. Civilians whose claims are now being heard in the Iran-United States Claims

¹ Lea Brilmayer & Geoffrey Chepiga, *Ownership or Use? Civilian Property Interests in International Humanitarian Law*, 49 HARV. INT'L L.J. 413, 417 (2008).

² See *id.* at 415-16.

Tribunal³ have been waiting three decades for a decision on the rendered value of their losses.⁴

Following a war, civilians who suffer from a lack of shelter, food, clothing or medicine are in dire need of humanitarian aid. Given the length of time it would take for a civilian to receive relief through a formal tribunal, the difference in amounts given under a “civilian-use” vs. “ownership” is only of secondary concern—at that point the affected civilians’ dire needs have either been resolved or have created greater destruction in their lives. If the suffering has been compounded over years, a civilian-use model may take into account only the value of the civilian property at the time of the conflict, not the suffering caused by order of magnitude in the years following. At this point, compensation even under a civilian-use model will be undervalued.

The notion that the larger IHL framework, or strategic interest, might induce warring parties to provide civilians with immediate relief is not illusory. To the contrary, some warring parties are increasingly developing mechanisms to provide immediate monetary payments to families and communities affected by conflict, usually in cases of unintended harm. For example, in Afghanistan many of the international military forces have discretionary funds to provide immediate help and apologies where civilians have lost a loved one, suffered injuries, or sustained significant property or livelihood losses.⁵

While these awards rarely approximate market value much less the “use value” of civilian losses, they provide something of greater value to individuals and families who are caught in war zones: immediate recognition and a modicum of relief. This is particularly true for individuals and families suffering from the loss of property that provided for basic humanitarian needs, the very property eligible for the authors’ “use-value” calculations. These *ex gratia* payments also tend to cover losses caused by actions that would likely be considered lawful under IHL, not just those that fit into the narrower category of deliberate destruction. In this way, these *ex gratia* payments may do more to carry out the overall objective of IHL provisions protecting civilians than formally adjudicated relief mandated only where wrongdoing or a breach has occurred. As Brilmayer and Chepiga establish, the primary motivation for many of the IHL provisions addressing civilians was the prevention of needless suffering—suffering caused regardless of whether the use of force was intentional or not.⁶

³ See *id.* at 415 n.11.

⁴ See *id.* at 415 n.12.

⁵ See, e.g., CIVIC Worldwide, *Losing the People: The Costs and Consequences of Civilian Suffering in Afghanistan* 74–78 (2009), www.civicworldwide.org/afghan_report (providing an overview of immediate payment mechanisms by warring parties in Afghanistan to civilians unintentionally harmed by their activities).

⁶ Brilmayer & Chepiga, *supra* note 1, at 422 (noting that “whenever property was debated and discussed in the various conferences that led up to the ratification of the Fourth Geneva Convention, it was consistently valued for its importance in preventing civilian suffering.”). See also W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT’L L. 381, at 398 (1997). (arguing that “it is surely incompatible with the postulates of humanitarian law . . . to allow an actor to

A second concern raised by the civilian-use model is that it puts the emphasis on collective property, while in practice there is often a greater need for replacement or recompense for individual property. Under the model proposed by the authors, civilians who suffer individual damages—a destroyed home or requisitioned cattle—should get compensation but not qualify for the extra civilian-use damage award. Destruction of essential community property is a pressing concern in conflict zones, and yet it is this type of property that tends to be replaced or renewed most rapidly either by aid groups, the international community or the local community itself as compared to the humanitarian needs of individuals or families, which are harder to address and thus sometimes overlooked; even Brilmayer and Chepiga note that determining a “civilian-use” value for individual claims is more difficult to calculate. The solution lies in better, less lethargic tribunals that investigate and establish appropriate compensation values for individuals, families and communities alike.⁷ The potential outcome for a widow or grieving father is well worth the additional effort. For this model to benefit the larger number of civilians harmed by intentional destruction of property, the focus should be expanded beyond the community—or rather collapsed, as it were, taking into account smaller units like the family or the individual.

The answer to the first question we pose, thus, is that the civilian-use model does little in practice to resolve the critical needs that civilians in these situations face both because of its delay in reaching civilians and because it fails to address individual losses.

III. WILL THE PROPOSED MODEL PROVIDE ANY ADDITIONAL DETERRENCE?

The authors suggest that their use-value model for awarding damages could provide an additional deterrent against the deliberate destruction of vital civilian property. Brilmayer and Chepiga argue that additional awards for property losses would reinforce the specific IHL prohibitions on the destruction of indispensable civilian properties such as hospitals, which support the humanitarian needs of the population. However, IHL already deters this type of intentional destruction by affording protection to necessary civilian property and establishing adjudicatory bodies that can require warring parties to pay damages for breaching these protections. Warring parties that destroy civilian property are already flouting the rules in favor of strategic advantage; greater compensation owed to communities in a distant tribunal is likely to offer only a marginal additional deterrent. Just as the low chance and distant relief of tribunal judgments offer little hope to civilians who suffer

externalize heavy costs onto innocent people—without engaging responsibility to compensate.”).

⁷ *Id.* at 436 (“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. By contrast, defining a catchment area and setting a fixed sum can be done relatively inexpensively and quickly.”).

losses, they do little to impact the cost-benefit calculus of warring parties already prepared to breach IHL obligations.

It is possible that Brilmayer and Chepiga's deterrent would be more effective if formal adjudication continues to develop such that they respond far more quickly to breaches of IHL. In such a case, it may be helpful for any civilian-use model to also recognize where warring parties have provided more immediate compensation and relief. As discussed above, civilians with property losses need such immediate help and warring parties increasingly motivated by altruistic or strategic reasons are acting to provide it. Where tribunals apply civilian-use damages, they might consider determining some discount of assessed compensation owed in proportion to the degree to which warring parties have already made immediate contributions to support the community. Categories of such initial support might include immediate monetary payments, the rebuilding of community infrastructure like hospitals or grain silos, replenishment of destroyed or obstructed humanitarian relief supplies, or even contributing significant funds to the International Committee for the Red Cross and Red Crescent, or other organizations providing quick humanitarian relief. In this way, warring parties would be "rewarded" for more immediately recognizing the harm they have caused to the civilian population and somehow making amends for those actions.

Brilmayer and Chepiga argue that focusing on mechanisms that encourage immediate relief or repair of destroyed property are "unrealistic" in the context of war because of the length of time it takes to recover from such losses. As they point out, "water treatment plants and hospitals take time to build; livestock can be replaced but only over a period of years."⁸ This is why, they argue, it is critical to focus on deterring such destruction rather than trying to encourage warring parties to immediately mitigate losses.⁹ While it is true that such losses cannot be restored in their original form immediately, significant measures can be taken to minimize the suffering of civilians in such a situation. A hospital cannot be rebuilt overnight, but medical facilities and transport can be, and in many recent wars have been, established. Livestock cannot be replaced immediately, but civilians need not starve if emergency relief can be made available. Recognizing and incentivizing these humanitarian actions, to the extent possible, may help civilians as much or more than additional compensation available years later.

IV. CONCLUSION

Brilmayer and Chepiga pursue the noble goal of compensating survivors of war more adequately for their property losses, with a new and valuable perspective on the real value of such harm. The proposed civilian-use model is an important step forward in theory because it recognizes the greater hardship caused by destruction of property related to humanitarian needs. However, practitioners are always looking toward what will be more helpful on the ground in conflict zones to protect and help

⁸ *Id.* at 433.

⁹ *See id.* at 432.

civilians caught in conflict. The civilian-use model does little to resolve the critical needs that civilians in these situations face and even less to bridge the gap between theory and practice. The proposed relief, albeit greater in value, would come much too late for the majority of civilian survivors of war thanks to the inaccessibility and delay of formal adjudication. Even where compensation is available to civilians, the civilian-use model addresses a category of loss that already is more likely to receive attention and support while overlooking the individual losses that are the most critical for the support of many war survivors and remain inadequately addressed in the international legal framework. Finally, because of the length of time for formal adjudication to respond to losses in conflict, it seems unlikely to provide much additional deterrence to warring parties.

This is not to suggest that adjudicatory mechanisms could never provide the immediate relief so critical when redressing property loss. In fact, if these tribunals can work more effectively and more quickly, this civilian-use model may prove to have a practical effect for war-torn communities. To be most helpful in current conflicts where individual losses are significantly greater than those of the community, this model would have to incorporate civilian-use damages for individual as well as community claims. A shorter lag-time between the incident and the relief and recovery might also enhance the deterrent effect that Brilmayer and Chepiga intend.

Whether the authors are successful in both garnering greater compensation for civilians and curbing harm on the ground remains unclear in practice, but in theory, they have succeeded in pressing to the fore the cause of civilian suffering, which after all is the driving purpose behind IHL.

* *Executive Director, CIVIC.*

Former Henigson Human Rights Fellow, CIVIC.