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Finding a Proper Role for the "Civilian-Use Model"

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

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In their article "Ownership or Use? Civilian Property Interests in International Humanitarian Law,"[1] Lea Brilmayer and Geoffrey Chepiga have attempted to identify a common purpose underlying the protection of civilian property under international humanitarian law (IHL). However, there is no such concept as "protected property" in IHL, and an approach to the protection of property and civilian goods has emerged from the application of the Geneva Conventions and other IHL instruments on a case-by-case basis.[2]

Brilmayer and Chepiga argue that IHL conventions value property mainly for its importance in preventing civilian suffering, as opposed to its connection to "ideas of ownership." In fact, this line of reasoning concerning the *raison d'être* of rules protecting property is confirmed by developments in the field of international criminal law (ICL). Many of the acts against civilian property envisaged in the Geneva Conventions were included in the grave breaches regime, thus paving the way for criminal prosecution of those allegedly responsible for their commission. The criminalization of attacks against civilian property, in particular those attacks carried out on a large scale and not justified by military necessity, does indeed reflect the need—and the will of the drafters—to protect the civilian population and to preserve

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

[2] For an interesting view on this topic, see Bing Bing Jia, *"Protected Property" and Its Protection in International Humanitarian Law*, 15 LEIDEN J. INT'L L. 131–53 (2002).

the means for its survival, and not merely the economic or monetary value of the goods destroyed or seized.

More recently, many provisions concerning war crimes against property were included in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Statute of the International Criminal Court (ICC), thus establishing a "civilian-use value" rationale for the protection of goods in times of war. The relevant provisions included in the ICTY Statute are rather few and concise,[3] but the ICC Statute includes five different rules directly criminalizing the expropriation or destruction of property. These rules include a prohibition on extensive destruction of both State and private property and pillaging both in international and non-international armed conflicts,[4] as well as a number of other rules which concern specific types of property such as hospitals and places where the sick and wounded are collected,[5] or which indirectly protect civilian property.[6] The purpose behind imposing a criminal sanction for these offenses is not to protect property but rather to punish the indiscriminate conduct of the perpetrator and to protect the civilian population from the consequences of such conduct. This confirms once more that the prevailing objective of IHL and ICL rules devoted to the protection of civilian property is the prevention of suffering of the civilian population and not of the protection of property in itself.[7] Therefore, the articulation of a civilian-use model for determining the calculation of damages caused to certain civilian goods is the most appropriate means of fulfilling the purpose behind the protection of property in IHL.

Although the "protected property" model is attractive in theory, there are some potential pitfalls to its implementation. The authors stress that one of the core elements of the model is calculating damages caused to civilian property using a fixed sum for every individual affected by the damages in a given "catchment area" in addition to the replacement costs for the items destroyed. On the other hand they

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[3] *See* S.C. Res. 827, art. 2, U.N. Doc. S/RES/827 (May 25, 1993) ("extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"); S.C. Res. 827, art. 3, U.N. Doc. S/RES/827 (May 25, 1993) ("b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; . . . e) plunder of public or private property").

[4] Rome Statute of the International Criminal Court art. 8(2)(a)(iv), 8(2)(b)(xiii), (xvi), 8(2)(e)(xii), (v), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. For a detailed analysis of war crimes against property, see GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 334–41 (2005).

[5] Rome Statute, *supra* note 4, art. 8(2)(b)(ix). This article is devoted to specially protected objects such as "buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives."

[6] *Id.*, arts. 8(2)(b)(ii)–(v), (ix), (xxiv), 8(2)(e)(ii).

[7] In International Criminal Law as well, however, the civilian-use value is not the only rationale for the protection of property and, in some cases, the idea of ownership prevails. *See* WERLE, *supra* note 4.

affirm that this "does not necessarily entail that money will be paid out to individual claimants," but that "the policy reasons underlying the use of fixed-sum amounts are equally compelling regardless of whether the fixed sum is used to calculate the amount due to individual victims, or the amount due to a government that has espoused the individual claims."[8]

By allowing such sums to be paid to the government rather than individuals, this model circumvents one of the most crucial problems concerning the application of IHL: the lack of effective remedies for victims. Does it really make sense to apply the civilian-use model and to determine a compensation award that includes a fixed sum for each individual affected by the damages caused to a hospital, for example, where the claim is put forward by a State that may eventually decide not to redistribute compensation to the individual victims (even those directly affected such as hospital patients)? This model remains an abstract exercise in calculation if it is not accompanied by an obligation for States to reallocate the sum awarded for the compensation of damages to the individual victims. The effectiveness of the model depends on the requirement that States pay out the fixed-sum quotas to the victims.

According to prevailing opinion, individuals do not have a directly enforceable right to compensation for damages paid as a result of an IHL violation. Admittedly, balanced and effective solutions can hardly be reached through the individualization of compensation mechanisms,[9] as the authors themselves underline. However, there is a significant trend to recognize that individuals may benefit from rights that derive from international law,[10] and the individual right to restitution and compensation for the victims of IHL violations has been the object of growing attention by the United Nations and other organizations.[11] These rights deserve to be carefully taken into consideration.

In conclusion, in those cases where a competent body has a mandate to award damages, or where formerly belligerent states are attempting to reach an agreement for post-war reparations, the civilian-use model for compensating for

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[8] Brilmayer & Chepiga, *supra* note 1, at 435 n.99.

[9] Some of the problems that hinder the individualization of compensation mechanism were very clearly set out by the U.S. Court of Appeals for the District of Columbia Circuit, with reference to Article 3 of the Hague Convention IV. Tel-Oren v. Libyan Arab Rep., 726 F. 2d 774, 810 (D.C. Cir. 1984).

[10] *See* INT'L. COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1056–57 (1987) ("Apart from exceptional cases, persons with a foreign nationality who have been wronged by the unlawful conduct of a Party to the conflict should address themselves to their own government, which will submit their complaints to the Party or Parties which committed the violation. However, *since 1945 a tendency has emerged to recognize the exercise of rights by individuals.*" (emphasis added)).

[11] It is impossible to refer to all relevant documents adopted on this topic by various U.N. bodies. It suffices here to refer to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

damages caused to civilian property could play an important role in a correct and fair calculation of the damages to be paid. However, the significance of this role depends on the condition that the fixed-sum quotas used for calculation are eventually reallocated to the victims. This would be the only way to respect the spirit of IHL provisions protecting civilian property and to respect victims' rights to restitution and compensation: to ensure that those who were primarily affected by the destruction of a certain good, that is to say those who would have benefited from the use of that property for their survival, are effectively compensated for the damages they have suffered.

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