

Ownership or Use? Civilian Property Interests in International Humanitarian Law

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This article argues that if and when recovery is possible for civilian property illegally destroyed during war—and there are reasons to believe that it is becoming an ever more realistic possibility—then damages should reflect not just the replacement value or market value of the items destroyed, but rather the humanitarian value, or what we refer to as the “civilian use” value. Food, medicine, and clothing should be compensated at higher levels, and according to a different calculus, than jewelry, radios, or sports equipment even though these items may cost the same to replace. For, particularly with respect to large infrastructure like grain warehouses or hospitals, international humanitarian law privileges “users” over and above “owners.” This article first explains the justifications for implementing a “civilian use” approach to damages, and then sketches a rough model of how an international court or tribunal might implement the approach.

“Indeed, there is no surer way of keeping possession than by devastation. Whoever becomes the master of a city accustomed to freedom, and does not destroy it, may expect to be destroyed himself.”¹

“Until we can repopulate Georgia it is useless to occupy it, but the utter destruction of its roads, houses, and people will cripple their military resources . . . I can make the march and make Georgia howl.”²

I. INTRODUCTION

It is now one hundred years since the Hague Convention of 1907 first provided for financial liability against states whose armed forces intentionally destroy civilian property in war.³ Similar liability provisions appeared in

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1. NICCOLO MACHIAVELLI, *THE PRINCE* 18 (George Bull trans., 2003) (1513).

2. Telegram from William Tecumseh Sherman to Gen. Ulysses S. Grant (Oct. 9, 1864), in *SHERMAN'S CIVIL WAR: SELECTED CORRESPONDENCE OF WILLIAM T. SHERMAN, 1860–1865*, at 731 (Brooks D. Simpson ed., 1999).

3. *See* Convention Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention (IV)] (“A belligerent Party which violates the provisions of [this Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”). The substantive protections for civilian property are found in article 25 (“The attack or bombardment, by whatever means, of towns,

the Fourth Geneva Convention of 1949,⁴ as well as in the two Additional Protocols of 1977.⁵ The purpose behind such liability has been to deter the kind of scorched-earth tactics contemplated by Machiavelli and carried out by General Sherman on his ruthless March to the Sea. Until recently, however, these provisions have been largely theoretical. Jean Pictet, the “grandfather” of the Geneva Conventions, declared shortly after their drafting that “it is not possible, at any rate as the law at present stands, to imagine an injured party being able to bring an action individually against the State in whose service the author of the infraction was.”⁶

Jurisdiction is among the many reasons why such liability has been largely limited to theory.⁷ Belligerent states, the obvious defendants, are generally immune to jurisdiction without their consent,⁸ and few states are willing to consent to the establishment of adjudicatory bodies that would

villages, dwellings, or buildings which are undefended is prohibited.”) and article 28 (“The pillage of a town or place, even when taken by assault, is prohibited.”).

4. An article common to all four Geneva Conventions of 1949 notes that “[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding article [on grave breaches].” See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 148, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

5. The First Additional Protocol makes a state’s obligation to pay compensation explicit: “A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 91, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; see also J. Crook, *Is Iraq Entitled to Judicial Due Process?*, in THE UNITED NATIONS COMPENSATION COMMISSION 77, 87 (Richard B. Lillich ed., 1995). The Second Protocol follows the First. See Second Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Protocol II].

6. INT’L COMM. OF THE RED CROSS, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 373 (Jean Pictet ed., 1952).

7. Among the hurdles besides jurisdiction is the fact that established tribunals such as the International Court of Justice (“ICJ”) are not well-suited to adjudicating claims concerning civilian compensation because institutionally they are not well-equipped to entertain mass claims, which is often the form that Geneva Convention cases take. *Ad hoc* tribunals such as the Iran-United States Claims Tribunal and the U.N. Compensation Commission have now broken the ice, but these are still more the exception than the norm. Again, jurisdiction in these tribunals has been consensual. Examples of claims commissions and tribunals have grown more numerous over time, however, and the advent of the International Criminal Court may set the stage for a larger number of reparations tribunals.

8. See Statute of the International Court of Justice art. 36(1), June 26, 1945, 59 Stat. 1055, 156 U.N.T.S. 77. While ICJ jurisdiction is generally consensual, there is also the “optional clause” system under article 36(2), through which a state can opt to recognize the jurisdiction of the court as compulsory in relation to any other state accepting the same obligation. As of 2007, sixty-six nations have filed declarations recognizing compulsory ICJ jurisdiction as against each other. See *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Apr. 8, 2008). In addition, under article 36(1), a nation may consent specifically to jurisdiction over a particular category of cases or disputes pursuant to a separate treaty. Of course, the former type of jurisdiction is grounded ultimately on consent as well—even if the consent in question is provided at an early point in time.

hold them liable for what amounts to war crimes.⁹ Even if jurisdiction in a suitable tribunal could be established, would-be claimants face the traditional restriction that only states have rights under international law—individual claims, to be cognizable, must be “espoused” by the individual’s home state.¹⁰ In effect, then, individuals have been able to recover only with both the affirmative support of their own state and the acquiescence (reluctant or otherwise) of its opponent.

These hurdles, finally, are giving way. Building on models such as the Iran-United States Claims Tribunal¹¹ and the United Nations Compensation Commission¹² (“UNCC”), increasing numbers of international adjudicatory bodies have been brought into existence, precisely in order to require violators of international humanitarian law to pay compensation to civilian victims. The Darfur Comprehensive Peace Agreement of 2006 envisioned the establishment of a Compensation Commission that would hear claims brought by individual Darfurians against the Government of Sudan;¹³ the two states of Eritrea and Ethiopia are currently arbitrating claims at the

9. History contains many examples of losing nations forced to submit to adjudicatory processes by victorious nations, such as Germany through the Treaty of Versailles. Truly impartial commissions have been very rare. As one historian observes, “the number of post-war claims tribunals that did, in fact, issue awards benefiting nationals of both States Parties can be counted on two hands.” David J. Bederman, *Historic Analogues of the UN Compensation Commission*, in THE UNITED NATIONS COMPENSATION COMMISSION, *supra* note 5, at 257, 258. The handful of mutually remunerative prior tribunals includes the Mixed Commissions established by the Jay Treaty of 1794 and the Iran-United States Claims Tribunal.

10. The doctrine of “diplomatic protection” or “diplomatic standing” requires a state to espouse the claims of its nationals in international litigation. *See, e.g.*, *Mavrommatis Palestine Concessions* (Greece v. Eng.), 1924 P.C.I.J. (ser. A) No. 2, at 13 (Aug. 30); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 374 (6th ed. 2003).

11. The Iran-United States Claims Tribunal was created to help resolve the crisis in relations between the Islamic Republic of Iran and the United States arising out of the detention of fifty-two U.S. nationals at the U.S. embassy in Tehran, which commenced in November 1979, and the subsequent freeze of Iranian assets by the United States. *See generally* CHARLES N. BROWER, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1998). Out of approximately 4000 total claims filed at the Iran-United States Claims Tribunal, approximately 1500 were filed by individuals. However, only six individual claims have been heard, and only one of those resulted in an award of compensation. The vast majority of individual claims were blocked by the Tribunal’s evidentiary standard for establishing “constructive wrongful expulsion.” Charles N. Brower, *Lessons of the Iran-U.S. Claims Tribunal*, in THE UNITED NATIONS COMPENSATION COMMISSION, *supra* note 5, at 15, 19.

12. The UNCC was created by the U.N. Security Council in 1991 to process claims for damage suffered as a direct result of Iraq’s unlawful invasion and occupation of Kuwait. *See generally* THE UNITED NATIONS COMPENSATION COMMISSION, *supra* note 5. Iraq’s “consent” was obtained under military duress. The recipients of UNCC awards were the individual victims in Kuwait. In just two years, the UNCC received over two million claims made against Iraq by individuals, businesses, NGOs, and nation-states. Carlos Alzamora, *The U.N. Compensation Commission: An Overview*, in THE UNITED NATIONS COMPENSATION COMMISSION, *supra* note 5, at 3, 5.

13. Darfur Peace Agreement arts. 199–213, May 5, 2006, available at http://africa.berkeley.edu/Sudan/Darfur/DPA_ABUJA-5-05-06-withSignatures.pdf. Only one of the major rebel groups signed the Darfur Peace Agreement, and prospects of establishing a Compensation Commission in the near future remain slim. Nevertheless, compensation for Darfurians has played a role in negotiations throughout the conflict. The U.N. International Commission of Inquiry on Darfur also called for the establishment of a Compensation Commission. Int’l Comm’n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶ 593 (Jan. 25, 2005), available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

Permanent Court of Arbitration for violations of international humanitarian law committed during their 1998–2000 border war;¹⁴ and the International Criminal Court (“ICC”) has adopted procedures for awarding reparations to civilians.¹⁵ Although it is far too early to dismiss traditional limitations as merely history, we must plan for a future in which their relevance is ever more in doubt.

The path-breaking courts and arbitral bodies charged with overseeing these experiments in international justice face considerable difficulties in applying international humanitarian law.¹⁶ The legal instruments at issue—the 1907 Hague Conventions, the Fourth Geneva Convention of 1949, and the First Additional Protocol of 1977—are pitched at an abstract level and do not address technical issues such as the specifics of judicial remedies. Nor does the academic literature fill this void; legal scholars have to this date been far more concerned with the substantive contours of the laws of war than the “procedural” or “remedial” problems arising when these norms serve as the basis for individual claims for compensation. With international adjudication on the rise, however, such questions cannot be deferred indefinitely.

14. The Eritrea-Ethiopia Claims Commission was established pursuant to article 5 of the Algiers Peace Agreement signed on December 12, 2000, between Eritrea and Ethiopia. The Commission is to “decide through binding arbitration all claims for loss, damage or injury by one Government against the other [that] . . . result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.” Agreement Between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, Eri.-Ethi., Dec. 12, 2000, 2138 U.N.T.S. 94, available at [http://server.nijmedia.nl/pca-cpa.org/upload/files/Algiers%20Agreement\(2\).pdf](http://server.nijmedia.nl/pca-cpa.org/upload/files/Algiers%20Agreement(2).pdf).

15. Pursuant to article 75 of the Rome Statute, “[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation.” Rome Statute of the International Criminal Court art. 75, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The ICC has not as yet made any reparations awards, but it has established procedures to do so under both its Rules of Procedure and Evidence, and the Regulations of the Assembly of States Parties. See Pablo de Greiff & Marieke Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, in *OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS* 225 (K. De Feyter et al. eds., 2006); see also Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?* 2 J. INT’L L. & INT’L REL. 25 (2006) (arguing that the ICC should move slowly and deliberately in awarding reparations to ensure that it does so equitably and with due regard to the larger goals of transitional justice). Importantly, the mechanisms of the ICC can be set in motion without any prior consent of the target state beyond its initial application for membership in the United Nations. See Rome Statute, *supra*, art. 13; see also Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L L. 1 (2000).

16. The terms “international humanitarian law” and “law of war” or “*jus in bello*” are largely interchangeable. Following common usage, we generally use “law of war” to refer to pre-1949 law and “international humanitarian law” for post-1949 law. See generally Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000); Robert Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 445 (2007) (“The term international humanitarian law (“IHL”), in contrast to older appellations such as the law of armed conflict or the law of war, connotes a shift Broadly speaking, this shift has been from a network of customary law and treaties—enforced by a variety of political dynamics that obtain between the professional armies of nation-states, including reciprocity, reputation, and military discipline within a hierarchical command structure—to an increasing reliance on norms of human dignity and individual rights that IHL shares with and derives in part from international human rights law.”).

One fundamental question—the focus of this Article—concerns the unique conception of “property” embodied in international humanitarian law. Civilian property protections under international humanitarian law are not like property protections elsewhere in international law. Generally, property protections in other areas of international law (such as norms prohibiting expropriation of property without compensation) are closely analogous to domestic property regimes. Such regimes privilege ownership and its corollary, the right to exclude;¹⁷ they view property primarily as an end in itself, such that the contours of property rights rarely, if ever, change based on the substance of the property in question.

International humanitarian law, on the other hand, is driven by a conception of property that is more instrumental, and values property in direct proportion to its role in assuring the survival of civilians.¹⁸ Thus, international humanitarian law distinguishes *ownership* of property from *use* of property, largely disregarding the ownership interests that figure centrally in times of peace, but protecting users’ interests. We argue, therefore, that awarding damages like a domestic court—exclusively on the basis of injury to owners—would misalign the remedy and the substantive legal protection. We suggest instead that international adjudicatory bodies should take a “use value” approach to compensation for illegally destroyed civilian property. We refer to this approach as the “civilian-use model.”

This Article opens in Part II with a historical survey of the development of the protections for civilian property in international humanitarian law. The language and drafting history of the substantive texts makes it evident that “civilian-use value” is the central element motivating protection of property. Notable in this regard are the First Additional Protocol’s concept of “civilian objects”—these are defined in terms of civilian use—and its heightened protection of civilian objects that are “indispensable to the survival of the civilian population.”¹⁹

Part III examines how the civilian-use model would function in practice. It begins with the theoretical issue of when and why to apply the model, and then turns to practical questions of how it would operate. We suggest that when such items as hospitals, water wells, or grain silos are deliberately

17. See J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (1997) (“Thus at a theoretical level we understand the right to property equally as a right of exclusion or a right of use, since they are opposite sides of the same coin.”).

18. As the U.S. delegate to Geneva said, the Geneva Conventions protect civilian property “in order to spare civilian populations the sufferings which might result from the destruction of their houses, clothes, foodstuffs and the means of earning their living.” 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, at 649 (2004) [hereinafter 2A FINAL RECORD].

19. See *infra* Part II.C (discussing Protocol I, art. 54, which states that “[i]t is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”).

destroyed, the model should be applied by awarding a relatively small fixed sum to every individual in a given catchment area. This approach minimizes the cost to a tribunal of measuring civilian reliance, and provides a verifiable, objective measure that can be tailored to any situation.

Part IV situates the civilian-use model within the current international law of remedies. Drawing the connection between civilian-use damages and consequential damages, we show that neither the requirement of proximate cause nor the prohibitions on double recovery and punitive damages are violated by applying the model.

We conclude that basing recovery at least in part on “civilian-use value” is the best way to carry forward the principles underlying international humanitarian law. A compensation scheme that recognizes the role of property in assuring civilian survival is more in tune with the purposes of the Geneva Conventions, and may also better deter scorched-earth military campaigns going forward.

II. INTERNATIONAL HUMANITARIAN LAW AND THE PROTECTION OF CIVILIAN PROPERTY

International humanitarian law has protected civilian property for almost as long—and for much the same reasons—as it has protected the civilian person. The 1907 Hague Conventions, the Fourth Geneva Convention of 1949, and the 1977 Additional Protocol I were designed to protect civilians against scorched-earth tactics by forbidding the intentional destruction of items essential for their survival, such as foodstuffs, water, and livestock.²⁰ The practical necessity for such protection, unfortunately, is clear.

Scorched-earth tactics have occupied a central, if ignominious, place in the history of warfare. Writing in 1513, Machiavelli was neither the first nor the last to expound the tactical advantages to be gained from destroying the sustenance of a civilian population.²¹ General Sherman saw such attacks as the way to end the Civil War. Hitler believed that attacking civilians would bring England to its knees.²² Nor are such strategies a thing of the past: in the last few years, armies have systematically attacked civilian hospi-

20. Attacks against civilians and their property are prohibited by articles 33 and 53 of the Fourth Geneva Convention and by article 52 of Protocol I. *See generally infra* Part II. Deliberate attacks on civilians and civilian objects are further prohibited by other sources of international humanitarian law, notably the Hague Convention (IV), *supra* note 3, art. 23(g), and the Rome Statute, *supra* note 15, art. 8(2)(b)(ii). *See also* Prosecutor v. Kupreskic, Case No. IT-95-16, Judgment, ¶ 521 (Jan. 14, 2000) (“The protection of civilians in time of armed conflict . . . is the bedrock of modern humanitarian law.”).

21. MACHIAVELLI, *supra* note 1.

22. At the start of the Blitz, the Nazi bombing of London that killed approximately 43,000 British civilians, Hitler issued a directive to the Luftwaffe to carry out “disruptive attacks on the population . . . by day and night.” Klaus A. Maier, *The Operational Air War until the Battle of Britain, in 2 GERMANY AND THE SECOND WORLD WAR: GERMANY’S INITIAL CONQUESTS IN EUROPE* 327, 387 (Militärgeschichtliches ed., Dean S. McMurray & Ewald Osers trans., 1991).

tals in the former Yugoslavia,²³ burned civilian grain stores in Darfur,²⁴ and razed villages in the Democratic Republic of Congo.²⁵ Debate continues today over the U.S. military's policy of knocking out an enemy's electrical grid as its first act of war. U.S. officials have openly acknowledged that one reason the United States targets enemy electrical grids is to achieve "second-order" effects such as lowering civilian morale.²⁶

The historical development of this area of law—the best interpretive guide at hand²⁷—reveals that the central concern of those who drafted the relevant conventions was not protecting the ownership rights of civilians, but rather the use value of that property to the population at large.²⁸ The trend has been apparent virtually since the inception of the laws of war. As we will show, starting at the beginning of the last century, humanitarian law activists focused increasingly on the protection of civilian property as a means for the protection of civilians. The principle is now firmly embedded in modern international humanitarian law.

A. *Civilian Property Protection Prior to the Second World War*

Prior to the twentieth century, international custom and the purported "laws of war" offered scant protections for civilians, and even fewer for their property. In medieval Europe, civilian property was seen as a significant

23. American journalist Roy Gutman, in Croatia at the time, has written of a "pattern whereby [Croatian] hospitals were targeted" by the Serbian Army. See Roy Gutman, *Spotlight on Violations of International Humanitarian Law: The Role of the Media*, 325 INT'L REV. OF THE RED CROSS 619, 623 (1998), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JPJF> ("Years later, I learned that an ICRC delegate had concluded at the time that the hospital at Vinkovci was a 'perfect' example of a violation of the Geneva Conventions. Moreover, it was only one hospital under constant attack. ICRC staff identified Karlovac and Osijek as others. The ICRC of course could not provide a complete account for attack on the hospital in Vukovar, which took, according to Croatian information, hundreds of shells and two 500-pound gravity bombs. When that did not destroy the hospital, after Serbs captured the town they carted off all the survivors and shot them.")

24. See, e.g., Lydia Polgreen, *Scorched Earth Strategy Returns to Darfur*, N.Y. TIMES, Mar. 2, 2008, at A1; Amnesty Int'l, *Sudan Government's Solution: Janjawid Unleashed in Darfur*, AI INDEX AFR 54/078/2006 (Nov. 24, 2006), available at [http://asiapacific.amnesty.org/library/pdf/AFR540782006ENGLISH/\\$File/AFR5407806.pdf](http://asiapacific.amnesty.org/library/pdf/AFR540782006ENGLISH/$File/AFR5407806.pdf).

25. See, e.g., Simon Robinson & Vivienne Walt, *The Deadliest War in the World*, TIME, June 5, 2006, at 38.

26. See J.W. Crawford III, *The Law of Noncombatant Immunity and the Targeting of National Electric Power Systems*, 21 FLETCHER F. WORLD AFF. 101, 101 (1997) ("Proponents [of attacking electrical grids] assert that attacking electricity results in particularly damaging 'second order' impacts on civilian morale, political leadership, military forces, and materiel production.")

27. On the use of historical development and drafters' intent as an interpretive guide in case of a gap or ambiguity in the law, see Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. Article 31 of the Vienna Convention on the Law of Treaties provides, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* art. 31. Article 32 elaborates, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure." *Id.* art. 32.

28. See *infra* Parts II.B, II.C.

source of booty, within the reach of soldiers who may otherwise have had no regular source of pay.²⁹ In the sixteenth and seventeenth centuries, civilian property was requisitioned with impunity.³⁰ During the nineteenth century, army field manuals such as Lieber's Code, which was used as rules of engagement by the North during the American Civil War, provided that seizing civilian property was not allowed but created a large exception for military necessity.³¹ Not only was the determination of "military necessity" left in the hands of military commanders themselves, but the exception was so broad as to swallow the rule—military necessity "allow[ed] of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy."³²

It was not until the first half of the twentieth century that international law focused squarely on the protection of civilians and their property. The first international legal protections for civilians and their property were the regulations promulgated in the Hague Conventions of 1899 and 1907. For the most part, these Conventions regulated how hostile armies could attack each other (what kinds of bullets may be used, how spies were to be treated, and so forth). But in delineating rules of engagement, they also provided some protections for civilians. For instance, article 23(g) forbids armies to "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."³³ The law here is similar to Lieber's Code in giving the military discretion, but the language is more stringent, requiring "imperative" necessity. Similarly, article 46 addresses private property: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."³⁴ This article was also largely borrowed from Lieber's Code and encapsulated best practices of the nineteenth century.

Yet while these protections represented an important step down the path that eventually led to the Geneva Conventions of 1949, they were too thin

29. See generally M.H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* (2d ed. 1993).

30. See, e.g., THEODOR MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES* 121–23 (1993). Vitoria, the famous Spanish just-war theorist, argued that victorious armies earned the right to all property in the vanquished state: "All moveables vest in the seizer by the law of nations [*ius gentium*], even if in amount they exceed what will compensate for damages sustained." FRANCISCO DE VITORIA, *DE INDIS ET DE IURE BELLI RELECTIONES* 184 (Ernest Nys ed., John Pawley Bate trans., William S. Hein Co. 1995) (1917).

31. FRANCIS LIEBER, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (1863), reprinted in *LIEBER'S CODE AND THE LAW OF WAR* 48 (Richard Shelly Hartigan ed., 1983).

32. *Id.* ("Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable . . . it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy.")

33. Hague Convention (IV), *supra* note 3, art. 23(g).

34. *Id.* art. 46.

and general to be of real value during war. The coming of “total war”³⁵ and the sufferings of civilians during World War I belied the idea that a belligerent’s honor was enough to protect civilians, or that it could be left up to the invading army to decide when destroying or seizing enemy property could be condoned by military necessity.

In the years following World War I, the international community sought to enhance the Hague Convention’s protections for civilians and their property. However, progress in drafting new conventions was slow. In 1934, the International Committee of the Red Cross (“ICRC”) finally completed its Tokyo Draft Convention for the Protection of Civilians, but the Draft was not ratified by the time World War II erupted in 1939.³⁶ From the first days of World War II, the ICRC proposed that belligerents put the protections of the Tokyo Draft into effect, but the proposal was rejected by all sides to the conflict.³⁷

The Second World War caused intense civilian suffering on an unprecedented scale, inside Nazi concentration camps, during the firebombing of Dresden, and at the Rape of Nanking, to mention only a few examples. The establishment of new conventions, including a convention specifically designed to protect civilians was felt to be “an imperative necessity.”³⁸ In the summer of 1946, the ICRC called a preliminary conference. In 1947, the Draft Conventions were debated and amended by a Conference of Government Experts³⁹ and then approved by the Seventeenth International Conference of the Red Cross at Stockholm in 1948.⁴⁰ A diplomatic conference was convened in Geneva, and the Four Geneva Conventions were ratified in the late summer of 1949.

B. Geneva IV and the Protection of Civilian Use

The first three Geneva Conventions update the laws of war as applied to combatants’ conduct toward one another. The Fourth Geneva Convention (Relative to the Protection of Civilians in Time of War) became the first international instrument designed specifically to protect civilians. It includes 159 articles and is divided into four parts.⁴¹

35. See, e.g., GERMAN HIST. INST., *ANTICIPATING TOTAL WAR: THE GERMAN AND AMERICAN EXPERIENCES, 1871–1914* (M.F. Boemeke, R. Chickering & S. Förster eds., 1999).

36. Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT’L L. 462, 473 (1951).

37. *Id.*

38. *Id.*

39. See Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, in HUMANITARIAN LAW 81, 102 (Judith Gardman ed., 1999).

40. *Id.*

41. The first part deals with the general protection of civilian populations against the effects of war; the second part concerns individual rights against torture and execution without due process; the third part lays out rules concerning enemy or alien civilians in belligerent countries; and the fourth part concerns occupied territories.

Property protections appear in several different places in the Fourth Geneva Convention. Article 18 prohibits attack at any time against civilian hospitals or medical care facilities. Article 33 establishes a general prohibition on “pillage,”⁴² but leaves intact a belligerent’s right to seize or requisition property.⁴³ In the case of an occupation by enemy forces, the Convention creates a hierarchy of property protections. Under article 55, foodstuffs or medical supplies may not be *requisitioned*, and an occupying power must ensure an adequate supply of these items.⁴⁴ All other property, under article 53, is simply protected from being *destroyed*.⁴⁵ In cases where civilians are placed in internment camps, occupying powers may not take their possession without giving detailed receipts.⁴⁶

Broadly speaking, these articles were designed to safeguard property because property was seen as essential to civilian welfare, and in particular to mitigating suffering. The U.S. delegate at Geneva made the point concisely. He said that the Fourth Geneva Convention needed to protect property “in order to spare civilian populations the sufferings which might result from the destruction of their houses, clothes, foodstuffs and the means of earning their living, as had happened at Oradour and Lidice.”⁴⁷ As further explained in the Official Commentary, “[t]he 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.).”⁴⁸ Indeed, 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.

An important example is the heightened protection that the Fourth Geneva Convention provides to civilian hospitals. The drafters of the Fourth Geneva Convention went to great lengths to ensure that civilian hospitals

42. Fourth Geneva Convention, *supra* note 4, art. 33. The Convention uses “pillage” broadly: “This prohibition is general in scope. It concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay.” INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 226–27 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) [hereinafter COMMENTARY IV].

43. Article 33 “guarantees all types of property, whether they belong to private persons or to communities or the State. On the other hand, it leaves intact the right of requisition or seizure.” See Fourth Geneva Convention, *supra* note 4, art. 33.

44. *Id.* art. 55 (“To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”).

45. *Id.* art. 53.

46. *Id.* art. 97.

47. 2A FINAL RECORD, *supra* note 18, at 649. Oradour-sur-Glane (France) and Lidice (Czechoslovakia) were sites of Nazi massacres of civilians during World War II.

48. COMMENTARY IV, *supra* note 42, at 226.

were protected from attack. Prior protections had been slim: the Hague Conventions of 1907 had only urged armies to take reasonable steps to avoid shelling hospitals,⁴⁹ and their predecessors, the earliest Geneva Conventions of 1864, had protected military hospitals but *not* civilian ones.⁵⁰ As a result, prior to 1949, some armies had been in the practice of “militarizing” civilian hospitals, that is, bringing wounded soldiers into civilian hospitals in hopes of qualifying the civilian hospitals as “military” and therefore protected.⁵¹ However, article 18 of the Fourth Geneva Convention protects civilian hospitals, and provides more protection to civilian hospitals than to any other type of property. The Official Commentary emphasized that civilian hospitals should be able to pursue their work under certain conditions and be protected against pillage, that patients undergoing treatment should be protected against expulsion, and that staffs and equipment should receive special privileges.⁵² Hospitals receive special privileges because, more than any other infrastructure, their destruction leads in turn to grave civilian harm. Not only are the patients inside affected,⁵³ but when hospitals are destroyed, no one else in the community can receive care either.

1. *Ideas of “Ownership”*

In contrast to the “use value” of property, ideas of “ownership” or “the right to exclude” received scant attention in either the drafting debates or in the final provisions of the Fourth Geneva Convention. For example, article 33 generally prohibits “pillaging,” but stops short of forbidding an army from requisitioning or seizing civilian property.⁵⁴ Similarly, during an occupation, article 53 prohibits the *destruction* of civilian property, but not its *requisition* or *seizure*.⁵⁵ Such a distinction between what may not be requisitioned and what may not be destroyed would not have been necessary if ownership value was centrally important, because from an aggrieved civilian’s perspective, the seizure, requisition, or destruction of their personal property has

49. Hague Convention (IV), *supra* note 3, art. 27 (“In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.”).

50. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field arts. 1–2, Aug. 22, 1864, 22 Stat. 940, T.S. 377.

51. COMMENTARY IV, *supra* note 42, at 141.

52. *Id.* at 142–43.

53. *Id.* at 143 (“The main purpose of article 18 is to protect civilian hospitals; by that very fact it protects also the wounded, sick, infirm and maternity cases under treatment in those hospitals.”).

54. *Id.* at 227, ¶ 3(1).

55. *See id.* at 301 (“It should be noted that the prohibition only refers to ‘destruction.’ Under international law the occupying authorities have a recognized right, under certain circumstances, to dispose of property within the occupied territory—namely the right to requisition private property, the right to confiscate any movable property belonging to the State which may be used for military operations and the right to administer and enjoy the use of real property belonging to the occupied State.”).

the same effect.⁵⁶ Had the drafters been concerned with protecting rights of ownership, they surely could have found stronger ways to state these prohibitions.

Indeed, one of the only times the drafters protect the right to exclude is article 55, which prohibits an occupying power from destroying *or* seizing food and medicine belonging to civilians.⁵⁷ Thus, in an occupation, while all other objects are only protected from destruction, food and medicine can be neither destroyed nor seized. The possessory right is recognized here, uniquely, because food and medicine contribute so directly to survival.

One of the only other times the Fourth Geneva Convention even addresses the concept of individual ownership is in article 97, which protects personal belongings in the possession of civilian internees. When internment of civilians is permitted, the occupying power must allow internees to maintain their personal effects, unless it gives them receipts for the objects confiscated: "Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. Detailed receipts shall be given therefor."⁵⁸ This recognition of individual ownership is wholly appropriate in the context of internment, because internment mirrors conditions of peacetime more than war. Internment presupposes that the occupying power has ensured plenary authority over the territory, and is functioning as a *de facto* government.⁵⁹ But even within this more traditional framework of individual ownership, "civilian use" plays a crucial role. As the Commentary to article 97 clarifies, "articles of personal use," which may never be confiscated, refers to necessities: "[C]lothes, linen, blankets and toilet requisites, but also books, perhaps a portable typewriter, medical supplies or anything, speaking generally, which is used in daily life."⁶⁰ On the other hand, those items that the occupying power may requisition, if it gives receipts for them, are those that will not contribute to survival in an internment camp—money, cheques, bonds, family heirlooms. Thus, even though individual ownership rights are recognized in the context of intern-

56. Fourth Geneva Convention, *supra* note 4, art. 55. Article 53's circuitous phrasing confirms this inference. Article 53 prohibits the destruction of property owned by individuals or by any other entity in the following terms: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited." *Id.* art. 53. The list of possible owners of property is so broad as to be virtually meaningless. The real intent here seems to be to distinguish military and civilian objects, not to protect ownership.

57. *Id.* art. 55 ("The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account.")

58. *Id.* art. 97.

59. Although internment of civilians often occurs during a war, such as the internment of Japanese Americans during World War II, almost by definition there are no active hostilities inside internment camps.

60. *Id.* art. 97, ¶ 1.

ment camps, the overall property regime prioritizes use value over and above ownership rights.

Although our focus here is civilian property, we note that a virtually identical regime applies to the property of prisoners of war. Article 18 of the Third Geneva Convention (Relative to the Treatment of Prisoners of War), holds that POWs' money may be confiscated, if a receipt is given, but their captors may not confiscate any items of personal use: "All effects and articles of personal use . . . shall remain in the possession of prisoners of war Effects and articles used for their clothing or feeding shall likewise remain in their possession."⁶¹ The provision goes even further, as it allows soldiers to retain certain military equipment that is intended to protect them: "[L]ikewise their metal helmets and gas masks and like articles issued for personal protection [shall remain in their possession] . . . even if such effects and articles belong to their regulation military equipment."⁶² POWs may keep whatever personal effects they own, or even military equipment, provided it contributes to their survival, but they may be forced to relinquish anything else, such as money. Survival and safety are protected, whereas possessory interests of non-essential items are subordinated.

2. *Article 53*

The tension between ownership interests and civilian-use value came to a head in the drafting of article 53 of the Fourth Geneva Convention, which, as discussed above, contains a blanket protection of civilian property in the context of an occupation by enemy forces. The initial "Stockholm version" of article 53 built on article 43 of the Hague Convention of 1907 and simply protected private property from attack.⁶³ Under the Hague Convention of 1907, as well as many domestic laws and army field manuals like Lieber's Code, civilian property could be destroyed only if required by military necessity, but property owned by the state could be confiscated, seized, or destroyed at will. This protection reflected customary international law, which at the time had long been more solicitous of private property than state-owned or public property.

At the diplomatic conference in Geneva, the Soviet Union challenged the Stockholm draft as too narrow in scope to prevent civilian suffering. The Soviet delegate argued to the subcommittee in charge of drafting the Fourth Geneva Convention that civilians in socialist countries relied on state-owned property for sustenance. The Soviet delegate said, "[T]he destruction of

61. Geneva Convention Relative to the Treatment of Prisoners of War art. 18, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

62. *Id.*

63. 1 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, at 118 (2004) ("Measures of reprisal against protected persons or their property are prohibited.").

[State] property affected not only the interests of the State but also those of individuals.”⁶⁴ The delegate from China supported the Soviet proposal, since it “provided for the prohibition of destruction of all categories of property,” and “the Article should be worded in such a way as to ensure the alleviation of the sufferings of war victims.”⁶⁵ To protect civilians, both private and government property would have to be protected.

The United States, Canada, and the United Kingdom objected. They claimed that the Soviet proposal would over-extend the protection and that there was no basis in existing international law for protecting property owned by a defeated state. These Western countries felt it important to allow victorious armies to take government property in order to dismantle their military capability, and to pay off their own debts.

Facing this impasse, the delegate from Monaco offered a compromise solution. Under Monaco’s proposal, the protection of property would extend to any items “intended solely” for use by individuals and not by the government, no matter who actually owned the property.⁶⁶ The proposal was acceptable to all and eventually became article 53. The Monaco compromise explains the article’s final, circuitous phrasing on ownership: “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited”⁶⁷ The circuitous phrasing makes the article applicable any time the destruction of property threatens to cause civilian suffering, regardless of who or what owns the property.⁶⁸

Thus, the Fourth Geneva Convention drew a link between protecting property and preventing suffering, and by and large neglected traditional, perhaps more “Western,” concepts of ownership. Property was valued in relation to its humanitarian value, with food and medicine receiving the most protection. This yardstick was well understood by the ICRC, the drafting states, and the larger international legal community. As Lauterpacht would later write,

We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely to prevent or mitigate suffering

64. 2A FINAL RECORD, *supra* note 18, at 649.

65. *Id.* at 651.

66. *Id.* at 650.

67. See Fourth Geneva Convention, *supra* note 4, art. 53.

68. Thereby the drafting states disregarded the customary international law distinction between private and public property. As the Commentary on article 53 summarizes: “It must be agreed, however, that this extension [to public property] gives the provision a character which does not altogether fit in with the general scope of the Convention.” COMMENTARY IV, *supra* note 42, art. 53.

[The Geneva Conventions protect property] for property is not merely an economic asset; it may be a means of livelihood.⁶⁹

The Fourth Geneva Convention protects civilians by protecting their property, but does not do so along the lines of traditional property rights through protecting ownership.

C. *The Additional Protocol's Protection of "Civilian Objects"*

Two Additional Protocols to the Geneva Conventions were drafted between 1974 and 1977; their purpose was to update the Conventions and fix the gaps and imperfections that had been exposed in the intervening years.⁷⁰ Protocol I applies to international armed conflicts,⁷¹ and Protocol II applies to non-international armed conflicts.⁷² These exemplify and expand on the Fourth Geneva Convention's valuation of property according to its role in mitigating civilian suffering.

Protocol I makes sweeping additions to the Geneva Conventions' civilian property protections. Article 52 prohibits attacks against "civilian objects" at all periods of an international armed conflict, not just during an occupation.⁷³ Almost as revolutionary, it extends the Geneva Conventions' definition of "civilian objects" to include all objects that are not in use by the military.⁷⁴ The article therefore protects all objects that are in use by civilians, regardless of who owns them.

This definition of "civilian objects" solves the dilemma posed by Soviet delegates at Geneva—that the public-private distinction was outmoded and did not reflect the core concern of preventing civilian suffering. The drafters of the Fourth Geneva Convention had accepted the Soviet point but had struggled with how to separate military or government targets from civilian ones on the basis of ownership. By contrast, the drafters of Protocol I discarded the concept of "ownership" altogether, substituting "civilian use" as the criterion for protection. This switch from ownership to use is crucial not

69. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, in HUMANITARIAN LAW, *supra* note 39, at 107, 110.

70. 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 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987), available at <http://www.icrc.org/ihl.nsf/COM/470-750069?OpenDocument> [hereinafter COMMENTARY ON PROTOCOLS]. The Swiss government convened the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The Conference met in Geneva in four sessions, from 1974 to 1977, and produced the two Protocols.

71. Protocol I, *supra* note 5. The United States—along with Iran, Morocco, Pakistan, and the Philippines—has not ratified Protocol I.

72. Protocol II, *supra* note 5.

73. Protocol I, *supra* note 5, art. 52 ("Civilian objects shall not be the object of attack or of reprisals.")

74. *Id.* ("In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.")

only in its own right, but also because it has been followed by all subsequent treaties and conventions in international humanitarian law,⁷⁵ including the Rome Statute,⁷⁶ and by the military manuals of an overwhelming number of states.⁷⁷

Furthermore, and perhaps most importantly, Protocol I creates a separate, heightened category of protection for objects that are “indispensable to the survival of the civilian population.”⁷⁸ Article 54 of Protocol I prohibits any action at any time whatsoever against these objects:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.⁷⁹

The drafters’ intent was not to reduce protection for other sorts of property, but, “in the case of indispensable objects . . . to increase the *degree* of protection.”⁸⁰ Thus, the article forbids not only the destruction of such objects but also “render[ing] useless” or “remov[ing]” them. The addition of these two verbs “cover[s] all possibilities, including pollution, by chemical or other agents, of water reservoirs, or destruction of crops by defoliants.” The term “indispensable objects” was intended to be “interpreted in the widest sense, in order to cover the . . . needs of populations in all geographic areas.”⁸¹ The enumerated list is not exhaustive—“the words ‘such as’ show that the list of

75. See, e.g., Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, Amended Protocol II art. 3(7), May 3, 1996, 35 I.L.M. 1206 (“It is prohibited in all circumstances to direct [mines, booby-traps and other devices], either in offence, defence, or by way of reprisals, against . . . civilian objects.”).

76. Rome Statute, *supra* note 15, art. 8(2)(b)(ii) (“[I]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives” constitutes a war crime in international armed conflicts.).

77. See CUSTOMARY INTERNATIONAL LAW VOL. II: PRACTICE, PART 1 916–18 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (claiming that the military manuals of Argentina, Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, Ecuador, France, Germany, Italy, Kenya, Lebanon, Madagascar, the Netherlands, New Zealand, Nigeria, South Africa, Spain, Togo, the United Kingdom and the United States all prohibit attacks against civilian objects).

78. Protocol I, *supra* note 5, art. 54. Protocol I, art. 69 uses similar language in the context of occupations, requiring an occupying power to “ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory” The Commentary to Article 54 notes that “essential” in article 54 and “indispensable” in article 69 should be given the same meaning. See COMMENTARY ON PROTOCOLS, *supra* note 70, at 652–53.

79. Protocol I, *supra* note 5, art. 54.

80. INT’L COMM. OF THE RED CROSS, COMMENTARY: DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, at 62 (1973) [hereinafter COMMENTARY: DRAFT ADDITIONAL PROTOCOLS] (emphasis added).

81. COMMENTARY ON PROTOCOLS, *supra* note 70, at 655.

protected objects is merely illustrative. An exhaustive list could have led to omissions or an arbitrary selection.”⁸²

These “indispensable objects” are clearly protected because they are essential to the well-being of the civilian population. Indeed, article 54 specifically identifies the relevant actions as destruction or removal “for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party,”⁸³ thus underscoring that the protected interest is civilian use and not traditional property rights of owners.

Because Protocol I already protected all civilian objects in article 52, article 54’s separate recognition of heightened protection for indispensable objects might at first appear superfluous. However, the need for additional protection of indispensable objects is clear once the differences between article 52 and article 54 are taken into account. Article 54’s heightened protection for indispensable objects was designed to emphasize that certain types of property can never be attacked under any circumstances. Article 52’s definition of “civilian objects” as all “non-military objectives” is insufficient for this purpose because it leaves room for a belligerent to argue that the property that it destroyed had at least some military value.⁸⁴ Article 54 deflects any such argument by creating a purely civilian safe harbor, a set of objects that can *never* be defined as “military” or attacked no matter the circumstances.

The drafting history confirms this inference. The term “indispensable objects” traces back to the first 1973 draft that the ICRC submitted to the Diplomatic Conference. The ICRC believed that the purposes of its proposed article were to safeguard civilians and to prevent mass civilian flight. According to the 1973 ICRC Commentary, “[t]he aim of this provision emerges at the end of the first sentence: it is to ensure the civilian population’s survival and avoid the creation of the movements of refugees.”⁸⁵ Thus, indispensable objects were first singled out because as long as civilians had access to them, they would not have to flee.

Article 54’s distinctive importance is revealed by the way that its protections were awkwardly forced into Protocol II, which applies only to non-international conflicts. Protocol II contains no general protections for civilian property because the drafting states believed they had no authority to arrange or protect property rights inside a sovereign state. Nonetheless, the drafting states included a prohibition on attacking or removing indispensable objects: article 14 of Protocol II borrows the language of article 54 of

82. *Id.*

83. Protocol I, *supra* note 5, art. 54.

84. See generally INT’L COMM. OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS: REPORT ON THE WORK OF THE CONFERENCE (1972).

85. See COMMENTARY: DRAFT ADDITIONAL PROTOCOLS, *supra* note 80, at 62.

Protocol I with the result that even though civilian property in general is not protected, indispensable objects are.⁸⁶

Thus, the Fourth Geneva Convention and Protocol I protect property to the extent it serves as a prophylactic between civilians and suffering. These conventions attempt to ensure that as many civilians as possible have access to foodstuffs, water wells, and hospitals. The rest of this Article contends that international courts or tribunals that award damages for the destruction of civilian property should recognize these purposes and calculate damages accordingly.

III. CONTOURS OF A CIVILIAN-USE MODEL

Given that the relevant conventions and customary law are unambiguous in holding that property used only for civilian purposes cannot be subject to attack,⁸⁷ we turn our attention to the question of how damages should be measured.

We contend that understanding the property protections of the Geneva Conventions as instrumental to the protection of civilian users, rather than as protection for the rights of owners, reorients the damages calculation toward determining the loss inflicted on these users, rather than merely determining the amount it would take to repair or replace the property in question. In this way, international humanitarian law's property protections in times of war are centrally different from property protection in times of peace, whether grounded in domestic or international law.

This Part addresses first when, then why, and finally how damages for the destruction of civilian property during war should reflect the amount of harm done to civilian users.

A. *Distinguishing Property Expropriation in Times of Peace from Deliberate Destruction in Times of War*

The fact that international humanitarian law protects the value of property to civilian users rather than owners makes it exceptional. Peacetime property protections, in contrast, are largely addressed to the interests of owners. This is true whether the peacetime property protection is found in international or domestic law; in both cases, property protections are largely designed to compensate the owner for the market value lost due to the unlawful expropriation or taking.

86. Protocol II, *supra* note 5, art. 14 ("It is . . . prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installation and supplies and irrigation works.").

87. See Hague Convention (IV), *supra* note 3.

A clear example of the conceptual similarity between domestic and international peacetime property protections is the prohibition on expropriation of property without compensation. International expropriation law is essentially an extension of domestic property protection into the transnational context. The jurisprudence of expropriation remedies, which is relatively well-developed, limits compensation to the loss suffered by the owner, who is assumed to be the sole interested party.

The Restatement (Third) of Foreign Relations Law makes this clear. Section 712 of the Restatement provides that “[a] state is responsible under international law for injury resulting from: a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation.”⁸⁸ The prohibition protects only those with proper title to goods or to real property. The commentary explains that the section applies any time that title is threatened, either through “avowed expropriations in which the government formally takes title to property,” or when “other actions of the government . . . have the effect of ‘taking’ the property, in whole or in large part, outright or in stages (‘creeping expropriation’).”⁸⁹ The appropriate damages in such a case should be what they would be in a domestic case, equal to “the full value of the property, usually ‘fair market value’ where that can be determined . . . [or the] ‘going concern value,’ if any.”⁹⁰

In this area of international law, analogy to domestic property regimes is expressly intended and perfectly appropriate. Expropriation by a foreign state of alien property typically will not affect civilian users of that property because in most cases it is just a change in ownership. For example, a foreign-owned granary or hospital, if expropriated, does not lose its value to the local population simply because ownership has been transferred to the local population’s own government. Moreover, in times of relative peace, international law need not presume the conditions of extreme scarcity that exist in times of war. Even if the expropriation of a foreign-owned granary caused hardship to a local population, in most cases, in times of peace, the population would have access to some other sources of food. So long as market value is paid to the owners, the property can be replaced or repaired. Therefore, there are no issues with protecting users of expropriated property; only in the most unusual cases would civilian use be seriously implicated.

By contrast, the property protections in international humanitarian law are designed primarily to deal with cases where an unlawful attack on civilian property involves destruction, rendering useless, etc., as opposed to simple expropriation or theft. Historically, a chief objective has been to deter destruction that is undertaken deliberately in order to deny the civilians the

88. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (1987).

89. *Id.* § 712 cmt. g.

90. *Id.* § 712 cmt. d.

use of the property, an objective reflected clearly in the provisions' text.⁹¹ In such situations, all the benefits that flow from property to non-owners are denied; indeed, denial of those benefits is the very reason that the property was destroyed in the first place.⁹²

The distinctive character of wartime civilian property protections thus follows from the distinctive character of the harm to be addressed—the fact that the destruction of particular civilian property is perceived as affirmatively desirable by an opposing army. This goal distinguishes international humanitarian law's protections of property from both domestic peacetime protections and peacetime property protection in international law.

Given the tactical temptation to inflict harm on civilians, the deprivation suffered by civilians must be factored into the damages equation. Disregarding this central factor means ignoring the incentives that actually motivate actors in the field to take the unlawful actions that they do. If belligerents were required only to repair or replace civilian property that they deliberately destroyed, they would effectively retain whatever gains they got from compromising the well-being of civilians, and international humanitarian law would fail at its object of deterring such unlawful conduct.

In a perfectly functioning, peacetime market, one expects that replacement costs would be roughly equal to the amount of harm inflicted. Indeed, economically speaking, if a facility could be repaired or replaced for less than the cost of not having the facility available for civilian use, then one would expect repair or replacement to be prompt. Thus, it might be argued, there will be few instances in which extensive and continuous civilian injury will be experienced, and the cases that do exist will be those where it is simply economically unjustifiable to perform the repairs because the cost of repair is greater than the benefit to civilians.

This reasoning does not apply in wartime conditions, however. Because of general insecurity or even hostile occupation, it may be impossible to reach a

91. Article 54 of Protocol I focuses on the underlying motive of attacks against indispensable objects: "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive." Protocol I, *supra* note 5, art. 54 (emphasis added).

92. The following chart may help summarize and explain the distinctions:

	Expropriation of Property	Deliberate Destruction of Property
Peacetime	Closest analogy to domestic takings scenario. Just compensation due to owners.	Compensation to owners should suffice to measure harm done. Assumption that civilian population not put at risk.
War	Seizure is allowed by military custom and article 53 of the Fourth Geneva Convention.	Civilian users at risk—likely to be objects of attack, and least able to support themselves because resources are scarce.

water supply facility for repairs, to replace destroyed food stores, or to rebuild a hospital. Restoring the status quo takes time; water treatment plants and hospitals take time to build; livestock can be replaced but only over a period of years. A hostile army destroys these facilities knowing the difficulty of replacing them in the short run under wartime conditions. Indeed, the precise reason for the destruction is to impose such costs at a time when repair or replacement will be nearly impossible.

Under such circumstances it is pointless to argue over the efficiency of replacing or rebuilding immediately. True, where the imposition on civilians from the destruction is great, and greater than the cost of replacement or repair, it would be reasonable to mitigate the damages to civilians by acting quickly. Where the government does not act quickly, one might argue that this shows that the cost for civilians is not so high as to warrant recovery under a civilian-use theory. History shows, however, that this reasoning is unrealistic. War is not the ideal situation for making these kinds of efficiency or incentive arguments.

B. *The Property Protected by a Civilian-Use Model*

The next issue we address is exactly what kinds of property should be compensated according to a civilian-use model. Not all property that may be deliberately destroyed is equal in the eyes of international humanitarian law. The destruction of a bowling alley does not threaten civilian survival like the destruction of a hospital. Domestic property compensation law does not require differentiation between different items of property that have the same market value; if they cost the same to build or rebuild, the measure of compensation for bowling alleys and for hospitals is the same. However, the civilian-use model invites—indeed, requires—a way of distinguishing property according to its use value.

We begin by turning to article 54 of Protocol I, which recognizes an implicit distinction in providing “heightened protections” for “objects indispensable to the survival of the civilian population.”⁹³ As the Commentary notes, this article was written to give “special protection for objects of this nature . . . [and] increase the *degree* of protection.”⁹⁴ During the drafting of Protocol I, “indispensable objects” were foremost in the minds of both the ICRC and the participating states. Article 54 supplies a preliminary list: “foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works . . .”⁹⁵ Any property deemed “indispensable” under article 54 should therefore qualify *per se* for civilian-use damages.

93. Protocol I, *supra* note 5, art. 54.

94. COMMENTARY: DRAFT ADDITIONAL PROTOCOLS, *supra* note 80, at 62 (emphasis added).

95. Protocol I, *supra* note 5, art. 54; *see also supra* Part II.C.

At the other end of the spectrum are luxury items such as jewelry, televisions, or movie theaters; these would be excluded from civilian-use damages.⁹⁶ The more difficult cases (as always) are in the middle. Transportation, for instance, has characteristics of both luxury and survival. Planes may be used for tourism, but also for bringing in essential food supplies or transporting civilians to hospitals. Shops or markets can be essential to the distribution of food and medicines, but it would go too far to say that every place of commerce is essential to civilian well-being.

Here, the Commentary to Protocol I supplies a useful interpretive guide. The Commentary takes a broad approach to “indispensability,” construing the term in a flexible, context-dependent way. It specifies that the list of indispensable items in the text of the article should be “interpreted in the widest sense, in order to cover the . . . needs of populations in all geographical areas.”⁹⁷ The test varies from climate to climate, and from population to population. As an obvious example, in an arctic climate, warm clothing or fuel would count as indispensable. In Saharan Africa, trees that provide fruit and shade might be indispensable, where they would not be in other places. Also, hospitals are not included in the enumerated list in article 54, but should be deemed “indispensable” and qualify for the civilian-use model on the grounds that they are given such extensive protection elsewhere in the Conventions.⁹⁸ Other particular cases will have to be decided on a case-by-case basis depending on the kind of property involved and the surrounding circumstances.

C. Applying a Civilian-Use Model

Notwithstanding the conceptual reasons for focusing on civilian use, the inherent complexity of application gives pause. Where remedies are designed to compensate an owner, quantification of damages is a relatively straightforward matter, at least in comparison to the calculation of remedies for civilian use. The reasons that civilian use is difficult to measure are va-

96. The different types of property protections might be diagramed as follows:

	Expropriation of Property	Deliberate Destruction of Property	
Peace	Closest analogy to domestic takings scenario. Just compensation due to owners.	Compensation to owners should suffice. Assumption that civilian users not put at risk.	
War	Seizure is allowed by military custom and article 53 of the Fourth Geneva Convention.	Owner Protection Only Luxuries or other objects not indispensable for survival; no extra deterrence necessary.	Civilian-Use Protection For “indispensable objects”; extra deterrence appropriate to prevent attacks <i>intended</i> to harm civilians by destroying their resources.

97. COMMENTARY ON PROTOCOLS, *supra* note 70, at 655.

98. See, e.g., Fourth Geneva Convention, *supra* note 4, art. 18 (protecting hospitals); Protocol I, *supra* note 5, art. 22 (protecting “hospital ships”).

ried: the number of users is likely to be large and diffuse for any essential facility; the harm may be potential rather than actual; and the damage that even a single user suffers is likely to be subjective and difficult to value. Compensation for property ownership can (admittedly with difficulty) be gauged by reference to market value, but there is no clear market comparison for public services in times of war.

A paradigmatic example, the deliberate destruction of a civilian hospital, illustrates these difficulties. How many people are affected by such an act? Should damages calculations include only the harm to civilians who actually needed to use the hospital while it was not operational, or should it also include civilians who would have availed themselves of preventative care (e.g., check-ups)? Or should it include all civilians in the given area, since they had to live with the knowledge that they had no access to medical care even in the case of an emergency? If potential harm is to be compensated, then how does one place a value on damage of this type?

While compensation would clearly be due to persons who can document specific injuries (e.g., permanent disability or death because of the unavailability of medical care specifically needed), such a measure, if exclusive, would systematically underestimate the damage suffered by the population as a whole. A belligerent that destroys necessary civilian infrastructure intends the scope of the damage to extend to a large group of people, if not the entire population. For this reason, we believe that a civilian-use model should be applied by first awarding replacement costs, then also including a fixed-sum amount for every individual in a given catchment area.

A "catchment area" is a bounded geographic region with a known population. Catchment areas can be defined in terms of each piece of civilian infrastructure. For example, for a particular medical center, a catchment area may be as large as an entire city, or as small as a few square blocks. In a developing country, where infrastructure is sparse and heavily utilized, a single hospital or clinic might serve an entire geographical sub-region.

A fixed-sum award is a relatively small monetary amount applied evenhandedly on the basis of the population of the catchment area.⁹⁹ A fixed-sum amount is always somewhat arbitrary, but the precise amount can be tailored given the severity of the harm suffered in the catchment area. If an occupying force destroys hospitals, foodstuffs, *and* water wells at the same time, the fixed sum could be set at a higher amount than if the destruction pertained to only one of those essential services.

99. The use of fixed-sum damages to calculate individual damages does not necessarily entail that money will be paid out to individual claimants. 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. Whether or not the state passes on the award to individuals is a separate question from how the damage is calculated.

Three important principles suggest using this approach. First, when indispensable objects are deliberately destroyed, a very sizable percentage of the civilian population in a given catchment area will be affected. In regard to food and water, it is clear that everyone in the local population needs a daily ration or else they will die. Hospitals at first blush present a somewhat more attenuated case, because not everyone uses hospitals every day, or even every year. Yet the pervasive use of medical facilities should not be discounted. Even in the United States, where hospitals account for a much smaller percentage of doctor visits, there are roughly 39 emergency room visits per year per 100 people.¹⁰⁰ This figure counts only visits to the emergency room, not visits to hospital doctors, scheduled check-ups, or out-patient services. It seems reasonable to assume that in countries where health maintenance organizations (“HMOs”) and individual doctor offices are less common, as in the developing world, a higher proportion of all available medical treatment will be provided by hospitals and that 39 percent is a low estimate of civilian use. Thus, even though hospital use is not as daily as the consumption of food and water, there is a reasonable inference that a large percentage of a population may be affected.

The second principle is that every civilian—even those who would not have used the hospital while it was destroyed—suffers to some extent. Civilians who would not have used the hospital themselves may have had to care for friends or family who could not get to a hospital. They may have lost such friends or family. Moreover, the potential to suffer—knowing that if you get sick there is no recourse to medical care—is so imminent that it itself is a harm, akin to intentional infliction of emotional distress.¹⁰¹ As a practical matter, it may be sufficient to cause the local population to leave their homes and flee to an unaffected area. Especially in the context of deliberate attacks on civilian infrastructure, it is very unlikely that any individual resident in a narrowly defined catchment area went unharmed.

Third, and perhaps obviously, is the cost of individualized assessment. 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.

It is not unprecedented in international law to rely on a presumption that everyone in a given catchment has been affected by deliberate destruction. Such presumptions have been used before in international claims practice—never with populations as a whole, but with very large numbers of POWs or

100. Centers for Disease Control and Prevention, Nat'l Ctr. for Health Statistics, *Visits to the Emergency Department Increase Nationwide* (Apr. 22, 2002), available at <http://www.cdc.gov/NCHS/press-room/02news/emergency.htm>.

101. As set forth in the Restatement (Second) of Torts § 46, “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress” RESTATEMENT (SECOND) OF TORTS § 46 (1965).

civilian internees. For instance, after World War II, the Canadian War Claims Commission granted reparations to Japanese citizens who were interned in camps and mistreated. Rather than require each internee to prove mistreatment, the Commission “granted a universal per diem award to both military and civilian Japanese internees on the ground that the treatment accorded to them . . . was so barbarous and inhumane as to make it unnecessary to prove it in every case.”¹⁰² Similarly, the U.S. War Claims Commission made a presumption with regard to claims by American POWs for mistreatment at the hands of Germany, Italy, and Japan during World War II.¹⁰³ This Commission did not require American POWs to actually show mistreatment. Rather, on the basis of its own investigation into the abuses, it presumed that Germany and Italy violated Geneva Convention obligations with respect to food rations for all POWs, and that Japan violated Geneva Convention obligations with respect to forced labor for all POWs. These post-World War II commissions were able to employ such presumptions because the mistreatment in question occurred in very confined spaces, such as an intern and POW camp, among a defined group.

Here, proving the scope of a catchment area outside the context of a POW or intern camp may be more difficult, but it is not prohibitively so. Evidence of the size of a catchment area might include census statistics, hospital records showing the usual scope of visitors to the hospital, or affidavit evidence by doctors or hospital administrators. How broad the catchment area should be in a given case will ultimately be decided on a case-by-case basis, by consideration of evidence submitted by the injured state. Accurately defining a catchment area and using that figure as the basis of the damage award will yield more consistent, less expensive, and arguably more equitable results than trying to determine individualized harm.

IV. THE CIVILIAN-USE MODEL AND THE EXISTING INTERNATIONAL LAW OF REMEDIES

In this Part, we argue that the civilian-use model, while conceptually somewhat novel, fits squarely within current practices and case law on remedies in international law. It is, from one perspective, a simple corollary of the existing provision for consequential damages. Where the damage to civilians was deliberately inflicted, the usual requirement of proximate cause is automatically satisfied. Moreover, we argue that it poses no threat of violating international law’s prohibitions on double recovery or punitive damages. That is to say that there is no doctrinal bar to recognizing the need for compensation for civilian users.

102. George T. Yates III, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURY TO ALIENS* 213, 244 (R. Lillich ed., 1983).

103. *Id.* at 250–52.

A. Sources of the International Law of Remedies

Since at least the end of the eighteenth century,¹⁰⁴ international courts have assumed wide latitude in granting appropriate remedies, even in the absence of specific provisions in a treaty or convention.¹⁰⁵ The most important formulation of this rule came from the Permanent Court of International Justice (“PCIJ”) in its famous *Factory at Chorzów* decision in 1927:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.¹⁰⁶

The PCIJ deduced this principle from the concept of inherent judicial authority, as well as the common law maxim of *ubi ius ibi remedium* (where there is a right, there is also a remedy).¹⁰⁷ Ian Brownlie has written that the

104. International courts have been around for much longer of course. As far back as the fourth century B.C., the Greek Amphictyonic Council acted as an arbiter of territorial disputes between Greek city states. See COLEMAN PHILLIPSON, *TWO STUDIES IN INTERNATIONAL LAW* 7 (1908). In 1603, Henry IV of France had his ministers draw up plans for a permanent council of Europe. *Id.* But the modern font of the international law on reparations is the Jay Treaty of 1794, signed by the United States and Britain. The Jay Treaty established arbitral tribunals called “Mixed Commissions” to adjudicate U.S. claims that the British Navy violated the law of neutrality by illegally seizing over 250 U.S. vessels in the Caribbean in the early 1790s. The arbiters cite foundational texts in international law—Grotius, Pufendorf, and Vattel—for different legal propositions on reparations, assuming that, just as the law of nations included certain substantive rules, so too did it encompass rules on remedies. See Joseph M. Fewster, *The Jay Treaty and British Ship Seizures: The Martinique Cases*, 1988 W.M. & MARY Q. 426 (1988); see also CHRISTINE GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 5 (1987); *INTERNATIONAL ADJUDICATIONS, MODERN SERIES* 4 (John Bassett Moore ed., 1931).

105. The most exhaustive compilation of international awards remains MARJORIE WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* (1937). Whiteman’s work was the culmination of an important wave of scholarly interest in reparations that followed the Treaty of Versailles. See, e.g., J. PERSONNAZ, *LA RÉPARATION DU PRÉJUDICE EN DROIT INTERNATIONAL PUBLIC* (1939); LADISLAS REITZER, *LA RÉPARATION COMME CONSÉQUENCE DE L’ACTE ILLICITE EN DROIT INTERNATIONAL* (1938). Important modern works include GRAY, *supra* note 104, and IAN BROWNLIE, *1 SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* (1983). Other modern studies focus on remedies in discrete subject areas of international law. See, e.g., XUE HANQIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW* (2003) (international environmental law); NINA H.B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* (2000) (international criminal law); DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (2d ed. 2005).

106. *Factory at Chorzów* (Jurisdiction) (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 8, at 21 (July 26).

107. The principle was first articulated in *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1703) (“If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal.”). Similarly, the U.S. Supreme Court recognized the fundamental nature of a right to a remedy in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . [F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.” (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *23, *109)).

presumed power of the International Court of Justice (“ICJ”) to award damages has gone largely unquestioned.¹⁰⁸

Traditionally, the ideal form of reparation has been *restitutio in integrum*, or restitution.¹⁰⁹ As the PCIJ elaborated in *Factory at Chorzów*, “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”¹¹⁰ When restitution is not available—as will usually be the case—compensation is the next best alternative.¹¹¹ Because “money is the common measure of valuable things,”¹¹² monetary damages are “perhaps the most commonly sought [form of reparation] in international practice,”¹¹³ but other kinds of compensation are also available.¹¹⁴

Historically, reparations have been awarded in a somewhat haphazard manner.¹¹⁵ As a leading scholar has pointed out, “international tribunals have not referred to each other’s decisions nor have they developed their own coherent systems of rules on remedies . . . [remedies are] often merely an afterthought.”¹¹⁶ Instead of looking to international precedent, tribunals

108. Ian Brownlie, *Remedies in the International Court of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 557, 558 (V. Lowe & M. Fitzmaurice eds., 1996).

109. See, e.g., SHELTON, *supra* note 105, at 65; Clyde Eagleton, *Measure of Damages in International Law*, 39 YALE L.J. 52, 53 (1929).

110. *Factory at Chorzów (Merits) (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

111. The ICJ has held in *Gabčíkovo-Nagymaros Project*, “It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.” *Gabčíkovo-Nagymaros Project (Hung. v. Slovakia)*, 1997 I.C.J. 81 (Sept. 25); see also UNITED NATIONS INTERNATIONAL LAW COMMISSION, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 218–30 (James Crawford ed., 2002) [hereinafter Crawford]; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 198 (July 9).

112. Eagleton, *supra* note 109, at 53 (quoting HUGO GROTIUS, DECISIONS AND OPINIONS 19 (1925)).

113. See Crawford, *supra* note 111, at 218.

114. In its 2006 resolution, “Basic Principles on the Right to a Remedy,” the U.N. General Assembly highlighted the importance of “rehabilitation” (medical and psychological care), “satisfaction” (a catch-all that encompasses apologies, memorials, and discovery of the truth), and “guarantees of non-repetition” (promoting mechanisms to keep the peace). See *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. 147, ¶¶ 21–23, U.N. Doc. A/RES/60/147 (Mar. 21, 2006); see also M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203 (2006). Just last year, the ICJ determined that satisfaction in the form of public condemnation, and not compensation, was the appropriate remedy for Serbia’s failure to prevent or punish the genocide at Srebrenica. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)* (Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

115. One cause of the haphazard application is that tribunals deciding these cases have been mostly ad hoc, and particularly susceptible to political considerations. Thus, reparations in the form of monetary payments have often been over-exacted by more powerful or victorious nations but have been unrealistic in cases brought by conquered or weaker states. See F.S. NORTHEGE & M.D. DONELAN, INTERNATIONAL DISPUTES: THE POLITICAL ASPECTS (1971); see also F.S. DUNN, THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW 186 (1932) (“The fixing of damages in such cases seems at bottom to be largely prophylactic in nature.”).

116. Christine Gray, *Is There an International Law of Remedies?* 65 BRIT. Y.B. INT’L L. 25, 46–47 (1985).

have sometimes crafted remedies on the basis of municipal laws,¹¹⁷ “general principles of law,”¹¹⁸ or “inherent judicial authority,”¹¹⁹ or even sometimes on the basis of all of these together.¹²⁰

A cure for this haphazard approach may soon be coming. In 2001, the International Law Commission completed its work on the Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”).¹²¹ The ILC Articles, which were over fifty years in the making,¹²² are essentially a restatement of the law of state responsibility prepared for the United Nations by leading scholars of international law. As former Special Rapporteur James Crawford puts it, “[T]he key idea is that a breach of a primary obligation [a treaty or convention] gives rise, immediately by operation of the law of state responsibility, to a secondary obligation or series of such obligations (cessation, reparation . . .).”¹²³ Or, as Professor Caron puts it, the ILC Articles are “trans-substantive rules” that operate to guide remedies independently of the particular international obligation in

117. *Id.*

118. *See, e.g.*, LaGrand (Ger. v. U.S.), 2001 I.C.J. 466, ¶ 48 (June 27) (“Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation.”) (citing *Factory at Chorzów* (Jurisdiction) (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 8, at 22 (July 26)).

119. *See, e.g.*, Velasquez-Rodriguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 27, at 49 (July 21, 1989) (applying principles of equity to determine indemnification for non-monetary harm).

120. The Iran-United States Claims Tribunal is a good example of a mixed, or heterogeneous, approach to damages. *See* SHELTON, *supra* note 105, at 75–77.

121. Crawford, *supra* note 111. The ILC Articles were adopted by the International Law Commission on August 9, 2001 and included in Resolution 56/83 adopted by the U.N. General Assembly on January 28, 2002. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc. A/Res/56/83/Annex (Jan. 28, 2002). The ILC Articles have not yet been enshrined in an international convention, but could be soon. *See generally* James Crawford & Simon Olleson, *The Continuing Debate on a UN Convention on State Responsibility*, 54 INT’L & COMP. L.Q. 959 (2005). They have already been cited with approval numerous times by the International Court of Justice. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 198 (July 9).

122. The process began in 1955, with F.V. Garcia-Amador as Special Rapporteur. Garcia-Amador rued that decisions by international tribunals on remedies had been “individual, and at times capricious.” F.V. Garcia-Amador, *Report on Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens—Reparations of the Injury*, [1961] 2 Y.B. INT’L L. COMM’N 1, 7. He also later wrote that no “principles, criteria or methods [exist] for determining *a priori* how reparation is to be made for the injury caused by a wrongful act or omission.” F.V. GARCIA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 89 (1974). In 1987, Christine Gray suggested abandoning the process altogether:

Rather than follow this approach [in evolving a set of general rules applicable in all cases], it would be better [for international tribunals] to accept the present lack of uniformity, and either turn to a particular municipal system (rather than general principles of law) for guidance, or accept that a case-by-case approach to decisions on the basis of the relationship between the parties may be inevitable.

Gray, *supra* note 116, at 46–47. Yet the ILC persevered and completed the Draft Articles in 2001.

123. James Crawford, *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT’L L. 874, 876 (2002).

question.¹²⁴ The ILC Articles will provide a common platform from which international tribunals going forward will approach questions of remedies.

In large part through the systemization provided by the ILC Articles, there is now general acceptance of certain basic principles of the international law of remedies. Among the principles that are relevant to implementing a civilian-use model, and accordingly the ones we discuss below, are the requirement that the wrongful act be the proximate cause of the damage for which compensation is sought, the prohibition on double recovery, and the prohibition on punitive damages. We argue below that none of these traditional principles is violated by awarding recovery for loss of civilian use.

B. *Consequential Damages and the Proximate Cause Requirement*

The major question faced by a civilian-use model is when destruction of civilian property will be sufficiently proximate to the harms suffered by individual civilians. Under international law, the doctrine of proximate cause limits responsibility for harms that are “too indirect, remote, and uncertain”¹²⁵ The proximate cause requirement is particularly important where, as here, the damages sought can be conceptualized as one form of consequential damage. The injury to civilian users is a consequence of the internationally unlawful conduct of one of the belligerents, only slightly less direct a consequence than the injury to the owners.

The proximate-cause requirement sometimes makes it difficult to attribute second-order effects to primary violations. Especially in the context of international war, there will be many potential preceding, superseding, or intervening causes. Are civilians’ deaths from a difficult childbirth or from malaria attributable to the fact that a local hospital was destroyed? Would deaths from malnutrition have taken place if grain stores had not been set on fire or livestock gratuitously killed? Particularly in the application of the catchment area approach suggested above, which does not require claimants to show individualized proof of harm, the proximate cause requirement presents a serious concern. However, the requirement of proximate cause is significantly less problematic if civilian-use recovery is limited to cases in which an enemy state *deliberately* destroys civilian infrastructure. If it can be shown, or at least inferred, that an occupying power *intended* to destroy a hospital, then it is more natural to attribute consequential harms to the *actus reus* of the enemy state.

124. David D. Caron, *The ILC's Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 871 (2002).

125. *Trail Smelter Arbitral Tribunal Decision*, 33 AM. J. INT'L L. 182, 206 (1939); see also Mark A. Drumbl, *Trail Smelter and the International Law Commission's Work on State Responsibility for Internationally Wrongful Acts and State Liability*, in TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 85 (R.M. Bratspies & R.A. Miller eds., 2006).

Where harm is intentional, it is necessarily reasonably foreseeable, and foreseeability is generally sufficient to satisfy the requirement of proximate cause.¹²⁶ Under international law, as in domestic law, foreseeability and proximate cause have been closely linked for both conceptual and practical reasons. Foreseeability is important as a convenient shorthand for the natural or probable consequences of any act. The natural or probable consequences of an action are usually “those which human foresight can anticipate because they happen so frequently they may be expected to recur,” as contrasted with remote consequences, which “are those which happen so infrequently that they are not expected to happen”¹²⁷ As one academic notes, “[a] review of cases decided by international claims commissions in this century shows that tribunals have often inquired whether the losses were reasonably foreseeable.”¹²⁸ Since there is currently no universal, objective test for proximate cause, foreseeability has served as a useful guidepost.¹²⁹

Courts and academics have sometimes analogized proximate cause to an elastic band—the band can be stretched to find liability the more unjustified or terrible the original action.¹³⁰ Deterrence supplies the rationale for doing so. For example, in the *Angola* (or *Naulilaa*) case,¹³¹ an international tribunal held that Germany’s unjustified military incursion into Angola proximately caused a popular uprising, for which Germany was therefore

126. Most recently, for example, the U.N. Compensation Commission has tethered its proximate cause analysis to foreseeability. See generally Arthur W. Rovine & Grant Hanesian, *Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission*, in THE UNITED NATIONS COMPENSATION COMMISSION, *supra* note 5, at 235.

127. *Rowell v. Wichita*, 176 P.2d 590, 596 (Kan. 1947).

128. Rovine & Hanesian, *supra* note 126, at 244; see also GRAY, *supra* note 104, at 24 (“Probably it is not possible to make any statement more precise than that the degree of fault of the respondent state will influence the arbitrator in his calculations.”). The UNCC has allowed consequential damages that were the foreseeable results of intentional illegal acts, and it has done so even though its founding document—U.N. Security Council Resolution 687—holds Iraq liable only for “direct loss, damage . . . or injury.” S.C. Res. 687, ¶ 16, U.N. Doc. S/RES/687 (Apr. 3, 1991). For instance, a panel concluded that claims for serious personal injury caused by pollution emitted from Kuwaiti oil wells were compensable. The claimants prevailed because the burning of Kuwaiti oil wells by the Iraqi army had been intentional, premeditated, and systematic. Since the destruction of the wells was intentional, it was foreseeable that civilians would suffer from pollution damage. See U.N. Sec. Council, U.N. Comp. Comm’n Governing Council, *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category “B” Claims)*, III(B)(2)(c), U.N. Doc. S/AC.26/1994/1 (May 26, 1994).

129. There has been much doctrinal debate in the United States over whether foreseeability is more properly viewed as an element of duty, rather than as a part of causation. See, e.g., *Dellwo v. Pearson*, 107 N.W.2d 859, 862 (Minn. 1961) (holding that foreseeability was not an element of proximate cause because “negligence is tested by foresight but proximate cause is determined by hindsight”). But in practice foreseeability has always been used to measure both duty and causation. As the Restatement (Third) of Torts notes: “Courts have increasingly moved toward adopting a foreseeability test for scope of liability in negligence cases. Currently, virtually all jurisdictions employ a foreseeability (or risk) standard for some range of scope-of-liability issues.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 cmt. e (Proposed Final Draft No. 1, 2005).

130. Rovine & Hanesian, *supra* note 126, at 236.

131. *Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (Port. v. Ger.)* [Liability of Germany for Damages Caused in the Portuguese Colonies in the South of Africa], 2 R. INT’L ARB. AWARDS 1011 (1928).

liable. The tribunal noted that the uprising was a foreseeable, and perhaps even an intended, consequence of the illegal incursion.¹³²

In the subset of cases where the consequences of an act are not only foreseeable, but also *intended*, domestic courts have not hesitated to find proximate causation no matter how remote the causal chain.¹³³ Courts in the United States and Britain have adopted the adage that “intended consequences cannot be too remote.”¹³⁴ H.L.A. Hart and Tony Honoré explain in their encyclopedic study *Causation in the Law* that if human agents intend to cause certain consequences, the causal chain between their actions and the intended consequences should extend through whatever circuitous events come between them.¹³⁵ Hart and Honoré conclude, “We do not hesitate to trace the cause back through even very abnormal occurrences if the sequence is deliberately produced by some human agent.”¹³⁶ No international cases directly support this proposition, but it has been approved in dicta.¹³⁷

Without going quite as far as Hart and Honoré’s conclusion that foreseeability is necessarily sufficient, the ILC Articles recognize deliberate intent to cause an injury as one factor in establishing proximate cause. The ILC Commentary to article 31 explains that

[c]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used, in others “foreseeability” or “proximity.” But other factors may also be

132. *Id.* at 1031 (“[I]ndeed, it would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended for the sole reason that, in the chain of causation, there are some intermediate links.”) (translation by authors).

133. “An actor who intentionally or recklessly causes physical harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM, *supra* note 129, § 33(b).

134. *Akins v. State*, 50 Cal. Rptr. 2d 531, 566 (Ct. App. 1996).

135. H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 43 (2d ed. 1985). Hart and Honoré provide a helpful example:

The cause of a motor accident may be the icy condition of the road, but it would be odd to cite the cold as a cause of the accident. By contrast . . . if I take advantage of the exceptional cold and plan the car accident accordingly by flooding the road with water, my action is the cause of what happened.

Id.

136. *Id.*

137. J. RALSTON, *VENEZUELAN ARBITRATIONS OF 1903*, at 7, 9 (1904) (citing *Dix Case* (U.S. v. Venez.), 9 R. INT’L ARB. AWARDS 119 (1903)). In the *Case of Ford Dix*, a mixed commission did not find proximate cause, but would have, had the claimant been able to prove an intent to harm him. The case was brought after the Venezuelan army seized cattle belonging to an American citizen, and the American sold the remainder of his cattle at a significant loss. The American argued that he deserved compensation for the losses incurred by selling his cattle at below market price. But the commission refused to make such an award, in the absence of any evidence of the Venezuelan army’s intent to harm him, or to seize his remaining cattle: “Governments like individuals are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences in the absence of evidence of deliberate intention to injure.” *Id.*

relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule. In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage “is not a part of the law which can be satisfactorily solved by search for a single verbal formula.”¹³⁸

Thus, for the purposes of the civilian-use model, the analysis suggested by the ILC Articles should allow claims when the injuries arise from the intentional, deliberate destruction of civilian property. When civilian property is intentionally destroyed, the two “plus factors” in the ILC formulation are both present: the action is deliberate, and the harm caused is “within the ambit of the rule which was breached.”¹³⁹

In the end, proximate cause will always require an ad hoc, case-by-case inquiry into the sufficiency of the relationship between two events, as well as mixed considerations of logic, common sense, and politics.¹⁴⁰ But when an army intentionally destroys a civilian hospital, a range of harms are foreseeable, including that pregnant women may die in childbirth, or that children will not receive vaccines and be more susceptible to hepatitis. Proximate cause should not act as a bar to recovery in all cases.

C. Double Recovery and Punitive Damages

Another concern with civilian-use damages is that international law allows only one recovery of damages for each wrong or injury suffered. Both “double recovery” and “punitive damages” are prohibited. Under the PCIJ’s *Factory at Chorzów* decision¹⁴¹ and article 47 of the ILC Articles,¹⁴² the only accepted purpose for exacting reparations from a state that has breached its international obligations is restoration of the injured parties to the situation in which they would have been, absent the breach.

At first appearance, civilian-use damages might seem to be punitive, or represent double recovery, since the compensation paid would surpass the

138. Crawford, *supra* note 111, at 204–05.

139. *Id.* at 204. Clearly, preventing effects such as starvation or lack of access to medicine was within the ambit of the Geneva Conventions. See *supra* Part II.

140. See generally D. E. Buckner, Annotation, *Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R. 2d 942 (1965). The most famous description of proximate cause as policy analysis comes from Judge Andrews, in his famous dissent in *Palsgraf v. Long Island R.R. Co.*:

A murder in Sarajevo may be the necessary antecedent to an assassination in London twenty years hence . . . [but] because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.

Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

141. *Factory at Chorzów (Merits) (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

142. See, e.g., Crawford, *supra* note 111, at 44, 70–71.

replacement cost of the destroyed property. This appearance is misleading. The compensation is for two separate harms to two distinct legal interests: the owner's interest in the property and the civilians' reliance on that property.

The prohibition on "double recovery" is concerned with multiple payments for the identical injury; it prevents one claimant from recovering from two different sources for the same loss, in such a way as to create a wind-fall.¹⁴³ Faced with situations where individuals had submitted the same claims against Iraq both to itself and to a domestic court, for example, the UNCC had to pay "constant attention" to ensure that the same person was not compensated twice.¹⁴⁴ Civilian-use damages, by contrast, compensate two different interests, the owner's and the civilian users'. The owner of any infrastructure has a property right in that infrastructure, and, under the applicable articles of the Fourth Geneva Convention and Protocol I, civilians who use infrastructure have a distinct and compensable interest in addition.

Neither should civilian-use damages be considered "punitive damages,"¹⁴⁵ which international law, like most civil law systems, does not allow.¹⁴⁶ Civilian-use damages are not intended to punish the violator, but rather to compensate victims. The fact that civilian-use compensation is measured differently from expropriation damages, in order to take account of the consequences to civilians and not merely the property owner, does not mean that it is punitive. Valuing property at a heightened level does not violate the prohibition, nor does taking into account the fact that the harm being compensated was caused deliberately.¹⁴⁷

143. The prohibition on double recovery was affirmed, for example, by the PCIJ in *Factory at Chorzów* (Merits), 1928 P.C.I.J. (ser. A) No. 17, at 59, when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over." See also Crawford, *supra* note 111, at 272–75. For a discussion of double recovery in the United States, see *Brightheart v. McKay*, 420 F.2d 242 (D.C. Cir. 1969).

144. Alzamora, *supra* note 12, at 8.

145. Punitive damages—sometimes called "exemplary damages" or "extra-compensatory damages"—are "sums awarded apart from any compensatory or nominal damages, usually . . . because of particularly aggravated misconduct on the part of the defendant." DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 204 (1973) (citing *RESTATEMENT OF TORTS* § 908 (1939)); see also Lord Scott of Foscote, Randy J. Holland & Chilton Davis Varner, *The Role of "Extra-Compensatory" Damages For Violations of Fundamental Human Rights in the United Kingdom & The United States*, 46 VA. J. INT'L L. 475 (2006). The concept has existed since at least the Code of Hammurabi, which provided that if a person stole an animal from the temple, that person would have to repay the temple thirtyfold. ALBERT KOCOUREK & JOHN WIGORE, 1 *SOURCES OF ANCIENT AND PRIMITIVE LAW* 391 (1915).

146. The reasons typically given are that there can be no *mala mens*, or malice on the part of an impersonal government, and also that it would be wrong to punish the people of a state for the act of their government. See Velasquez-Rodriguez Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, at 52, ¶ 38 (July 21, 1989); see also Filártiga v. Peña-Irala, 577 F. Supp. 860, 865 (E.D.N.Y. 1984); Nina H.B. Jørgensen, *A Reappraisal of Punitive Damages in International Law*, 68 BRIT. Y.B. INT'L L. 247 (1997); S. Wittich, *Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility*, 101 AUSTRIAN REV. INT'L & EUR. L. 157 (1998); Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. TIMES, Mar. 26, 2008, at A1, available at <http://www.nytimes.com/2008/03/26/us/26punitive.html>.

147. As Lord Devlin noted in *Rookes v. Barnard*:

V. CONCLUSION

Seeking civilian-use damages may seem quixotic, especially in a world where very few claims will ever come before a commission. Why should we concern ourselves with compensation for newly recognized forms of injury when the international legal system cannot even accommodate compensation for traditional forms of harm? But the aspirational nature of international humanitarian law is not limited to the idea of compensation for civilian use; it is endemic. As one scholar has written, “[i]nvariably, the Geneva Conventions were ‘out of date’ from the moment they entered into force; they laid out rules for a world more orderly than the world they had inherited, and hoped that by doing so, they would encourage life to imitate art.”¹⁴⁸

Civilian-use damages are no more unrealistic than anything else about the Conventions. Their idealism lies in the simple implication that civilian suffering matters at least as much as costs for bricks and mortar. Never mind that over a billion people on this planet live on less than one dollar a day;¹⁴⁹ when the food, water, or medicine people have access to is intentionally destroyed, civilians should receive compensation, or at the least have their harm recognized by an international commission. The harms from destruction of indispensable objects will often be greater to civilians who use the objects than to owners, especially if there is no owner, the owner is a corporation, or the owner is the state.

[Courts often] take into account the motives and conduct of the defendant where they aggravate the injury caused to the plaintiff. . . . Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed.

Rookes v. Bernard [1964] A. C. 1129 (H.L. 1964) (appeal taken from Eng.).

148. Rosa Brooks, *The Politics of the Geneva Conventions: Avoiding Formalist Traps*, 46 VA. J. INT'L L. 197, 198 (2005).

149. JEFFREY SACHS, *THE END OF POVERTY* 20 (2005); Shaohua Chen & Martin Ravallion, *How Have the World's Poorest Fared Since the Early 1980s?* (World Bank Dev. Research Group, Working Paper No. 3341, 2004), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2004/07/22/000112742_20040722172047/Rendered/PDF/wps3341.pdf.