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### An International Constitutional Moment

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## An International Constitutional Moment

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Anne-Marie Slaughter\*

William Burke-White\*\*

In 1945, the nations of the world, concerned about the continuing threat of interstate aggression, committed to a basic principle of not using force in interstate relations. The principle was articulated in Article 2(4) of the U.N. Charter, whereby all nations pledged to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”<sup>1</sup> This pledge has been the fundamental principle, the *grundnorm*, of the post-World War II world order. Though often honored in the breach, it has gained sufficient stature and legitimacy that direct invasion of one nation by another, other than in self-defense, has become increasingly rare. When interstate aggression happens, the vast majority of the world’s nations routinely and automatically condemn it as illegal.<sup>2</sup>

The framers of the U.N. Charter were responding to two world wars, countless interstate wars, and indeed, centuries in which the primary threat to international peace and security was the aggressive use of force by one state against another. Today, as scholars, pundits, and policymakers have pointed out for a decade, the threats have changed. The events of September 11 branded these new threats indelibly into the American consciousness,

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1. U.N. CHARTER art. 2, para. 4.

2. S.C. Res. 600, U.N. SCOR, 45th Sess., 2932d mtg., at 19, U.N. Doc. S/RES/600 (1990) (condemning the “Iraqi invasion of Kuwait”); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., at 28, U.N. Doc. S/RES/678 (1990) (authorizing the use of “all necessary means” to secure the withdrawal of Iraqi forces from Kuwait); S.C. Res. 479, U.N. SCOR, 35th Sess., 2248th mtg., at 23, U.N. Doc. S/RES/479 (1980) (calling upon “Iran and Iraq to refrain immediately from any further use of force.”); S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg., at 5, U.N. Doc. S/1511 (1950) (calling on member states to “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack.”). Most recent incidents of the use of force begin as a civil conflict only to escalate subsequently into an international conflict contrary to Article 2(4). See, e.g., S.C. Res. 1160, U.N. SCOR, 53rd Sess., 3868th mtg., at 10, U.N. Doc. S/RES/1160 (1998) (calling on member states to respect the “territorial integrity of the Federal Republic of Yugoslavia” based on Article 2(4) while working to secure an “enhanced status for Kosovo.”); S.C. Res. 749, U.N. SCOR, 47th Sess., 3066th mtg., at 10, U.N. Doc. S/RES/749 (1992) (deploying a U.N. protective force in Yugoslavia after the escalation of the domestic conflict there).

bringing home an awareness of vulnerability all too familiar to many peoples around the world. They are the threats posed by non-state actors and the states that harbor them, by civil conflict spilling across borders, by shadowy global criminal networks, and by biological, chemical, and nuclear weapons.

We thus find ourselves between the threats and the wars of the twentieth century and those of the twenty-first. The war in Afghanistan is not a war against a geographically bounded state, nor is it a war against a religion, a people, or a civilization. It is a new kind of war, a war against stateless, networked individuals.<sup>3</sup> The goal of this war is not economic advantage, territorial gain, or the submission of another state. It is to bring individual terrorists to justice and to punish and deter the states that harbor them.

To respond adequately and effectively to the threats and challenges that are emerging in this new paradigm, we need new rules. Just as in 1945, the nations of the world today face an international constitutional moment.<sup>4</sup> In the words of British Foreign Secretary Jack Straw: "Few events in global history can have galvanized the international system to action so completely in so short a time."<sup>5</sup>

In this new constitutional moment, the world's nations must come together at the outset of a war rather than at its end. They must take account of the beginning of a new century and of a renewed tide of globalization pulling us together. Their purpose must be to complement Article 2(4), to establish an additional constitutional principle of international peace and security for a very different world.

Article 2(4)(a) should read: "All states and individuals shall refrain from the deliberate targeting or killing of civilians in armed conflict of any kind, for any purpose." No state or group can justify the deliberate deaths of civilians. Conversely, states and individuals will be obligated to make every effort to protect civilian lives and to structure their diplomatic and military actions to avoid civilian casualties.

This provision articulates a principle of civilian inviolability. Just as Article 2(4) could not itself end the use of force between states, the proposed Article 2(4)(a) can not ensure that no civilian will ever again die in war or as the victim of a direct armed attack. The point, however, is to establish parallel prohibitions on the use of force between states and the use of force

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3. Although Afghanistan considers bin Laden a "guest," his Saudi citizenship has been revoked. Moreover, in our framework he is in fact *hostis humanae generis*. See Press Release, Kingdom of Saudi Arabia, Interior Minister Reiterates Kingdom's Stance on Terrorism (Oct. 1, 2001), [http://www.saudiembassy.net/press\\_release.01-spa-US-terror-01.htm](http://www.saudiembassy.net/press_release.01-spa-US-terror-01.htm).

4. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 26, 26 (1998); Bruce Ackerman, *A Generation of Betrayal*, 65 *FORDHAM L. REV.* 1519, 1519 (1997) (A constitutional moment "occurs when a rising political movement succeeds in placing a new problematic at the center of American political life.").

5. British Foreign Secretary Jack Straw, *Order out of Chaos: the Future of Afghanistan*, Address at the International Institute of Strategic Studies (Oct. 22, 2001) (on file with Harvard International Law Journal).

against civilians—parallel prohibitions that are the twin foundations of international order.

All nations around the world agree on some concept of civilian inviolability. President George W. Bush has repeatedly condemned the terrorist attacks of September 11 as horrific attacks on innocent civilians.<sup>6</sup> Even Osama Bin Laden has recognized civilians should be accorded special protections. He stated that the Twin Towers were “legitimate targets” because the victims were not civilians “but working for the American system.”<sup>7</sup> His definition of civilian challenges the international community to adopt and elaborate the more precise definition of civilian already articulated in the laws of war.

The principle of civilian inviolability draws its strength from four distinct elements. This Essay will address each of these elements in turn. First, it reflects a paradigm shift from “war” to “armed conflict.” Second, it fuses existing legal doctrines in the areas of the laws of war, international criminal law, and the law of terrorism into a single powerful principle. Third, the principle moves the legal and rhetorical discussion from terrorism to targeting, from terrorists to global criminals. Fourth, the principle reflects the progressive individualization of international law over the past half-century. The final Part of this Essay focuses on problems and implications concerning legitimate armed resistance to oppressive governments and the international balance of power. These questions must be addressed to ensure that the principle does not deepen existing rifts in the international system. It must serve the cause of justice as well as peace.

## I. FROM “WAR” TO “ARMED CONFLICT”

When the nations of the world signed the U.N. Charter in Muir Woods in 1945, the principal threat to international peace and security was “war.” War was “declared” and occurred on a mass scale.<sup>8</sup> It was waged by soldiers. Soldiers fought for states, in organized armies. Civilians were the ultimate victims of most wars, in the sense that states fought to conquer territory or change a political system, but civilians were not the direct targets. Soldiers stood between the civilian and the enemy.

In our previous understanding of war, it was only possible to attack the vital life within a nation by first destroying the army that protected it. The protected physical space between the civilian populations of combatant states and the time it took to traverse this space served as protective geographical and temporal buffers to safeguard the civilian population.

6. *Sa.*, e.g., President George W. Bush, Remarks at National Day of Prayer and Remembrance, the National Cathedral (Sept. 14, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010913-2.html>.

7. David Bamber, *Bin Laden: Yes I Did It*, LONDON TELEGRAPH, Nov. 11, 2001, [http://news/telegraph.co.uk/news/main.jhtml?xml=news/2001/11/11/wbin11.xml](http://news.telegraph.co.uk/news/main.jhtml?xml=news/2001/11/11/wbin11.xml).

8. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 2, 29, 6 U.S.T. 3516, “5 U.N.T.S. 28” [hereinafter Geneva Convention IV].

The law of war, therefore, was established largely to govern the conduct of the two conflicting armies. Legal regimes were designed to protect civilians in occupied territories, as most other civilians were already protected by their own state's army and by physical separation from the enemy.<sup>9</sup> Outside of actual occupation or simple proximity to a battlefield, "civilian" security was a matter of domestic law.

Article 2(4) of the U.N. Charter fit squarely within this understanding. Born of the legacies of two world wars, it sought to safeguard international peace and security by requiring states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>10</sup> The international community thus sought to proscribe war itself, to replace it with a regime of non-violent dispute resolution, and collective use of force, authorized by the Security Council.

Yet the seeds of a new understanding of war were already sown in World War II. The rise of airpower, particularly when coupled with the advent of weapons of mass destruction, eroded the protective physical and temporal barriers once afforded by territorial boundaries. The development of airpower in World War II meant that tons of explosives could be carried to the heart of a target state in a matter of hours. Weapons of mass destruction—whether nuclear, chemical, or biological—allow instant, indiscriminate attacks against the civilian heart of an enemy state. Terrorist attacks similarly aim directly and deliberately at civilians. Indeed, attacks such as those of September 11 radically turn a state's own infrastructure against itself, striking at the vital core of the civilian population.

This change in targets and means has been accompanied by a change in attackers. The range of potential perpetrators of armed attacks is far broader than the wages of war. They may or may not wear uniforms. They may or may not be soldiers. They may or may not represent a state. They are likely to be organized,<sup>11</sup> but their organization need not reflect that of a traditional army.

The paradigm for addressing this spectrum of threats to both individual and state security is not war. It is "armed conflict," waged between states, by states, and by non-state actors. According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), "armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>12</sup> This definition cov-

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9. *Id.*

10. U.N. CHARTER art. 2, para. 4.

11. Prosecutor v. Tadić, Case No. IT-94-1-A, Opinion and Judgment, ¶ 562 (May 7, 1997).

12. Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

ers all contemporary uses of force, including traditional interstate war, civil wars, insurgencies of all kinds, and domestic and international terrorism.

Armed Conflicts have many manifestations. They can include attacks by one armed group against another. Alternatively, a single organized group can engage in an armed conflict through serial attacks on civilian or military targets.<sup>13</sup> However, these attacks must be systematic.<sup>14</sup> Those conducted according to an overall plan, and not merely random occurrences, give rise to an armed conflict.

Focusing on “armed conflict” rather than war recognizes the many ways in which organized armed violence can threaten international peace and security, regardless of the identity of specific attackers or the territorial scope of their struggle. Equally important, it focuses attention less on the attackers than the attacked. In modern conflicts, most victims are civilians.

This idea is not mere semantics. The point of this definitional exercise is to separate, in the language of Common Article 3 of the Geneva Conventions, the individuals who take “an active part in the hostilities”<sup>15</sup> from those who do not, or simply have the fatal misfortune to stand in harm’s way. They may live on or near a battlefield. They may work in a building targeted for terrorist attack. They may have the reproductive capacities to bear children of a different ethnicity. But they are not legitimate targets.

## II. MERGING EXISTING LEGAL PRINCIPLES

The principle of civilian inviolability is already well established in international and domestic law. It sits at the heart of several different categories of law: the law of war, international criminal law, and the law of terrorism. For the past decade these categories have grown and become increasingly interdependent. The events of September 11 have merged them, at least in practice; they must now be formally merged under the principle of civilian inviolability to create a logically consistent and doctrinally unified set of generally applicable rules.

### A. *The Law of War*

The principle of civilian inviolability finds its earliest form in the law of war or international humanitarian law. As early as the Hague Conventions of 1907, international treaties restricted the conduct of warfare in order to protect civilians from armed conflict.<sup>16</sup> These early regulations were limited,

13. Prosecutor v. Tadić, Case No. IT-94-I-A, Opinion and Judgment, ¶ 562 (May 7, 1997).

14. Crimes are deemed systematic based on “the organised nature of the acts of violence and the improbability of their random occurrence.” Prosecutor v. Kunarac, Case No. IT-96-23, Judgment, ¶ 439 (Feb. 22, 2001).

15. E.g., Geneva Convention IV, *supra* note 8, art. 3(1) (Article 3 is common to all four 1949 Geneva Conventions and is referred to as Common Article 3).

16. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, arts. 23–28, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention IV].

prohibiting only “the killing and wounding treacherously” of non-combatants and the bombardment of undefended towns.<sup>17</sup> Killing civilians for killing’s sake was outlawed, but killing civilians for military advantage remained permissible.<sup>18</sup> In 1938, the League of Nations added its voice, finding that the intentional bombing of civilians “was illegal.”<sup>19</sup>

It was not, however, until the 1949 Geneva Conventions that an overarching regime to protect civilians was codified. The Fourth Geneva Convention of 1949 was specifically drafted to protect civilians in international armed conflicts. The Convention regulates the treatment of civilians in occupied territories, and forbids grave breaches, including the “willful killing, torture or inhuman treatment” of civilians.<sup>20</sup> The Geneva Conventions place affirmative duties on states to suppress such breaches and to search for and extradite or prosecute violators.<sup>21</sup>

While the Grave Breaches provisions only apply in international armed conflicts, Article 3, common to all four Geneva Conventions, applies to any armed conflict, international or non-international. Common Article 3 is weaker in form than the Grave Breaches provisions; it does not impose a duty to prosecute. Nonetheless, Common Article 3 forbids “violence to life and person,” and “outrages upon personal dignity” against “persons taking no part in the hostilities.”<sup>22</sup> The 165 States-Parties to the Geneva Conventions thus created the first global regime to protect civilians from willful killing in the course of armed conflict.

The next significant step forward in the development of the principle of civilian inviolability was the adoption of the 1977 Additional Protocols to the Geneva Conventions. Additional Protocol I, applicable in international armed conflicts, establishes a basic rule that all parties must “distinguish between the civilian population and combatants . . . and accordingly shall direct their operations only against military objectives.”<sup>23</sup> Likewise, Additional Protocol I requires that “the civilian population as such, as well as individual civilians, shall not be the object of attack.”<sup>24</sup> Additional Protocol II, which applies in all armed conflicts, is less specific, but nonetheless guarantees that “the civilian population . . . shall enjoy general protection against the dangers arising from military operations.”<sup>25</sup> The Geneva Con-

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17. *Id.* art. 25.

18. See, e.g., George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT’L L. 42, 50 (2000).

19. LEAGUE OF NATIONS, O.J. Spec. Supp. 182, at 15–17 (1938).

20. Geneva Convention IV, *supra* note 8, art. 147.

21. *Id.*, arts. 146, 147.

22. *Id.* art. 3.

23. Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 25 [hereinafter Additional Protocol I].

24. *Id.* art. 51.

25. Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 13, 1125 U.N.T.S. 609, 615 [hereinafter Additional Protocol II].

ventions and their additional protocols have provided the legal foundation for the inviolability of civilians as part of the law of war.

Despite the heightened protection accorded civilians in the Geneva Conventions and their protocols, such protection long depended on the existence of an international armed conflict. The post–World War II cases involving civilian protection generally required the existence of such a conflict as a preliminary matter.<sup>26</sup> Even the bulk of the protections afforded civilians in the Geneva Conventions were limited to persons who are “in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>27</sup> While Common Article 3 and Additional Protocol II expanded a weaker form of protection in the case of non-international armed conflict, the nexus to an armed conflict, preferably of an international character, remained a prerequisite.

The jurisprudence of the *ad hoc* international tribunals of the 1990s has relaxed this requirement, expanding civilian protection law to non-international armed conflicts. As the Martić Trial Chamber held in 1996: “the rule that the civilian population as such as well as individual citizens shall not be the object of attack is a fundamental rule of international law applicable to all armed conflicts . . . irrespective of their characterization as international or non-international.”<sup>28</sup> Most notable about the recent ICTY jurisprudence is that no distinction is made between international and non-international armed conflict; the same high level of protection is accorded civilians in both types of war.

As the Senior Legal Advisor in the ICTY Office of the Prosecutor clarifies: “attacks on [civilians and] civilian objects are prohibited as a matter of customary law in all conflicts.”<sup>29</sup> The statute of the International Criminal Tribunal for Rwanda (ICTR) is particularly noteworthy in this respect as the conflict in Rwanda had no significant international component. While the ICTR does not have jurisdiction to prosecute war crimes generally, it is empowered to prosecute domestic crimes against civilians in the form of crimes against humanity or violations of Common Article 3 of the Geneva Conventions.<sup>30</sup>

The issue raised by September 11—the extent to which “armed conflict” as defined in the Geneva Conventions can also apply to terrorist attacks. As

26. See, e.g., *In re Pilz*, 17 I.L.R. 391, 392 (Holland, Dist. Ct. of the Hague, Special Ct. of Cassation, 1949) (finding that Netherlands’ courts had no jurisdiction as the crimes in question did not constitute “crimes against humanity in the sense of the Charter of the International Military Tribunal, since the victim no longer belonged to the civilian population of occupied territory”).

27. Geneva Convention IV, *supra* note 8, art. 4.

28. Prosecutor v. Martić, Case No. IT-95-11, Initial Indictment (July 25, 1995). See also Prosecutor v. Kupreškić, Case No. IT-95-16, ¶ 522 (Jan. 14, 2000); Prosecutor v. Tadić, Case No. IT-94-1, Opinion and Judgment, ¶¶ 71–85 (May 7, 1997).

29. William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT’L L. 539, 557 (1997).

30. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 5453rd mtg., Annex, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].



noted in Part I above, these attacks fall within the formal definition of armed conflict elaborated by the ICTY. They qualify as part of “protracted armed violence between governmental authorities and [an] organized armed group.”<sup>31</sup> This expanded definition, however, still requires political confirmation.

### B. International Criminal Law

International law has long dictated that when one state wrongs another, state liability attaches.<sup>32</sup> International criminal law has moved this liability to the personal level, holding individuals liable for their own acts and acts that they command or supervise. This step is crucial for the operationalization of the principle of civilian inviolability. At Nuremberg, individuals were indicted for and convicted of crimes against civilians.<sup>33</sup> Thereafter, the U.S. Supreme Court acknowledged the obligation to protect civilians in war-time, noting that the commander of the Japanese forces during World War II had an “affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”<sup>34</sup>

The recent jurisprudence of the *ad hoc* international criminal tribunals has significantly expanded and strengthened the law of civilian protection. In a 1996 decision, the Martić Trial Chamber stated the rule clearly: “the prohibition on attacking the civilian population as such, or individual civilians [is] part of this corpus of customary law.”<sup>35</sup> In a 2000 decision, the Kupreškić Trial Chamber described “the protection of civilians” in time of armed conflict as “the bedrock of modern humanitarian law.”<sup>36</sup> Nearly every judgment of the ICTY to date has found that the victims are part of a civilian population and individuals are then held criminally responsible for attacks on those civilians, either as crimes against humanity or war crimes.<sup>37</sup>

31. Prosecutor v. Tadić, Case No. IT-94-I-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

32. See, e.g., Chorzow Factory Case, 1928 P.C.I.J., (ser. A) No. 13, at 10–11. While Chorzow considers state responsibility vis-à-vis other states, state responsibility for injuries to civilians has rarely been found. The ICJ has only considered state responsibility for injuries to civilians in the theoretical terms of an advisory opinion, Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion), 110 I.L.R. 165 (I.C.J. 1996) (noting that “collateral damage to civilians, even if proportionate to the importance of the military target, must never be intended”); Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. 226, 257, ¶ 78. In classical international law, concrete claims of this nature were unusual, as injured civilians had no standing to bring such claims themselves and any state with standing was likely to have unclean hands.

33. See 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1947) (indicting the accused for murder, ill-treatment, deportation for slave labor and for other purposes of civilian populations of occupied territories).

34. Application of Yamashita, 327 U.S. 1, 16 (1946).

35. Prosecutor v. Martić, Case No. IT-95-11, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Mar. 8, 1996).

36. Prosecutor v. Kupreškić, Case No. IT-95-16, Judgement, ¶ 521 (Jan. 14, 2000).

37. See, e.g., Prosecutor v. Delalić, Case No. IT-96-21, Judgement, ¶ 439 (Nov. 16, 1998) (finding that Delalić had “the necessary intent required to establish the crimes of willful killing and murder, as

Most of the Tribunal's indictments seek to establish individual criminal responsibility for crimes against civilians. Slobodan Milosevic, for example, stands charged with "murder and willful killings of Croat and other non-Serb civilians,"<sup>38</sup> and Milan Martić is accused of shelling "civilians in Zagreb."<sup>39</sup> National courts have joined the international tribunals in prosecuting individuals for violations of civilian protection law under the principle of universal jurisdiction. Belgium has convicted individuals of war crimes against civilian populations in Rwanda;<sup>40</sup> Germany has prosecuted war crimes against civilians in Bosnia.<sup>41</sup>

To make a general principle of civilian inviolability effective, international criminal law must expand as a viable tool of law enforcement. Armed attacks occur in a world of permeable borders. Criminal law must therefore expand jurisdictionally, by providing new mechanisms to regulate the transnational interactions that give rise to armed attacks across borders. It must also expand substantively—both at the domestic and international levels—to encompass and address in a coherent fashion the threats posed by this new brand of armed attack. Specifically, it must address numerous criminal elements—murder, kidnapping, hijacking, money laundering, etc.—heretofore rarely considered in conjunction. National law enforcement officials, perhaps working under the auspices of an international institution, must work together to harmonize existing law and develop a shared set of guiding principles to prosecute international crimes.

### C. *The Law of Terrorism*

Unlike the law of war and international criminal law, which have undergone significant development in the past decades, the law of terrorism has progressed slowly. It has stumbled over the lack of a widely accepted working definition of the term.<sup>42</sup> Nevertheless, two distinct legal approaches to terror have developed—preventing and punishing acts of terrorism and

recognized in the Geneva Conventions . . . where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life"); *Prosecutor v. Kunarac*, Case No. IT-96-23, Judgment, ¶ 425 (Feb. 22, 2001) (finding that the victims were part of the "civilian population"); *Prosecutor v. Tadić*, Case No. IT-94-1, Opinion and Judgment, ¶ 638 (May 7, 1997) (establishing the requirement that the victims must be part of a civilian population).

38. *Prosecutor v. Milosevic*, Case No. IT-01-50, Initial Indictment (Oct. 8, 2001).

39. *Prosecutor v. Martić*, Case No. IT-95-11, Initial Indictment (July 25, 1995). *See also* *Prosecutor v. Radovan Karadžić & Ratko Mladić*, Case No. IT-95-1, Initial Indictment (July 24, 1995) (indicted for shelling civilians in Sarajevo).

40. *Belgium Loi Relative à la Répression des Violations Graves de Droit International Humanitaire* (Feb. 10, 1999), in *MONITEUR BELGE* § 7 (Mar. 25, 1999), (allows prosecution under the universality principle). Cases have included the trials of two Catholic nuns, Consolata Mukangango and Julienne Mukabutera, who were sentenced to over 10 years imprisonment. *See* *WORLD NEWS CONNECTION*, Oct. 10, 2001, 2001 WL 28793236.

41. *See, e.g.*, *Public Prosecutor v. Djajic*, BayObLG (1997) (Ger.) (prosecution under the universality principle for killing unarmed Muslim civilians). *See also* *Public Prosecutor v. Jorgic*, BayObLG (1997) (Ger.).

42. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *HOUS. J. INT'L. L.* 3, 22 (1999).

holding states accountable for those acts. Both approaches provide further support for the principle of civilian inviolability.

The United Nations attempted to draft a comprehensive treaty against terrorism in early 1972.<sup>43</sup> It failed. Instead, a piecemeal approach ensued, by which specific types of terrorism—aircraft hijacking,<sup>44</sup> crimes against protected persons,<sup>45</sup> and hostage taking<sup>46</sup>—became the subjects of separate multilateral treaties.<sup>47</sup> The purpose of these treaties was to define a specific crime, to require States-Parties to punish the crime through domestic legislation, and to agree to a principle of prosecution or extradition with regard to alleged offenders. However, the actual crimes defined and punished by these various treaties all involve the protection of civilians—whether air passengers, diplomats, or hostages.

The limited effectiveness of piecemeal treaty-making led to a broader approach to terrorism prevention, beginning in 1994. In that year, a U.N. declaration condemned “all acts, methods, and practices of terrorism as criminal and unjustifiable” and declared such acts a “grave violation of the purposes and principles of the United Nations.”<sup>48</sup> Invoking the principle of civilian inviolability, the declaration described terrorism as “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons.”<sup>49</sup> This declaration was followed in 1997 by the Convention for the Suppression of Terrorist Bombings, which unlike previous treaties “criminalizes a general technique”<sup>50</sup>—the detonation of “an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility . . . [w]ith the intent to cause death or serious bodily injury.”<sup>51</sup> Here again, bombing itself is not prohibited, but rather the

43. See REPORT OF THE AD HOC COMMITTEE ON INTERNATIONAL TERRORISM (1975): 1 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 329, 331 (Robert A. Friedlander ed., 1979); Reisman, *supra* note 42, at 23.

44. See, e.g., Montreal Convention for the Suppression of Unlawful Acts Against Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Montreal Hijacking Convention].

45. See, e.g., Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter Diplomats Convention].

46. See, e.g., International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205 [hereinafter Hague Hijacking Convention].

47. See Reisman, *supra* note 42, at 25 (noting that “resistance to a general definition persisted and it continued to be easier to address particular acts”). See also Diplomats Convention, *supra* note 45; Hague Hijacking Convention, *supra* note 46, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Montreal Hijacking Convention, *supra* note 44.

48. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 60, U.N. GAOR 6th Comm., 49th Sess., Supp. No. 49, arts. 1, 2, at 303, U.N. Doc. A/49/743 (1994).

49. *Id.*

50. Reisman, *supra* note 42, at 27.

51. International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, S. TREATY DOC. NO. 106-6, 37 I.L.M. 251 [hereinafter Terrorist Bombing Convention].

bombing of targets that are certain to result in the deaths of many civilians is.<sup>52</sup>

A second recent convention seeks to prohibit the financing of terrorism and to punish those who do provide such assistance to known terrorists. Offenses under this convention likewise bolster the principle of civilian inviolability, including any “act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict . . . .”<sup>53</sup>

Beyond criminalization of acts of terrorism, a second approach prevents states from supporting terrorist activities. This has taken the form of soft law—U.N. resolutions and declarations that call on states to “refrain from organizing, instigating, assisting, or participating in . . . terrorist acts in another state or acquiescing in . . . activities . . . directed towards the commission of such acts.”<sup>54</sup> These declarations, too, invoke the notion of civilian inviolability, declaring acts “intended or calculated to provoke a state of terror in the general public” as “criminal.”<sup>55</sup>

To date, much of the international law governing terrorism has been patchy and often ineffective. The specific conventions only ban one technique and have not been uniformly respected.<sup>56</sup> The broader declarations have no binding legal force. In addition, the U.N. Sixth Committee, charged with producing a global terrorist convention, has met with only limited success.<sup>57</sup> An underlying theme running through all these efforts, however, is an attempt to ban attacks aimed at specific types of targets. Building on that theme and merging it with its expression in the law of war and international criminal law more generally ultimately provides a more effective approach to fighting terrorism—in fact if not in name.

### III. FROM TERROR TO TARGETS

The principle of civilian inviolability avoids the circularity and “lack of definitional orientation”<sup>58</sup> that continually plagues legal and philosophical

52. It may be argued that the prohibition on bombing state or government facilities includes military installations, but other parts of the convention belie this interpretation. *See id.*, art. 19, at 393; *infra* Part V.

53. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, Agenda Item 160, art. 2, at 108, U.N. Doc. A/54/109 (1999).

54. Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 210, U.N. GAOR, 51st Sess., Supp. No. 49, at 346, U.N. Doc. A/51/631 (1996). *See also* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883d plen. Mgg., Supp. No. 28, at 121, U.N. Doc. A/8082 (1970).

55. G.A. Res. 210, *supra* note 54, at 346; Timothy Garton Ash, *Is There A Good Terrorist?*, N.Y. REV. BOOKS, Nov. 29, 2001, at 50, 33.

56. Note for example the Italian refusal to extradite Abdullah Ocalan to Turkey and Germany's refusal to seek his extradition. *See* Reisman, *supra* note 11, at 28.

57. *See* Summaries of the Work of the Sixth Committee, Report on Measures to Eliminate International Terrorism, U.N. GAOR 6th Comm., 56th Sess., Agenda Item 166, U.N. Doc. A/56/100.

58. Jordan Paust, *Legal Responses to International Terrorism*, 22 *HOF. S. INT. L. J.* 1 (1999).

thinking about terror. Traditionally, international treaties or national criminal statutes regulating terrorism have focused on preventing the spread of terror. This focus is rhetorically expedient but analytically constraining. Terror does not exist in isolation; it is spread for a purpose, generally to advance or publicize a cause or to undermine public order as part of a political, ethnic, or religious struggle.<sup>59</sup> It is this communicative aspect associated with "terrorism" that leads to the old adage and analytic dead end: "one man's terrorist is another man's freedom fighter."

Further, "terror" describes a spectrum of effects far broader than the impact of acts carried out by self-proclaimed terrorists. Bombs and missiles create terror in civilian populations in the line of attack. Soldiers or secret police battering down doors in the middle of the night sow terror. Yet governments engaged in these activities around the world would reject the appellation of terrorist. Defining terrorism in terms of "terror" thus quickly becomes a political quagmire.

The principle of civilian inviolability, by contrast, offers a definitional approach to terrorism with analytic power.<sup>60</sup> The fundamental issue at stake is not the desire to sow terror, but rather the types of targets attacked. Civilians must not be the deliberate targets of attack, under any circumstances, for any purpose.

The immediate question that arises, of course, is what is a civilian? Indeed, it may seem as if the definitional difficulties have simply been transferred from "terrorists" to "civilian." In fact, however, defining civilian is a far more tractable task than identifying terrorists. First, military lawyers have refined this definition over the past century. Second, the definition of civilian is far less ideologically laden. One man's civilian is another man's combatant? Third, the definition of civilian has evolved with the nature of warfare. Additional Protocol I defined civilian as individuals who are not part of the "armed forces of a party to a conflict"<sup>61</sup> and who do not "carry

59. See Reisman, *supra* note 42, at 7.

60. One of the most useful definitions of terrorism available also focuses on methods, not goals: "Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby—in contrast to assassination—the direct targets of violence are not the main targets." Alex P. Schmid, *The Respective Problem as a Definition Problem*, in *WESTERN RESPONSES TO TERRORISM* 8 (Alex P. Schmid & Ronald D. Crelsten eds., 1993).

61. Additional Protocol I, *supra* note 23, art. 50 (defining a civilian as "any person who does not belong to one of the categories referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol"). Article 4(A) of the Third Convention references "members of the armed forces of a Party," and "members of other militias . . . who fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates
- (b) that of having a fixed distinctive sign recognizable at a distance
- (c) that of carrying arms openly . . .

Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 4(A), 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]. According to Art. 43 of Additional Protocol I, "[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups, and units which are under a command responsibility to that Party . . . ." Additional Protocol I, *supra* note 23, art.

arms openly.”<sup>62</sup> In practice, this distinction often turned on whether the individuals in question were in uniform or in civilian clothes.<sup>63</sup>

More recently, the definition has focused on “the inoffensive character of the persons to be spared and the situation in which they find themselves.”<sup>64</sup> The ICTY has emphasized this point, noting that the main reason why civilians are protected under the laws of war is because of their inoffensive character.<sup>65</sup>

Defining civilian by reference to their inoffensive nature implies that they can lose their civilian status whenever they become “offensive”—that is, whenever they take action against military forces or their fellow citizens. Between civilian and soldier, then, emerges a new category: global criminals. These are individuals who have forfeited their civilian status but who cannot be dignified as soldiers. They have violated the law of war and both domestic and international criminal law. In the language of the law of war, they are “non-privileged combatants.”<sup>66</sup> In the language of universal jurisdiction, depending on the scale and gravity of their deeds, they may be *hostis humanae generis*; but in the language of the international legal order of the 21st century, they are best described as global criminals.

#### IV. THE INDIVIDUALIZATION OF INTERNATIONAL LAW

The principle of civilian inviolability is consistent with broad and deep secular trends in international law over the past half century. It is a logical sequel in the progressive individualization of international rules. International law now protects individual citizens against abuses of power by their governments. It imposes individual liability on government officials who commit grave war crimes, genocide, and crimes against humanity. It must now impose direct obligations on individuals who would attack governments, their fellow citizens, and their fellow humans.

Traditional public international law regulates relations between states. International lawyers generally conceived of states as unitary entities—the classic black boxes or billiard balls. Aside from the law of diplomatic relations<sup>67</sup> and a few other specialized areas, international law did not recognize or address state-society relations: the relations between a government and its citizens. The development of human rights law rendered these relations

62. Geneva Convention III, *supra* note 61, art. 1(A)(2).

63. *See, e.g.*, Pius Nwaoga v. The State, 52 I.L.R. 494, 496–97 (1972) (Nigeria).

64. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 609 (Claude Pilloud et al., eds., 1987). *See also* Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda*, 43 HARV. INT'L L. J. 257, Prosecutor v. Kupreškić, Case No. IT-95-16, Judgement, ¶ 547 (Jan. 14, 2000).

65. Additional Protocol II, *supra* note 25, art. 13(2), mandating that “the civilian population . . . shall not be the object of attack.”

66. *See generally* Geneva Convention III, *supra* note 61, art. 4.

67. *See, e.g.*, Mavromattis Palestine Concessions Case (Greece v. U.K.) 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

transparent, imposing direct obligations on governments to safeguard the basic rights of their citizens.

Through the Universal Declaration of Human Rights as well as multilateral and regional agreements, international law has come to prevent torture, political killings, and forced disappearances perpetrated by a government against individuals in domestic society.<sup>68</sup> Politicians as well as courts have recognized that any government must now "respect the internationally agreed norms of behavior towards other states and towards its own citizens."<sup>69</sup> Further, at least in some human rights regimes, citizens have been given the power to hold their governments accountable for violations of these obligations in national and international tribunals.<sup>70</sup>

The next step in the individualization of international law was to render governments themselves transparent, transforming a previously opaque entity into an aggregation of individual officials performing specific functions, with each personally responsible for his or her actions. The two international criminal tribunals for the former Yugoslavia and Rwanda have brought the law of war, the law of genocide, and the law regulating crimes against humanity home to individual perpetrators at every level of government. Similarly, the British House of Lords held that General Augusto Pinochet lacked head of state immunity and could stand trial as an individual for crimes against Spanish civilians committed while he was President of Chile.<sup>71</sup> The states that these officials represent may also be held accountable for violations of the rights of fellow states, but those violations now exist alongside individual violations of international law.

Expanding the principle of civilian inviolability to non-state actors, whether they qualify as terrorists, rebels, insurgents, separatists, or freedom fighters, now renders society itself transparent. No longer are citizens an undifferentiated mass of individuals entitled to specific protection from their governments as a whole or from specific government officials. Individual actors in society, whether acting alone or as part of a group or network, are

68. See, e.g., *Universal Declaration on Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948) ("Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms."); International Covenant on Civil and Political Rights, S. Exec. Doc. No. 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Torture Convention].

69. Straw, *supra* note 5.

70. See, e.g., *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. H.R. Rep. 548 (1999) (finding the discharge of sailors from the Royal Navy based on sexual-orientation a violation of the European Convention on Human Rights); *State v. Makwanyane*, [1995] (3) S.A. 391 ¶¶ 63-69 (CC) (South Africa) (looking to decisions of foreign tribunals as well as the European Convention on Human Rights and the ICCPR in considering the legality of the death penalty); *Olga Tellis v. Bombay Mun. Corp.*, [1985] (3) S.C.C. 545 (India) (finding India bound not to tear down housing based on obligations under the ICCPR).

71. *Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 1 A.C. 147, 248 (H.L. 2000).

now also to be held accountable for their acts toward fellow citizens or the citizens of other countries. Regardless of the perceived justice or injustice of their cause, they may not prosecute it through attacks on civilians—fellow human beings who take no active part in their conflict. Their acts are now subject to regulation under both domestic and international law.

Operationalizing this principle will require developing a series of rules and doctrines to resolve jurisdictional conflicts. Just as human rights law and the law of war are part of both domestic and international law, so too will be the principle of civilian inviolability. At one end of the scale, it is encompassed within ordinary criminal law prohibiting murder and related crimes. Larger scale attacks on fellow citizens will fall under domestic law governing terrorism and/or organized crime. As the gravity and scale of these crimes increase, international tribunals are likely to enjoy concurrent jurisdiction with domestic tribunals. At the far end of the spectrum, where the scope or the nature of specific crimes is universally reprehensible, perpetrators may be subject to universal jurisdiction in domestic courts worldwide.<sup>72</sup>

A key question for international lawyers and policymakers will be the hierarchy or priority of these different fora. Following the principles set forth in the Rome Statute for the International Criminal Court, a regime of complementarity would seem to make most sense.<sup>73</sup> That regime would locate jurisdiction in national tribunals first, and only in international tribunals when national courts prove unable or unwilling to prosecute. The exercise of universal jurisdiction by courts in countries with no direct link to the crimes would provide a third alternative, to be used only after exhaustion of the first two.

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72. Universal jurisdiction attaches to piracy, slave-trading, war crimes, crimes against peace, crimes against humanity, genocide, torture. See PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 29 (2001). See also Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L. REV.* 785, 815–39 (1988). Universal jurisdiction has a complex history, initially evolving as a means of prosecuting those individuals who might otherwise not fall under the jurisdiction of any nation, such as pirates or slave-traders. Its application over the past few decades has expanded through the application of the principle by domestic courts to prosecute defendants who would likely escape prosecution in their home countries. See, e.g., REDRESS TRUST REPORT, *UNIVERSAL JURISDICTION IN EUROPE* (1999) (describing efforts of victims of torture in other countries to seek redress in European state courts). The application of universal jurisdiction has expanded based on the reprehensibility of specific crimes sufficient to shock the global conscience. See INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE, *FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES* 3 (2000); M. Cherif Bassiouni, *The Evils of International Criminal Justice*, 11 *PACE L. REV.* 309, 312 (1999). States have assumed obligations to enact domestic legislation to be able to prosecute the most severe international crimes under the universality principle. See MARC WELER & WILLIAM BURKE-WHITE, *NO PLACE TO HIDE: NEW DEVELOPMENTS IN THE EXERCISE OF INTERNATIONAL CRIMINAL JUSTICE* ch. 2 (forthcoming 2002).

73. See Rome Statute of the International Criminal Court, July 17, 1998, pmbl., U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute] (noting that the Court's jurisdiction "shall be complementary to national criminal jurisdictions").



Civilian inviolability is a corollary of individual dignity. For individuals to be inviolable, each must be understood to have a fundamental worth: to carry a kernel of value, of humanity, of dignity within. The drafters of Common Article 3 of the Geneva Conventions saw this core of human dignity in the individual: they chose to specially protect "personal dignity."<sup>74</sup> At a fundamental level, Common Article 3 is about treating individuals "as . . . fellow human being[s]" and respecting their humanity.<sup>75</sup> Individual dignity and personal humanity are not, however, the traditional subjects of international law. Only through the progressive individualization of international law has it become possible to elevate a principle of civilian inviolability as a foundational safeguard of international peace and security.

## V. CHALLENGES AND IMPLICATIONS

The global responses to the events of September 11 and their aftermath reflect widespread recognition of the principle of civilian inviolability. These various responses also highlight problems and implications that would attend the adoption of a principle of civilian inviolability as a complement to Article 2(4). Space constraints permit only the identification of such issues here. Together, however, they map an intellectual agenda for lawyers and policymakers that will be comparable to the principles and case law generated by the interpretation and application of Article 2(4) itself.

The principle of civilian inviolability provides the common ground for the coalition arrayed against Al Qaeda. The coalition is willing to use military force has been used to bring to justice the individual perpetrators of massive crimes against civilians. At the same time, U.S. targeting decisions must have included specific restrictions to protect civilians and avoid civilian objects, even at the potential cost of U.S. casualties.<sup>76</sup>

The U.S. Judge Advocate General has created Civilian Protection Law training programs to ensure that the U.S. armed forces "protect[ ] . . . civilians and . . . preserve[ ] their basic human rights."<sup>77</sup> The United States has provided food to civilians across Afghanistan,<sup>78</sup> pledged over \$32 million during the month of October alone for Afghan refugees,<sup>79</sup> and has created a

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<sup>74</sup> E.g., Geneva Convention IV, *supra* note 8, art. 3(1)(c).

<sup>75</sup> I COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 53 (Jean S. Pictet ed., 1952).

<sup>76</sup> While the U.S. Rules of Engagement in Afghanistan are classified, a report produced by the ICTY Office of the Prosecutor after investigating NATO bombing in Kosovo found that concrete steps had been taken to protect civilians, including: relaxing the 15,000 foot height restriction; the decision not to use cluster bombs after May 7, 1999; and the decision not to attack potentially civilian objects, such as bridges, when civilians were near. See William Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 EUR. J. INT'L L. 489, 501 (2001).

<sup>77</sup> Maj. Timothy P. Pendolino, Department of the Army, *Pamphlet 27-50-281, ARMY LAW.*, Apr. 1996, at 29.

<sup>78</sup> See, e.g., Associated Press, *Planes Drop 35,000 More Rations*, Oct. 28, 2001, 2001.

<sup>79</sup> Press Release, Department of State, Response to the Refugee Crisis in Afghanistan (Oct. 26,

"Special Fund for Afghan Children" to help "the children [of Afghanistan] survive."<sup>80</sup> Each time Afghani civilians have been confirmed killed, the United States has expressed "regret [at] any loss of civilian life."<sup>81</sup>

Beyond the coalition, U.N. Secretary General Kofi Annan noted that "we must . . . do everything possible to protect innocent civilian populations"<sup>82</sup> and that "innocent civilians should not be punished for the actions of their government."<sup>83</sup> Amnesty International has called on the United States to "demonstrate that all possible steps were taken to protect against civilian casualties."<sup>84</sup> A joint statement by the heads of various U.N. aid and human rights agencies called on "the entire international community" to "prevent further tragedy" to the "five million [Afghan] civilians" with but a "fragile grip on survival."<sup>85</sup>

The Islamic world, too, has invoked the principle of civilian inviolability. The Taliban's Deputy Ambassador to Pakistan declared that "the killing of innocent civilians is a terrorist attack."<sup>86</sup> Indeed, the Taliban declared that the U.S.-led bombing campaign is a "genocide of Afghan civilians."<sup>87</sup> General Musharraf of Pakistan noted concern "not only in the Islamic world, but in the entire world, in the West and in the United States, at all the civilian casualties."<sup>88</sup> The Pakistani Interior minister added that "Muslims are upset over a large number of civilian casualties."<sup>89</sup> In a press conference with Tony Blair, Syria's President Assad commented: "We cannot accept what we see every day on television screens, the killing of innocent civilians."<sup>90</sup> The Secretary General of the Organization of the Islamic Conference expressed "con-

2001). <http://www.state.gov/r/pa/prs/ps/2001/index.cfm?docid=5767>.

80. Press Release, White House, President Announces "America's Fund for Afghan Children" (Oct. 11, 2001), <http://www.whitehouse.gov/news/releases/2001/10/20011011-8.html>.

81. Press Release, Spokeswoman Victoria Clarke, Department of Defense News Briefing (Oct. 23, 2001), [http://www.defenselink.mil/news/Oct2001/r10232001\\_r1023asd.html](http://www.defenselink.mil/news/Oct2001/r10232001_r1023asd.html).

82. Associated Press, *U.N. Chief Urges All Parties to Minimize Civilian Casualties in Afghanistan* (Oct. 15, 2001).

83. U.N. Secretary General Kofi Annan, Opening Statement at Press Conference (Sept. 27, 2001) (transcript on file with the Harvard International Law Journal).

84. Press Release, Amnesty International, *US Obligated to Avert Civilian Casualties in Any Missile Attack* (Oct. 25, 2001) (on file with Harvard International Law Journal).

85. Joint Statement, In Afghanistan, A Population in Crisis (Carol Bellamy, Executive Director, U.N. Children's Fund, Catherine Bertini, Executive Director, World Food Program, Rudd Lubbers, U.N. High Commissioner for Refugees, Mark Malloch Brown, Administrator, U.N. Development Program, Kenzo Oshima, Emergency Relief Coordinator, Office for the Coordination of Humanitarian Affairs, and Mary Robinson, U.N. High Commissioner for Human Rights) (Sept. 24, 2001) (on file with the Harvard International Law Journal).

86. Statement by Sohail Shaheen, Deputy Ambassador, Taliban Embassy to Pakistan, in Richard S. Ehrlich, *Support in South Asia Swings against US Action*, THE BANGKOK POST, Oct. 30, 2001.

87. *U.S. Britain Dispute Afghan Campaign Critics*, CNN.COM, Oct. 29, 2001, <http://www.cnn.com/2001/WORLD/asiapcf/central/10/29/ret.attacks.afghanistan.index.html>.

88. John E. Burns, *A Nation Challenged: Appeal: Pakistan Chief Says US Should End Bombing Soon*, N.Y. TIMES, Oct. 27, 2001, at B1.

89. *Attack on Afghanistan: Wobble Effect: Bombs go Astray, the Casualties Mount and the Doubts Set in*, GUARDIAN, Oct. 29, 2001.

90. Andrew Parker, *Attack on Afghanistan Intelligence and Bio-Terror: Assad Hits at Attack on Afghanistan*, FIN. TIMES., Nov. 1, 2001.

cern over civilian casualties in Afghanistan.”<sup>91</sup> “Casualties among Afghan civilians” have been described as “unbearable” by Saudi Arabia.<sup>92</sup>

Translating these various sources of support for civilian inviolability into a globally acceptable *grundnorm*, however, raises a number of difficult questions. We group these questions under three broad headings: shifting the global balance of power, curbing the power of governments, and state responsibility. These issues must be met head on to forge the degree of global consensus necessary for a genuine international constitutional moment.

### *A. Shifting the Global Balance of Power*

Militarily, the principle of civilian inviolability will tend to privilege powerful states over their less powerful counterparts. The number of states capable of avoiding or strictly limiting civilian casualties during military action is limited. The few states with such ultra-high technologies may be able to conduct military activity without transgressing the principle of civilian inviolability, while the rest of the international community is unable to respond militarily. States without advanced military technologies might then decide to derogate from the principle or ignore it completely, to the detriment of all.

Additional rules will be required to ensure that technologically advanced states do not abuse their privilege. The first step must be to rethink the regime governing weapons of mass destruction. As their name implies, the very purpose of such weapons is to kill indiscriminately,<sup>93</sup> rather than selectively. Where civilian deaths are not only foreseeable, but certain, they cannot be justified as unintended.

The just war doctrine of double effect tackles this problem by imposing a strict doctrine of proportionality, requiring that the weapons used in any military attack be strictly proportional to the “objectives sought.”<sup>94</sup> But weapons of mass destruction cannot be proportional.

In an international order founded in part on the principle of civilian inviolability, no country can ever again borrow Harry Truman’s justification for the use of a nuclear weapon at Hiroshima, by claiming it was targeted at “an important Japanese army base.”<sup>95</sup> A more logical regime would ban the use, although not necessarily the possession, of all weapons of mass destruction by all nations and individuals. Moving away from weapons of mass destruction also means moving away from deterrence based on mutually assured destruction. Downgrading deterrence, in turn, makes the world a

91. Farhan Bohari & John Thornhill, *Attack on Afghanistan: Military Campaign & Diplomacy*, FIN. TIMES, Oct. 29, 2001.

92. Roula Khalaf, *Saudi Arabia: Kingdom Faces a Tough Test of Sympathy*, FIN. TIMES, Oct. 29, 2001.

93. See generally *Legality of the Threat of Nuclear Weapons (Advisory Opinion)*, 1996 I.C.J. 226.

94. J. Bryan Hehir, *Kosovo: A War of Values and the Values of War*, AMERICA, May 15, 1999, at 7.

95. James Carroll, *Bombing with Blindfolds On*, BOSTON GLOBE, Nov. 6, 2001, at A5 (suggesting, however, that states continue using similar justifications for civilian casualties). See generally SVEN LINDQVIST, *A HISTORY OF BOMBING* (Linda Hawerty Rugg trans., New Press 2001) (1999).

much more dangerous place. All states would thus have a renewed incentive to develop and use peaceful international mechanisms to have their interests and grievances heard. In a world of violent dispute resolution, states able to use force more precisely will be more powerful. But minimizing the resort to violence is the best hope for achieving a more equitable balance of power. As radical as this prescription may seem, it is in fact consistent with the Bush administration's emphasis on revising strategies, capabilities and rules to combat a new generation of nuclear, chemical, and biological threats.

### *B. Curbing the Power of Governments*

The principle of civilian inviolability also generally privileges states over non-state actors. States tend to monopolize legitimate coercive power. This power can often be used without civilian casualties through the rule of law and police power. Non-state actors, minorities, and rebel groups often have but limited means at their disposal. These groups in the past have found it necessary or unavoidable to target civilians to draw attention to their cause.

With the principle of civilian inviolability at work, such non-state actors will find it more difficult to get attention and thereby publicize their cause through terror. Adoption and enforcement of a general civilian inviolability principle could thus constrain legitimate political resistance by minorities or majorities against oppressive governments, colonial powers, or foreign occupation.

Forging an international constitutional principle of civilian inviolability requires renewed attention to the creation of both domestic and international channels for political voice short of civilian killings in both domestic and international fora. As utopian as it may seem, making such channels accessible and meaningful is the only way to bolster those who seek to have their grievances resolved without resort to violence against civilians. Curbing terrorism cannot be a one-way street.

The privilege accorded to states entails another danger—that of the state becoming the terrorist. If the principle of civilian inviolability is not truly reciprocal in application, states may enforce the prohibition against civilians killing other civilians, but may not respect their own obligation to avoid targeting civilians. Iraqi bombing of the Kurds in the early 1990s and Slobodan Milosevic's attacks on Kosovar Albanians in 1998 and 1999 are clear examples of this phenomenon. Here the principle of civilian inviolability must be enforced through human rights law, international criminal law, and the evolving doctrine of humanitarian intervention. Individualizing international law with respect to ordinary members of society cannot relieve government officials of their own legal obligations.

### *C. State Responsibility*

A final cluster of questions arising from the principle of civilian inviolability concerns state responsibility. When should states be held accountable

for allowing global criminals from their territory to target civilians? The answer to this question is crucial to the determination of when and if military force can be used against a state to bring international criminals to justice. The traditional “effective control” test for attributing an act to a state seems insufficient to address the threats posed by global criminals and the states that harbor them.<sup>96</sup>

One approach here would be to build on the transparency of governments and their citizens before international law. In popular accounts of the relationship between the Taliban and Al Qaeda, the relationship has been described in terms of “harboring” or “hijacking.” In one account, Taliban officials are distinct from the terrorists in their midst, but offer them at least tacit support. On another view articulated by British Foreign Secretary Straw, it is the Al Qaeda members who have “hijacked” Afghanistan, essentially taking over the government.<sup>97</sup> The question thus concerns the specific relationships between Taliban officials and Al Qaeda members. Are they distinguishable? Or are their activities so intertwined at an individual level that they are impossible to separate?

Where a government and the terrorists on its soil are distinguishable, the traditional test of effective control could still apply. It would still be possible to hold the government responsible for the terrorist acts, but the counter measures allowed could fall short of the use of force.<sup>98</sup> However, where government officials and terrorist leaders are indistinguishable in their exercise of coercive power, direction of state finances, and formulation of other government policies, then attacks on the state apparatus could be legitimized either as a direct attack on the terrorists or as a direct response to a state act. Relevant evidence in such inquiries could come from many sources, including post hoc ratification of terrorist acts.<sup>99</sup>

## VI. CONCLUSION

In 1919 Great Britain became the first country to bomb Afghanistan from the air. Immediately following World War I, Britain had declared that civilian-protection limits had been placed on aerial bombing. However, a recently released internal memo of the British War Office reveals that that declaration was intended only “to preserve appearances ‘because the truth

96. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 109–12 (June 27).

97. Michael Smith, *Paras and Marines on Standby, British Troops Prepare for “Direct Action,”* DAILY TELEGRAPH, Oct. 22, 2001, at 1.

98. Helen Duffy, *Responding to September 11th, the Framework of International Law* (Oct. 2000), <http://www.interrights.org/about/sept0102001.asp>. A number of U.N. Documents have called upon states to refrain from supporting or allowing terrorist activity, this bolstering the claim for attribution of such acts when states fail to prevent them.

99. *See, e.g., United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 35 (May 24) (finding that the “approval” or “endorsement” of activities by private actors can “transform the legal nature of the situation . . . into acts of state.”). The Taliban endorsed the acts of September 11 in just this way.

[is] that air-warfare has made such restriction obsolete and impossible.”<sup>100</sup> In 2001, the United States, Britain, and other countries must preserve far more than appearances. They must protect civilian lives in America, Afghanistan, and around the globe. Such protection is neither obsolete nor impossible. It is necessary and increasingly urgent. In the past eighty years civilian inviolability has been transformed from a rhetorical aside to a basic principle in many areas of international law. It is time to make it a constitutional principle of the international legal system.

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100. Carroll, *supra* note 95, at A5.