

The Future of Law

Protecting the Rights of Civilians

Throughout world history, the principal threat to international peace and security has been “war”—the threat that the League of Nations, the Kellogg-Briand Pact, and the United Nations sought, but failed, to prevent. Traditionally, war has been declared and fought on a mass scale, waged by soldiers fighting for states in organized armies. In the traditional understanding of war, it was possible to attack a nation only by first destroying

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the army that protected it. Civilians were thus largely insulated from conflict, physically separated from danger by the armies that stood between them and their enemies. Prior to the rise of airpower and the advent of weapons of mass destruction, international law did not have to address the security of the civilian populations themselves. Legal regimes therefore proscribed war generally and only protected civilians in occupied territories. “Civilian” security was generally a matter of domestic law.

While interstate warfare has declined in recent decades, civil conflict arising from ethnic, religious, and nationalist strife is on the rise. And as the events of September 11 demonstrated in the starkest terms, international violence is no longer limited to war fought between states, whether declared or undeclared. Individuals can murder thousands and potentially millions of other individuals across national borders without ever encountering an army. The physical space between combatant states

as patrolled by soldiers, sailors, and pilots no longer serves as a protective buffer to safeguard civilians. National armies and state-supported terrorism are still important, but international rules addressing only organized state violence are more appropriate for past wars than for wars to come.

To address this new generation of threats, international law must move beyond general prohibitions on war and develop a regime to protect civilian lives. We must embrace and elevate the principle of civilian inviolability to an absolute prohibition on the deliberate targeting or killing of civilians in armed conflict of any kind, by states or individuals, for any purpose. This principle must become a foundational principle of the international order, equivalent to and parallel with the prohibition on interstate war in Article 2(4) of the UN Charter.

When the framers of the UN Charter adopted the prohibition on the use of force in interstate relations in Article

2(4), they were pulling together a number of strands of existing law, similar to the situation today. The principle of civilian inviolability has been strengthened and developed in three distinct bodies of international law—the law of war, international criminal law, and the law of terrorism. The law of war regulates the conduct of combat, with an emphasis on protecting civilians from violent conflict. International criminal law has grown from its roots in Nuremberg to hold individuals accountable for international crimes. The law of terrorism has developed in an effort to prohibit attacks by non-state actors and state sponsorship of these attacks.

These three bodies of law are deeply rooted in the existing international order and are supported by generally effective enforcement mechanisms. Collectively they offer a powerful new logic to address and possibly prevent violent conflict in the next century. The protection of civilians

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must become more than a specialized doctrine applicable in specific areas of the law. "Civilians" are individuals who do not choose to engage in armed conflict, who seek only to go about their lives and participate in their communities. They are not cannon fodder, not tools to be used as means to any end. They must be free from violence, whether from their own governments, marauding armies, suicide bombers, or hijacked planes.

Under the law of war the principle of civilian inviolability is typically referred to as "noncombatant immunity." The change in terminology that we propose, as well as the elevation of this principle to a foundational principle of international order next to Article 2(4), is telling. "Noncombatant" implies individuals trying to stay clear of the violence swirling around them. "Civilian" means members of civil society, in every nation around the world and increasingly across borders. It is the birthright of all civilians, as all humans who choose not to take up arms, to be free from violence, to be free to live their lives in dignity and peace. The move from "noncombatant immunity" to "civilian inviolability" is thus a move from the law of war to the law of peace.

The Law of War

The law of war has a long history both in formal agreements and in the practice of states. This body of law provides the foundations for the principle of civilian inviolability. As early as the Hague Conventions of 1907, international treaties restricted the conduct of warfare in order to protect civilians from armed conflict. These early regulations were limited, prohibiting only "the killing and wounding treacherously" of noncombatants and the bombardment of undefended towns. Killing civilians for killing's sake was outlawed, but killing civilians for military advantage remained permissible. In 1938 the League of Nations added its voice, finding that the intentional bombing of civilians

"was illegal."

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. The Geneva Conventions place affirmative duties on states to suppress such breaches and to search for and extradite or prosecute violators.

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 internal. Common Article 3 is weaker in form than the grave breaches provisions; it does not impose duties to suppress or

prosecute. Nonetheless, Common Article 3 forbids "violence to life and person," and "outrages upon personal dignity" against "persons taking no part in the hostilities." 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." Likewise, Additional Protocol I requires that "the civilian population as such, as well as individual civilians, shall not be the object of at-

**Precedent of Guilt:
Goering, Hess, Von
Ribbentrop, Keitel, and
The Butcher of Prague,
Kaltenbrunner, appear in
1946 during the
Nuremberg trial.**



tack." 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." The foundations of the principle of civilian inviolability were thus established.

Despite the heightened protection accorded civilians in the Geneva Conventions and their protocols, such protections have historically applied only in the context of interstate war. War-crime trials in the wake of World War II all required a preliminary finding of an international armed conflict before invoking laws protecting civilians. Given that the physical separation of the civilian population from the enemy army was seen as protection itself, the Geneva Conventions applied largely to prisoners of war and civilians who were in territory occupied by another state. Common Article 3 of each Geneva Convention and Additional Protocol II expanded the scope of protection for civilians, applying it to civilians in

subject of attack is a fundamental rule of international law applicable to all armed conflicts... irrespective of their characterization as international or non-international." In recent ICTY jurisprudence 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 clarified: "attacks on [civilians and] civilian objects are prohibited as a matter of customary law in all conflicts."

The developments in the law of war over the past century have greatly expanded both the protections accorded to civilians and the scope of applicability of these regulations. The issue today is the extent to which "armed conflict" as defined in the Geneva Conventions can also apply to terrorist attacks. Recent ICTY jurisprudence suggests it should. In the *Tadic* case, which involved crimes against humanity committed in 1992, the Appeals Chamber found that "armed conflict exists whenever there is

plied primarily to states, imposing duties on governments that they were then bound to transmit to their generals and officers. International criminal law, to which we now turn, has translated these obligations into a code of specific crimes, for which individuals can be held specifically accountable.

International Criminal Law

Developments in international criminal law have strengthened the rules of the law of war, expanding their scope and creating a viable set of enforcement mechanisms. Just as the law of war has moved from a focus on states to a focus on individuals, so too has international criminal law. International law has long dictated that when one state wrongs another, the state that committed the wrong must pay reparations. International criminal law has moved this liability to the personal level, holding individuals responsible for their own acts and those that they commanded or supervised.

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armed conflict, whether or not they were in the hands of the enemy or in occupied territory. Nevertheless, the existence of an armed conflict, preferably of an international character, remained an absolute prerequisite for legal protection.

The jurisprudence of the ad hoc international tribunals of the 1990s has greatly expanded civilian protection law, relaxing the requirement that there be armed conflict and applying these rules in non-international as well as international armed conflicts. As the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in 1996, "The rule that the civilian population as such as well as individual citizens, shall not be the ob-

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." This definition covers all contemporary uses of force, including traditional interstate war, civil wars, insurgencies of all kinds, and both domestic and international terrorism.

By expanding well beyond traditional organized armed violence to a definition of "armed conflict" broad enough to include violence traditionally the province of police rather than soldiers, the law of war lays the foundation for an international legal principle protecting individuals from violence of almost any kind. The Geneva Conventions, however, have traditionally ap-

the operation of the principle of civilian inviolability. The process began at Nuremberg, when individuals, rather than states, were indicted for and convicted of crimes against civilians. It then drew on the corpus of human-rights law, which rendered state-society relations transparent, imposing direct obligations on governments to safeguard the basic rights of their citizens. The next step was to render governments themselves transparent, transforming the previously unified government into an aggregation of individual officials performing specific functions, each personally responsible for his or her actions.

The ICTY is the foremost example of this process of the individualization of international law. The ICTY has ap-

plied the rules of civilian protection and held individuals accountable. In its 2000 decision in the *Kupreskic* case, which tried Kupreskic for acts of ethnic cleansing against Yugoslavian Muslims, the Trial Chamber described “the protection of civilians” in time of armed conflict as “the bedrock of modern humanitarian law,” holding Kupreskic personally accountable for violations thereof. Nearly every judgment of the ICTY to date has found that the victims are part of a protected civilian population and held the perpetrators criminally responsible for crimes against humanity or war crimes. Most of the ICTY’s indictments seek to establish individual criminal responsibility for crimes against civilians. Even former heads of state are not immune. Slobodan Milosevic, for example, stands charged with “murder and willful killings of Croat and other non-Serb civilians.”

National courts have joined the international tribunals in prosecuting individuals for violations of civilian protection law under the principle of universal jurisdiction. Historically invoked in cases of piracy, national courts are now using universal jurisdiction to prosecute crimes against civilians when the crimes can be described as genocide or crimes against humanity. A famous example is the Spanish request for the extradition of Augusto Pinochet to stand trial for acts of torture committed when he was president of Chile. Likewise, Belgium has convicted individuals of war crimes against civilian populations in Rwanda, and Germany has prosecuted war crimes against civilians in Bosnia.

To make a general principle of civilian inviolability effective, international criminal law is undergoing a further transformation. Just as state-society relations and governments themselves have been rendered transparent, society is itself undergoing this same transformation. Individual actors in society, whether alone or part of a group or network, are now being held accountable for their acts toward fellow citizens

A Wrinkle in His Brow: Former Yugoslav President Slobodan Milosevic appears before the International Criminal Tribunal for the former Yugoslavia in December 2001.



and the citizens of other countries. Regardless of the perceived justice or injustice of their cause, they may not pursue their claims through attacks on civilians or they will be held personally accountable. Their acts are now subject to regulation under both domestic and international law. Courts everywhere are now ready and willing to enforce these rules.

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, stumbling over definitional ambiguity. Nevertheless, two distinct legal approaches to terror have developed—preventing and punishing acts of terrorism and 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 1972 and failed. Instead, a piecemeal approach ensued in which specific acts of terrorism—aircraft hijacking, crimes against protected persons, and hostage taking—became the subjects of separate multilateral treaties. The purpose of these treaties was to define a specific crime, to require states to pass domestic laws forbidding the crime, and to create a system whereby perpetrators would either be prosecuted or extradited to face prosecution elsewhere. Each of the crimes defined in these various treaties involves the taking of innocent civilian life, whether air passengers, diplomats, or hostages.

The limited effectiveness of piecemeal treaty-making led to a broader approach to prevent terrorism. In 1994, the UN Declaration on Measures to Eliminate International Terrorism 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.” 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.” This declaration was followed in 1997 by the Convention for the Suppression of Terrorist Bombings, which “criminalizes a general technique”—the detonation of “an explosive or other lethal device... with the intent to cause death or serious bodily injury.” Here again, bombing is not prohibited in and of itself but only when certain to result in civilian deaths. The 1999 International Convention for

have not been uniformly respected. The broader declarations have no binding legal force, and the UN Sixth Committee charged with producing a global terrorist convention has met with only limited success. An underlying theme running through all these efforts, however, is an attempt to ban attacks aimed at civilians.

The Future of Law

Individually, the developments in each of these three areas of law are significant. Taken collectively, they are extraordinarily powerful. They create a web of prohibitions and penalties around the principle of civilian inviolability. Whether understood as illegal

ian inviolability creates a new category between civilian and soldier. It is the category of global criminals. Individuals who deliberately target and kill civilians are the modern equivalent of “the enemies of all mankind,” the designation given pirates, slave-traders, and torturers under the international law establishing universal jurisdiction. In their current incarnation, global criminals have killed hundreds of thousands of people.

The final element in the equation is the addition of weapons of mass destruction. By definition, such weapons cannot discriminate between civilians and combatants. A foundational principle of civilian inviolability would thus

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the Suppression of the Financing of Terrorism has sought to punish those who finance 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.”

Beyond the criminalization of acts of terrorism, a second approach prevents state sponsorship of terrorism. Soft law in the form of UN resolutions and declarations 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.” These declarations, too, invoke the notion of civilian inviolability, declaring as criminal all acts “intended or calculated to provoke a state of terror in the general public.”

To date, much of the international law governing terrorism has been patchy and ineffective. The specific conventions only ban one technique and

combat, international crime, or an inherent element of terrorist attacks, the deliberate killing of individuals intent only on living their lives as members of civil society is unacceptable.

The logic of this principle provides a new way to think about terrorism. Terror does not exist in isolation; it is spread for a purpose, generally to advance or publicize a cause or undermine public order as part of a political, ethnic, or religious struggle. 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.”

The principle of civilian inviolability, by contrast, offers a definitional approach to terrorism with analytic power. The fundamental issue at stake is not the desire to terrorize but rather the types of targets attacked. Civilians must not be the deliberate targets of attack under any circumstances, for any purpose. Focusing on targeting choices resolves the uneasy definitional tension between civilian, soldier, and terrorist.

A foundational principle of civil-

outlaw their use. It would immediately label as an outlaw any individual, whether a national leader or a terrorist, who prepared to use them. As part of the UN Charter or an incorporated element of Security Council jurisprudence, this principle could thus authorize a much wider range of action against state leaders or individuals suspected of developing biological, chemical, or nuclear weapons outside the strictures of current international law.

Those who kill civilians are global outlaws, individuals who have violated the basic precepts of all legal systems. They have violated the law of war and both national and international criminal law. They may be government officials or generals, religious or political fanatics. Global outlaws may be pursued by armies and police forces as well as by intelligence operatives, financial regulators, and prosecutors. But their pursuit, arrest, and trial must be conducted under a new international legal order closely connected to national law. Developing that order is the international legal challenge of the 21st century. ■