FOREIGN AFFAIRS

War Unbound

Gaza, Ukraine, and the Breakdown of International Law

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Hamas's attack on Israel and Israel's response to it have been a disaster for civilians. In its October 7 massacre, Hamas sought out unarmed Israeli civilians, including women, children, and the elderly, killing close to 1,200 people and taking around 240 hostages. Israel's subsequent air and ground campaign in Gaza has, as of March 2024, killed more than 30,000 people, an estimated two-thirds of whom were women and children. The Israeli offensive has also displaced some two million people (more than 85 percent of the population of Gaza), left more than a million people at risk of starvation, and damaged or destroyed some 150,000 civilian buildings. Today, there is no functional hospital left in northern Gaza. Hamas, Israel maintains, uses civilian structures as shields, operating in them or in tunnels beneath them—perhaps precisely because such buildings have

been considered off-limits for military operations under international law.

International humanitarian law, also known as the law of war or the law of armed conflict, is supposed to spare civilians from the worst calamities of conflict. The aim of this body of law has always been clear: civilians not involved in the fighting deserve to be protected from harm and to enjoy unimpeded access to humanitarian aid. But in the Israel-Hamas war, the law has failed. Hamas continues to hold hostages and has used schools, hospitals, and other civilian buildings to shield its infrastructure, while Israel has waged an all-out war in densely populated areas and slowed the flow of desperately needed aid to a trickle. The result has been utter devastation for civilians in Gaza.

The conflict in Gaza is an extreme example of the breakdown of the law of war, but it is not an isolated one. It is the latest in a long series of wars in the years since 9/11, from the U.S.-led "war on terror" to the Syrian civil war to Russia's war in Ukraine, that have chipped away at protections for civilians. From this grim record, it might be tempting to conclude that the humanitarian protections that governments worked so hard to enshrine in law after World War II hold little meaning today. Yet even a hobbled system of international humanitarian law has made conflict more humane. Indeed, for all the frequent transgressions, the existence of these legal protections has provided continuous pressure on belligerents to limit civilian casualties, provide safe zones for noncombatants, and allow for humanitarian access—knowing they will face international consequences when they do not.

After the horrors of World War II, the United States and its allies established the Geneva Conventions, the four treaties of 1949 that lay out elaborate rules governing the conduct of war. At a moment when the laws

of war are once again being severely tested, the United States—which, especially in the years after 9/11, helped weaken them—should act now to renew and strengthen them.

LICENSE TO KILL

The law of war offers a tradeoff. Soldiers of a sovereign nation can be lawfully killed in armed conflict. In exchange, they are granted immunity that allows them to commit acts that in any other context would likely be considered crimes—not only to kill but also to trespass, break and enter, steal, assault, maim, kidnap, destroy property, and commit arson. This immunity applies whether their cause is just or unjust.

There are limits—which, for most of history, were modest. Hugo Grotius, the early-seventeenth-century Dutch diplomat who has been called "the father of international law," wrote that soldiers should be prohibited from using poison, killing by deception (for example, after feigning surrender), and rape. In Grotius's framework, these three offenses made up the only exceptions to a soldier's license to kill. Enslavement, torture, pillaging, and the execution of prisoners were all allowed; so was the intentional killing of unarmed civilians, including women and children. Although few treaties governed the conduct of war at the time, countries in western Europe widely accepted these rules as customary international law.

According to Grotius, soldiers were not allowed to massacre civilians whenever they liked. They were legally permitted to take the steps necessary to enforce the rights on which the enemy had infringed—and nothing more. If killing women and children did not advance the war effort, there was no justification for doing so. Yet even if the senseless slaughter of innocent civilians was technically illegal under international law at the time, those who committed it could not be held accountable;

such deeds, Grotius observed, could be "made with impunity." The lack of legal remedy for attacks on civilians began to be addressed only in the middle of the eighteenth century, when countries gradually adopted the principle of distinction, which requires soldiers to distinguish between combatants and civilians.

The rules governing war continued to evolve over the course of the nineteenth century. The first Geneva Convention, signed in 1864, prohibited attacks on hospitals, medical personnel, and their patients. The 1868 St. Petersburg Declaration banned the use of fragmenting, explosive, or incendiary small-arms munitions. The 1899 and 1907 Hague Conventions, ratified by most world powers at the time, prohibited attacking towns and buildings that were not defended by military forces. They also banned pillaging, executing prisoners of war, and compelling civilians to swear allegiance to a foreign power.

But countries that were engaged in war struggled to figure out how to enforce these rules. Their solution was generally reprisal: if an adversary violated the laws of war in a military operation, a country would respond with a violation of its own. Often, the reprisals would be meted out on prisoners of war, who were near at hand and could easily be killed. But civilians were not insulated from attacks. When Spanish guerrillas attacked a French column in Spain's Sil Valley in 1808, during the Napoleonic Wars, the French commanding officer, General Louis-Henri Loison, ordered his soldiers to torch the countryside.

THE POSTWAR RECKONING

During World War II, more than 30 million civilians were killed. In the aftermath of such catastrophic violence, it was clear that new and stronger rules were needed to regulate war. In 1949, a series of international

conferences convened by the International Committee of the Red Cross established the four Geneva Conventions in an effort to prevent the most brutal violence of war. Although Grotius offered just three prohibitions to guide states in war, the Geneva Conventions and, later, its three Additional Protocols filled hundreds of pages with specific rules for almost any scenario. The new rules governed the treatment of wounded and sick military personnel in the field and at sea, prisoners of war, and civilians.

Unlike the early laws of war, the Geneva Conventions prohibited not just senseless violence but also some forms of violence that advanced war aims. To adhere to the conventions, parties to a conflict must distinguish between civilians and combatants and between civilian places and military ones. Above all, they may never intentionally target civilians or "civilian objects," such as schools, private homes, construction equipment, businesses, places of worship, and hospitals that do not directly contribute to military action. And civilians must never be the target of reprisals. The principle of proportionality, codified in 1977 in Additional Protocol I, acknowledges that sometimes armies will harm civilians and civilian objects when pursuing military objectives. But the rule requires that the damage not be "excessive in relation to the concrete and direct military advantage anticipated." The principle of precaution, moreover, requires that armies must take constant care to spare civilians and civilian objects, even if doing so might slow down military operations.

The Geneva Conventions, their protocols, and the customary international law that has grown around them take an important step beyond the rules that came before. They aim to protect civilians from harm even when that harm might serve a strategic purpose. Thus, an

attack on a military target that would help a belligerent's war effort is prohibited if it would hurt too many civilians.

In many ways, the Geneva Conventions have been remarkably successful. All four conventions have been ratified by all UN member states. Most countries have adopted military manuals that translate the conventions into concrete rules meant to guide the conduct of their armies. Many have enforced these rules against their own soldiers. Yet these elaborate and ambitious rules were shaped by wars that were very different from most conflicts today.

Since the end of World War II, wars between states have sharply declined, but conflicts involving nonstate armed groups have risen. The Geneva Conventions say little about the latter. Only one article, Common Article 3, specifically applies to wars with nonstate groups. Protecting civilians in war, it turns out, is much harder when one of the belligerents is a nonstate actor. Combatants belonging to nonstate groups generally don't wear uniforms. Although their members may assemble, train in camps, and be organized under a hierarchical leadership, they tend to operate in places where civilians are also present. As a result, it can be extremely difficult to tell them apart from ordinary civilians.

SELF-DEFENSE CLASSES

The 9/11 attacks and the U.S. response to them inaugurated a new era of war that has pushed international humanitarian law to a breaking point. Before 2001, legitimate self-defense under international law was generally understood to apply only when one country was defending an attack from another. Until then, few countries had cited nonstate actors as their primary reason for using force in self-defense. (Israel was a notable exception; its adversaries included irregular forces located in Egypt,

Jordan, Lebanon, and Syria.)

After 9/11, self-defense claims changed. The United States justified its invasion of Afghanistan by arguing that it was responding to, as the Bush administration informed the UN Security Council, the "ongoing threat to the United States and its nationals posed by the Al-Qaeda organization." Within a year, Australia, Canada, France, Germany, New Zealand, Poland, and the United Kingdom had also filed claims of self-defense against al Qaeda. And it was not long before countries began making claims against other nonstate groups. In 2002, for example, Rwanda cited a right of self-defense against the Interahamwe, a militia group. And in 2003, Côte d'Ivoire cited the same right against "rebel forces."

To confront groups such as al Qaeda and the Islamic State (also known as ISIS), the United States and its allies came to rely on what they dubbed the "unwilling or unable doctrine"—the theory that action against a nonstate threat is justified as long as the country in which the nonstate actor is found is unwilling or unable to suppress the threat. In most cases, the United States sought the consent of governments to target nonstate actors in their territories. Iraq, Somalia, Yemen, and, while the Taliban was out of power, Afghanistan all agreed to U.S. intervention. When states would not consent—for example, Syria—the United States used the unable or unwilling theory, explicitly endorsed by fewer than a dozen countries, to justify using military force.

As Washington went to war with nonstate actors, it struggled with how to distinguish the civilians it was allowed to kill according to the Geneva Conventions—those "who take a direct part in hostilities"—from those it was not. If a civilian who was not a member of ISIS performed a task for the group—say, placing an improvised explosive device on a road—and

then returned to work as an ordinary laborer, could that person still be targeted?

In 2009, the International Committee of the Red Cross issued guidance to governments on how to protect civilians when fighting nonstate actors. The ICRC document reiterated the rule that civilians must be protected against direct attack "unless and for such time as they take direct part in hostilities." It set out the principle that civilians who do not take a direct part in hostilities must be distinguished not only from armed forces but also from those who participate in hostilities "on an individual, sporadic or unorganized basis only." The devil was very much in the details.

The ICRC concluded that direct participation in hostilities "refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict." A person integrated into an organized armed group has a "continuous combat function" and can be targeted throughout the war. Hence, ISIS fighters are considered legitimate military targets as long as the conflict with ISIS continues. But ISIS members who provide noncombat support, including recruiters, trainers, and financiers, are not. A civilian who places an improvised explosive device for ISIS is directly participating in the war when positioning the weapon and while in transit for the task. But once this task is finished, so is the direct participation in the war, and the person can no longer be targeted. Many countries rejected the ICRC's guidance, including the United States and the United Kingdom, which came up with their own rules for their counterterrorism campaigns in the Middle East.

BLURRED LINES?

To address the changing reality of urban combat, the United States and

other countries adopted new policies that once more put civilians in the cross hairs. At the center of this shift was the concept of so-called dual-use objects. According to international humanitarian law, all sites are either military or civilian; there is nothing in between. Objects normally dedicated to civilian purposes, such as places of worship, houses, or schools, are presumed to be civilian. But they can lose their civilian status if they are used for a military purpose.

The clear-cut division between civilian and military often fails to match the reality on the ground. There are many sites and structures that serve important civilian purposes but, by virtue of having some military use, may be considered military objectives—for example, trains, bridges, power stations, and communications infrastructure. Even an apartment building, if part of it serves for weapons storage, can be considered dual use.

More controversially, the United States now considers sectors of the adversary's economy that may help sustain a war as legitimate targets. In the course of its operations against ISIS, for example, the United States struck oil wells, refineries, and tanker trucks. States generally agree that industries directly related to the military or defense may be targeted, such as those producing arms or supplying fuel to military vehicles. But they diverge on whether a belligerent may target an industry that contributes only indirectly to military activities, by providing financial support, for example. The *Department of Defense Law of War Manual* maintains that a given industry's or sector's "effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient." This means that banks, businesses, and, indeed, any source of economic activity that contributes to an adversary's ability to sustain itself could be fair game. And because members of nonstate groups often rely on the same sources

as ordinary civilians for food, fuel, and money, these areas of the economy that are essential to civilian life are regularly in the direct line of fire.

As a result, the dual-use concept has increasingly made a wide variety of civilian activities subject to potential military action. An enterprise that is mostly used for civilian purposes, such as an oil refinery or even a bakery, can become a target in war if it contributes in some way to the war effort. It is still the case that harm to civilians and civilian infrastructure must be proportional to the potential military advantage attained. But the United States and Israel take the position that any site that can plausibly qualify as dual use is a legitimate military objective. Damage to such a target, then, is not part of the proportionality calculus. If noncombatant civilians are expected to be harmed, that must be weighed before taking the strike, but the long-term loss of vital civilian services, such as those provided by a water treatment plant, an electric grid, a bank, or a hospital, does not.

The military logic behind Israel's air and ground campaign in Gaza is, in part, a result of these incremental changes, which both the United States and Israel have contributed to for decades. Hamas is both a nonstate actor and the de facto governing authority in Gaza. Determining who is a Hamas fighter and who is not, particularly from the air, is difficult. Even on the ground, Israeli forces have often failed to distinguish between civilians and combatants, as in December 2023, when Israeli troops shot three Israeli hostages as they waved a white flag. And even when Israeli forces have made every possible effort to distinguish between combatants and civilians, targeting the one without killing the other has proved nearly impossible. Given Gaza's extraordinary population density, almost any military target is in, near, above, or below buildings in which large numbers of civilians live or work.

In Gaza, there are few objects or structures that Israel does not consider dual use. Israel has worsened Gaza's humanitarian crisis by holding at the border items such as oxygen cylinders and tent poles. Meanwhile, it treats hospitals, schools, apartment buildings, and even places of worship as legitimate military targets if Hamas has used them for military purposes. Israel maintains that Hamas knows the law of war and has sought to protect its military infrastructure by hiding its activities in tunnels under civilian structures, such as hospitals, that the law protects from attack. Israel emphasized this point in its defense before the International Court of Justice against South Africa's claims that Israel is committing genocide in Gaza.

Israel's decision to treat locations traditionally protected from attack as legitimate targets has meant devastation for civilians in Gaza. Hospitals and schools where those displaced by the war sought refuge have been targeted in large-scale attacks, killing thousands. The problem has been compounded by Israel's expansive interpretation of proportionality. As Eylon Levy, an Israeli government spokesperson, told the BBC, proportionality in Israel's view means that the collateral damage of a given strike must be proportionate to the expected military advantage. "And the expected military advantage here," he explained, "is to destroy the terror organization that perpetrated the deadliest massacre of Jews since the Holocaust."

Israel has turned a principle that was meant to shield civilians into a tool to justify violence. Its approach to assessing proportionality—not strike by strike but in light of the entire war aim—is not how militaries are supposed to carry out their assessments. Rather, according to international law as codified in Additional Protocol I, the principle of proportionality

prohibits a given attack where the expected harm to civilian people and places is "excessive" compared with the "direct military advantage" that the attack is supposed to achieve. By weighing any single instance of harm to civilians against a perceived existential threat, Israel can justify virtually any strike as meeting the requirements of proportionality; the purported benefits always outweigh any costs. Unsurprisingly, this approach has led to a war with few restraints.

CAUGHT IN THE CROSSFIRE

Although civilians have been killed at extraordinary rates in the war in Gaza, they have also suffered extensively in other recent conflicts. During the Syrian civil war, the Syrian government repeatedly gassed its own people, wiping out entire neighborhoods in an effort to suppress the opposition. In 2018, a UN report found that Syrian forces, supported by the Russian military, had attacked hospitals, schools, and markets.

Saudi Arabia, too, has been accused of violating legal protections for civilians in its operations against Iranian-backed Houthi rebels in Yemen. In 2015, Saudi Arabia led a coalition of states in a campaign to defeat the Houthis, who had launched cross-border attacks against it and seized the Yemeni capital, Sanaa. A team of UN investigators found that coalition airstrikes—which the United States supported with midair refueling, intelligence, and arms sales—had hit residential areas, markets, funerals, weddings, detention facilities, civilian boats, and medical facilities, killing more than 6,000 civilians and wounding over 10,000. The strikes on essential infrastructure, including water treatment plants, created a cholera epidemic that killed thousands, most of them children.

Ukraine has also been the site of barbaric attacks against civilians. Russian forces carried out summary executions, disappearances, and torture in

Bucha and beyond. They indiscriminately bombed Mariupol, damaging 77 percent of the city's medical facilities in the process. Throughout the war, Russia's attacks on Ukraine's energy grid have left millions of civilians without electricity, water, or heat.

Meanwhile, technological innovations threaten to further erode the line between civilians and combatants. In Ukraine, for example, the same app that Ukrainians use to file taxes can also be used to track Russian troops. Using an "e-Enemy" feature, Ukrainians can submit reports, photos, and videos of Russian troop movements. Yet this makes those same civilians vulnerable to attack, since any civilian who uses the app to alert Ukrainian forces of Russian military activity might be regarded as "directly participating in hostilities" and therefore considered a legitimate target. Ukrainian data servers store both military and civilian information, likely rendering computer networks and the information stored in them dual-use objects. Ukraine created an "IT army" of more than 400,000 volunteers who work with Ukraine's Defense Ministry to launch cyberattacks on Russian infrastructure. These Ukrainians may not realize that by volunteering their services, they have, according to international law, become combatants in an armed conflict.

CAUSE FOR CONSTRAINT

One pessimistic takeaway from the wars in Gaza and Ukraine may be that the hard-won lessons of World War II have been forgotten and efforts to use law to protect civilians from war are pointless. But as brutal as the current conflicts are, they would likely be even more horrific without these rules. A careful reading of the current era would show that rather than altogether abandoning the protections of civilians enshrined in the Geneva Conventions, belligerents in recent wars have been making those

protections less effective by severely restricting what counts as civilian. And the United States has played a key part in this shift.

Since 9/11, Washington has used its power to weaken constraints on the use of force, aggressively interpret the right to self-defense, and allow for more expansive targeting of dual-use sites and structures. These positions have created greater flexibility for the U.S. military, but they have also placed more civilians in harm's way. Following the United States' lead, other countries, including France, Israel, Saudi Arabia, Turkey, and the United Kingdom, have likewise loosened constraints on their own militaries.

To reverse this trend and strengthen the law of armed conflict, Washington must decide that embracing constraints and pressing others to do the same is essential to the fundamental principles of human dignity that the United States, at its best, has championed. To its credit, the Biden administration has already taken some modest steps in this direction. In 2022, the Defense Department announced a detailed plan for how the U.S. military would better protect civilians, and this February, the Biden administration said that it would require foreign governments to promise that any U.S. weapons they received would not be used to violate international law. But much more remains to be done.

For starters, the United States should expand collaboration and cooperation with the International Criminal Court, the most effective international mechanism for enforcing international humanitarian law. Indeed, members of the U.S. Congress have cheered the ICC's exercise of jurisdiction over Russia for crimes committed during the war in Ukraine and passed a law allowing the United States to share evidence of Russian war crimes in Ukraine with its prosecutor. Yet in 2020, the Trump

administration sanctioned ICC judges and lawyers in retaliation for having investigated whether U.S. soldiers committed war crimes in Afghanistan. To the rest of the world, the hypocrisy is glaring and instructive. One way for the United States to improve its relationship with the court would be to repeal the American Service-Members' Protection Act, a 2002 law, known colloquially as "the Hague Invasion Act," that allows the president to order military action to protect Americans from ICC prosecution. It also prohibits government agencies from assisting the court unless specifically permitted, as with the Ukraine investigation.

The United States should also reconsider some of the expansive legal positions it adopted after 9/11. It should, for example, endorse more stringent limits on when dual-use objects can be targeted. It should revise the treatment of the principles of proportionality and feasible precautions in the Defense Department's *Law of War Manual* to better reflect international humanitarian law. And it should fully implement its new plan to mitigate civilian harm during U.S. military operations.

The United States should also restrict its military assistance to those countries that comply with international humanitarian law—not just when providing arms but also when offering financial support, intelligence, and training. The United States has counterterrorism programs in some 80 countries on six continents. If Washington conditioned its support on greater adherence to the law—and withdrew it from countries that didn't comply—the effect would be powerful and immediate. And Israel should not be exempt from those standards; the United States should insist that the country make clear the concrete steps it intends to take to ensure that its conduct of the war in Gaza comports with international law.

These changes should be made not only as a matter of policy but also as a matter of law. When the executive branch offers legal explanations for U.S. behavior, it almost always does so to justify taking military action, often in ways that push existing legal boundaries. By contrast, when it endorses restraints that better protect civilians in war, it has generally emphasized that it is doing so only as a matter of policy—not because it is required but as a choice. This means the restraints can be easily discarded when they become inconvenient. The legal rationales for acting, meanwhile, stand as precedents to justify the United States' future military operations—and those of other countries around the world.

If the law of war is to survive today's existential challenges, the United States and its allies need to treat it not as an optional constraint to be adjusted or shrugged off as needed but as an unmoving pillar of the global legal order. True, there will be wartime actors who break the law, and civilians will continue to suffer as a result. But before the United States can hold these offenders to account, it must show that it is prepared to hold its own forces—and those of its allies—to the same standards.

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