Israel-Hamas 2025 Symposium – Conditionality and the ICC's Gallant "Starvation as a Method of Warfare" Charge

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by Rob McLaughlin | Mar 21, 2025

On 20 May 2024, the Prosecutor at the International Criminal Court (ICC) stated his intention to seek arrest warrants in respect of the situation in Gaza for, amongst others, Israeli Prime Minister Netanyahu and former Israeli Defense Minister Gallant. Amongst the list of proposed charges was the ICC's first instance of alleging "Starvation of civilians as a method of warfare as a war crime contrary to article 8(2)(b)(xxv) of the Statute." On 21 November 2024, Pre-Trial Chamber I (PTC I) issued the arrest warrants (which remain secret), affirming, *inter alia*, that,

The Chamber considered that there are reasonable grounds to believe that both individuals intentionally and knowingly deprived the civilian population in Gaza of objects indispensable to their survival, including food, water, and medicine and medical supplies, as well as fuel and electricity, from at least 8 October 2023 to 20 May 2024. This finding is based on the role of Mr Netanyahu and Mr Gallant in *impeding* humanitarian aid in violation of international humanitarian law and their *failure to facilitate relief by all means at its disposal* … .

The Chamber therefore found reasonable grounds to believe that Mr Netanyahu and Mr Gallant bear criminal responsibility for the *war crime of starvation* as a method of warfare (italics added).

There has been quite wide consideration and analysis of many aspects of these arrest warrants and of the starvation charge in particular (see here, here, and here). But two things have occurred that now require us to think about this charge differently as between Netanyahu and Gallant. The first is the timeframe of culpability in that Gallant was dismissed as Defense Minister on 5 November 2024. Given that the key attribute that linked Gallant to the starvation charge was his position and authority as Defense Minister, it is likely that his culpability period is therefore going to be limited to between 8 October 2023 and 5 November 2024. By contrast, for the ICC, Netanyahu's culpability window continues.

The second thing is qualitative in that there are some interesting issues of proof that the trial prosecutor will need to address concerning the "starvation as a method of warfare" charge in respect of Gallant, which the prosecutors will likely be able to sidestep in respect of Netanyahu. This is a result of Netanyahu's public shift in policy on 2 March 2025, which—while still referring to Hamas's misappropriation of aid—added the further conditions that all aid flow into Gaza would be ceased unless and until a new ceasefire and the release of all remaining hostages is agreed.

Prior to this, some of the issues that will attend proving the "starvation as a method of warfare" offence against Gallant, should it proceed to trial, would also have been relevant to proving the offence against Netanyahu. This is because, as I will outline below, the curious amalgam of Geneva Convention IV (GC IV) and Additional Protocol I (AP I) provisions that is evident in the ICC Statute Article 8(2)(b)(xxv) offence contains a limited—but potentially relevant—set of besieger "safeguards." However, Netanyahu's shut down of all aid, which by definition affects the entire civilian population, not just Hamas capabilities, for the express purpose of forcing a particular military outcome—a ceasefire and return of the hostages—cannot be claimed as being for a "safeguard" purpose.

By contrast, there is still some, albeit minimal, scope for Gallant, who does not appear to have been a co-author of this recent policy statement, to present an argument relating to the safeguards provision built into the Article 8(2)(b)(xxv) offence. This is not to say that a safeguards argument, if made, could be entirely exculpatory in this particular factual nexus; but it is to say that it is a matter the trial prosecutors will need to consider in structuring their case theory and sequence of proofs for this particular charge.

The "Starvation as a Method of Warfare" Offence

The Article 8(2)(b)(xxv) war crime is as follows,

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

In teasing out the clauses, “starvation” serves the key labelling purpose in this offence. That is, starvation is the general label for the headline offence of “using starvation of civilians as a method of warfare.” In this regard, it is likely that the prosecutor will seek to prove starvation as a process (a policy) rather than an outcome (actual incidences of starvation). As the ICC’s Independent Panel Report observed (para. 23),

The Prosecutor seeks to charge Netanyahu and Gallant on the basis that they made an essential contribution to a common plan to use starvation and other acts of violence against the Gazan civilian population as a means to eliminate Hamas and secure the return of hostages as well as to inflict collective punishment on the civilian population of Gaza who they perceived as a threat to Israel.

The second component of the offence is a “by” statement. The headline offence of starvation as a method of warfare is proved if it can be shown that the civilian population was deprived of objects indispensable to their survival. This equating of “deprivation of objects indispensable” with “starvation” confirms the broad reading of the concept of starvation (i.e., not just about food and water) intended by the drafters of the ICC Statute.

The third clause is more challenging. There are at least two approaches for characterising this third “including” component of the offence. The first is to say that it is a compulsory subcomponent of the proofs; that is, it is essential that wilful impeding of relief supplies *must* be a part of the overall deprivation of objects indispensable course of action. This is unlikely to be the correct reading as there are certainly situations where deprivation of objects indispensable can be achieved by methods and means other than impeding relief supplies. It would be perverse to discount the applicability of the starvation offence as a whole simply because the impugned course of conduct did not involve impeding relief supplies as one of its mechanisms.

The second approach is that this clause serves as an indicative example, that is, by affirming that one way in which the deprivation of objects indispensable can be proven is by proving wilful impeding of relief supplies. This would mean that impeding relief supplies is one way to prove deprivation of objects indispensable, but that it is not, however, a necessary requirement in proving the offence. That is, proving the overall offence does not require that impeding relief supplies was in every case a component of the course of conduct that led to the deprivation of objects indispensable.

The final component of the offence is some conditionality that appears to apply only to this final “including” component (the impeding relief supplies component) of the offence. This condition appears to be that impeding relief supplies is to be interpreted in accordance with

the balance struck in the Geneva Conventions between permissible use of siege and impermissible use of starvation as a method of warfare. This (new) GC IV balance was intended to be a tightening of the "customary" rules on siege, expressed for example by a U.S. tribunal in Nuremberg (p. 563) in the *High Command* case, citing Hyde's *International Law*.

"A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed legitimate."

We might wish the law were otherwise but we must administer it as we find it. Consequently, we hold no criminality attached on this charge.

This difficult siege rule still retains resonance. As the International Committee of the Red Cross (ICRC) commentary on Rule 53 of their *Customary International Humanitarian Law Study* notes, "The prohibition of starvation as a method of warfare does not prohibit siege warfare as long as the purpose is to achieve a military objective and not to starve a civilian population."

In assessing the effects of this final clause in the Article 8(2)(b)(xxv) offence, the key provision is Article 23 of GC IV, which includes certain "safeguards" directed at preserving the legitimacy of certain uses of siege as a method of warfare. To explain how and why these safeguards have any relevance at all to the starvation offence, we must begin with the curious amalgam evident in the text of Article 8(2)(b)(xxv).

Where the Clauses in the Offence Come From

The Article 8(2)(b)(xxv) offence is a not-necessarily-seamless amalgam of two law of armed conflict rules. The first is the ruleset about "free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases," which is found primarily in GC IV Article 23 (and to a lesser extent in Article 17). This provision is traditionally understood to relate to situations of ongoing operations including siege, as distinct from the similar references in respect of the occupation context (in Articles 50, 55, and 59).

However, Article 23 contains a set of three "safeguards" which are not repeated in the second ruleset (see next paragraph). Of note, Knut Dörmann considers that the "rather restrictive" GC IV Article 23 has been superseded (my word, not his) in the ICC Rome Statute Article 8(2)(b)(xxv) offence which, he continues, "more closely reflect[s] modern customary international law" (p. 367). I must respectfully disagree with Dörmann on this point; the offence clearly and expressly refers to the "wilful impeding" clause as being subject to "as provided for under the Geneva Conventions," not as provided by (and more limited under) customary international law or AP I.

The second ruleset incorporated in the offence, as noted immediately above, is that distilled in AP I, and particularly Articles 54 and 70 (noting that Article 69 applies to occupation in terms not particularly different from those set out in GC IV). As Professor William Schabas notes in his *Commentary on the Rome Statute* (2d ed. 2016, p. 285), the "indispensable items" aspect of the starvation offence is primarily drawn from AP I Article 54.

Article 54 employs the direct concept of starvation ("Starvation of civilians as a method of warfare is prohibited"), and the terminology of "objects indispensable to the survival of the civilian population"—including food—where this is "for the specific purpose of denying them [that is, the objects indispensable, which are of] sustenance value to the civilian population … whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."

However, AP I Article 54 does not contain the same safeguards as GC IV Article 23. Rather, Article 54(3) only excludes from scope "objects indispensable" when used "as sustenance solely for the members of its armed forces," or "in direct support of military action," so long as the application of this caveat is not "expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement." To some extent, AP I Article 70(3)(a) does provide a non-occupation "relief action" safeguard in that the parties "shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted." However, this safeguard, and the combined effect of the AP I provisions is not the same, and indeed is more restrictive, than the provisions around siege in GC IV.

The Rome Statute Article 8(2)(b)(xxv) offence is thus an incomplete amalgam of rulesets relating to siege, general military operations, and less clearly, belligerent occupation, drawn from two separate but related treaties, but which appears to implicitly include reference only to the safeguards from GC IV Article 23.

What Are the GC IV Article 23 "Safeguards?"

The explicit and specific reference to "as provided for under the Geneva Conventions" in relation to the "wilful impeding of relief supplies" is a clear invocation of the GC IV understanding of the interrelationship between the lawful exercise of siege and the obligation to allow the entry of relief supplies to besieged populations. Article 23 of GC IV deals with free passage of certain goods and materials, including essential foodstuffs, and provides that the obligation is expressly,

… subject to the condition that [in this case, the blockading] Party is satisfied that there are no serious reasons for fearing:

a) that the consignments may be diverted from their destination,

b) that the control may not be effective, or

c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the abovementioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The 1958 ICRC *Commentary* to this provision notes that although these conditions "have been criticized as leaving too much to the discretion of the blockading Powers," and that "Such objections appear to be only too well justified," they were still specifically included in the Convention.

Nevertheless the Diplomatic Conference of 1949 had to bow to the harsh necessities of war; otherwise they would have had to abandon all idea of a general right of free passage. Some delegations had originally intended to accept the principle of free passage only in the form of an optional clause. It was only after the insertion of the safeguards set out under (a), (b), and (c) above, that it was possible to make the clause mandatory (p. 182-183).

The two most potentially relevant "safeguards" in the Gaza relief convoys context are (a) and (b). The condition in (a) is described in the 1958 *Commentary* as addressing the "danger of misappropriation," such that "A doubt as to the destination of consignments would not be sufficient reason for refusing them free passage; the fears of the Power imposing the blockade must be based on serious grounds, i.e. they must have been inspired by the knowledge of certain definite facts" (p. 182). The condition in (b) is described as being about "supervision" in that "It is essential that consignments should be subject to strict and constant supervision from the moment they arrive until they have been distributed" (p. 182).

The obvious next question is whether, and if so how, these "safeguards" (as they are labelled in the 1958 *Commentary*) will come into play in relation to proving the Article 8(2)(b)(xxv) offence. The first point to make is that a narrow, and probably correct, reading of the text of the Article 8(2)(b)(xxv) offence would indicate that this requirement to take cognizance of the GC IV Article 23 safeguards *only* applies to the issue of "wilfully impeding relief supplies." That is, the safeguards are not relevant to every form of deprivation of objects indispensable.

However, in the context of the timeframe-limited Gallant arrest warrant, the information in the public domain indicates that "wilfully impeding relief supplies" as a means to achieve the broader consequence of depriving the civilian population of objects indispensable to its survival has been specifically alleged. This means that the GC IV Article 23 safeguards built into the offence are potentially relevant in this particular case.

Consequently, one issue the trial prosecutors will need to consider, should the matter come to trial, is proving that none of the "safeguards" in GC IV Article 23 are applicable in respect of the allegation, as it relates to Gallant, of wilfully impeding relief supplies. In this regard, the Prosecutor will need to deal with evidence (including from UN sources) of unauthorised "interference" with aid convoys by Israeli civilians, and "misappropriation" of aid convoys

inside Gaza by criminal gangs, armed men, and/or Hamas, as has been reported on many occasions during the culpability window relevant to Gallant. This is relevant because these reports raise the potential for defence counsel to argue that safeguard (a)—limiting misappropriation by the adversary force—was material to Gallant's decision-making *if* aid throughput was reduced as a matter of policy (as opposed to a matter of capacity constraints in terms of ability to push the aid through the checkpoints).

Likewise, in setting out the proofs against Gallant, the trial prosecutors will also need to deal with the second "safeguard," supervision. In this respect, as noted above, there are numerous reports of intervening conduct by "mobs," criminal gangs, and Hamas in seizing aid convoys once they enter contested areas in Gaza and redirecting them to their own uses or profit. This will necessarily speak to the question of capacity to ensure that the aid is distributed as intended. That is, what might be the effect of such intervening conduct on attributing primary responsibility to Gallant for the failure to see the aid delivered as intended, which is the essence of the "supervision" concern.

This argument could be led in conjunction, for example, with evidence that the Israel Defense Forces (IDF) did not have occupation law-relevant "effective control' (to use the ICJ's measure as per the Advisory Opinion, paras. 92-93) over the entirety of the "humanitarian area(s)" or other sites where the aid was due to be delivered during the period when Gallant was Defence Minister. Indeed, for much of this period, the IDF had no effective control within several areas of southern Gaza where Hamas continued to "to function as the de facto governing authority."

Conclusion

The Gallant arrest warrant, whilst secret, reportedly contains an allegation related to starvation. It is probable that the charge is for an Article 8(2)(b)(xxv) offence, which will require proof to the criminal standard that the accused intended to implement a course of action that would deprive the civilian population of objects indispensable to its survival. That is, using "starvation" as a method of warfare. And in this particular case, as the language in the PTC I decision indicates, the arrest warrant contains a specific allegation that this course of action was pursued, at least in part, through a policy of wilfully impeding relief supplies.

This specific inclusion means that one task likely to be relevant in proving the charge will be working out if and how the limited GC IV Article 23 safeguards built into the offence operate (or not) in relation to the indicted "wilfully impeding relief supplies" conduct. This issue has not been litigated previously. Should the case reach trial, prosecuting the starvation offence within this particular fact nexus will therefore break new ground both for international law generally and for ICC jurisprudence in particular.

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