The War Crime of Starvation – The Irony of Grasping at Low Hanging Fruit

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Rumours surrounding possible International Criminal Court (ICC) arrest warrants in the *Situation in the State of Palestine* have raised several important legal, procedural and political questions. Without joining speculation of what the ICC Prosecutor might do, or entering into a discussion of compliance with international humanitarian law (IHL) during the current hostilities in Gaza, we want to react to one point relating to predictions of forthcoming charges, specifically, the likelihood the Prosecutor will pursue particular "low hanging fruit" crimes.

Charging Decisions at the ICC

We do not take issue with the basic premise that prosecutors often prioritize what they consider the most easily proven suspected crimes. Whether this approach advances the societal interests prosecutors are entrusted with protecting is often a complex issue in itself. If this prediction is accurate, let's hope the motivation is a genuine concern over impunity for serious violations of the ICC Statute, and not the desire to find some plausible allegation in order to assuage the drumbeat of public condemnation of Israel.

Assuming prosecutorial motive is pure, and that the decision to seek Pretrial Chamber approval of such charges is objectively credible, why anyone would characterize the crime of starvation as low hanging fruit is perplexing. To the contrary, when assessed through the lens of any potential criminal accusation—is there compelling evidence to prove beyond a reasonable doubt that the "guilty hand" was moved by a "guilty mind" to produce the prohibited result—that fruit is much farther up the branch than suggested.

In the context of the ongoing armed conflict between Israel and Hamas, there is certainly compelling evidence that indicates proving some war crimes *would be* straightforward, the real "low hanging" fruit. Hostage taking is an obvious example. The underlying prohibition in IHL is clear, framed in the same way in both international and non-international armed conflicts and the corresponding war crimes in the ICC Statute simply repeat it. And, if proof beyond a reasonable doubt means evidence that excludes all rational hypotheses except guilt, publicly available information indicates that burden can be satisfied *vis à vis* those Hamas members complicit in the kidnapping and unlawful deprivation of liberty of all the hostages. Indeed, this seems like a crime that can be established beyond any doubt.

This is not the case with the war crime of starvation. This war crime is derived from the IHL prohibitions in Article 54 of Additional Protocol I (AP I) and Article 14 of Additional Protocol II. Pursuant to these provisions, what crosses the line from permissible but nonetheless regrettable incidental suffering caused by the lack of access to food and water and other objects indispensable to survival resulting from hostilities, to impermissible methods of warfare whose purpose is causing starvation is complex.

What is not complex is that a *result* of starvation does not *ipso facto* establish a violation. So too with the corresponding war crimes in the ICC Statute. In short, it is one thing to regret the tragic humanitarian suffering resulting from an armed conflict; it is quite another to infer from that suffering the requisite actions and mental state needed to prove it is the result of the war crime of starvation. Yet this is nonetheless suggested as a gap that will be easy to bridge in relation to the conflict in Gaza.

Interplay between IHL and War Crimes

War crimes are "serious violations of laws and customs of war." The jurisdiction of the ICC over such war crimes is textual. It is established by the treaty and the offenses and elements established for the Court. But the intersection of the two branches of the law remains critical, especially when an offense within the Court's jurisdiction mirrors an IHL prohibition. For such offenses, it is invalid to assert that conduct that does not amount to a violation of the IHL prohibition can nonetheless constitute the war crime derived from that prohibition. While a war crime may be framed more narrowly than the underlying rule of IHL,[i] it cannot be broader in scope. For the war crime of starvation as a method of warfare, this is critical.

The first step in interpreting the war crime of starvation is therefore understanding the rule of IHL that it is derived from. In both cases, it is not the result of starvation that establishes the violation, it is the result that is actuated by the illicit (IHL) or criminal (international criminal law (ICL)) *intent* to use starvation as a method of warfare. And while it may be tempting to extrapolate from the *result* of starvation that the conduct that produced it must violate both branches of the law, such an outcome-oriented assessment reflects a fundamental distortion. Indeed, neither IHL nor ICL requires this harmful result; in both contexts it is the *intent* to inflict this result, coupled with conduct to effectuate that intent that establishes the violation. Ultimately, like almost all other conduct of hostilities proscriptions, starvation is defined in terms of conduct, not result, but only when that conduct concurs with the requisite prohibited mental state: intent.

We recognize that the term "intent," especially in the context of ICL, is itself somewhat controversial. In the common law tradition, intent is almost universally understood as a purely subjective mental state. In the criminal context this means proving what the defendant's purpose (objective) or at a minimum knowledge of almost absolute certainty. The civil law tradition allows for intent to be satisfied in some contexts by what the common law would regard as recklessness: subjective awareness that conduct was creating a substantial and unjustifiable risk while at the same time believing the risk would not manifest.

This notion of oblique intent is not, however, compatible with starvation as a violation of either IHL or the ICC offense. Article 54(1) of AP I is clear: a violation requires a specific intent of starving civilians, which is best understood as purpose. Purpose is a mental state even more demanding than knowledge. It means that the individual acted with the *conscious objective* of producing the prohibited result, in this context starvation of civilians. And there is good reason why this highest mental state was required by the prohibition. Wars will often create conditions that *result* in severe food insecurity and even starvation of civilians. That result alone is unfortunate and something that should be avoided and mitigated whenever feasible. Many other rules of IHL play an important role in this regard. But prohibiting that result without an actuating illicit purpose would impose an unrealistic demand on war fighters that would be inconsistent with the realities of the destructive operations they must conduct.

So too with the ICC offense, which is defined as "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."

Note that this proscription focuses on the *use* of starvation and requires that *use* to be intentional. Starvation may be the *result* the law seeks to prevent, but it is the *conduct* of using starvation of civilians as a method of warfare that is criminally proscribed. And it is that use that must concur with the criminal intent. The *mens rea* element of proof for this offense reinforces the point. It requires proof beyond a reasonable doubt that the "perpetrator *intended* to starve civilians as a method of warfare." The construction of this element indicates that the intent qualifies the *conduct* of causing starvation; the perpetrator must

intend to starve civilians. According to the ICC Statute, when intent relates to prohibited conduct, it requires proof, "that person means to engage in the conduct." This means that like IHL, a violation requires establishing the perpetrator had the purpose, or objective, of starving civilians as a method of warfare.

All this indicates that proving such an offense would be complicated when the principal evidence is that military operations *resulted* in civilian starvation. Like all conduct-based conduct of hostilities proscriptions, such results may often be *probative* of violation, but they are rarely *dispositive.* This is especially true in a complex urban operational environment where food insecurity was already prevalent.

There is, of course, no way to predict how either the Office of the Prosecutor or the Court will interpret the war crime of starvation. But hopefully all involved will acknowledge that the ICC offense is derived from, and therefore must be informed by, the three different IHL rules:

1. The general prohibition of employing a method of warfare for the purpose of causing civilian starvation in Article 54(1) AP I;

2. Terminology in the definition of the starvation offense that suggests it was derived from the prohibition in Article 54(2) AP I of attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population;

3. The rules regulating humanitarian relief operations.

As explained briefly below, none of these rules is simple. Nor have any of these rules been the subject of authoritative interpretation by courts and tribunals.

The Prohibition of Starvation of Civilians as a Method of Warfare

Article 54 of AP I contains two distinct prohibitions. They share the objective of reducing the risk that civilians will suffer from starvation during armed conflict. They also share important limitations, albeit phrased in slightly different ways. The prohibitions only cover conduct that has the specific purpose of depriving civilians of goods for their sustenance value (and by implication exempting from the prohibitions measures taken for the purpose of depriving the *enemy* of sustenance).

The first paragraph of Article 54 sets out a general prohibition of starvation of civilians as a method of warfare; general in the sense that this prohibition is not restricted to any particular type of conduct. Every method of warfare that has the purpose of causing the starvation of civilians is prohibited.

An important question is whether the prohibition only applies where the purpose of particular conduct is the starvation of civilians, or whether knowledge that starvation of civilians will be the incidental result of a method of warfare that does not have this result as its purpose is also prohibited. In other words, is a commander prohibited from employing an otherwise

lawful method of warfare when it is foreseeable it will result in civilian starvation? The negotiations of what became Article 54(1) of AP I, State practice as reflected in miliary manual provisions addressing this issue, and statements made during the negotiations of the ICC Statute and Elements of Crimes indicate that, it is the first, narrower approach.

There are those who assert the prohibition is broader and extends to foreseeable incidental consequences. This approach focuses on the result of starvation, and not the intent of the method of warfare being employed. In so doing, it opens the door to applying more of a knowledge of foreseeable consequences mental state—or oblique intent—as the dispositive standard. The aversion to the tragedy of civilian starvation may make this understandable, but it certainly does not render this view universal or controlling. And, as noted above, this oblique intent approach necessitates treating both the IHL and ICC prohibitions as result or consequence based, when the textual nature of each of them is conduct based.

The second prohibition, in paragraphs 2 to 4 of Article 54, focuses on certain acts that can cause the starvation of civilians: attacking; destroying; removing; or rendering useless "objects indispensable to the survival of the civilian population." Like using starvation as a method of warfare, these acts are prohibited only when they have the specific purpose of denying these objects *for their sustenance value to the civilian population*. Again, conduct that would foreseeably cause severe food insecurity but that does not have the specific purpose of denying the goods for their sustenance value to civilians does not fall within the prohibition.

This does not mean that IHL does not require belligerents to take into account the impact of such conduct on civilians. Any planned attack involving the reasonable anticipation of death or injury or damage to civilian objects must be considered in proportionality assessments. Furthermore, the attacking commander is always obliged to implement feasible precautions to mitigate the risk of harm to civilians and to more broadly use "constant care" to prevent or reduce civilian suffering. All of these obligations will require a commander contemplating an operation for the purpose of starving enemy forces or that might affect objects indispensable to the survival of the civilian population to implement feasible measures to mitigate the anticipated adverse impact on civilians. But none of these indicate that such an impact is *ipso facto* evidence of violating the prohibitions in Article 54.

Rules Regulating Humanitarian Relief Operations

The ICC Statute definition of starvation as a war crime includes "wilfully impeding relief supplies as provided for under the Geneva Conventions" if done to "intentionally deprive them of objects indispensable to their survival." Proving starvation as a war crime based on this prong of the crime seems equally if not more complicated.

The expression “willfully impeding relief supplies” does not appear in IHL treaties. While the expression might have a certain appeal in relation to international criminal law, as it highlights the heightened mental element required, unlike the term “intent” it is not defined in the ICC Statute. But a generally accepted meaning negates any plausible “oblique intent” theory of definition. Only a purpose—a conscious objective—should satisfy a willful requirement.

Moreover, importantly, not every impediment of humanitarian relief operations is a violation of IHL, even if willful. Under IHL, humanitarian relief operations are unlawfully impeded in two circumstances. First, when consent to offers to carry out humanitarian relief operations is withheld in violation of international law, for example not authorising any organisations to conduct medical relief operations. Second, once consent has been obtained, parties to an armed conflict unlawfully impede humanitarian relief operations where they fail to comply with the obligation to allow and facilitate rapid and unimpeded passage of supplies, equipment and personnel involved in such operations. It is this second dimension that seems most relevant to relief operations in Gaza.

Determining when humanitarian relief operations have been “impeded” to a degree that amounts to a violation of this obligation is complex as a matter of law and fact. IHL treaties do not provide guidance on this point. Apart from the small number of instances in which specific conduct is required, the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief operations may be discharged in a variety of ways, and belligerents have considerable discretion in its implementation.

IHL treaties only lay down a small number of specific measures that belligerents are required to take to allow and facilitate passage of relief operations. Most significantly, they must not divert relief from its intended purpose or delay its forwarding, except in cases of urgent necessity in the interests of the civilian population concerned. Restrictions may be imposed on the activities and the freedom of movement of humanitarian relief personnel only in the event of imperative military necessity, such as in the case of military operations in a particular location. Even in such circumstances restrictions may be imposed only temporarily.

Belligerents are entitled to prescribe technical arrangements for the passage of relief operations. These may include searching consignments to ensure they do not contain material that may be used for military purposes or requiring relief convoys to use prescribed routes at specific times to ensure that they do not hamper and are not endangered by military operations. Passage of relief consignments may be made conditional on their distribution under the local supervision of an impartial organisation or other measures to guarantee that the supplies will reach their intended beneficiaries.

Against this background, it is extremely complex to determine whether constraints, impediments, or delays to humanitarian relief operations are consistent with belligerent rights or whether they amount to a violation of the obligation to allow and facilitate rapid and

unimpeded passage of relief operations, and, therefore, amount to “unlawful impeding” of such operations.

For example, are delays resulting from Israel Defense Forces (IDF) inspection of relief supplies entering Gaza an arbitrary and pretextual tactic to unlawfully impede provision? Or, are these legitimate measures to ensure resources are exclusively humanitarian in nature? What about delays resulting from Hamas attacks on humanitarian relief access points? Are limits on border crossing locations a consequence of operational necessity, or a calculated tactic to curtail humanitarian response? Are IDF efforts to implement measures to secure routes of movement that slows or impedes transportation of relief assets a legitimate tactic to protect such assets, or a way of controlling the spicket of relief? What about suspending access to certain areas due to operational considerations related to ongoing hostilities? Ask relief agencies and you will likely get very different answers to these questions than if you ask experienced military commanders who themselves have had to deal with the complexity of facilitating humanitarian access into an area of active combat operations.

The War Crime in the ICC Statute

Returning to the war crime in the ICC Statute, the wording of the crimes in international and non-international armed conflict differs. In both cases, the crime combines the two rules in the prohibition of starvation of civilians and the rules regulating relief operations. In both cases the language used does not mirror the underlying rules of IHL.

Combining different rules of IHL into a single war crime impairs the clarity of the crime and raises complex questions. For one, what is the relationship between the different elements? For example, does the reference to starvation of civilians as a method of warfare qualify the other elements of the crime by importing the requirement that the conduct in question has the specific purpose of starving civilians? Does this mean that violations of the rules regulating humanitarian relief operations would only fall within the crime when the violations are the result of that specific purpose?

It is only in recent years that the prohibition of starvation and the rules regulating relief operations have begun to receive the attention they warrant, considering that in most modern conflicts far more civilian deaths and suffering occur as a result of humanitarian crises caused or exacerbated by conflict than from actual hostilities. Guidance on how to interpret these rules remains limited. All too frequently military manuals merely reiterate treaty provisions, and to this day there still has not been an authoritative judicial interpretation of the rules, let alone criminal investigations of the related crimes.

Returning to the low hanging fruit theory. It is interesting to compare the ICC Prosecutor’s strategy *vis à vis* Russia. Although hostilities in Ukraine had a very clear impact on food security, and there had been calls for framing the campaign of Russian attacks against

Ukraine's energy infrastructure from October 2022 to March 2023 as the war crime of starvation, there has to date been no indication of pursuing such a charge.

In view of the broad interpretation of starvation adopted by the ICC Statute to cover other objects indispensable to the survival of the civilian population in addition to food and water, why is it the Prosecutor did not take this approach in the arrest warrants against Sergei Ivanovich Kobylash, Commander of the Long-Range Aviation of the Aerospace Force, and Viktor Nikolayevich Sokolov, Commander of the Black Sea Fleet? Instead, the arrest warrants relate to the war crime of directing attacks at civilian objects and of causing excessive incidental harm to civilians or damage to civilian objects. The war crime of disproportionate attacks is also notoriously hard to establish and only rarely prosecuted. Nonetheless, it must have been considered a safer avenue than the untested crime of starvation of civilians.

Concluding Thoughts

None of this in any way minimizes or trivializes the human suffering ongoing in Gaza. Millions of civilians have been caught in the midst of intense hostilities between approximately 35,000 Hamas forces and the more than 100,000 IDF forces deployed to render that enemy combat ineffective. All of this takes place in some of the most densely populated territory on the face of the earth, where the nature of the conflict necessitated that almost all of the fighting take place in urban areas. These are genuine war victims; the very focal point of IHL rules and principles intended to mitigate the suffering of victims of war.

But the sad reality of war is that it is almost always the case that civilians will suffer, even when all parties to the conflict act in good faith to implement their international legal obligations to avoid and mitigate that suffering. It is also obvious that pervasive disregard for these obligations will inevitably exacerbate this suffering. There is no inconsistency with acknowledging these realities, or even lamenting the insufficiency of existing law in minimizing civilian suffering, while at the same time acknowledging that such suffering is not necessarily indicative of IHL violations or related war crimes.

Instead, there is both logic and wisdom in making the *intent* to inflict civilian suffering—especially starvation—the focal point of condemnation and criminal accountability. Doing so balances the unavoidable realities of engaging in hostilities in the midst of civilians with the imperative that those who employ the military power entrusted to them not to weaken and defeat enemy forces but to inflict avoidable suffering on civilians act beyond the tolerance of the law and deserve the sanction that befalls them.

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[i] This is the case for example for the rule of proportionality. Art. 51(5) AP I prohibits attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." The corresponding war crime in the ICC Statute is limited to attacks where the expected incidental harm is *clearly* excessive to the *overall* anticipated military advantage (art. 8(2)(b)(iv) ICC Statute).