ICC Prosecutor’s application for arrest warrant against Israeli leaders: The war crime of starvation and its contextual element

ejiltalk.org/icc-prosecutors-application-for-arrest-warrant-against-israeli-leaders-the-war-crime-of-starvation-and-its-contextual-element/

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On 20 May 2024, the ICC Prosecutor requested arrest warrants against leaders of both Hamas and Israel. The key crime charged against the Israeli leaders, Benjamin Netanyahu (Prime Minister) and Yoav Gallant (the Minister of Defence), is the war crime of starvation of civilians as a method of warfare. This crime raises numerous issues, including in relation to its intentional element, which has already been discussed elsewhere (here and here). This post focusses instead on the contextual element of that war crime, specifically that it must have been committed ‘in the context of and associated with’ an armed conflict.

The main issue concerns the nature of that armed conflict. The war crime of starvation as a method of warfare is only applicable to the ongoing armed conflict in Gaza if that conflict is qualified as an international armed conflict (IAC). Although that war crime is included in the lists of war crimes under the ICC jurisdiction for both international and non-international armed conflicts (NIAC), the State of Palestine has not (yet) ratified the 2019 amendments that added this crime to the list of war crimes applicable in NIACs. In his application for arrest warrants, the ICC prosecutor asserted that all ‘the war crimes alleged in these applications were committed in the context of an IAC between Israel and Palestine, and a NIAC between Israel and Hamas running in parallel’. All six war crimes charged against Hamas leaders are based on ICC provisions applicable in NIACs. By contrast, among the four war crimes charged against Benjamin Netanyahu and Yoav Gallant, three stem from provisions applicable in both NIACs and IACs. They include the war crimes of intentionally directing attacks against civilians (8(2)(b)(i), or 8(2)(e)(i)), wilfully causing great suffering or cruel treatment (8(2)(a)(iii), or 8(2)(c)(i)) and wilfully killing or murder (8(2)(a)(i), or 8(2)(c)(i)). The fourth one, the war crime of starvation as a method of war, is grounded on a provision only applicable in IACs (8(2)(b)(xxv)).

The ongoing hostilities between Israel and Hamas can surely be qualified as a NIAC, since the twofold requirements for such conflict, intensity of the violence and organization of the parties, are met. Moreover, Hamas is not acting on behalf of the State of Palestine, and it does not seem that a foreign State is exercising ‘overall control’ over it. It is more questionable whether the ongoing armed conflict in Gaza also triggers the application of the law of IAC, which would provide a legal basis for the prosecution of the war crime of

starvation as a method of war under Art. 8(2)(b)(xxv) of the Rome Statute. That law of IAC may result from the existence of either an IAC (1) or a situation of belligerent occupation (2). Let us study these two hypotheses separately.

International armed conflict

Applying the law of IAC to the Israeli operations in Gaza presents two main challenges: first, the existence of Palestinian statehood, and second, the practical implementation of the so-called 'double classification theory.'

The Palestinian statehood. To classify the conflict between Israel and Palestine as international, Palestine would first need to be considered as a State under international law. In this short post, we will not delve into the well-known controversies surrounding the definition of Palestine as a State. It is sufficient to note that, despite occasional contentions that Palestine lacks a sufficiently effective government, convincing arguments exist to qualify Palestine as a full State. In fact, a great number of States and international organizations recognize and treat Palestine as such. This is evidenced by its status as non-member observer State at the United Nations since 2012 (see UN General Assembly Resolution 67/19). Furthermore, a UN General Assembly resolution – adopted by a large majority of 143 States – has recently urged 'favourable consideration' for Palestine's request to upgrade to full-membership status. It could also be – albeit more controversially – argued that, even if Palestine does not qualify for full statehood under international law, similar to its treatment for ICC jurisdiction, Palestine should be regarded as functionally equivalent to a State for the purposes of applying the laws of IAC to the Gaza conflict. Indeed, the notion of 'Powers' referred to in common Article 2(3) of the four Geneva Conventions has sometimes been interpreted to include *quasi*-State entities (or *de facto* States), such as liberation movements (see here, p. 566). Despite the fact that their statehood remains disputed by several States, these entities could be treated as State-like entities for the purposes of International Humanitarian Law (IHL) mainly because they have sufficient effectiveness to apply and respect the most-developed norms of IHL applicable in IACs (see here, §§ 176-185). Such a functional approach aligns with the spirit of IHL, which often prioritizes effectiveness considerations. This is exemplified by many provisions governing the conduct of hostilities that contain obligations of means and that are thus anchored in considerations of effectiveness, as well as by the functional definition of occupation referred to below.

The 'double classification theory'. This theory was elaborated by the ICRC and implicitly endorsed by the ICC Prosecutor in his application for arrest warrants, as well as by the ICC judges in several judgments (see here, § 726) and here, at 1184). Under this conception, when a state uses force against an armed group on the territory of another state without that state's consent, this use of force triggers an IAC between the two states, which overlaps with the NIAC between the intervening state and the armed group. According to this approach, the ongoing hostilities in Gaza would imply the existence of two simultaneous armed conflicts: an IAC between Israel and the State of Palestine, since Israel intervenes on the

territory of the State of Palestine without the latter state's consent, and a NIAC between Hamas and Israel, since the military operations are directed against a non-state armed group.

Even though this 'double classification theory' is supported by certain scholars (see here, at 233) it has been criticized by others. One criticism relates to the difficulty in determining which acts fall into one or the other type of armed conflict. Some scholars argue that all the acts of the intervening state, in this case Israel, would be regulated by both the law of IAC and the law of NIAC (see here, at 74). This might lead to absurd consequences, notably that the Hamas soldiers would then be both members of an armed group in relation to the NIAC and civilians in relation to the IAC. The cumulative application of both bodies of law would mean that the Hamas fighters would be protected against any attack. Other scholars instead confine the application of the law of NIAC to certain acts only, such as attacks exclusively impacting members of the armed group (see here, at 815, and here, at 842) provided that no damage is caused to anyone or anything else. This is also untenable in practice, as it is hardly foreseeable that an attack will only impact members of the armed group. These absurd or untenable consequences have led some authors to reject the double classification theory and to retain only the qualification of NIAC (see here, at 434-452).

The main problem with the 'double classification theory' is that it unrebuttably presumes from the lack of consent of a State to military operations conducted by another State on its territory the existence of a hostile intent from the latter State against the former one. In other words, the absence of consent from the Palestinian authority to the Israeli military operation would necessarily imply that Israel is animated by a hostile intent against the State of Palestine with respect to any of its conduct. Yet, that hostile intent should be objectivized through material acts. For example, it is clear that such intent does not exist when the foreign military operations only consist of targeting the armed group, such as Hamas, and the military operations are confined to the territory controlled by that armed group. However, the issue is much more unclear when civilians are impacted in such a manner as the Gaza population is today affected by the Israeli impediments to the delivery of humanitarian assistance. This extends far beyond the scope of military operations against Hamas in the strict sense. In such a case, the presumption of the existence of a hostile intent against Palestine due to its lack of consent can hardly be rebutted, and the law of IAC could be considered applicable to the Israeli conduct responsible for the starvation of the civilian population.

Occupation

In the case of Israel's occupation of Gaza, the nexus requirement between starvation and an IAC would be automatically fulfilled. Indeed, occupation is traditionally viewed as an extension of an IAC. Despite the withdrawal of Israeli troops from Gaza in 2005 and the ongoing intense hostilities, the existence of such a situation of occupation could be argued on the basis of three alternative views.

The first view, supported by certain scholars, is grounded on a restrictive approach to the end of occupation. According to this conception, the occupation of Gaza that began in 1967 did not end after the 7 October attacks, despite violent clashes between Israel and Hamas in that territory. This perspective is based on the assumption, notably shared by the UN and the ICRC, that Gaza remained an occupied territory – or, at least, that Israel was required to fulfil certain obligations as an occupying power in Gaza – after the 2005 Disengagement Plan. This is due to the control Israel retained over the Gaza Strip's land and sea 'borders' as well as its airspace. Since such remote control did not cease after the 7 October attacks, it has been argued that there was no reason to consider that the occupation has ended. This is notably evidenced by Israel's control over the delivery of essential supplies to the Gazan population, such as water, gas, fuel and electricity.

The second view adopts a broad approach to both the end and beginning of occupation. Under that view, the occupation might have ended with the withdrawal of the Israeli armed forces from Gaza in 2005. However, the law of occupation would apply again immediately after Israel re-entered Gaza. This aligns with the position held by some scholars that the rules of the law of occupation become applicable as soon as the invading forces come into contact with the foreign civilian population, provided that the invading state exercises sufficient control over individuals to be able to comply with those rules. The ground invasion of Gaza began with the Israeli offensive carried out on October 27 and is still ongoing. Additionally, the IHL rules on humanitarian relief applicable in situations of occupation are flexible enough to accommodate any degree of control exercised by the invading state over individuals. These rules consist of prohibitions or obligations of means, which must be complied with '[t]o the fullest extent of the means available to'.

The third view is founded on a broad conception of the end of occupation and a restrictive approach to the beginning of occupation. The latter conception, favoured by most courts, states, scholars as well as the ICRC, asserts that occupation begins only when the invading forces exercise effective territorial control over the foreign territory. Accordingly, under that third view, the occupation might have ended after 2005, and resumed only when and where the Israeli armed forces exercised that effective territorial control. This involves the physical presence of the Israeli military forces, the lack of consent from the State of Palestine, and the ability of the Israeli forces to exercise authority over the territory in lieu of the local authorities, namely Hamas. Even under such a restrictive approach to the beginning of occupation, it may be argued that a situation of occupation at least existed in some parts of Gaza, especially in Northern Gaza where the civilian population already suffers from famine, for a determined period of time, at least between January and May 2024. Hamas was, indeed, complexly dismantled in the north of Gaza around the end of December 2023, while hostilities resumed in that region in May 2024. Although that period lasted a few months, Israel manifestly impeded the delivery of humanitarian assistance to the Gazan population, which caused the current and likely future famine.

The first view does not raise the issue of the statehood of Palestine. It does not require that Gaza must be part of a foreign State, namely the State of Palestine, since, as stated by the International Court of Justice, the Israeli occupation that began in 1967 resulted from an IAC, between Israel on one hand and Jordan and Egypt on the other hand. The issue of statehood of Palestine is not relevant either with respect to the other two views, even if the claimed renewed occupation of Gaza by Israel can no longer be considered the result of an IAC with Jordan and Egypt. Indeed, it is widely acknowledged that the unsettled sovereign status of a territory, namely that of Palestine, is irrelevant to the application of the law of occupation. As supported in legal scholarship and by the ICRC, 'it is sufficient that the State whose armed forces have been established effective control over the territory was not itself the rightful sovereign of [that territory]'.

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Therefore, even if the State of Palestine is not considered a State under international law, or the 'double classification theory' is dismissed, and certain approaches to the notion of occupation are not followed, the alleged war crime of starvation allegedly committed by Israeli leaders could still be argued to have occurred 'in the context of and associated with an IAC', thereby falling under the ICC jurisdiction to prosecute such a crime.

The editorial team notes that Professor Marko Milanovic was not involved in reviewing or editing this post.