

DOUBLE EFFECT AND HUMAN RIGHTS IN WAR

by Nigel Biggar

Quillette, 11 August 2024

When, in June, the International Criminal Court's prosecutor sought arrest warrants for Israel's Prime Minister and Defence Minister over their conduct in Gaza, the Conservative government objected that the ICC lacks jurisdiction over Israeli citizens. Last week, the new Labour incumbents of No. 10 abandoned that challenge.

But lack of jurisdiction is only the weakest ground for objection. Had the reasoning of the panel of legal experts invited to justify the prosecutor's action been applied to the Allies' invasion of Normandy in June 1944—the eightieth anniversary of which we have just celebrated—it would have approved the arrest of Churchill and Eisenhower.

According to the experts' report, there are "reasonable grounds" to believe that the ministers have committed war crimes in Gaza. This is because they have "intentionally" used the starvation of civilians as a method of warfare against Hamas, by depriving civilians of "objects indispensable for their survival" and so of "fundamental rights". This they have done by "deliberately" impeding the delivery of humanitarian relief and by "attacks directed against" facilities that produce food and clean water, civilians attempting to obtain relief supplies, and humanitarian workers and convoys. "Either ... the suspects meant these deaths to happen", write the lawyers, "or ... they were aware that deaths would occur in the ordinary course of events as a result of their methods of warfare". As for the crime of extermination, "the number of deaths resulting from starvation is sufficient on its own to support the charge".

An objection to the panel's report could be raised on factual grounds, since whether or not it is true that Gaza has in fact been on the brink of starvation is a hotly contested issue. But I shall let that pass, since my objection is ethical rather than factual.

Legal reasoning is only as good as its moral concepts. One flawed moral concept here is that of intention. The lawyers think that a deliberate act that has a foreseeable effect must intend that effect. So, when the Israelis deliberately conduct a military operation having the foreseeable effect of starving or killing Gazan civilians, they must have 'meant' it. To be aware is to mean; to mean is to intend.

This is wrong. We often do something in full awareness that it will have a consequence we don't want, but we do it anyway for the sake of a consequence we do want. And if that desired consequence is more important, or if we are under an overriding obligation to prefer it, then our causing the undesired consequence is proportionate—provided we take all feasible steps to minimize it. That's the ethical principle of 'double effect'. The desired consequence or effect is what we intend; the unwanted effect we accept with active reluctance.

Take a case presented in the film, *Master and Commander*. During the Napoleonic Wars, HMS *Surprise* sails into a raging storm in the South Atlantic. A mast snaps and crashes into the sea. The bo'sun warns the captain that the broken mast will capsize the ship unless cut loose. Straightaway, the captain calls upon a nearby sailor to start cutting the connecting ropes. Tragically, the sailor's best friend is clinging to the broken mast, and, if cut loose, will certainly drown. Nonetheless, in full awareness of the effect of his deliberate action, the

sailor raises his axe and brings it down upon the rope, the tears streaming down his cheeks. Should we say that he intended to kill his friend? No, he intended to save the ship and its crew of several hundred. He merely accepted with the greatest reluctance his friend's death as a side-effect—unavoidable, unwanted, and proportionate.

That's a fictional case, but the principle is familiar in real ones, too. Suppose I'm your boss. Your misconduct or the survival of the firm requires that I fire you. I know that doing so will cause you and your family all manner of woe. And yet I proceed to fire you anyway. I knowingly—deliberately—caused you distress. Does that mean that I intended to cause it? No. I intended, first, the end of discharging my responsibility to care for the good of the firm as a whole; and second, the necessary means of removing you from your post. Causing distress was not my intention; it was beside my purpose; it was, literally, an undesired 'side-effect' or 'co-lateral' damage. Of course, I am *responsible* for all the effects that I knowingly cause, but so long as I can give a sufficiently justifying reason—in terms of overriding duty, necessity, and proportionality—I am not morally *culpable* for them. I cannot be blamed for them.

It's possible that Israel's government intends to starve and exterminate Palestinian civilians in Gaza. But to have reasonable grounds for supposing so requires more than the fact that a large number of civilians have been caught up in 'attacks directed against' Hamas. Moreover, telling against such a supposition are facts that go unmentioned by the lawyers: that the Israeli military has taken care to warn civilians of attacks, to use weapons of minimal destructive power, and to provide some humanitarian aid.

Beyond its inadequate concept of intention, there's a second moral problem with the lawyers' reasoning: its concept of a fundamental (or basic) human right. Speaking to *Prospect Magazine* in October 2023, one of the experts, Helena Kennedy, asserted that "water is a basic human right and its denial violates international law. It is a war crime". A right is supposed to be basically human in two senses: it guarantees access to an existential necessity; and it attaches to any human being, such that, wherever there is a human, there is also the right. So, to deny access is a violation—no matter what the circumstances.

But this doesn't make sense. Suppose a situation where there is no water and no one—anywhere—is capable of supplying it. Or suppose a situation where there is only sufficient water to save one population and a state could supply it, but it has an overriding obligation to supply it to a different population. Or suppose a situation where a state has an overriding obligation to defend its own people against an aggressor, but it cannot do so effectively while supplying water to the aggressor's civilians. In any of those situations, how can those tragically dying of thirst be supposed to have a right to what cannot or what may not be delivered?

A basic human need only amounts to a right where the supply exists and delivery is possible and obligatory. The right comes and goes, according to circumstances. There is no absolute human right to water, no matter what human rights idealists would have us believe. So, whether or not civilians in Gaza have a right to water depends on Israeli intentions, their attempts to minimize civilian risks, and the importance of their military objectives.

The moral flaws in the reasoning of the ICC prosecutor's legal experts exposes a serious conflict between two bodies of international law—international human rights law (IHRL) and the law of armed conflict (LOAC, also confusingly known as 'international humanitarian law'). IHRL deals in terms of human rights that attach to a human being as her inalienable property, applying always and everywhere. That's what makes them 'absolute'. In contrast, drawing from the sixteen-hundred-year-long ethical tradition of 'just war' thinking,

which does not use the concept of 'a right' at all, LOAC denies that rights to water and other necessities of life are absolute, insisting that they depend on the circumstances.

The unchallenged intrusion of an absolutist concept of human rights into the law of armed conflict, together with neglect of the principle of double effect, will result in legal reasoning that makes it impossible to wage war successfully—however just the cause. The effect will be to hobble law-abiding states susceptible to 'rights' advocacy in any military struggle against states that are unencumbered by respect for either law or rights.

Applied in 1944, the sort of legal reasoning displayed by the panel of legal experts would have judged the Allies invading Normandy guilty of war crimes. Because the British were running out of manpower, the Allies relied heavily on bombing Nazi positions. And since their bombers lacked the technological means to be precise, this had the effect of killing 30,000 French civilians. But since their bombing was deliberate and its lethal effect foreseeable and massive, that would have sufficed for the ICC's legal experts to support the arrest of Churchill and Eisenhower. With the quite possible result that the Allied war effort would have been so weakened as to enable the triumph of a Nazi regime intent upon the systematic eradication of rights.

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