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What the ICC gets wrong about Israel

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International Criminal Court Prosecutor Karim Khan (Getty Images)

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Legal reasoning is only as good as the ethical concepts it uses. That’s why the International Criminal Court’s decision to issue arrest warrants for Israel’s Prime Minister and former defence minister is basically flawed.

The ICC claims reasonable grounds for believing Benjamin Netanyahu and Yoav Gallant guilty of the war crimes of ‘intentionally and knowingly depriv[ing] the civilian population in Gaza of objects indispensable to their survival’, creating

‘conditions of life calculated to bring about [their] destruction.’ The grounds are these: Israel’s failure to facilitate relief ‘by all means at its disposal’ and to ‘ensure that the civilian population... would be adequately supplied with goods in need’ amounts to a violation of the ‘fundamental rights... to life and health’.

There are two major ethical problems with this. The first concerns the concept of intention. We often do something in full awareness that it will have an undesirable consequence we don’t want, but we do it anyway for the sake of a desirable consequence we do want. And if that desirable consequence is more important, or if we are under an overriding obligation to prefer it, then our causing the undesirable consequence is proportionate – provided we take all feasible steps to minimise it. That’s the ethical principle of ‘double effect’. The desirable consequence or effect is what we intend; the undesirable effect we accept with active reluctance.

Take, for example, the swashbuckling case presented in the 2003 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 (Russell Crowe) that the broken mast will capsize the ship unless cut loose. 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 – ‘knowingly’ – the sailor raises his axe and brings it down upon the rope, tears streaming down his cheeks. Should we say he intended to kill his friend? No, he intended to save the ship and its crew of several hundred. He merely accepted with the deepest reluctance his friend’s death as a side-effect – unavoidable, unwanted, but necessary.

According to this logic, which characterises the ethic of ‘just war’ thinking, it’s permissible to attack a military objective, knowing it will risk civilian casualties, provided that risk is unavoidable and all feasible measures are taken to minimise it. One may intend the effect of disabling enemy combatants, while reluctantly accepting injury to civilians as a tragic side-effect. Certainly, this is permissive, but that’s because, otherwise, the successful waging of war, however just the cause, is practically impossible. Nevertheless, unburdened by concern for military success, the ICC considers that any military action taken in the knowledge that it will put civilians at risk of injury intends – is ‘calculated’ – to destroy them.

Telling against the judgement that Israel has any such intention are the measures taken by its military to minimise harm – giving advanced warning of attacks, using weapons of minimally destructive power, and providing some humanitarian aid.

Had the ICC sat in judgement on the UN against the Nazis, would have issued arrest warrants for Churchill and Eisenhower

Julie Burchill

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Here's where the ICC's second flawed concept comes into play: the idea of an absolute, fundamental human right to the necessities of life and health. This is nonsense. Suppose a situation where no water is available, or no one is capable of supplying it, or those capable of supplying it have overriding obligations forbidding them to do so. How can those dying of thirst be supposed to have a right to what cannot or may not be delivered? A fundamental human need only amounts to a right where supply exists and delivery is possible and obligatory. So, whether or not civilians in Gaza have a right to water depends on Israeli intentions, the importance of their military objectives, and their attempts to minimise civilian risks.

But that's not how the ICC sees it. In its eyes, the fundamental right to the necessities of life have obliged Israel to 'ensure' that civilians are given 'adequate' provision. Its provision of humanitarian relief as far as allowed by the exigencies of waging war against an atrociously murderous, intentionally genocidal Hamas, is not enough. The right is absolute.

Such strong, unyielding rights-talk sits ill with the court's implicit gesture towards the traditional interpretation of the law of armed conflict, when it says it found reasons for believing that 'no clear military need... could be identified' for Israel's restrictions on humanitarian relief operations. In other words, despite evidence of Israeli military necessity, it wasn't 'clear' in the court's eyes. Yet, why a body of 18 professional lawyers with no military experience should prefer its own armchair judgement is a puzzle.

Had it been sitting in judgement on the prosecution of the war against the massively murderous Nazi empire by Britain and the US, the ICC would have issued arrest warrants for Churchill and Eisenhower. While invading Italy in 1943, the Allies caused old men, women, and children to be torn apart by bombs and shells, exposed to the wintry elements by the destruction of their homes, and starved of food and water. They did this 'knowingly', aware of the effects of their unavoidably imprecise bombing and shelling. But they didn't intend civilian harm and sought to minimise it, as far as war-winning allowed. Nonetheless, their efforts weren't 'adequate' to save tens of thousands from perishing.

The presumptuousness of a court that declares itself devoted to the cause of 'lasting peace', its novel and imprudent intrusion of a concept of fundamental human rights into the laws of war, and its neglect of the principle of double effect, all combine to drive a legal interpretation that makes successful war-fighting unlawful, however just its cause. Thereby the ICC undermines its own authority, forcing states intent on military victory to repudiate its jurisdiction.

Starmer

Brendan O'Neill

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