

No. 24-704

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE; AL-HAQ;  
AHMED ABU ARTEMA; MOHAMMED AHMED ABU ROKBEH;  
MOHAMMAD HERZALLAH; AYMAM NIJIM; LAILA ELHADDAD; WAEIL  
ELBHASSI; BASIM ELKARRA; and DR. OMAR EL-NAJJAR,

*Plaintiff-Appellant,*

v.

JOSEPH R. BIDEN, JR., President of the United States; ANTONY J.  
BLINKEN, Secretary of State; and LLOYD JAMES AUSTIN III,  
Secretary of Defense, in their official capacities

*Defendant-Appellee.*


On Appeal from the United States District Court  
for the Northern District of California  
No. 4:23-cv-05829-JSW  
Hon. Jeffrey S. White

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**AMICUS CURIAE BRIEF OF GLOBAL RIGHTS COMPLIANCE, LINA  
BADDOUR, AND TOM DANNENBAUM IN SUPPORT OF APPELLANTS  
AND REVERSAL**

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## **INTEREST OF AMICUS CURIAE**

Global Rights Compliance (GRC) is the leading legal organization on prohibiting, preventing and seeking accountability for mass starvation and associated violations. We possess unrivalled expertise and granular knowledge of the crime of starvation, derived from a dedicated portfolio of analysis, accountability and investigative work. GRC has conducted multiple starvation investigations with partners and pursued advocacy and accountability pathways. Our principal geographic areas of focus have been Syria, South Sudan and Yemen, Tigray, Ethiopia, Ukraine, with a more recent focus on Palestine.

Lina Baddour is a licensed US attorney, specialized in international criminal and human rights law and policy. Her work has spanned various domestic, international and hybrid courts and tribunals, including the ICC, ICTY and the War Crimes Chamber of the State Court of Bosnia and Herzegovina. She has extensive experience working in the Palestine context, including as a legal advisor with the UN Development Programme, as an international legal advisor to State leadership, and as counsel acting before the International Criminal Court. She has expertise in the law of starvation, having led and contributed to projects aimed at advancing accountability for violations of the prohibition. She writes here in an independent capacity.

Tom Dannenbaum is Associate Professor of International Law at the Fletcher School of Law & Diplomacy. His institutional affiliation is provided for identification; he writes here in his individual capacity. Dannenbaum is expert on various areas of international law, including international humanitarian law and international criminal law, and particularly the international prohibition and criminalization of the starvation of civilians as a method of warfare.

GRC, Lina Baddour and Tom Dannenbaum (*amici curiae*) have an interest to intervene in support of the Plaintiffs-Appellants as subject-matter experts on the starvation war crime and associated violations, whose work has been focused on dispelling the misconception that starvation is an inevitable by-product of war and highlighting the criminality of the deliberate use of starvation methods, which are properly understood as a form of societal torture. The *amici curiae* are therefore filing this brief to assist the Court by elucidating the contours of these lesser-known crimes, highlighting how the facts unfolding in Gaza since October 2023 implicate the starvation war crime, and explaining the legal nexus between that war crime and, where genocidal intent can be established, the infliction of destructive conditions of life as an underlying act of genocide.

This brief is submitted with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a)(2).<sup>1</sup>

## STATEMENT OF FACTS

On October 9, 2023, two days after Hamas' attacks of October 7, Israeli Defense Minister Gallant announced a "complete siege" on Gaza, declaring, "[t]here will be no electricity, no food, no water, no fuel, everything is closed."<sup>2</sup> This was an order to cut off Palestinian civilians from objects indispensable for their survival ("OIS").<sup>3</sup> This declaration was followed by a combination of total siege, subsequent severe impediments to the passage of humanitarian relief, and the attack, destruction, or rendering useless of items inside Gaza.

The deprivation of OIS in Gaza has taken many forms. Those include: damage to the agricultural and food production systems,<sup>4</sup> the denial of sea access for boats

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and their counsel, made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> Emanuel Fabian, *Defense minister announces 'complete siege' of Gaza: No power, food or fuel*, Times of Israel (Oct. 9, 2023), [https://www.timesofisrael.com/liveblog\\_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/](https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/).

<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), Jun. 8, 1977, 1125 U.N.T.S. 3, art. 54(2).

<sup>4</sup> *UNOSAT Gaza Strip Agricultural Damage Assessment - January 2024*, United Nations Satellite Centre (UNOSAT) (Feb. 1, 2024), <https://unosat.org/products/3792>.

(precluding fishing), the destruction of livestock,<sup>5</sup> and persistent restrictions on the entry and delivery of essential goods.<sup>6</sup> The delivery of food and other essentials to northern Gaza has been particularly tightly restricted.<sup>7</sup> With only one out of the three water pipelines from Israel partially functional, most water wells not in operation, and obstacles to delivery, the northern part of Gaza has no access to clean water.<sup>8</sup>

The latest Integrated Food Security Phase Classification (IPC) report projected that approximately 80 percent of the population of Gaza would be classified in Emergency IPC Phase 4 and Catastrophe IPC Phase 5 by February 2024, making this the highest share of people facing high levels of acute food insecurity ever classified by the IPC initiative for any given area or country.<sup>1</sup> At least twenty-seven people, including twenty-three children, have already starved to death.<sup>2</sup>

Having determined on January 26, 2024 that “many Palestinians in the Gaza Strip have no access to the most basic foodstuffs, potable water, electricity, essential

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<sup>5</sup> *Famine Imminent in Gaza, Humanitarian Officials Tell Security Council, Calling for Immediate Ceasefire*, UN Security Council SC/15604. (Feb. 27, 2024), <https://press.un.org/en/2024/sc15604.doc.htm>

<sup>6</sup> *Gaza: Every day, more and more people are on the brink of faminelike conditions*, Food and Agriculture Organization (FAO) (Feb. 12, 2024), <https://www.fao.org/newsroom/detail/gaza-every-day-more-and-more-people-are-on-the-brink-of-famine-like-conditions/en>

<sup>7</sup> *Hostilities in the Gaza Strip and Israel | Flash Update #127*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (Feb. 27, 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-127>.

<sup>8</sup> *Hostilities in the Gaza Strip and Israel - reported impact | Day 157*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (Mar. 12, 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-157>

medicines or heating,”<sup>9</sup> the International Court of Justice (ICJ) determined on February 16, 2024 that the situation was “perilous,” observing that “the most recent developments in the Gaza Strip, and in Rafah in particular, ‘would exponentially increase what is already a humanitarian nightmare with untold regional consequences’, as stated by the United Nations Secretary-General”.<sup>3</sup> Less than a week later, Médecins Sans Frontières Secretary General Christopher Lockyear told the United Nations Security Council that the humanitarian response in Gaza was “an illusion.”<sup>10</sup> The Global Nutrition Cluster reported in February that over 15% of children under two in northern Gaza are acutely malnourished.<sup>11</sup> Medical Aid for Palestinians stated “[t]his is the fastest decline in a population's nutrition status ever recorded. That means children are being starved at the fastest rate the world has ever seen.”<sup>4</sup>

Against that backdrop, impediments to humanitarian relief continue. A recent field report by Refugees International, “found routine and arbitrary denial of legitimate humanitarian goods from entering Gaza; a highly complicated Israeli inspection and approval process without clear or consistent instructions; frequent

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<sup>9</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) Order of 26 January 2024, ¶ 70.

<sup>10</sup> *MSF briefing on Gaza to UN Security Council*, Medecins sans Frontier (Feb. 22, 2024), <https://www.msf.org/msf-briefing-gaza-un-security-council>.

<sup>11</sup> *Nutrition Vulnerability and Situation Analysis: Gaza*, Global Nutrition Cluster (Feb. 2024) <https://www.nutritioncluster.net/sites/nutritioncluster.com/files/2024-02/GAZA-Nutrition-vulnerability-and-SitAn-v7.pdf>.

denials of humanitarian movements within Gaza; clear indications that Israel has failed to establish functional humanitarian deconfliction; and persistent attacks on Gaza’s humanitarian, health, food, power, and other critical infrastructure that have simultaneously debilitated the aid effort and escalated needs.”<sup>12</sup>

One week prior to the filing of this brief, United States Senator Chris Van Hollen reported, “In all my discussions, [Biden] Administration officials have recognized that the Netanyahu government has put up unacceptable barriers to the delivery of humanitarian assistance into Gaza, and so the question is not one of fact but what to do about it.”<sup>13</sup> High Representative of the European Union, Josep Borrell emphasized that the crisis in Gaza “is man-made .... the natural way of providing support through roads is being closed, artificially closed. And starvation is being used as a weapon of war.”<sup>14</sup>

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<sup>12</sup> *Siege and Starvation: How Israel Obstructs Aid to Gaza*, Refugees International (Mar. 7, 2024), <https://www.refugeesinternational.org/reports-briefs/siege-and-starvation-how-israel-obstructs-aid-to-gaza/>.

<sup>13</sup> Isaac Chotnier, *Why America Isn’t Using Its Leverage with Israel*, The New Yorker (Mar. 7, 2024), <https://www.newyorker.com/news/q-and-a/why-america-isnt-using-its-leverage-with-israel>.

<sup>14</sup> *United Nations: Speech by High Representative Josep Borrell at the annual UN Security Council session on EU-UN cooperation*, European Union External Action (Mar. 12, 2024), [https://www.eeas.europa.eu/eeas/united-nations-speech-high-representative-josep-borrell-annual-un-security-council-session-eu-un\\_en](https://www.eeas.europa.eu/eeas/united-nations-speech-high-representative-josep-borrell-annual-un-security-council-session-eu-un_en).

## SUMMARY OF ARGUMENT

The *amici curiae* submit this brief to support the position taken by the Plaintiff-Appellants in their Appellate Brief in relation to justiciability and the binding nature of international legal obligations implicated by the legal questions in the case. As such, the *amici curiae* submit that i) the use of starvation as a method of warfare is prohibited under customary international humanitarian law (IHL), is a customary war crime, and is therefore a binding international legal obligation; ii) the facts of the Case are capable of engaging these customary prohibitions; iii) the customary prohibition of starvation provides an additional lens through which to view acts of inflicting conditions of life calculated to bring about a group's destruction and, as such, where genocidal intent can be established, may serve to establish the *actus reus* of genocide.

## ARGUMENT

**I. STARVATION OF CIVILIANS AS A METHOD OF WARFARE IS PROHIBITED UNDER CUSTOMARY INTERNATIONAL LAW AND AS A WAR CRIME. WHERE COMBINED WITH GENOCIDAL INTENT, THE VIOLATION OF THIS PROHIBITION CAN QUALIFY AS ONE OF THE UNDERLYING ACTS OF GENOCIDE, NAMELY, INFLICTING CONDITIONS OF LIFE CALCULATED TO BRING ABOUT THE PHYSICAL DESTRUCTION OF A GROUP.**

Even in the context of armed conflict, there are red lines past which no belligerent may traverse. Those red lines are specified in the treaties and customs of IHL and the attendant regime of war crimes. The prohibition of starvation of civilians as method of warfare is such a red line.

IHL applies in armed conflict or belligerent occupation. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV) arts. 2-3, Aug. 12, 1949, 75 U.N.T.S. 287 (replicating the same articles in Conventions I-III); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1., June 8, 1977, 1125 U.N.T.S. 3. Its “basic rule” is that belligerents “shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Article 48, Protocol I. The prohibition of starvation of civilians as a method of warfare is a specific manifestation of that basic rule.



Amici argue that Israel is in breach of the starvation prohibition. The looming famine in Gaza is not the inevitable consequence of fighting. It is the product of the illegal choice to deprive the civilian population of Gaza of food, water, and other objects indispensable to its survival.

**II. STARVATION OF CIVILIANS AS A METHOD OF WARFARE IS PROHIBITED UNDER CUSTOMARY INTERNATIONAL LAW APPLICABLE TO ALL STATES AND ARMED GROUPS AND IS A WAR CRIME UNDER CUSTOMARY INTERNATIONAL CRIMINAL LAW BINDING ON ALL NATURAL PERSONS.**

Starvation of civilians as a method of warfare is prohibited in the widely ratified 1977 Protocols Additional to the Geneva Conventions (API and AP II)<sup>15</sup> and firmly accepted as a matter of customary international law (CIL).<sup>16</sup>

CIL, which binds all states, is established when a rule is reflected in general state practice that is underpinned by states' understanding that the practice is legally determined (*opinio juris*).<sup>17</sup> A finding of CIL is compatible with country practice,

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<sup>15</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Protocol I”), Jun. 8, 1977, 1125 U.N.T.S. 3, art. 54(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non- International Armed Conflicts (Protocol II), Jun. 8, 1977, 1125 U.N.T.S. 609, art. 14.

<sup>16</sup> *Customary International Humanitarian Law, Volume II: Practice, Int’l Comm. of the Red Cross* (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005) (“Customary IHL: Practice”), Rule 53 and 54, at 186 *et seq.*

<sup>17</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶190 (June 27).

where such practice is recognized as a breach and/or condemned.<sup>18</sup> The prohibition on starvation of civilians as a method of warfare meets these requirements.<sup>19</sup>

Numerous states, including those not party to the 1977 Protocols, include the ban in their military manuals,<sup>20</sup> prohibit starvation methods in national law,<sup>21</sup> or have ratified treaties that are predicated on the prohibition's customary status.<sup>22</sup> Such actions manifest the official framework for those states' practice in armed conflict, while evincing their *opinio juris*.<sup>23</sup> Israel and the United States have affirmed the customary status of the prohibition.<sup>24</sup>

When starvation tactics have been used, they have been roundly condemned in multiple United Nations Security Council (UNSC) resolutions,<sup>25</sup> including the landmark and unanimous Resolution 2417 (2018),<sup>26</sup> and through the UN General

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<sup>18</sup> *Id.* ¶186.

<sup>19</sup> San Remo Manual on International Law Applicable to Armed Conflicts at Sea §§ 102–04 (Dec. 31, 1995); Program on Humanitarian Pol'y Conflict Research at Harvard University, Manual on International Law Applicable to Air and Missile Warfare ¶¶ 97, 100–04, 157–59 (2009).

<sup>20</sup> Customary IHL: Practice, Rule 53.

<sup>21</sup> *Id.* Rule 53.

<sup>22</sup> Tom Dannenbaum, *Criminalizing Starvation in an Age of Mass Deprivation in War*, 55 Vand. J. Transnat'l L. 681, 701-710 (2022) (“Dannenbaum”).

<sup>23</sup> Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to the US Comments*, 89 Int'l Rev. Red Cross 473, 475 (2007).

<sup>24</sup> HCJ 9132/07 Jaber Al-Bassiouni Ahmed and others v. Prime Minister & Minister of Defence, ¶¶13–22 (2008); U.S. Dep't of Def., Department of Defense Law of War Manual ¶5.20.1 (rev. ed., 2023).

<sup>25</sup> *See, e.g.*, S.C. Res. 2417 (May 24, 2018); S.C. Res. 2573 (Apr. 27, 2021).

<sup>26</sup> S.C. Res. 2417 ¶¶5-6, 8-13.

Assembly and UN Human Rights Council.<sup>27</sup> The customary status of the prohibition is reflected in the comprehensive Customary IHL Study by the International Committee of the Red Cross (ICRC).<sup>28</sup> Beyond its general prohibition, starvation of civilians as a method of warfare is codified as a war crime in the ICC Statute and established as such in customary international law.<sup>29</sup>

The seriousness of violating the customary rule outlined above is expressed in the form and scope of state condemnation<sup>30</sup> and is evident in the torturous suffering, social destruction, gendered impacts, vulnerability to disease, and excess mortality that the method portends for affected populations.<sup>31</sup> That individual criminal liability attaches to this method as a matter of custom is supported by its codification in the ICC Statute,<sup>32</sup> its criminalization in the national war crimes codes of numerous states not party to the ICC,<sup>33</sup> its incorporation in the statutes of regional and hybrid

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<sup>27</sup> See, e.g., G.A. Res. 49/196, ¶ 14 (Dec. 23, 1994); G.A. Res. 74/149, preamble (Jan. 24, 2020); H.R. Res. 26/23 ¶ 6 (Jul. 17, 2014).

<sup>28</sup> Customary IHL: Practice, Rules 53-55.

<sup>29</sup> Rome Statute of the International Criminal Court, art. 8(2)(b)(xxv), Jul. 17, 1998, 2187 U.N.T.S. 90 (“ICC Statute”); Assembly of States Parties, *Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court*, Resolution ICC-ASP/18/Res.5 (Dec. 6, 2019).

<sup>30</sup> See *supra* notes 16-17.

<sup>31</sup> See, e.g., Dyan Mazurana, Bridget Conley, Kinsey Spears, *Sex, Gender, Age, and Mass Starvation*, in *Accountability for Mass Starvation: Testing the Limits of the Law* (Conley et al. eds.) (OUP 2022) at 340.

<sup>32</sup> *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20 OA8, Judgment on the Appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II’s ‘Decision on the Defence ‘*Exception d’incompétence*’, (Nov. 1, 2021) ¶89.

<sup>33</sup> Customary IHL, Rule 53; see *Starvation Jurisprudence Digest* (“GRC Digest”), GRC, <https://starvationaccountability.org/publications/starvation-jurisprudence-digest/>.

internationalized criminal courts,<sup>34</sup> and its identification as such by various other international authorities.<sup>35</sup>

**III. THE PROHIBITION ATTACHES TO THE DEPRIVATION OF OBJECTS INDISPENSABLE TO CIVILIAN SURVIVAL FOR THE PURPOSE OF DENYING THEIR SUSTENANCE VALUE OR IN THE KNOWLEDGE THAT CIVILIANS WILL STARVE.**

At the heart of the starvation prohibition (and the associated war crime) is the elevated protection of objects indispensable to the survival of the civilian population (OIS). OIS have been defined broadly with reference to an illustrative and non-exhaustive list: foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies, and irrigation works. Some OIS, such as those listed, are inherently indispensable to survival, others may be situationally indispensable, such as shelter. In the key codification of the rule, paragraph 1 of Article 54 of Additional Protocol I to the 1949 Geneva Conventions prohibits the starvation of civilians as a method of warfare, while paragraphs 2-3 elaborate that ban. The latter prohibit attacking, destroying, removing, or rendering useless OIS for the purpose of sustenance denial, regardless of the motive, or for any other purpose, if civilians will

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<sup>34</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 27, 2014), arts. 28D(b)(xxvi), 28D(e)(xvi); UNTAET Regulation No. 2000/15 (June, 6 2000), art. 6.1(b)(xxv); The Statute of the Iraqi Special Tribunal (Dec. 10, 2003), art. 13(b)(25); Law No. 05/L-053, Law on Specialist Chambers and Specialist Prosecutor's Office, Kosovo (Aug. 3, 2015), art. 14(1)(b)(xxv).

<sup>35</sup> S.C. Res 2417 at pmb. & ¶¶6, 10 (2018); S.C. Res 2573 ¶4 (2021); *Supra* note 32, GRC Digest.

be left starving. The regulation of humanitarian assistance supplements the prohibition of starvation, which also proscribes wilfully impeding humanitarian relief.<sup>36</sup>

This composite prohibitive framework underpins the war crime, as codified in article 8(2)(b)(xxv) of the ICC Statute, which outlaws “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.” Its constituent elements are elaborated authoritatively in the ICC *Elements of Crimes* (EoC): (i) the perpetrator deprived civilians of objects indispensable to their survival; (ii) the perpetrator intended to starve civilians as a method of warfare; (iii) the conduct took place in the context of and was associated with an international; and (iv) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>37</sup>

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<sup>36</sup> Mwatana for Human Rights and Global Rights Compliance, *The Starvation Makers: The Use of Starvation by Warring Parties in Yemen as a Method of Warfare* (Sept. 2021) at 94-95, <https://starvationaccountability.org/wp-content/uploads/2021/09/Starvation-Report-2021-August-En.pdf>.

<sup>37</sup> Int’l Crim. Ct., *Elements of Crimes* 31 (2013), <https://www.icc-cpi.int/Publications/Elements-of-Crimes.pdf>; Assembly of States Parties, *Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court*, annex II, Resolution ICC-ASP/18/Res.5 (Dec. 6, 2019).

This brief presumes conduct that is associated with an armed conflict. As such, the key elements are the deprivation of objects indispensable to civilian survival and the intent to starve civilians as a method of warfare. Elucidating these elements requires clarifying the meaning of “objects indispensable to civilian survival” (OIS), “deprivation,” and “the intent to starve civilians as a method of warfare.” Information in the public record indicates that Israel has engaged in the deprivation of OIS since October 9, 2023 and that this strategy is being pursued with the “intent to starve civilians as a method of warfare.”

**OIS.** This section builds on the brief elaboration of OIS above. Food, water, and other essentials need not be used exclusively by civilians to qualify as objects indispensable to *civilian* survival. In fact, the reverse is true. API’s codification of the underlying IHL rule specifies that, unlike dual-use objects generally, objects indispensable to survival can be targeted for their sustenance value *only* if they provide sustenance *solely* to combatants.<sup>38</sup>

In the context of Gaza, multiple categories of OIS have been attacked, destroyed, or rendered useless. This has included agricultural and food production

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<sup>38</sup> Protocol I, arts. 54(2), 54(3)(a).

systems,<sup>39</sup> sea access for boats (precluding fishing), livestock,<sup>40</sup> and the entry and delivery of essential items.<sup>41</sup> With only one out of the three water pipelines from Israel partially functional, most water wells inoperable, and obstacles to delivery, the northern part of Gaza has no access to clean water.<sup>42</sup>

The indispensability of health systems only rises in war. As of March 12, 2024, 155 health facilities and 124 ambulance cars in Gaza have been damaged or destroyed. Out of 36 hospitals, only 13 remain partially operational.<sup>43</sup> With an estimated 31,184 civilian deaths and 72,889 civilians injured,<sup>44</sup> Gaza's health system

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<sup>39</sup> UNOSAT Gaza Strip Agricultural Damage Assessment - January 2024, United Nations Satellite Centre (UNOSAT) (Feb. 1, 2024), <https://unosat.org/products/3792>.

<sup>40</sup> *Famine Imminent in Gaza, Humanitarian Officials Tell Security Council, Calling for Immediate Ceasefire*, UN Security Council SC/15604. (Feb. 27, 2024), <https://press.un.org/en/2024/sc15604.doc.htm>

<sup>41</sup> Gaza: Every day, more and more people are on the brink of faminelike conditions, Food and Agriculture Organization (FAO) (Feb. 12, 2024), <https://www.fao.org/newsroom/detail/gaza-every-day-more-and-more-people-are-onthe-brink-of-famine-like-conditions/en>

<sup>42</sup> *Hostilities in the Gaza Strip and Israel - reported impact | Day 157*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (Mar. 12, 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-157>

<sup>43</sup> *HOSTILITIES IN THE GAZA STRIP AND ISRAEL | FLASH UPDATE #135*, (OCHA) (MAR. 8, 2024), [HTTPS://WWW.OCHAOPT.ORG/CONTENT/HOSTILITIES-GAZA-STRIP-AND-ISRAEL-FLASH-UPDATE-135](https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-135)

<sup>44</sup> *Hostilities in the Gaza Strip and Israel - reported impact | Day 157*, (OCHA) (Mar. 12, 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-157>.

is on the verge of total collapse.<sup>45</sup> In a context in which shelter is indispensable to survival, over 60 percent of Gaza's housing stock has also been destroyed.<sup>46</sup>

**Deprivation.** In principle, any conduct restricting civilians' use of an OIS may qualify as deprivation. This includes not only the prohibited acts listed in Article 54(2), but also willfully impeding relief supplies,<sup>47</sup> disrupting coping strategies, and preventing civilians from accessing agricultural resources, aid, or other sources of sustenance, or forcibly transferring a population in a way that precludes access to OIS.

Even though experts are now predicting that more Palestinians in Gaza may die from starvation and disease than airstrikes,<sup>48</sup> Israel continues to impede the effective delivery of humanitarian assistance to Palestinians,<sup>49</sup> not only by refusing to allow

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<sup>45</sup> *Investigate Israel's assault on Gaza's Healthcare Infrastructure | Position Paper*, Physicians for Human Rights – Israel (Feb. 19, 2024), <https://www.phr.org.il/en/investigate-israels-assault-eng/>.

<sup>46</sup> *Hostilities in the Gaza Strip and Israel - reported impact | Day 157*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (Mar. 12, 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-157>.

<sup>47</sup> ICC Statute, arts 8(2)(b)(xxv); 8(2)(e)(xix).

<sup>48</sup> *Deaths by starvation and disease may top deaths by bombs as families squeezed into deadly "safe zones", two months into Gaza crisis*, Save the Children (Dec. 9, 2023), <https://www.savethechildren.net/news/deaths-starvation-and-disease-may-top-deaths-bombs-families-squeezed-deadly-safe-zones-two>.

<sup>49</sup> *Israel: Starvation Used as Weapon of War in Gaza*, Human Rights Watch (HRW) (Dec. 18 2023), <https://www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza>.



sufficient aid in, and imposing restrictions at crossings,<sup>50</sup> but also by precluding its distribution through maintaining intense military operations without a system of humanitarian deconfliction.<sup>51</sup>

These impacts have been exacerbated by the damage, destruction or rendering useless of infrastructure critical for the delivery of basic necessities for civilians, such as Gaza's sole power plant, which ceased functioning on October 11, 2023 when it ran out of fuel, cutting off electricity to over 2 million people and critically impacting water, sewage, and healthcare facilities.<sup>52</sup>

Reporting has also indicated a pattern of attacks on people attempting to access food or seeking to access aid, with over 14 incidents recorded between mid-January and the end of February.<sup>53</sup> The largest to date has been the recent "flour massacre", in which Israeli forces responded to what they claimed was a stampede toward aid by attacking the starving civilians that had gathered to receive flour, resulting in the

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<sup>50</sup> *Gaza Market Monitoring- Flash Update 7 - March 2024*, World Food Programme (WFP) (Mar. 2024), <https://www.wfp.org/publications/202324-wfp-palestine-monthly-market-dashboard>.

<sup>51</sup> *Hostilities in the Gaza Strip and Israel | Flash Update #88*, (OCHA) (Jan. 9, 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-88>.

<sup>52</sup> 3-ER-419-507, ¶81.

<sup>53</sup> *UN experts condemn 'flour massacre', urge Israel to end campaign of starvation in Gaza*, United Nations (Mar. 5, 2024), <https://www.ohchr.org/en/press-releases/2024/03/un-experts-condemn-flour-massacre-urge-israel-end-campaign-starvation-gaza>.

killing of 118 persons and injury of 760.<sup>54</sup> A similar Israeli attack occurred on January 25, also during the humanitarian distribution of flour to starving civilians, killing at least 20 persons and injuring 150 others.<sup>55</sup> On March 13, one of UNRWA's few remaining food distribution centers was hit by an Israeli strike, despite the Israeli Army having reportedly received the coordinates the previous day.<sup>56</sup>

Forced displacement can also contribute to, or be a modality of, OIS deprivation. An estimated 1.7 million people, roughly 75% of Gaza's entire population, have been forcibly displaced, often multiple times.<sup>57</sup> On October 12, 2023, Israeli forces ordered the population in Northern Gaza, over 1 million people, to evacuate to the South of Gaza within 24 hours.<sup>58</sup> Reports indicate that Israel subsequently targeted roads it had previously designated as "safe routes", killing and

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<sup>54</sup> *UN Human Rights Office strongly deplores killing of at least 112 Palestinians during food aid distribution in Gaza City*, UN Human Rights Office in Occupied Palestinian Territory (Mar. 1, 2024) <https://reliefweb.int/report/occupied-palestinian-territory/un-humanrights-office-opt-un-human-rights-office-strongly-deplores-killing-least-112-palestinians-during-food-aid-distribution-gazacity-enar>.

<sup>55</sup> *Hostilities in the Gaza Strip and Israel | Flash Update #102*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (Jan. 25, 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-102>.

<sup>56</sup> *At Least One UNRWA Staff Killed When Israeli Forces hit UNRWA Centre Used for Food and Lifesaving Supplies*, United Nations Relief and Works Agency for Palestine Refugees (UNRWA) (Mar. 13, 2024) <https://www.unrwa.org/newsroom/official-statements/least-one-unrwa-staff-killed-when-israeli-forces-hit-unrwa-centre-used>.

<sup>57</sup> *Most of Gaza's Population Remains Displaced and in Harm's Way*, Human Rights Watch (Dec. 20, 2023), <https://www.hrw.org/news/2023/12/20/most-gazas-population-remains-displaced-and-harms-way>.

<sup>58</sup> 3-ER-419-507, ¶12.

injuring fleeing civilians who were attempting to abide by the evacuation order and were travelling south.<sup>59</sup> Such evacuation orders coupled with the bombardment campaign and ground operations in Northern Gaza, ultimately resulted in the majority of Palestinians in Gaza seeking safety and shelter in Rafah on the border with Egypt, where the Israeli military is currently ramping up extensive military operations.<sup>60</sup>

By design or by consequence, this displacement deprives civilians of their normal means to access OIS and creates conditions of extreme pressure on access to food, water and OIS in Rafah and other areas where civilians have been forced to flee.

**No requirement of starvation.** Contrary to a common misconception, although the starvation war crime entails the actual deprivation of OIS, it is not necessary for anyone to have died or suffered physically or psychologically for the crime to attach.<sup>61</sup>

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<sup>59</sup> 3-ER-419-507, ¶¶92-94.

<sup>60</sup> *UN relief chief warns military operations in Rafah could lead to a slaughter in Gaza and put a fragile humanitarian operation at death's door*, (OCHA) (Feb. 13, 2024), <https://www.unocha.org/news/un-relief-chief-warns-military-operations-rafah-could-lead-slaughter-gaza-and-put-fragile>.

<sup>61</sup> Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck, Hart, Nomos, 2016) at 517, 790.

Notwithstanding this, in the context of Gaza, the impact has been devastating. As noted in the statement of facts, the overwhelming majority of the population is facing emergency or catastrophic levels of acute food insecurity, children and adults are dying from malnutrition, and famine looms, if it has not already taken hold. Given that most deaths in famine occur due to disease, not malnutrition, the death toll from the latter undercounts the lethality of OIS deprivation in Gaza.<sup>62</sup> Reports indicate that civilians have been reduced to severe coping mechanisms including accounts of families using animal fodder to make flour and the consumption of animal feed, bird seed, and leaves.<sup>63</sup>

**Intent.** Starvation as a method of warfare consists of deprivation of OIS with two constituent elements of intent, the intent to deprive and the intent to starve civilians as a method of warfare.

**Intent to deprive.** The deprivation of objects indispensable to civilian survival must be intentional. Pursuant to the meaning of “intent” in the ICC Statute, the intent

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<sup>62</sup> Bridget Conley and Alex de Waal, *The Purposes of Starvation: Historical and Contemporary Uses*, 17 J. Int’l Crim. Justice 699 (2019).

<sup>63</sup> *Flash Analysis Report: Over Five Months of Attacks on Food Security in Gaza*, Insecurity Insight (Mar. 2024), <https://insecurityinsight.org/wp-content/uploads/2024/03/Flash-Analysis-Over-Five-Months-of-Attacks-on-Food-Security-in-Gaza.pdf>.

to deprive can be either direct (where deprivation was the purpose) or oblique (where the perpetrator knew that their conduct would lead to that deprivation).<sup>64</sup>

**Intent to starve civilians as a method of warfare.** Additionally, the perpetrator must have acted with the intent to starve civilians as a method of warfare. Drawing again on the meaning of intent in the ICC framework, the intent to starve can be proven through either direct or oblique intent. It does not have to be the sole or even primary intent.<sup>65</sup>

In interpreting this intent element, it is appropriate to resort to the underlying IHL framework. Elucidating the prohibition of starvation of civilians as a method of warfare in Article 54(1) of AP I, the subsequent paragraphs of that provision (Article 54(2-3)) prohibit the attack, destruction, removal, or rendering useless of OIS in two contexts. First where they are targeted for their sustenance value, in a context in which civilians are among those who draw sustenance from the objects.<sup>66</sup> Second, where they are targeted for any other reason, in a context that would leave the civilian population starving or forced to move.<sup>67</sup>

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<sup>64</sup> ICC Statute, art. 30(2).

<sup>65</sup> Wayne Jordash, Catriona Murdoch, Joe Holmes, *Strategies for Prosecuting Mass Starvation*, 17 J. Int'l Crim. Justice 849, 856-860 (2019) ("Jordash et al.").

<sup>66</sup> Protocol I, arts 54(2), 54(3)(a).

<sup>67</sup> *Id.* art. 54(3)(b).

On that basis, the direct intent to starve civilians is established when the perpetrator engaged in that deprivation with the purpose of denying sustenance to a population including civilians, or, at least, to a civilian population.<sup>68</sup> Alternatively, direct intent to starve could be satisfied by showing that the perpetrator aimed to inflict conditions of life conducive to the starvation of civilians or a civilian population.<sup>69</sup>

In applying these rules, it is critical to recognize that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”<sup>70</sup> When a population is overwhelmingly composed of civilians, the population retains civilian status, notwithstanding the presence of combatants within it.<sup>71</sup>

Evaluated against this standard, the population of Gaza, which is overwhelmingly composed of civilians, is unambiguously a civilian population. Just as it would be unlawful to bomb that entire population as a means to eliminating the embedded combatants,<sup>72</sup> a deprivation operation directed at such a population with

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<sup>68</sup> Dannenbaum, at 734-739, 740-41.

<sup>69</sup> Bridget Conley, Alex De Waal, Catriona Murdoch, and Wayne Jordash (eds.), *Accountability for Mass Starvation: Testing the Limits of the Law* (OUP 2022) at 115-116 (“Conley et al.”).

<sup>70</sup> Protocol I, art. 50(3).

<sup>71</sup> *Prosecutor v. Karadžić*, IT-95-5/18-T, Trial Judgement (Mar. 24, 2016), ¶¶474, 4610 n.5510.

<sup>72</sup> Protocol I, art. 51(2); ICC Statute arts. 8(2)(b)(i), 8(2)(e)(i), 7(1)(a), 7(1)(b).

a view to denying the sustenance value of the affected OIS would qualify as starvation of *civilians* as a method of warfare, under direct intent, even if motivated by pressuring the embedded combatants.

Alternatively, in the absence of direct intent, oblique intent would be satisfied when the perpetrator engaged in the deprivation action in the awareness that the starvation of civilians would be a foreseeable consequence.<sup>73</sup> Given the momentum of mass starvation, that threshold necessarily predates the point at which civilians start dying from malnutrition or disease arising from starvation.<sup>74</sup>

The unprecedented scale and speed with which Israel’s actions have cut off the civilian population of Gaza and destroyed OIS “surpasses any other case of man-made famine in the last 75 years.”<sup>75</sup> Coupled with key public statements,<sup>76</sup> this points towards the deprivation of OIS as either a policy of sustenance denial, or a policy undertaken with the virtual certainty that civilians will suffer conditions of life incompatible with survival.

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<sup>73</sup> Conley et al., pp.115-116.

<sup>74</sup> Alex de Waal, *Can the International Court of Justice Stop Starvation in Gaza?*, *Reinventing Peace* (Jan. 16, 2024), <https://sites.tufts.edu/reinventingpeace/2024/01/16/can-the-international-court-of-justice-stop-starvation-in-gaza/>.

<sup>75</sup> Alex de Waal, *Starvation as a Method of Warfare*, *London Review of Books* (Jan. 11, 2024), <https://www.lrb.co.uk/blog/2024/january/starvation-as-a-method-of-warfare>.

<sup>76</sup> For more examples see 3-ER-419-507.

The intention to deny sustenance was articulated from the conflict's outset. On October 7, 2023, two days prior to Gallant's announcement of the imposition of a full siege, Giora Eiland, Israeli Army Reservist Major General, former Head of the Israeli National Security Council, and adviser to the Defense Minister, wrote in an online journal: "In order to make the siege effective, we have to prevent others from giving assistance to Gaza [...] The people should be told that they have two choices; to stay and to starve, or to leave."<sup>77</sup> In a national newspaper, he elaborated on this tactic of bringing the adversary "country to the brink of dysfunction."<sup>78</sup> On October 9, he advocated targeting water treatment facilities, reasoning, "[w]hen the entire world says we have gone insane and this is a humanitarian disaster — we will say, it's not an end, it's a means."<sup>79</sup>

In explaining the total siege ordered by Defense Minister Gallant on October 9, 2023, head of the Coordinator of Government Activities in the Territories Ghassan

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<sup>77</sup> Giora Eiland, *A new turning point in the history of the State of Israel. Most people don't understand that*, Fathom (Oct. 7, 2023), <https://fathomjournal.org/opinion-a-new-turning-point-in-the-history-of-the-state-of-israel-most-people-dontunderstand-that/>.

<sup>78</sup> Giora Eiland, *The state of Gaza has started a war against Israel - and it should be fought accordingly*, Mako (Oct. 7, 2023), [https://www.mako.co.il/news-columns/2023\\_q4/Article-fcf787ad0ba0b81027.htm](https://www.mako.co.il/news-columns/2023_q4/Article-fcf787ad0ba0b81027.htm).

<sup>79</sup> *How should one respond to the massacre of hundreds?*, Yedioth Ahronoth (9 October 2023), <https://drive.google.com/file/d/115Ow2T0Na20BcoL2yautiobij8ldNsVK/view>.



Alian implied that “the citizens of Gaza” deserved to be treated as “human animals,” warning them: “you wanted hell, you will get hell.”<sup>80</sup> Israeli National Security Minister of Energy and Infrastructure Israel Katz tweeted “No electrical switch will be turned on, no water hydrant will be opened and no fuel truck will enter until the Israeli abductees are returned home.”<sup>81</sup>

In the alternative, Israel’s policy of ignoring warnings for months<sup>82</sup> and continuing to engage in various acts of OIS deprivation, even as starvation conditions have worsened past the point of multiple deaths from malnutrition,<sup>83</sup> itself evinces oblique intent—deprivation in the knowledge that starvation would occur as a result.

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<sup>80</sup>Ghassan Alian (Oct. 10, 2023) <https://www.youtube.com/shorts/5a0EWv-o7mE>.

<sup>81</sup> *Israel Katz, Minister of Energy and Infrastructure, Member of the Political-Security Cabinet, Member of Knesset, @Israel\_katz*, Tweet (Oct. 12, 2023) [https://twitter.com/Israel\\_katz/status/1712356130377113904](https://twitter.com/Israel_katz/status/1712356130377113904) and (Oct. 13, 2023) [https://twitter.com/Israel\\_katz/status/1712876230762967222](https://twitter.com/Israel_katz/status/1712876230762967222).

<sup>82</sup> *Gaza faces widespread hunger as food systems collapse, warns WFP*, World Food Programme (WFP) (Nov. 16, 2023) <https://www.wfp.org/news/gaza-faces-widespread-hunger-food-systems-collapse-warns-wfp>; Luke Taylor, *Allow More Aid into Gaza or Risk Famine, Warns WHO*. 384 BMJ 115 (Jan. 16, 2024).

<sup>83</sup> *Hostilities in the Gaza Strip and Israel | Flash Update #137*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (Mar. 12, 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-137>.

**IV. THE MATERIAL ELEMENTS OF STARVATION OF CIVILIANS AS A METHOD OF WARFARE OVERLAP WITH THE MATERIAL SCOPE OF ONE OF THE UNDERLYING ACTS OF GENOCIDE (THE INFLICTION OF DESTRUCTIVE CONDITIONS OF LIFE). IF COMBINED WITH SPECIAL GENOCIDAL INTENT, THE INFLICTION OF THOSE CONDITIONS OF LIFE WOULD QUALIFY AS GENOCIDE, NOTWITHSTANDING THE EXISTENCE OF AN ARMED CONFLICT. DESTRUCTIVE CONDITIONS OF LIFE ARE CURRENTLY PRESENT IN GAZA.**

Starvation facts can underpin a number of crimes beyond the core war crime, including, where the other elements of the crime are present, an underlying act of genocide.<sup>84</sup> While this brief does not tackle the specific issue of genocidal intent, it explicates the overlap between the underlying act of ‘deliberately inflicting conditions’ and the material scope of the starvation war crime.

Deliberately inflicting conditions of life calculated to bring about the physical destruction of one or more persons who belong to a national, ethnic, racial or religious group has been described as consisting of “the denial to members of a certain group of the elementary means of existence enjoyed by other sections of the population”.<sup>85</sup> It encompasses the creation of conditions deliberately placed upon

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<sup>84</sup>Jordash, Murdoch and Holmes, ‘Strategies for Prosecuting Mass Starvation’ [2019] 17(4) JICJ 875.

<sup>85</sup> *Prosecutor v. Stakić*, IT-97-24, Decision on Rule 98 bis Motion for Judgment of Acquittal (Oct. 31, 2002) ¶25.

one or more persons<sup>86</sup> that may not immediately kill, but would typically lead to the slow death of the group over time.<sup>87</sup>

Jurisprudence broadly recognizes the destruction of conditions of life to comprise elements of starvation as defined in IHL, incorporating, notably, the deliberate deprivation of food, including subjecting the group to a subsistence diet; of medical care, including the reduction of medical services to sub-minimum standards; of shelter; of hygiene; and systematic expulsion from homes.<sup>88</sup> The ICC *Elements of Crimes* draws language directly from the prohibition on starvation as a method of warfare when it provides that “[t]he term ‘conditions of life’ may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”<sup>89</sup> In this way, the same facts that implicate the starvation war crime, as highlighted above, can also serve to establish the material element of genocide through inflicting conditions of life. Broadly speaking, this includes the deliberate

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<sup>86</sup> *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeal Judgment (Apr. 8, 2015), ¶¶225–237.

<sup>87</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment (Sept. 2, 1998) ¶168.

<sup>88</sup> *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeal Judgment (Apr. 8, 2015), ¶226; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia-Serbia*), Judgment, (Feb. 3, 2015) ¶161; *Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1, Trial Judgment, (May. 21, 1999) ¶115-116.

<sup>89</sup> ICC *Elements of Crimes*, art. 6(c)(4), fn. 4.

deprivation of objects indispensable to survival including food, water and medical treatment, as well as the systematic destruction of homes and farmlands.

**A. Similar to the Starvation War Crime, there is No Requirement of Result for the Act of Deliberately Inflicting Conditions of Life, as Underlying Act of Genocide, to be Established.**

In assessing whether the underlying act of inflicting conditions of life is implicated, it is not necessary to determine whether members of the group died of starvation or suffered physically or psychologically from the deprivation.<sup>90</sup> Indeed, killing and causing serious bodily or mental harm are enumerated as underlying acts of genocide *alternative* to the infliction of destructive conditions of life.<sup>91</sup>

Nevertheless, as noted above, there is evidence in the current context that the starvation-related conditions of life inflicted on the population of Gaza have caused multiple deaths. Most obviously, as of March 12, twenty-seven people, including twenty-three children, have died of malnutrition and dehydration in northern Gaza and the actual number of deaths is likely to be much higher.<sup>92</sup>

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<sup>90</sup> *Tolimir* Trial Judgement, ¶742.

<sup>91</sup> Convention on Prevention and Punishment of Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277, arts. II (a-b); ICC Statute, art. 6(a-b).

<sup>92</sup> *Hostilities in the Gaza Strip and Israel | Flash Update #137*, United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (Mar. 12, 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-137>.

**B. The Requirement that Conditions of Life Be Calculated to Bring About the Physical Destruction of a Group is Distinct from the Special Intent Element of Genocide and Can Be Established Through Evidence of Action Taken Despite the Probability of Destruction.**

The underlying act of inflicting conditions of life is implicated where the conditions of life imposed upon the group are deliberate and *calculated* to bring about physical destruction. This should not be confused with the separate and additional requirement to establish genocidal intent, the subject of which is beyond the scope of the current brief. The assessment of calculation may be proven by direct evidence. However, in the absence of direct evidence, it would suffice for establishing calculation that there exists an “objective probability” that the measures imposed would lead to the group’s physical destruction in whole or in part.<sup>93</sup> In determining objective probability, the jurisprudence has elaborated the following factors: “the nature of the conditions imposed, the length of time that members of the group were subjected to them, and characteristics of the targeted group such as vulnerability”.<sup>94</sup>

In the Brđanin case the ICTY Trial Chamber concluded that starvation-related conditions of life imposed upon a group were deliberate and *calculated* to bring

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<sup>93</sup> *Karadžić*, Trial Judgment on Rule 98 *bis* Motion for Judgment of Acquittal ¶40.

<sup>94</sup> *Id.* ¶40.

about the physical destruction of that group. The Chamber based its finding on an assessment of objective probability, considering that members of the group were confined to a crowded space, with insufficient food, drinking water, hygiene facilities and a shortage of medical supplies and treatment, for as few as three days to sixteen days.<sup>95</sup>

In the context of the present case, the statements of Israeli officials on and around the announcement of the strengthened siege of Gaza on October 9, 2023, as cited above, are example of direct evidence of calculation with respect to the infliction of destructive conditions of life. However, even in the case that direct evidence of calculation was considered insufficient, the objective probability that the conditions were calculated to destroy is inescapable. As described above, for just over five months, Israeli forces have reduced the civilian population in the present case to the verge of collapse. They have destroyed, removed or rendered useless water, food and electricity and denied or obstructed humanitarian access to a population in dire need. The forces have attacked humanitarian workers and facilities and desperate civilians seeking aid, as well as hospitals, medical workers and

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I.<sup>95</sup> *PROSECUTOR V. BRĐANIN*, IT-99-36-T, TRIAL JUDGMENT, (SEPT. 1, 2004) ¶909-962.

medical patients. Healthcare in Gaza is on the brink of total failure and over 75% of Gaza's civilian population has been forcibly displaced, often multiple times.

The underlying vulnerability of the population of Gaza compounds the assessment of objective probability, further implicating the act of inflicting *calculated* conditions of life in the current context. With more than 5,556 persons per square kilometer, Gaza was already one of the most densely populated areas in the world prior to October 7. Close to 70% of the population of Gaza were already refugees and more than half the population was comprised of children. The prior blockade had already created conditions of food insecurity and heightened vulnerability. It is against this backdrop that the siege and bombardment of Gaza over the past five months must be evaluated.

## CONCLUSION

Starvation of civilians as a method of warfare is prohibited under CIL applicable to all states and armed groups and is a war crime under customary international criminal law binding on all natural persons. That prohibition is implicated in Gaza and its material scope overlaps with that of one of the underlying acts of genocide (the infliction of destructive conditions of life). If combined with special genocidal intent, outside the scope of this brief, the infliction of those conditions of life would qualify as genocide, notwithstanding the existence of an armed conflict. The requirement that conditions of life be calculated to bring about

the physical destruction of a group is distinct from the special intent element of genocide and can be established through evidence of action taken despite the probability of destruction. Destructive conditions of life are currently present in Gaza, where ongoing impediments to humanitarian relief and other forms of deprivation of objects indispensable to civilian survival implicate the deliberate infliction of conditions of life calculated to bring about physical destruction.

Dated: March 14, 2024

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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