



AL-HAQ

Genocide Series

Legal Brief III

Starvation and the Denial of
Humanitarian Assistance

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INTRODUCTION

This brief provides an analysis of the denial of humanitarian aid and depriving a population of goods essential to their survival, including through causing famine and starvation, as part of an act of genocide, specifically when committed as part of an overarching act of “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” under both the Genocide Convention (Article II(c)) and the Rome Statute (Article 6(c)) (“**Category (c) Genocide**”).

Part I of this brief sets out common definitions of “famine” and “starvation” in international governance and the history of criminalising starvation as a method of warfare. **Part II** turns to the conditions under which the denial of humanitarian aid and causing of famine or starvation constitutes the genocidal act of “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,” for which individuals **(a)** and States **(b)** can be held responsible. **Part III** sets out the denial of humanitarian aid and starvation as an act of genocide under the other acts of genocide **(a)** examining the genocidal acts of killing, physical and mental harm, and prevention of births, and sets out potential evidentiary issues **(b)** in bringing a claim; and **Part VI** addresses evolutions in this area of law and concludes.

For the time being, no individual or State has been held legally responsible for genocide for withholding or obstructing humanitarian aid, or for its causation of famine or starvation. This brief therefore heavily relies on doctrine for its analysis, drawing on the limited existing jurisprudence where relevant.

I. DEFINITIONS AND HISTORY

a) What are famine and starvation?

While frequently used interchangeably, the terms famine and starvation have a differing meaning. Famine is often employed in contemporary global governance as a scientific or technical term denoting the state of “*an extreme deprivation of food*.”¹ Famine is usually declared in relation to a specific area. The Integrated Food Security Phase Classification (IPC), the leading global initiative on food security routinely cited by international courts, considers the following factors should be met for a famine classification: (a) 20% of households in an area experience an extreme lack of food and/or cannot meet other basic needs even after full employment of coping strategies; (b) about one in three children are acutely malnourished, and (c) there are two deaths per day for every 10,000 inhabitants or four child deaths out of every 10,000 children per day, due to starvation or the interaction of malnutrition and disease.²

1 Integrated Food Security Phase Classification (IPC), Fact Sheet - IPC Famine (March 2024), https://www.un.org/unispal/wp-content/uploads/2024/03/IPC_Famine_Factsheet.pdf.

2 Ibid.

Starvation, on the other hand, is used to describe the most extreme form of undernutrition, which can lead to extreme suffering or death.³ It also conveys a proactive meaning: *causing* people to starve. In the context of violations of the law of armed conflict, the ICRC’s Commentary to the Additional Protocols provides that starvation means “*the action of starving or subjecting to famine, i.e., to cause to perish of hunger; to deprive of or ‘keep scantily supplied with food’ or ‘causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies.’*”⁴ Notably, adopting a more expansive definition, the International Criminal Court (ICC) Statute provides that the war crime of starvation covers not only deprivation of food and water but extends to other “*objects indispensable to [the] survival [of civilians].*”⁵ This could feasibly include medical supplies, blankets or clothes if indispensable for survival in the prevailing circumstances.⁶ However, commentators have observed that this may entail stretching the term “starvation” beyond its ordinary meaning.⁷

b) The history of criminalising starvation under international law

The criminalization of starvation as a method of warfare is the result of a gradual and complex evolution in international law. For centuries, the use of starvation was considered a legitimate war tactic.⁸

An important turning point occurred in 1919, with the Report of the Commission on Responsibilities, established at the end of World War I. This report identified “deliberate starvation of civilians” as a violation of the laws and customs of war, subject to criminal prosecution.⁹ This recognition marked a step forward in the protection of civilians, although, in practice, starvation continued to be used as a strategic weapon. The Allies themselves had imposed an economic blockade on Germany during the war, causing hundreds of thousands of civilian deaths¹⁰, and were reluctant to acknowledge this practice as a crime.

3 World Food Program USA, Words Matter: The Hunger Terms and Definitions You Need to Know About People Who Live on Less Than \$2 a Day (5 August 2022), <https://www.wfpusa.org/articles/words-matter-hunger-terms-definitions-you-need-to-know/>.

4 International Committee of the Red Cross (ICRC), Commentary on the Additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Martinus Nijhoff Publishers, 1987), paras. 4791 and 2089.

5 Rome Statute of the ICC, Art. 8 (2)(b)(xxv); International Criminal Court, Elements of Crimes (2013), <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>, p. 2.

6 See *ibid.*; Global Rights Compliance, Legal Paper: The Crime of Starvation and Methods of Prosecution and Accountability (2019), <https://starvationaccountability.org/wp-content/uploads/2019/06/Legal-Paper-Starvation.pdf>, p. 6 and fn. 42.

7 Ventura, Manuel J. “Prosecuting Starvation under International Law: Exploring the Possibilities”, *Journal of International Criminal Justice* (2019), Volume 17, Issue 4, p. 9.

8 Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863, <https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863>, art. 17.

9 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties Report Presented to the Preliminary Peace Conference, 1919 Report of the Commission on the Responsibility of the War, and on Their Punishment (excerpts) (29 March 1919), https://assets.cambridge.org/97811087/29086/excerpt/9781108729086_excerpt.pdf.

10 Whyte, Jessica. “A ‘Tragic Humanitarian Crisis’: Israel’s Weaponization of Starvation and the Question of Intent”, *Journal of Genocide Research* (2024), pp. 6-11; JUSTICEINFO.NET, Anne Van Mourik and Lucy Gaynor, Starvation and potential ICC warrants on Gaza: what does international law say? (6 May 2024), <https://www.justiceinfo.net/en/131620-starvation-potential-icc-warrants-gaza-what-does-international-law-say.html>: “By the war’s conclusion, an estimated 424,000 to 478,500 civilians in Germany perished due to the blockade’s devastating effects”. See also Mulder, Nicholas and van Dijk, Boyd. “Why Did Starvation Not Become the Paradigmatic War Crime in International Law?” in ed. Venzke and Heller, *Contingency in International Law: On the Possibility of Different Legal History* (Oxford: Oxford University Press, 2021).

In the 1940s, Raphael Lemkin, a jurist and the principal architect of the Genocide Convention, expanded the debate on famine and starvation by classifying it as a genocidal tactic.¹¹ However, when the Genocide Convention was adopted in 1948, starvation was only indirectly mentioned through the formulation in Article 2(c),¹² reflecting a continued hesitance to directly address this method. This reluctance was partly fuelled by the fact that starvation had also been used as a weapon during World War II by the major powers. For example, the United States carried out an operation called “Operation Starvation” in 1945, targeting Japanese supply lines and drastically reducing the food rations of Japanese civilians.¹³

It was not until 1977, with the adoption of the Additional Protocols to the Geneva Conventions, that starvation was explicitly prohibited under international humanitarian law (“IHL”).¹⁴ Article 54 of Additional Protocol I prohibits starving civilians in international armed conflicts, while Article 14 of Additional Protocol II extends this prohibition to non-international armed conflicts. These provisions fall within a humanitarian framework aimed at regulating methods and means of warfare, and banning practices that cause unnecessary suffering to civilian populations. This advancement reflected the continuous efforts of delegates from States that had not yet been decolonized at the time of the 1949 Geneva Conventions, and of national liberations movements.¹⁵ The prohibition of causing famine/starvation as a method of warfare now constitutes a customary rule of international humanitarian law, as underscored by Rule 53,¹⁶ applicable to both international and non-international armed conflicts. It therefore applies regardless of the ratification of the aforementioned — or indeed any other — legal instruments.

Finally, in 1998, the adoption of the Rome Statute marked a decisive step in the international recognition of starvation as a war crime. Article 8(2)(b)(xxv) of the Statute explicitly classifies ‘the intentional starvation of civilians as a method of warfare’ as a war crime.¹⁷

11 Ibid.: “In his writings in his book *Axis Rule in Occupied Europe* (1944), Lemkin emphasized that the deliberate deprivation of food and resources could indeed be used to systematically destroy a targeted group”. See also Lemkin, Raphael, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944), pp. 85-89.

12 Rome Statute of the International Criminal Court, Art. 2 (c): “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”. See also Mulder, Nicholas and van Dijk, Boyd. “Why Did Starvation Not Become the Paradigmatic War Crime in International Law?”.

13 Anne Van Mourik and Lucy Gaynor, *Starvation and potential ICC warrants on Gaza: what does international law say?*: “The average daily per capita food intake in Japan plummeted from 1900 calories in 1944 to 1680 calories by mid-summer 1945, leading to the imminent starvation of hundreds of thousands of Japanese civilians.”

14 Whyte, Jessica. “A ‘Tragic Humanitarian Crisis’: Israel’s Weaponization of Starvation and the Question of Intent”, pp. 6-11.

15 Ibid.

16 ICRC, *Customary International Humanitarian Law*, Rule 53: “The use of starvation of the civilian population as a method of warfare is prohibited”.

17 See also Just Security, Yousef Syed Khan, *Gaza Arrest Warrants: Assessing Starvation as a Method of Warfare and Associated Starvation Crimes* (31 May 2024), <https://www.justsecurity.org/96257/assessing-gaza-starvation/>; International Criminal Court (ICC), *Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant* (21 November 2024), <https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>.

II. STARVATION AS AN ACT OF GENOCIDE

a) Individual Criminal Liability

This section will now assess the likely requirements for holding individuals criminally responsible for the denial and impeding of humanitarian assistance and basic services, and the causing of starvation, as an act of genocide, describing first the key elements of the *actus reus* (material element of the crime) (i), before turning to the *mens rea* (mental element of the crime) (ii).

This analysis addresses liability in the context of any potential proceedings before the International Criminal Court (ICC) under article 6(c) of the Rome Statute (reflective of article II(c) of the Genocide Convention): “For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: [...] Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part [...]” (“category (c) genocide”). Reference will also be made to relevant jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the statutes of which incorporated the same category of genocide at articles 4(c) and 2(c) respectively and therefore constitute significant precedent for the ICC.

i) *Actus reus* – the material element

The Elements of Crimes, a document drafted to assist the ICC in interpreting articles 6 to 8 of the Rome Statute, provide that the *actus reus* of Article 6(c), Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, comprises three primary elements:

Element 1: “The perpetrator inflicted certain conditions of life upon one or more persons”. The ICTY, ICTR and the International Court of Justice (ICJ) have all addressed the role of the denial and impeding of humanitarian aid and basic services to this *actus reus*, stating such conditions of life could encompass: “deprivation of food, medical care, shelter or clothing, as well as lack of hygiene”, “subjecting the group to a regime of subsistence... the reduction of essential medical services below minimum requirement...”, and generally “creat[ing] circumstances that would lead to a slow death.”¹⁸ As academics have indicated,

18 Prosecutor v. Stakić, Trial Chamber II, Judgment, IT-97-24-T (31 July 2003) (Stakić, Trial Judgment), para. 517; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3., para. 161; The Prosecutor v. Akayesu, Trial Chamber I, Judgment, ICTR-96-4-T (2 September 1998) (Akayesu, Trial Judgment), para. 506. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Declaration of Intervention of Spain under Article 63 of the Statute of the International Court of Justice, 28 June 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240628-int-01-00-en.pdf>, para. 32:

“...Spain considers that the blockade of humanitarian assistance is leading to conditions of life in the Gaza Strip that could fall under paragraph c) of Article II of the Convention...”

South Africa v. Israel, Declaration of Intervention by the Plurinational State of Bolivia, 8 October 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20241008-int-01-00-en.pdf>, para. 42:

“Similarly, Bolivia wishes to underscore that siege, starvation, widespread destruction of civilian and medical infrastructure, deprivation of food and medical supplies and treatment, forcible displacement by means of systematic deportation, and denial of access to humanitarian aid may amount to genocidal acts within the meaning of Article II (c).”

South Africa v. Israel, Declaration of Intervention by the United Mexican States, 24 May 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-int-01-00-en.pdf>, paras. 38-39.

this would also include destroying food and water supplies or preventing their delivery;¹⁹ and interfering with the production of food and water supplies, for example, by disrupting critical farming equipment or destroying farming land.²⁰ All in all, they include “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction”.²¹ Such methods must be inflicted *deliberately* (*i.e.* the perpetrator intended to inflict them),²² and be of a sufficient length and scale to be capable of causing such destruction, in whole or in part.²³

Element 2: “Such person or persons belonged to a particular national, ethnical, racial or religious group”: the action must affect members of a protected group. For a discussion as to what constitute protected groups, see Al-Haq Legal Brief II: Protected Groups under the Genocide Convention.²⁴

Element 3: “The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”: this element is deemed a “contextual circumstance.”²⁵ The acts under Element 1 should generally take place in a “*manifest* [i.e. objective] *pattern of similar conduct*”.²⁶ This element was introduced to avoid having individual ‘lone’ acts be subsumed under genocidal acts, *i.e.*, if they did not take place in the context of a crime of genocide which — according to States’ delegates — required “that there be a certain scale or other real threat to the group”.²⁷ The element does not add a mental requirement, nor does it exclude individual genocidal acts that took place in the beginning of a genocide (hence “context”), and does not require that the pattern consist of similar acts of genocide — *i.e.*, any of the prohibited acts (killing, harm, ...) under the Genocide Convention could form part of the pattern of conduct relevant to establishing the presence of the contextual element.²⁸

Element 4: “the conditions of life were calculated to bring about the physical destruction of that group, in whole or in part”: the perpetrator intended for the conditions of life to be inflicted on the protected group, and knew that the consequence of inflicting such conditions would be the destruction of the protected group. Doctrine suggests the term “calculated” is not a reference to the *mens rea* of the perpetrator.²⁹ The particular conditions inflicted on the victim(s) may have been calculated by a third party. However, the alleged perpetrator must have knowledge of the fact that the conditions would bring

19 Ventura, Manuel J. “Prosecuting Starvation under International Law: Exploring the Possibilities”, p. 789.

20 Ibid. See also, *mutatis mutandis*, in relation to the crime against humanity of extermination, The Prosecutor v. Bagilishema, Trial Chamber I, Judgment, ICTR-95-1A-T (7 June 2001) (Bagilishema, Trial Judgment), para. 90: “The ‘creation of conditions of life leading to the mass killing’ of others include, for example imprisoning a large number of people and withholding the necessities of life, so that mass death results; or introducing a deadly virus into a population and preventing medical care, with the same result.”

21 Akayesu, Trial Judgment, para. 505; Croatia v. Serbia, para. 161.

22 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Bosnia v. Serbia), Judgment, I.C.J. Reports 2007, p. 43, para. 186. See also The Prosecutor v. Kayishema and Ruzindana, Trial Chamber II, Judgment, ICTR-95-1-T (21 May 1999) (Kayishema and Ruzindana, Trial Judgment), para. 548.

23 Kayishema and Ruzindana, Trial Judgment), para. 548.

24 Al-Haq, Al-Haq Legal Brief II: Protected Groups under the Genocide Convention (4 August 2025), https://www.alhaq.org/cached_uploads/download/2025/08/04/genocide-series-legal-brief-2-protected-groups-1-1754328855.pdf.

25 International Criminal Court, Elements of Crimes (2013), p. 1.

26 Ibid., p. 2.

27 Lee, Roy S. ed. The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (New York, Transnational Publishers, Inc., 2001), pp. 45-49.

28 Ibid.

29 Klamberg, Mark ed. Commentary on the Law of the International Criminal Court (Brussels: Torkel Opsahl Academic EPublisher, 2017), p. 26.

about the destruction, i.e., “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”³⁰

Jurisprudence and doctrine provide additional guidance on interpretation of these four elements.

Proof of result: A finding of the *actus reus* of genocide of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” does not require proof of the effective physical destruction of the protected group or its members, through such conditions. It simply requires that the “conditions of life” have come into existence and been inflicted.³¹ It is therefore immaterial whether the conditions of life actually succeed in bringing about the destruction of the group, in whole or in part, or not³² — although they must be objectively capable of doing so.³³ Committing the genocidal act in the most efficient way is also not a requirement. For example, the ICTY Appeals Chamber recognised that international attention can prevent the perpetrator “who devised the genocidal plan from putting it into action in the most direct and efficient way” and compel him to adopt “the method which would allow them to implement the genocidal design while minimizing the risk of retribution”.³⁴

No temporal requirement: Article 6(c) genocide includes “*methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.*”³⁵ Doctrine suggests there is no precise duration of time over which conditions need be imposed,³⁶ although the Trial Chamber of the ICTR suggested a short period of deprivation of food may not suffice.³⁷

Commission by omission: the *actus reus* of an offence may be an act of commission or an act of omission. It is possible to commit all five acts of genocide by omission, but this is most clearly applicable to Article 6(c) on genocide by deliberately inflicting conditions of life calculated to bring about physical destruction. Such an omission would be especially clear where the omission concerns an existing duty, and several ICTY and ICTR judgments suggest that international human rights law and international humanitarian law may provide an additional source of such duties despite the fact they are generally considered to impose obligations on States rather than individuals.³⁸ As regards starvation and famine, duties to act in situations of belligerent occupation include article 55 of the Fourth Geneva Convention,

30 Ibid., p. 27; Rome Statute, Article 30 (3).

31 Prosecutor v. Brđanin, Trial Chamber II, Judgment, IT-99-36-T (1 September 2004) (Brđanin, Trial Judgment), para. 691; Stakić, Trial Judgment, para. 517; Mark Klamberg, Commentary on the Law of the International Criminal Court, p. 26.

32 Ibid., Schabas, William A. Genocide in International Law: the Crime of Crimes, 2nd Edition (Cambridge: Cambridge University Press, (2009), p. 192. See also, Al-Haq, Al-Haq Legal Brief I: Special Intent (Dolus Specialis) Required to Classify Acts as Genocide (12 May 2025), https://www.alhaq.org/cached_uploads/download/2025/05/12/legal-brief-1-genocide-series-1747067173.pdf.

33 Brđanin, Trial Judgment, para. 906.

34 Prosecutor v. Krstić, Appeals Chamber, Judgment, IT-98-33-A (19 April 2004) (Krstić, Appeal Judgment), para. 32.

35 Akayesu, Trial Judgment, para. 505. See also Kayishema and Ruzindana, Trial Judgment, para. 116.

36 Schabas, William A., p. 191.

37 Kayishema and Ruzindana, Trial Judgment, para. 548.

38 See e.g., *mutatis mutandis*, Prosecutor v. Mrkšić and Šljivančanin, Appeals Chamber, IT-95-13/1-A (5 May 2009) (Mrkšić and Šljivančanin, Appeal Judgment), para. 151.

which requires an Occupying Power to ensure the food supplies of the population under occupation,³⁹ and the obligation not to destroy objects indispensable to the population's survival.⁴⁰ States intervening in the ICJ's Advisory proceedings in *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory* have further outlined the duties of an Occupying Power with regards to humanitarian assistance *vis-à-vis* a population occupied by it.⁴¹ These duties will often be applicable to individuals in a position of authority, for instance with superior or command responsibility.⁴² In other words, an omission to fulfil an obligation to provide a population with the means indispensable to their survival, including where this is the case *vis-à-vis* detainees,⁴³ could also constitute an act of genocide under Article 6(c) where accompanied by the requisite *mens rea*.

Interaction with International Humanitarian Law: note however that it is also conceivable that “*inflicting on the group conditions of life calculated to bring about its physical destruction [...]*” may result from lawful actions under international humanitarian law (IHL), *e.g.*, targeting infrastructure or convoys where such targeting is in line with the principles of military necessity, distinction, proportionality and humanity. In principle, lawful attacks under IHL can still meet the threshold required for criminal responsibility under Article 6(c) of the Rome Statute if they contain the relevant material and mental elements, including the requisite genocidal intent.⁴⁴

The following observations may also assist in determining the presence of the abovementioned material elements:

Vulnerabilities: vulnerabilities can be engineered or can be inherent. For example, in relation to engineered vulnerabilities, in its provisional measures order in *The Gambia v. Myanmar* the International Court of Justice (ICJ) observed that the Rohingya group remained “extremely vulnerable”, referencing *inter alia* Myanmar's citizenship laws having disenfranchised the Rohingya Muslim population of Myanmar, rendering them stateless.⁴⁵ Many such engineered vulnerabilities were also highlighted by

39 South Africa v. Israel, Request for the Modification of the Order Indicating Provisional Measures of 26 January 2024, Order of 28 March 2024, I.C.J. Reports 2024, Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi, <https://www.icj-cij.org/sites/default/files/case-related/192-20240328-ord-01-03-bi.pdf>, paras. 2, 6-7.

40 ICRC, Customary International Humanitarian Law, Rule 54.

41 See, for example, *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory*, Request for an Advisory Opinion, Written Statement on behalf of the Secretary-General of the United Nations, 27 February 2025, <https://www.icj-cij.org/sites/default/files/case-related/196/196-20250227-wri-04-00-en.pdf>; *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory*, Request for an Advisory Opinion, Written Statement of the State of Palestine, 28 February 2025, <https://www.icj-cij.org/sites/default/files/case-related/196/196-20250228-wri-25-00-en.pdf>; *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory*, Request for an Advisory Opinion, Written Statement of the Republic of South Africa, 28 February 2025, <https://www.icj-cij.org/sites/default/files/case-related/196/196-20250228-wri-25-00-en.pdf>.

42 Roth, Robert. “Improper Omission” in Jérôme de Hemptinne, Robert Roth and Elies van Sliedregt eds., *Modes of Liability in International Criminal Law*, (Cambridge: Cambridge University Press, 2019), p. 63; Mettraux, Guénaél. *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), pp. 37-95.

43 Schabas, William A. p. 177; Tams, Christian, Berster, Lars and Schiffbauer, Björn, eds. *Convention on the Prevention and Punishment of the Crime of Genocide: Commentary* (London: CH Beck, Hart and Nomos, 2014), p. 183.

44 Lawfare, Gabor Rona and Natalie Orpett, *Can Armed Attacks That Comply With IHL Nonetheless Constitute Genocide* (5 June 2024), <https://www.lawfaremedia.org/article/can-armed-attacks-that-comply-with-ihl-nonetheless-constitute-genocide>.

45 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3, para. 72

the Committee on the Elimination of Racial Discrimination (CERD) as indicators relevant to assessing the increased possibility of genocide.⁴⁶ Academic literature has echoed the relation between genocide and the engineering of vulnerabilities as well — especially with respect to indigenous populations subject to settler-colonial regimes and minority groups.⁴⁷ Other vulnerabilities are more inherent,⁴⁸ such as for example:

Children: In *The Gambia v. Myanmar*, six intervening States held that “in assessing whether a specific act constitutes an underlying act of genocide, if the act is committed against children, its particular impact on children must be taken into account”, specifying that:

“...the conditions of life that will bring about the physical destruction of members of a group will depend on the characteristics of members of the group. When considering the deprivation of food or the imposition of a subsistence diet, it would be relevant to consider that the amount of food that would ultimately lead to the death of an adult is different than that which would lead to the death of a child. Similarly, the medical needs of children are different than those of adults, and account needs to be taken of those differences in considering whether the absence of particular medical services amounts to the imposition of conditions of life that would bring about the destruction of specific members of the group... A situation in which children are unable to survive might additionally lead to the inability of the group as a whole to regenerate itself...”⁴⁹

46 See e.g. Indicator Nine: “Systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media”, Indicator 13: “Significant flows of refugees and internally displaced persons, especially when those concerned belong to specific ethnic or religious groups”, and Indicator 15: “Policies aimed at the prevention of delivery of essential services or assistance, including obstruction of aid delivery or access to food, water, sanitation or essential medical supplies in certain regions or targeting specific groups”, at United Nations Committee on the Elimination of Racial Discrimination (UN CERD), Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, CERD/C/67/1 (14 October 2005), https://www.ohchr.org/sites/default/files/Documents/Press/indicators_for_genocide.pdf.

47 See e.g. Lemkin, Raphael, Chapter IX; Moses, Dirk. *The problems of genocide : permanent security and the language of transgression* (Cambridge: Cambridge University Press, 2011); Wolfe, Patrick. “Settler colonialism and the elimination of the native”, *Journal of Genocide Research* (2006), Volume 8, Issue 4.

48 Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory including East Jerusalem, Advisory Opinion of 19 July 2024 (Policies and Practices of Israel, Advisory Opinion), Declaration of Judge Charlesworth, <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-10-en.pdf>, para.2 :

“Palestinians as a group share an ethnicity, but they also have many different identities individually — for example, in terms of age, disability and gender.”

49 *The Gambia v. Myanmar*, Joint declaration of intervention of Canada, the kingdom of Denmark, the French Republic, the Federal Republic of Germany, the kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland pursuant to Article 63 of the Statute of the International Court of Justice, 15 November 2023, <https://icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf>, paras. 38, 42 and 43. See also *The Gambia v. Myanmar*, Declaration of Intervention by Ireland, 20 December 2024, <https://icj-cij.org/sites/default/files/case-related/178/178-20241220-int-01-00-en.pdf>, p. 19:

“Again, the conditions of life imposed on the protected group, in whole or part, will have different impacts on different categories of group members, with vulnerable members such as children being more susceptible to adverse conditions, such as starvation.”;

South Africa v. Israel, Application for Permission to Intervene and Declaration of Intervention of Belize, 30 January 2025, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20250131-int-01-00-en.pdf>, paras. 12, 20, 71; and Policies and Practices of Israel, Advisory Opinion, Declaration of Judge Charlesworth, para. 9:

“...Similarly, the effects of Israel’s practice of property demolition are felt particularly by children, as the Advisory Opinion implies (Advisory Opinion, paragraph 217).”

See also Jepkemboi, Grace, “The Effects of Hunger on Physical and Cognitive Development of Children”, in Judith Szente, ed., *Assisting Young Children Caught in Disasters*, (Springer Cham 2018), https://link.springer.com/content/pdf/10.1007/978-3-319-62887-5_10.pdf; Kerac, Marco and Cheng, Mengling, “Long-term and intergenerational impacts of famine: why preventing and treating child malnutrition must be seen as an investment and not a cost”, *The American Journal of Clinical Nutrition* (2024), Volume 119, Issue 2, <https://ajcn.nutrition.org/action/showPdf?pii=S0002-9165%2823%2966297-5>, pp. 239 – 240.

Gender: Similarly, as stressed by Mexico in its intervention in *South Africa v. Israel*,⁵⁰ and as addressed by Judge Charlesworth in her separate Declaration in the context of the Advisory Opinion on Israel's unlawful occupation,⁵¹ the gendered effect of measures directed towards members of a group should not be overlooked.

ii) Mens rea – the mental element

Article 30 of the Rome Statute provides that an individual shall only be liable for a crime if the material elements are committed with the relevant *mens rea*. The Elements of Crimes affirm that the *mens rea* of Article 6(c) comprises two primary elements:

Element 1: “the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such”: this refers to the overarching specific intent (*dolus specialis*) necessary to categorise any acts as constituting part of a crime of genocide (see Al-Haq Legal Brief I: Specific Intent).⁵²

As with the material elements of the crime, specific characteristics of the members of the group targeted or affected can provide further indication as to the presence of the mental elements of the crime as well, including of the *dolus specialis*. As stated for example by Ireland in its intervention in *The Gambia v. Myanmar*, “certain reasonable inferences can be drawn from acts directed against, or failing to distinguish, child members of the group”.⁵³

Element 2: A person would only be “criminally responsible and liable for punishment ... within the jurisdiction of the Court” if “the material elements [of the crime] are committed with intent and knowledge”. A person has intent where: “(a) [i]n relation to conduct, that person means to engage in the conduct” and where “(b) [i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events”; and “[K]nowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”⁵⁴

50 *South Africa v. Israel*, Declaration of Intervention by the United Mexican States, paras. 42-43:

“The actions taken by a State to prevent a certain group from receiving humanitarian aid, in the context of an armed conflict, brings about differentiated consequences towards specific components of said group. Women and girls, for example, may be subject to specially aggravating conditions due to the impossibility of access to feminine hygiene products and health procedures. The European Commission has stated that “[i]n times of complex crises, [...], women and girls become extremely exposed to all kinds of risks”, “...particularly to infectious diseases while caring for sick family members, as they bear primary responsibilities as caregivers”

51 *Policies and Practices of Israel*, Advisory Opinion, Declaration of Judge Charlesworth, paras. 6 and 8.

52 Al-Haq, Legal Brief I: Special Intent (*Dolus Specialis*) (12 May 2025), <https://www.alhaq.org/publications/26380.html>

53 *The Gambia v. Myanmar*, Declaration of intervention by Ireland, pp. 19-20:

“In assessing whether a pattern of conduct may disclose a genocidal plan or campaign, Ireland respectfully submits that extra weight should be given to evidence of the effects of the material acts of genocide on children, and on the consequences of such acts for the long term viability of the protected group. This is especially important in the context of armed conflict where recent studies have concluded that children are up to seven times more likely to be killed by explosive weapons, and that hunger and malnutrition affects them much earlier and more severely. Where there is evidence that children of the protected group have been particularly targeted, or that the conduct targeting the group made no distinction between child and adult members of it, certain conclusions can be drawn. As children are essential to the continued existence of any human group, acts constituting the material elements of genocide directed at, or without making distinction for, child members of the group will have an obviously significantly greater impact on the resilience and ultimate survival of the group than the same acts directed at a similar or larger number of adult members. Moreover, the psychological effects of these acts on surviving children may greatly impair their capacity to contribute to the growth of the group in the future. It therefore follows that certain reasonable inferences can be drawn from acts directed against, or failing to distinguish, child members of the group.”

54 Rome Statute, Art. 30.

b) State responsibility for starvation as a crime of genocide

While section 1 analysed individual criminal responsibility, this section will address the question of state responsibility for the denial or obstruction of humanitarian aid and the starving of a population as a crime of genocide, in particular under Article II(c) of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which contains the same formulation as Article 6(c) of the Rome Statute.

Can states be held responsible for genocide?: While the Genocide Convention is principally concerned with engaging States' commitment to prevent and punish genocide, and does not explicitly provide that States may be held responsible for the commission of genocide, the ICJ has confirmed that the logical effect of Article I is to prohibit States from committing genocide.⁵⁵ Moreover, customary international law also prohibits the commission of genocide — a prohibition which constitutes a peremptory norm (*jus cogens*) under international law,⁵⁶ and an obligation *erga omnes, i.e.*, in view of the importance of the rights involved, all States have a legal interest in their protection.⁵⁷

What form of responsibility would a State assume?: In accordance with general principles of international law, a breach of any international obligation, including the Genocide Convention, would give rise “international responsibility”, requiring the State to cease the unlawful conduct and make reparation in an adequate form. State breaches of international law result in this singular form of responsibility, which is distinct from criminal responsibility. Findings of such breaches also have consequences for third States, who have an obligation not to recognise as lawful or aid and assist in the wrongful act;⁵⁸ and have an obligation not to recognise as lawful or aid and assist in the maintenance of the situation resulting from the serious breach.⁵⁹ They also have an obligation to cooperate to bring the serious breach(es) to an end.⁶⁰

For the purposes of the actus reus of genocide, which acts can be attributed to States?: Under international law, the conduct of state organs is attributable to the state. The term “organs” encompasses all persons and entities with that status under national law, such as military personnel, irrespective of grade.⁶¹ It may also extend to certain non-state entities under the instruction, direction or control of the state.⁶² It also covers the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority if the organ, person or entity acts in that capacity, even if it exceeds

55 Bosnia v. Serbia, Judgment, para.166.

56 Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, para. 64; Bosnia v. Serbia, Judgment, para. 161. See also: Direito Internacional e Comparado, Dire Tladi, The Relationship between ius cogens and Genocide: A Legal Perspective (18 June 2025), https://www.youtube.com/watch?v=fWbFFo_YsrQ.

57 Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595, p. 616, para. 31; Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, p. 32, paras. 33-34.

58 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, Article 16.

59 Ibid., Article 41

60 Ibid.

61 Ibid., Article 4(2).

62 Ibid., Article 8; Bosnia v. Serbia, Judgment, para. 384.

its authority or contravenes instructions.⁶³

For the purposes of mens rea, how can specific intent be attributed to States?: Per the definition of genocide in article II, the State must have acted with specific intent. While certain commentators have suggested that a State's specific intent may only be inferred from the existence of a state policy or plan;⁶⁴ others have maintained that a State would also incur responsibility if the persons whose conduct is attributable to the State entertain the requisite genocidal intent.⁶⁵ This second manner of attribution would stem from the fact that, where acts constituting the commission of genocide are committed by (a) State organ(s) or person(s) or entities exercising elements of governmental authority, those organs', persons' or entities' genocidal conduct is attributable to the State and the State is internationally responsible for the commission of genocide.⁶⁶ This also extends to instances where the organ, person or entity acting in that capacity "exceeds its authority or contravenes instructions".⁶⁷ The commission of genocide by a person or group of persons that are not organs of the State would also be attributable to the State if the person or group of persons is in fact acting on the instructions of, or under the direction or "effective control" of, that State.⁶⁸

III. FURTHER OBSERVATIONS

a) Other acts of genocide

Causing starvation and the denial of aid can also constitute acts of genocide under Article II(a) ("killing members of the group"); Article II(b) ("Causing serious bodily or mental harm to members of the group"); and Article II(d) ("Imposing measures intended to prevent births within the group") of the Genocide Convention,⁶⁹ in addition to acts of genocide under Article II(c) — where the relevant material and mental elements of the crime are met. There is no obstruction to recognising an act as genocidal under various categories of genocidal acts, as long as the relevant *actus reus* and *mens rea* are present.⁷⁰

63 Ibid., Article 7; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, para. 214.

64 Schabas, William A., p. 250; Gaeta, Paola. "On What Conditions Can a State Be Held Responsible for Genocide?", *European Journal of International Law* (2007), Volume 18, Issue 4. See also United Nations Security Council (UNSC), Report of the International Commission of Inquiry on Darfur to the Secretary-General, S/2005/60 (1 February 2005), <https://undocs.org/S/2005/60>, para. 518.

65 Tams, Christian, Berster, Lars and Schiffbauer, Björn, eds, p. 63.

66 Ibid. See also *Bosnia v. Serbia*, Judgement, para. 384, 396-412; Milanović, Marko. "State Responsibility for Genocide", *European Journal of International Law* (2006), Volume 17, Issue 3.

67 Ibid.

68 Ibid.; International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Article 8.

69 See e.g. *South Africa v. Israel*, Declaration of Intervention by the Plurinational State of Bolivia, para. 43:

"Additionally, Bolivia maintains that strikes and blockades leading to extreme conditions of life, lack of essential supplies, inadequate or in-existent healthcare, maternity or emergency assistance, and undernourishment may amount to genocidal acts within the meaning of Article II (d) through a serious increase in miscarriages, stillbirths, premature births, and deaths from preventable causes in both women and infants."

70 See Mettraux, Guénaél. *International Crimes: Law and Practice, Volume I: Genocide* (Oxford: Oxford University Press, 2019), pp. 256-257. See also *mutatis mutandis*, *Kayishema and Ruzindana*, Trial Judgment, para. 548, where rape — habitually thought of as relevant to category (b) ("causing serious bodily or mental harm to members of the group"), was considered relevant to Category (c) ("conditions of life") as well.

b) Evidentiary Issues

A range of evidentiary issues are likely to arise when bringing claims against both individuals and states. Notably:

Causal link: it can be complex to determine the precise cause of mass starvation and famine and conclusively establish an underlying starvation policy and underlying intent, as “[g]eneralized food insecurity, underdevelopment, weak healthcare systems, environmental or climatic factors ... economic crisis or unintentional ramifications of armed conflict might be brought forward as factors that purportedly mitigate the direct responsibility of a perpetrator regime”.⁷¹

Proving intent: unlike direct forms of violence involving the use of force (including through snipers or airstrikes), starvation inflicts a slow form of suffering, making it less tangible in the short-term and in legal terms. Determining intent becomes particularly challenging in cases of starvation, where a deliberate tactic can also plausibly be portrayed as an unintended consequence of broader policies with other objectives.⁷² Note, however, that the crime of genocide can be established even if the perpetrator possessed other motives, or additional intent.⁷³ In addition, the information available to decision-makers about the likely impact of policies resulting in starvation, and what action could have been taken to prevent that impact of their policies vs. the action that was taken by them, are all relevant to establishing intent. Similarly, continued omissions of States with relevant legal duties (*e.g.*, under international humanitarian law) subsequent to clear warnings and knowledge of impending starvation and famine would also be relevant to establishing intent.

IV. CURRENT DEVELOPMENTS AND POTENTIAL EVOLUTIONS

While the denial of humanitarian aid and starvation can constitute acts of genocide — especially under the form of the “[d]eliberate[...] inflicting on the group” of “conditions of life calculated to bring about its physical destruction in whole or in part” — this legal avenue remains largely untested in both individual and state responsibility contexts. The analysis presented underscores the complexity of defining and prosecuting the denial of humanitarian aid and starvation within the framework of genocide, particularly given the evidentiary challenges of proving intent and causation. The evolution of international law, highlighted by increasing attention from UN bodies⁷⁴ and recent cases brought before the ICJ,⁷⁵ reflects growing recognition of starvation as not just a means and method of war, but also a means and method to destroy a group in whole or in part. Continued development in jurisprudence and international mechanisms is essential to ensure accountability for starvation and the denial of humanitarian aid, including when part of a crime of genocide, and to prevent its use as a method of group destruction.

71 Conley, Bridget and de Waal, Alex. “The Purposes of Starvation: Historical and Contemporary Issues”, *Journal of International Criminal Justice* (2019), Volume 17, Issue 4, p. 701.

72 Anne Van Mourik and Lucy Gaynor, *Starvation and potential ICC warrants on Gaza: what does international law say?*.

73 See Al-Haq, *Al-Haq Legal Brief I: Special Intent*.

74 See, *e.g.*, United Nations General Assembly, Report of the Special Rapporteur on the right to food, Michael Fakhri: Starvation and the right to food, with an emphasis on the Palestinian people’s food sovereignty, A/79/171 (17 July 2024), <https://undocs.org/A/79/171>, paras. 4, 42-64.

75 See *e.g.*, *South Africa v. Israel*.