

Addendum to:
Does the closure of Gaza constitute the crime against humanity of persecution?
Independent Legal Opinion

16 January 2024

Summary of conclusions

Since at least 2007, Israel has imposed a “closure” on Gaza, comprising a fluctuating series of border restrictions on people and commodities. In 2022, we considered that there was a reasonable basis to believe that the closure constitutes the crime against humanity of persecution.

On 7 October 2023, Hamas launched a vicious attack of unprecedented scale within Israel, involving substantial and extreme violence against civilians. As part of its response, Israel radically amplified the severity of the closure and, thereby, its consequences for people in Gaza. The (recent) “total siege”, and (current) heightened restrictions, have imposed severe hardships on a civilian population that had already been rendered highly vulnerable by more than 15 years of closure.

We have concluded that there is a reasonable basis to believe that the legal elements of the crime of persecution continue to be met in respect of the intensified closure. We conclude that conditions in Gaza amount to a severe deprivation of human rights, and that they have been imposed knowingly and, on the part of at least some officials, deliberately. In the circumstances, the infliction of severe deprivation on a Palestinian population is discriminatory and, it appears, intentionally so. We can identify no justification or excuse in international law that would permit this conduct.

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1. INTRODUCTION

1. In December 2022, we concluded a legal opinion for Lawyers for Palestinian Human Rights (“LPHR”) regarding the closure of Gaza (“Opinion”).¹ We were asked whether the closure constituted the crime against humanity of persecution, with particular reference to the framework of the International Criminal Court (“ICC”). We concluded that there was a reasonable basis to believe that it did.
2. On 7 October 2023, Hamas led a large-scale attack in Israel. Approximately 1200 people were killed, the majority civilian, and around 240 were abducted, with the apparent intent of holding them hostage. In response, Israel launched “Operation Swords of Iron” in Gaza, which has included massive aerial bombardments and the use of ground forces. On 9 October, Israel declared that it would implement a “complete” or “total” siege of Gaza: no food, water, medicine, electricity, or fuel would be permitted to enter. After some time, Israel agreed to the entry of some humanitarian aid, but the volume of basic necessities entering Gaza has remained well below pre-October 2023 levels, despite dramatically increased need.
3. LPHR has asked that we provide an addendum to our December 2022 opinion considering these developments. That is, we are asked to assess whether the events of and since 7 October 2023 alter our assessment that the Gaza closure appears to constitute the crime against humanity of persecution.
4. We caution that our analysis and conclusions here should not be read as implying a position on the lawfulness or unlawfulness of conduct beyond the closure - whether by Israel, Hamas, or other actors. For example, Hamas’ attacks on civilians fall outside the scope of this analysis, as does the lawfulness of Israeli military targeting. Similarly, our focus on the crime against humanity of persecution should not be interpreted as implying any view regarding the (un)availability of other legal characterisations (for example, of genocide). We have not analysed those questions and therefore take no position on them.
5. This Addendum is intended to be read together with our original Opinion, in which we assessed all of the elements of the crime against humanity of persecution, as well as potentially relevant defences. The law as set out there remains current - we have reviewed key judicial decisions issued since that time but have not identified any material changes. In this document, we have limited ourselves to revisiting our analysis of those elements and defences which might arguably have been affected by the events on and since 7 October 2023.

¹ Does the closure of Gaza constitute the crime against humanity of persecution? Independent Legal Opinion, 5 December 2022.

6. As before, we have sought to reach conclusions against the standard of *a reasonable basis to believe*. This is the standard of proof used to determine whether an investigation should be initiated under the Rome Statute, and is far lower than the “beyond reasonable doubt” standard required to make a finding of individual criminal responsibility. Conclusions reached against this standard, therefore, do not demonstrate guilt (something that only a fair criminal trial can achieve) but rather indicate the need for a full forensic investigation.

2. FACTUAL BASIS OF THIS ADDENDUM

7. We have faced challenges ascertaining relevant factual matters concerning recent events in Israel and Gaza. An overwhelming volume of open-source coverage exists, but key matters are in dispute, and the veracity of allegations is frequently difficult to assess. These difficulties are now intensified because events are unfolding rapidly, and ongoing military operations have reduced the sources of information and reporting from within Gaza.
8. In light of these challenges, we have sought, as far as possible, to avoid reaching wide-ranging or detailed factual conclusions. Instead, we have worked from the narrowest possible set of facts, which we believe are supported by evidence available at the date of this Addendum.

2.1 *The closure before October 2023*

9. A full factual explanation of the closure, as it existed before October 2023, is set out in our Opinion, including its history and impacts.² Its key aspects are as follows.
10. Despite “disengaging” from Gaza in 2005, Israel has maintained various forms of control over the territory, most notably of its perimeter. At least since Hamas took control of Gaza in 2007, Israel has made use of this power to close off the population of Gaza from the outside world in various ways. Restrictions have been imposed, *inter alia*, on imports, exports, electricity, water, and fuel, as well as the entry and exit of persons. The restrictions are not static; the measures constituting the closure have been intermittently constricted and relaxed. Typically, as Israel reacts to a provocation from Hamas, the closure is tightened. Eventually, restrictions are loosened and the cycle repeats.
11. The consequences, over more than 15 years, include the separation of residents of Gaza from their family members elsewhere; the decimation of Gaza’s economy, causing widespread poverty; and the debilitation of essential services such as

² See Opinion, paras 19-164.

construction and health care. Complicating the picture are intermittent military hostilities between Hamas and Israel, which have destroyed critical civilian infrastructure and caused numerous civilian deaths and injuries. In their impacts, the closure and the military offensives are interconnected and cumulative. For example: import restrictions on construction materials slow the rebuilding of civilian infrastructure after bombardments; hostilities and the closure together contribute to economic collapse; and the resulting long-term poverty hinders recovery from physical and mental injuries suffered during military bombardments.

12. Israel has typically justified the closure as a security measure. However, as we observed in our Opinion, there have been indications that other motives also play a role, including to sanction the population of Gaza.³

2.2 Armed attacks against Israel

13. On 7 October 2023, Palestinian armed groups launched attacks into Israel from Gaza, which they have since referred to as “Operation Al-Aqsa Flood”. Large numbers of rockets were fired into Israel, and armed fighters entered Israel’s territory, where they carried out violent attacks against Israeli communities and some military installations and personnel.
14. Around 1200 people were killed in Israel, nearly 800 of them civilians, and more than 12,000 people were injured.⁴ In addition, around 240 people – again, mostly civilians – were abducted and taken to Gaza where they were held captive. In late October 2023, four or five captives⁵ were released. Between 24 and 30 November 2023, larger releases totalling around 100 persons occurred, following a deal reached on 21 November 2023.⁶ As of 10 January 2024, an estimated 132 of those abducted on 7 October remained captive, although Israel says that it believes at

³ Opinion, paras 384-412.

⁴ All of the numbers cited in this paragraph are approximations. Numbers provided by Israeli Government websites contain some discrepancies and inconsistencies by small amounts, making it difficult to be precise. We have relied primarily on figures provided at the following websites, although they differ slightly: Israeli Ministry of Foreign Affairs, [Swords of Iron: War in the South – Hamas’ Attack on Israel](#), 7 October 2023 (updated 14 January 2024); Israeli Ministry of Foreign Affairs, [Return of hostages](#), 24 November 2023 (updated 1 December 2023).

⁵ There is overwhelming evidence that these individuals have been detained with the objective of compelling Israel to meet demands made by Hamas. Nonetheless, “hostage-taking” is a technical legal characterisation. We have not analysed (or been asked to analyse) whether Hamas’ conduct in this respect constitutes the war crime of hostage-taking and/or which other crimes it may constitute. Therefore we prefer to avoid terms which may convey a specific legal characterisation, and to instead use the factual descriptor “captive”.

⁶ J. Magid and T. Schneider, [Cabinet okays deal for release of 50 Israeli hostages in exchange for 4-day Gaza truce](#), The Times of Israel, 22 November 2023; [Israel-Hamas War: The hostage deal and ceasefire explained](#), Reuters, 27 November 2023.

least 23 of these people are dead. Israel says it has retrieved the bodies of a further 8 deceased captives. It does not appear to be contested that most of the captives are civilians.

15. The attacks appear to have been led by Hamas, but with involvement of other groups, including Palestinian Islamic Jihad. Despite some statements that Hamas' political leadership was not involved,⁷ or that attacks were not directed against civilians,⁸ the weight of available evidence indicates the contrary. In media statements made through its leaders on and since 7 October, Hamas has not distanced itself from the 7 October attacks, but rather has frequently sought to justify them while appearing to claim responsibility.⁹ We have also had regard to the (civilian) location of many of the attacks, the very large proportion of civilian casualties, and the continued detention of civilians. In our view it is clear that Hamas and Islamic Jihad intended to attack civilians and to take civilians captive. The methods used (including the use of paragliders to attack a music festival attended by unarmed civilians) strongly suggest a premeditated plan designed to cause maximum terror in the Israeli civilian population.

2.3 Movement of goods and other necessities into Gaza

16. Two days after the attacks, on 9 October, Israel's Defence Minister issued a statement in which he said that he had ordered a "total siege" of Gaza and that "no electricity, no food, no water, no fuel" would be permitted to enter Gaza.¹⁰ This reflected a decision made by the Israeli Security Cabinet on 8 October.¹¹ From 7 October until 20 October 2023, no food, water, medicine, or fuel entered Gaza. During this time, efforts by Egypt to organise the entry of humanitarian aid

⁷ F. Kilani, [Hamas leader refuses to acknowledge killing of civilians in Israel](#), BBC, 7 November 2023.

⁸ See, for example: [How does Hamas explain an attack on civilians? A Hamas spokesman has answers](#) [audio], NPR, 17 October 2023; [VIDEO: Basem Naim on the hostage situation in Gaza](#) [video], ABC, 17 October 2023; [Hamas official discusses hostages taken after terror attack on Israel](#) [video], NBC News, 2 November 2023.

⁹ [Ghazi Hamad, Hamas Spokesman: Offensive against Israel](#) [video], Al Jazeera, 7 October 2023; [Hamas chief Ismail Haniyeh says Hamas was on the verge of a great victory](#), The New Arab, 7 October 2023; [How does Hamas explain an attack on civilians? A Hamas spokesman has answers](#) [audio], NPR, 17 October 2023; [VIDEO: Basem Naim on the hostage situation in Gaza](#) [video], ABC, 17 October 2023; [Hamas official discusses hostages taken after terror attack on Israel](#) [video], NBC News, 2 November 2023; B. Hubbard and M. Abi-Habib, [Behind Hamas's Bloody Gambit to Create a 'Permanent' State of War](#), New York Times, 8 November 2023 (updated 9 November 2023).

¹⁰ Yoav Gallant, [Post on X](#) [video], 9 October 2023 [translation from O. Holmes and R. Michaelson, [Israel declares siege of Gaza as Hamas threatens to start killing hostages](#), The Guardian, 10 October 2023]. See also below at paragraph 53.

¹¹ Israeli Ministry of Foreign Affairs, [Security Cabinet convenes and makes series of operational decisions](#), 8 October 2023.

through the border at Rafah were prevented by Israeli bombardment of the Gaza side of the crossing.¹²

17. Later, the position became less absolute. On 18 October, following meetings with the United States (“US”) President, the Israeli Prime Minister released two statements. He said in one that “we will not allow humanitarian assistance in the form of food and medicines from our territory to the Gaza strip,”¹³ clarifying in his other statement that this would be the case “as long as our captives are not returned.”¹⁴ However, he added that following the US President’s request, “Israel will not prevent humanitarian assistance from Egypt as long as it is only food, water and medicine for the civilian population located in the southern Gaza strip or which is evacuating to there, as long as these supplies do not reach Hamas. Any supplies that reach Hamas – will be prevented.”¹⁵
18. Following repairs to damage caused by the earlier bombings,¹⁶ the border between Egypt and Gaza at Rafah was re-opened from 21 October 2023 to allow aid trucks to enter Gaza. During the week that followed, up to 20 trucks entered Gaza per day.¹⁷ Thereafter, the volume of aid began to increase. On 21 November 2023, Israel agreed to allow 200 trucks to enter Gaza from Egypt per day, but due to various obstacles (discussed further below at paragraph 37), by 10 January this target had only been reached on four days, all of which were during the November ceasefire.¹⁸ On 15 December 2023, Israel agreed to allow aid to enter Gaza through the Kerem Shalom crossing, in order to meet the 200-truck target.¹⁹ The crossing opened on 17 December 2023.²⁰ During the period from 21 October

¹² G. Pacchiani, [Egyptian trucks bringing fuel, food to Gaza make U-turn after Rafah crossing bombed](#), Times of Israel, 10 October 2023; G. Pacchiani, [Egypt urges Israel to stop bombing Rafah crossing to allow aid delivery](#), The Times of Israel, 12 October 2023; Y. Mohamed, N. Awadalla and T. Ramadan, [Gaza aid stuck as Egypt says Israel not cooperating](#), Reuters, 16 October 2023.

¹³ Israeli Ministry of Foreign Affairs, [Statement by PM Netanyahu](#), 18 October 2023.

¹⁴ Israeli Ministry of Foreign Affairs, [Statement from the Prime Minister’s Office](#), 18 October 2023.

¹⁵ *Ibid.*

¹⁶ [On Egypt-Gaza border, blocked aid waits to reach Palestinians](#), Al Jazeera, 19 October 2023; H. Sullivan, [Egypt’s Rafah crossing: when will aid begin to enter Gaza and why has it been closed?](#), The Guardian, 19 October 2023.

¹⁷ OCHA, [Regional Office in Cairo: Aid Trucks Crossing from Egypt to Gaza, As of 11 November 2023](#), 12 November 2023.

¹⁸ Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024. See also, UNRWA, [Gaza Supplies and Dispatch Tracking](#).

¹⁹ Israeli Ministry of Foreign Affairs, [Israel to transfer food and humanitarian aid for the civilian population in Gaza](#), 15 December 2023. For a short period before this, from 12 December 2023, Israel partially reopened Kerem Shalom crossing as an inspection point for aid. However, following security checks the trucks were returned to Egypt before entering Gaza through Rafah crossing: OCHA, [Today’s top news: Occupied Palestinian Territory, Syria](#), 12 December 2023.

²⁰ COGAT, [Post on X](#), 17 December 2023.

until 16 December, before the re-opening of Kerem Shalom, an average of 75 trucks entered Gaza per day.²¹ At the time of writing, approximately 155 trucks carrying humanitarian aid enter Gaza on average per day.²²

19. As far as we can tell from public information, commercial imports and exports – which were also an essential part of sustaining Gaza’s population – have been entirely stopped since the 7 October attack and *only* aid trucks have been permitted to enter Gaza. Whilst Israel has at times maintained that aid levels are adequate,²³ it is relevant that far more goods routinely entered Gaza previously.²⁴ Over the first nine months of 2023, an average of around 9745 trucks per month entered Gaza.²⁵ By comparison, in the month ending 12 January 2024, a total of 3982 trucks entered,²⁶ around 40% of the earlier monthly average. International agencies have reported starvation, dehydration and disease.²⁷
20. Power lines from Israel, which had provided electricity to Gaza, ceased supply on 7 October 2023.²⁸ On that day, Israel’s then Energy Minister, Israel Katz, posted on X: “I signed the order instructing the electric company to stop supplying electricity to the Gaza Strip. What was will not be.”²⁹ More recently, Israel has attributed the

²¹ Gisha, [Israel allows entry of aid into Gaza via Kerem Shalom Crossing, but it isn’t enough](#), 3 January 2024.

²² Over the 7 days ending 16 January 2024, a total of 1088 trucks entered Gaza (calculated using data from UNRWA, [Gaza Supplies and Dispatch Tracking](#)).

²³ COGAT, [Post on X](#), 9 January 2024; [Israel says there’s no lack of food, water and humanitarian supplies in Gaza](#), Times of Israel, 7 November 2023. Although contrast more recent statements to the contrary, for example, in submissions to the International Court of Justice: *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, [Verbatim Record](#), CR2024/2, 12 January 2024, especially at pp. 46, 52.

²⁴ Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024; Gisha, [Israel allows entry of aid into Gaza via Kerem Shalom Crossing, but it isn’t enough](#), 3 January 2024; V. Yee, A. Sell and R. Caryn Rabin, [Inspections, Bottlenecks and Safety Concerns Hinder Gaza Aid](#), New York Times, 11 January 2024.

²⁵ Based on data from OCHA, [Gaza crossings: movement of people and goods](#), which shows total imports for January to September 2023 as 87,704 truckloads. For comparing the total volume of goods entering Gaza at different times there are benefits to considering per-month figures. Per-day calculations may confuse matters given changes in the number of days per week on which crossings have been opened. Respective daily numbers of trucks entering through the two crossings are available at: UNRWA, [Gaza Supplies and Dispatch Tracking](#). Figures for the most recent week are available at: COGAT, [Swords of Iron Humanitarian Efforts](#). We note that there are consistently discrepancies between the figures given by these sources, but not by a significant margin.

²⁶ Calculated using data from UNRWA, [Gaza Supplies and Dispatch Tracking](#).

²⁷ Integrated Food Security Phase Classification, [Gaza Strip: Famine Review of the IPC Analysis: Conclusions and Recommendations](#), 21 December 2023; WHO, [Lethal combination of hunger and disease to lead to more deaths in Gaza](#), 21 December 2023.

²⁸ [Energy minister instructs authorities to cut off water to Gaza](#), Times of Israel, 9 October 2023.

²⁹ Israel Katz, [Post on X](#), 7 October 2023 [translation from Google Translate]. See also, OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #88](#), 9 January 2024.

lack of electricity to Hamas damaging power lines.³⁰ Since 11 October 2023, when Gaza's sole power plant stopped functioning due to lack of fuel, there has been no electricity in Gaza's power grid.³¹

21. This left Gaza's population reliant on generators, but no fuel was permitted to enter Gaza until mid-November.³² On 13 November 2023, UNRWA reported that its fuel stores had depleted such that humanitarian operations in Gaza would stop within 48 hours.³³ From 15 November 2023, small deliveries of fuel were permitted into Gaza, which Israeli authorities restricted to use for aid trucks.³⁴ On 18 November 2023, Israel announced that it would permit the entry into Gaza of 2 fuel trucks per day, for use by the UN.³⁵ That limit was reportedly doubled during the November ceasefire, and according to OCHA an average of 110,000 litres per day entered during that period.³⁶ Some cooking gas also began entering Gaza during the pause.³⁷ For some days after hostilities resumed the amount of fuel entering fell back to below 70,000 litres per day,³⁸ but in early December, Israel's Security Cabinet voted to allow 120,000 litres of fuel to enter Gaza daily, apparently in response to US demands.³⁹ It has been reported that following an

³⁰ Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Key Legal Aspects](#), 3 December 2023 (updated 14 December 2023); Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Frequently Asked Questions](#), 6 December 2023 (updated 8 December 2023).

³¹ OCHA, [Electricity in the Gaza Strip](#) (last accessed 11 January 2024). OCHA's data, based on information from the Gaza Electricity Distribution Company, shows that Gaza had 4 hours of electricity per day from 8-10 October 2023, and then no electricity from 11 October until the end of the year. Data for 2024 is was not yet available at the time of writing.

³² Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024. It was reported that on 13 November 2023, when Al-Shifa hospital ran out of power, the IDF offered an *ad hoc* delivery of fuel for generators, but that the offer was refused. According to some reports the fuel would only have run the hospital's generators for 30 minutes: E. Fabian, [IDF: We supplied 300 liters of fuel to Shifa, Hamas barred hospital from getting it](#), Times of Israel, 12 November 2023; A. Salman, ["All essential units have collapsed", Al-Shifa hospital director tells CNN](#), CNN, 13 November 2023.

³³ UNRWA, [Post on X](#), 13 November 2023.

³⁴ UNRWA, [Gaza continues to have huge needs for fuel amid siege and war](#), 15 November 2023; Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024.

³⁵ Israeli Ministry of Foreign Affairs, [PM Netanyahu holds press conference with MoD Gallant and Minister Gantz](#), 18 November 2023 (updated 19 November 2023); Israeli Prime Minister's Office [Statement by the Director of the National Security Council and National Security Advisor Tzachi Hanegbi at a press conference](#), 18 November 2023; Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024.

³⁶ OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #59](#), 4 December 2023.

³⁷ OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #54](#), 29 November 2023.

³⁸ OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #59](#), 4 December 2023; OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #61](#), 6 December 2023; OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #62](#), 7 December 2023; OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #65](#), 10 December 2023;

³⁹ Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024; B. Ravid, [Israeli cabinet approves increasing amount of fuel allowed into Gaza](#), Axios, 6 December 2023.

agreement with Egypt on 13 December 2023, Israel increased this amount to 189,000 per day.⁴⁰ Some cooking gas (2-4 truckloads per day) is also now said to be permitted to enter.⁴¹ These amounts remain well below pre-October 2023 levels, which were approximately 374,000 litres of fuel (not including fuel for use by the Gaza power plant), 2.7m litres of gasoline and 8,000 tons of cooking gas per day.⁴²

22. On 9 October 2023, Israel Katz announced that water pipes providing water to Gaza would be cut off.⁴³ Two of these were later put back into use on around 15 October⁴⁴ and 29 October.⁴⁵ Israel's office for the Coordination of Government Activities in the Territories ("COGAT") was reported to have said that the third pipe (to northern Gaza) had been damaged by Hamas, but that additional water sources were not necessary.⁴⁶ The third pipe is reported to remain out of use, and damage to one of the two restored pipes on 15 January left only one functioning water pipeline at the time of writing.⁴⁷ In any event, before 7 October these pipes contributed only around 10% of Gaza's water supply.⁴⁸ Water has also been sourced through wells accessing (contaminated) groundwater and from desalination plants. These water supplies have been severely impacted by loss of electricity and fuel shortages which have fully or partially shut down pumps for wells, desalination and water treatment facilities, as well as the means for distributing water.⁴⁹ By the time aid trucks began entering Gaza on 21 October 2023, UNICEF said that water production capacity was at 5% of "normal" levels, and that the residents of Gaza were accessing 3 litres of water person per day, the

⁴⁰ M. Sio, [Egypt to boost daily fuel supply to Gaza Strip amid ongoing humanitarian aid efforts](#), Anadolu Agency, 14 December 2023; Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024.

⁴¹ Gisha, [Israel allows entry of aid into Gaza via Kerem Shalom Crossing, but it isn't enough](#), 3 January 2024; COGAT, [Swords of Iron Humanitarian Efforts](#) (accessed on 16 January 2024).

⁴² Gisha, [Israel allows entry of aid into Gaza via Kerem Shalom Crossing, but it isn't enough](#), 3 January 2024.

⁴³ [Energy minister instructs authorities to cut off water to Gaza](#), Times of Israel, 9 October 2023.

⁴⁴ WASH Cluster, [People in Gaza need water. Now.](#), 15 October 2023. See also, WASH Cluster, [Gaza Strip: Critical water and wastewater infrastructure](#), 17 October 2023.

⁴⁵ J. Sharon, [Israel reopens second of three water pipelines into Gaza](#), The Times of Israel, 29 October 2023. One pipe was later damaged by airstrikes in late December 2023 but appears to have been restored to functionality a few days later: OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #77](#), 26 December 2023; OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #88](#), 9 January 2024.

⁴⁶ J. Sharon, [Israel reopens second of three water pipelines into Gaza](#), The Times of Israel, 29 October 2023.

⁴⁷ Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024; OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #94](#), 16 January 2024.

⁴⁸ N. Hall, A. Kirschenbaum, D. Michel, [The Siege of Gaza's Water](#), Center for Strategic and International Studies, 12 January 2024.

⁴⁹ WASH Cluster, [Explainer: Water Supply & Fuel Relationship in The Gaza Strip](#), 14 November 2023; Action Against Hunger, [Water Running Out in Gaza](#), 15 November 2023; Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024.

minimum required for survival.⁵⁰ On 19 December 2023, UNICEF reported that displaced children in southern Gaza had access to only 1.5-2 litres of water per day.⁵¹

2.4 Movement of persons

23. Since 7 October 2023, no crossings from Gaza into Israel have been permitted other than those forming part of Israeli military activities. This has also prevented travel from Gaza to the West Bank.⁵² The only known civilian movements from Gaza to Israel during this time have been those of released captives. There are no reported crossings by Palestinian civilians.⁵³
24. The Gaza-Egypt crossing at Rafah was also closed from 7 October to 31 October 2023. From 1 November, limited numbers of people have been permitted to cross into Egypt. Most are foreign citizens or dual nationals and their dependents, along with a smaller number of patients requiring emergency medical treatment. By 16 January 2024, Israel reported that 13,832 foreign nationals from 69 countries had left Gaza.⁵⁴ According to WHO, by 11 January 2024, fewer than 2,500 had left because of medical emergencies.⁵⁵

2.5 Central and uncontested matters

25. We recognise that some aspects of these facts may be contested, and that some of the above details may, in due course when more information comes to light, prove to be inaccurate. However, we have identified some broad and central matters that are not in serious question. These are:

⁵⁰ UNICEF, [First deliveries of life-saving supplies for children enter Gaza](#), 21 October 2023. International standards recommend 2.5 to 3 litres (depending on climate and individual physiology) as the minimum for consumption to ensure survival; additionally 2 to 6 litres is required for basic hygiene (dependent on social and cultural norms), and 3 to 6 for cooking (dependent on food type, social and cultural norms): WHO and WEDC, [How much water is needed in emergencies](#), July 2013.

⁵¹ UNICEF, [Barely a drop to drink: children in the Gaza Strip do not access 90 per cent of their normal water use](#), 19 December 2023.

⁵² As explained in our Opinion, passage from Gaza to the West Bank is only possible through Israel (with Israeli permission) because Israel controls entry into the West Bank and does not permit Palestinians registered as resident in Gaza to enter from Jordan: Opinion, para. 101.

⁵³ Regarding movement in the other direction, it has been reported that thousands of Gaza residents with work permits allowing them to be in Israel on 7 October had their permits revoked and that many were detained and returned to Gaza: Gisha, [Secretly and unlawfully, Israel detained thousands of Palestinians from Gaza](#), 14 December 2023.

⁵⁴ COGAT, [Swords of Iron Humanitarian Efforts](#) (accessed on 16 January 2024).

⁵⁵ WHO, [oPt Emergency Situation Update Issue 20](#), 11 January 2024; COGAT, [Swords of Iron Humanitarian Efforts](#) (updated 16 January 2024). The figures differ slightly. WHO cites 1,445 injured or sick people and 913 companions; Israel refers to 1,603 “ill and wounded along with escorts”.

- (i) On 7 October 2023, Palestinian armed groups under Hamas' leadership launched a massive violent attack against Israel which principally targeted civilians.
- (ii) In response to that attack, Israel launched military operations in Gaza and also significantly tightened the existing closure of Gaza. Although the "total siege" was eased somewhat after an initial period, the closure has remained considerably more extreme than it was prior to 7 October 2023 in respect of the movement of both goods (or other commodities) and persons.
- (iii) Statements of Israeli leaders make clear that the intensified closure has been imposed intentionally.
- (iv) Severe impacts of the intensified closure have been widely reported.

3. MATERIAL ELEMENTS OF PERSECUTION

- 26. Sections 4 to 7 of our Opinion addressed the *chapeau* and material elements of the crime against humanity of persecution.⁵⁶ The defining features of this crime are the requirements (i) that there has been a severe deprivation of fundamental human rights, and (ii) that this deprivation is discriminatory against a protected group.
- 27. We analysed the impact of the closure on the fundamental human rights of persons living in Gaza, focusing on the rights to freedom of movement, an adequate standard of living, health, and family life. We concluded that the closure had the effect of severely depriving residents of Gaza of these rights. In assessing the gravity of the deprivation of these rights, we found that the cumulative impact of the restrictions was especially compelling, as was their extended duration and the large number of persons affected. We also recognised that since the closure began, Israeli military offensives have intermittently occurred in Gaza, intensifying the impacts of the closure in various ways.
- 28. These effects of the closure are discriminatory. We concluded that the measures imposed as a part of the closure either explicitly differentiate Palestinians from others, or have specific consequences for the population of Gaza, which is almost exclusively Palestinian.
- 29. In the following sections, we review these material elements in light of recent developments.

⁵⁶ We do not consider it necessary to revisit our analysis concerning the *chapeau* elements or the connection requirement, as the relevant facts are unchanged.

3.1 Severe deprivation of fundamental human rights

30. Movement from Gaza into Israel and the West Bank is now impossible. Travel to Egypt has become virtually impossible, except for those with a second nationality or emergency medical needs.⁵⁷
31. Access to electricity, food, water, and sanitation in Gaza has been dramatically reduced. Electricity is necessary for the operation of medical, water and sanitation facilities.⁵⁸ Public health concerns have increased as electricity remains cut off.⁵⁹ At a time when health needs have dramatically increased because of injuries caused by military operations, as well as disease outbreaks owing to mass displacement, health services have been severely affected by the loss of power supply, medical supplies, and sanitation services. As of 11 January 2024, aside from 3 field hospitals, only 15 of Gaza's 36 hospitals were open, and were described by the World Health Organization ("WHO") as only "partly functional".⁶⁰
32. The strain on civilians in Gaza has been compounded by mass displacement, which has resulted in civilians being separated from any means of subsistence. Beginning from 12 October, Israel directed civilians to move from the north of Gaza (where military activity was anticipated to be focused) towards the south.⁶¹ UNRWA reports that 1.9 million civilians in Gaza, or 85% of the population, have been displaced.⁶² Many of those people have been displaced multiple times as

⁵⁷ We note reports that people in Gaza are paying thousands of dollars for the possibility of entering Egypt, apparently by corrupt and unreliable means: K. Ahmed and R. Michaelson, [Palestinians desperate to flee Gaza pay thousands in bribes to 'brokers'](#), The Guardian, 8 January 2024.

⁵⁸ See OCHA, [Hostilities in the Gaza Strip and Israel Flash Updated #53](#), 28 November 2023; Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Key Legal Aspects](#), 3 December 2023 (updated 14 December 2023).

⁵⁹ WHO, [Risk of disease spread soars in Gaza as health facilities, water and sanitation systems disrupted](#), 8 November 2023.

⁶⁰ WHO, [oPt Emergency Situation Update Issue 20](#), 11 January 2024. This number has fluctuated since the outbreak of hostilities on 7 October. At one point in November, only 10 hospitals were functional (see WHO, [oPt Emergency Situation Update](#), 23 November 2023), in December, only 8 were open (WHO, [oPt Emergency Situation Update](#), 14 December 2023). Since at least 10 November, the majority of hospitals in Gaza have not functioned.

⁶¹ Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Frequently Asked Questions](#), 6 December 2023 (updated 8 December 2023); IDF, [Post on X](#), 13 October 2023; IDF, [Post on X](#), 28 October 2023.

⁶² UNRWA, [Situation Report #64 on the situation in the Gaza Strip and the West Bank, including East Jerusalem](#), 15 January 2024.

military activities moved south.⁶³ At the time of writing, 1.4 million people are sheltering in UNRWA facilities.⁶⁴

33. Sanitation conditions amongst the displaced population are dire and, coupled with the factors above, have given rise to a public health crisis. UNRWA reported on 11 January that at its shelters in Rafah, on average one toilet is shared by 486 people.⁶⁵ Communicable diseases – including acute respiratory infections, skin diseases, and diarrhoea – are spreading in overcrowded shelters.⁶⁶ On 11 January 2024, WHO reported a 23-fold increase amongst children under 5 of rates of diarrhoea,⁶⁷ the second leading cause of death worldwide in children under 5.⁶⁸ WHO also reported that more than 210,000 cases of acute respiratory infection had been recorded since mid-October.⁶⁹ Thousands of cases of hepatitis A had been reported by December.⁷⁰
34. Despite aid trucks being permitted to enter Gaza again since 21 October and increasing somewhat since then, it has been widely reported that aid remains inadequate. Before the current outbreak of hostilities, an estimated 80 percent of people in Gaza were already aid-dependent.⁷¹ Demand for humanitarian assistance has been increased by the apparent total ban on commercial trucks entering Gaza since 7 October 2023, as well as by massive displacement and the destruction of crops and civilian infrastructure. Yet despite this dramatic increase in need, the volume of goods entering Gaza has not yet even approached half of the level which existed prior to 7 October 2023.⁷² On 21 December 2023, the Integrated Food Security Phase Classification's Famine Review Committee reported on Gaza using its classification of food insecurity levels which range from 1 (none/minimal) to 5 (catastrophe/famine). It concluded:

⁶³*Ibid.*

⁶⁴*Ibid.*

⁶⁵ UNRWA, [Situation Report #63 on the situation in the Gaza Strip and the West Bank, including East Jerusalem](#), 11 January 2024. On 19 December UNICEF gave a Gaza-wide figure of 700 people per toilet: UNICEF, [Barely a drop to drink: children in the Gaza Strip do not access 90 per cent of their normal water use](#), 19 December 2023.

⁶⁶ WHO, [oPt Emergency Situation Update](#), 14 December 2023; [BBC Gaza doctor says lack of medicine is "catastrophic" as diseases spread](#), 14 December 2023.

⁶⁷ As compared to a baseline figure from 2022. Some 152,734 cases were reported from mid-October to 11 January. WHO, [oPt Emergency Situation Update Issue 20](#), 11 January 2024.

⁶⁸ WHO, [Diarrhoeal disease](#), 2 May 2017.

⁶⁹ WHO, [oPt Emergency Situation Update Issue 20](#), 11 January 2024.

⁷⁰ [Gaza doctor says lack of medicine is "catastrophic" as diseases spread](#), BBC, 14 December 2023; ["We Are All Sick": Infectious Diseases Spread Across Gaza](#), New York Times, 11 December 2023.

[Gaza doctor says lack of medicine is "catastrophic" as diseases spread](#), BBC, 14 December 2023; ["We Are All Sick": Infectious Diseases Spread Across Gaza](#), New York Times, 11 December 2023.

⁷² See above at paragraph 19.

At least one in four households (more than half a million people) in the Gaza Strip are facing catastrophic acute food insecurity conditions (IPC Phase 5 – Catastrophe), characterized by extreme food gaps and collapse of their livelihood. About 80% of the population in Gaza Strip are in Emergency (IPC Phase 4) or Catastrophe (IPC Phase 5). The entire population can be considered classified in IPC Phase 3 and above (Crisis or worse) during the projection period starting in the second week of December. Furthermore, the situation is deteriorating rapidly.⁷³

35. Taken together, these factors persuade us that people in Gaza are being deprived of their fundamental human rights.⁷⁴ Most obviously, the violations of the rights to an adequate standard of living and to health, which we described in our Opinion,⁷⁵ continue and have become even graver. Additionally, the blanket and almost exceptionless closure of Gaza’s borders continues and exacerbates the violations we described of the rights to freedom of movement and to family life.⁷⁶ We emphasize that this is certainly not a comprehensive assessment of the human rights violated by the conditions we have described above.
36. In our Opinion, we assessed suggestions that hardship in Gaza could be attributed to factors other than the closure – in particular, to decisions made by Hamas, the Palestinian Authority, Egypt, and the United Nations. We concluded that as a matter of factual (as opposed to political or second order) causation, certain harms could be attributed to the closure.⁷⁷
37. Similar questions arise in the current context. We take note of statements by Israel that humanitarian aid is not reaching civilians due to lack of capacity on the part of international organisations,⁷⁸ because of insufficient donations,⁷⁹ or because aid is being diverted by Hamas.⁸⁰ For its part, the UN states that insufficient aid is entering Gaza because of “the closure of all but two border crossings in the south and the multi-layered vetting process for trucks” as well as a lack of access routes

⁷³ Integrated Food Security Phase Classification, [Gaza Strip: Famine Review of the IPC Analysis: Conclusions and Recommendations](#), 21 December 2023. See also, Integrated Food Security Phase Classification, [Gaza Strip: Special Brief](#), 21 December 2023.

⁷⁴ As we recognised in our Opinion, arguments by Israel that it does not owe human rights obligations within Gaza are not relevant to this element of the crime of persecution. See, Opinion, para. 210.

⁷⁵ Opinion, paras 244-255.

⁷⁶ Opinion, paras 226-243.

⁷⁷ Opinion, paras 147-164.

⁷⁸ Israeli Ministry of Foreign Affairs, [Israel-Hamas Conflict 2023: Humanitarian Efforts](#), 14 December 2023 (updated 16 December 2023).

⁷⁹ Eylon A. Levy [Israeli Government Spokesperson], [Post on X](#) [video], 20 December 2023.

⁸⁰ Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Frequently Asked Questions](#), 6 December 2023 (updated 8 December 2023); Israeli Ministry of Foreign Affairs, [Israel-Hamas Conflict 2023: Humanitarian Efforts](#), 14 December 2023 (updated 16 December 2023); Israel Foreign Ministry, [Post on X](#), 28 December 2023.

for aid to north Gaza.⁸¹ It also states that Israel has repeatedly denied it access to areas where it needs to deliver aid.⁸² A variety of other factors have been reported by others as contributing to delays in aid distribution: border inspections that are slow and unpredictable because of non-transparent prohibitions on the entry of certain “dual-use” items; the closure of Kerem Shalom crossing on Saturdays; damage to road and communication systems in Gaza (which remain unrepaired because “dual-use” goods needed for repairs are not permitted to enter); shortages of fuel and the absence of electricity; the fact that warehouses are unavailable because they are sheltering displaced people; and some level of looting and profiteering.⁸³ It is also reported that Israel is not permitting aid to be sourced from its territory or through its ports (as was usual previously), meaning that new aid routes through more distant ports in Egypt are being relied on.⁸⁴ Israel has to date declined to open further routes or border crossings in order to alleviate these difficulties.⁸⁵ The impact of hostilities is also clear: by far the highest levels of aid access occurred during the ceasefire, notwithstanding that Kerem Shalom crossing was not yet being used at that time.⁸⁶

38. Humanitarian access in Gaza is thus clearly influenced by many factors, a substantial proportion of which are within Israel’s power. And beyond humanitarian aid, Israel has also not permitted the resumption of commercial imports, which is how most goods entered Gaza prior to 7 October 2023.⁸⁷ Moreover, between 7 and 21 October 2023, *nothing* was able to enter Gaza. There can be little doubt that shortages of food, water, fuel, and medical equipment during those weeks can be attributed to the closure. Since then, the volume of

⁸¹ WHO, WFP, UNICEF, UNRWA, [Preventing famine and deadly disease outbreak in Gaza requires faster, safer aid access and more supply routes](#), 15 January 2024.

⁸² See, for example, OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #89](#), 10 January 2024. OCHA reported on 12 January that 5 out of 24 of its planned deliveries to northern Gaza this year had been prevented in this way: OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #91](#), 12 January 2024.

⁸³ V. Yee, A. Sell and R. Caryn Rabin, [Inspections, Bottlenecks and Safety Concerns Hinder Gaza Aid](#), New York Times, 11 January 2024; Gisha, [Israel allows entry of aid into Gaza via Kerem Shalom Crossing, but it isn’t enough](#), 3 January 2024.

⁸⁴ Gisha, [Israel allows entry of aid into Gaza via Kerem Shalom Crossing, but it isn’t enough](#), 3 January 2024. The UN has also called on Israel to allow aid to be shipped through the Port of Ashdod on the Israeli coast near Gaza: WHO, WFP, UNICEF, UNRWA, [Preventing famine and deadly disease outbreak in Gaza requires faster, safer aid access and more supply routes](#), 15 January 2024.

⁸⁵ There were reports that Israel has been under pressure from the US to open Erez crossing, and that it has also been considering whether to allow aid to enter through a separate crossing currently only used for IDF access, but neither step has been taken: Y. Kubovich, [Under U.S. Pressure, Israel Weighs Opening Erez Crossing for Gaza Humanitarian Aid](#), Haaretz, 4 January 2024.

⁸⁶ Gisha, [The humanitarian catastrophe in Gaza: Facts and figures](#), 10 January 2024.

⁸⁷ Gisha, [Israel allows entry of aid into Gaza via Kerem Shalom Crossing, but it isn’t enough](#), 3 January 2024.

goods entering Gaza has remained at less than half the pre-October 2023 levels.⁸⁸ Of course, wrongful diversion of goods by Hamas (as well as individual profiteers⁸⁹) and inefficiencies by international agencies may well exacerbate the impact of these shortages. However, as we pointed out in our Opinion, but for the closure, there would not exist such scarcity that other factors could create critical difficulties.⁹⁰

39. Lastly, but perhaps most significantly, the cumulative impact of the closure over time is of relevance. For reasons which we set out in our Opinion,⁹¹ we consider that Israel's closure is the primary cause of Gaza's economic destitution and the enfeebled state of its essential infrastructure. These factors, in turn, have ensured the dependency of Gaza's population on aid, and its reliance on Israel for electricity, water, fuel, and other essentials. It was therefore the cumulative impact of the closure over time which has allowed Israel to conjure a humanitarian catastrophe almost overnight. Having used the closure to keep Gaza's economy "on the brink of collapse",⁹² Israel had also established the conditions to push it over.

3.2 Discrimination in fact

40. In our Opinion, we concluded that the closure is discriminatory. The 7 October attack does not alter that assessment. The denial of electricity and commercial produce, and restrictions on fuel and on humanitarian aid, have been directed specifically against the population of Gaza, which is almost exclusively Palestinian. The treatment of this Palestinian population stands in stark contrast to that of the neighbouring population in Israel. In our view, the nature of the measures imposed has not changed in any way material to this element since 7 October, and nor has their target.
41. Further, Israel's conduct towards Palestinians outside Gaza since 7 October confirms our earlier conclusions. On 10 October 2023, COGAT revoked all permits for Gaza residents to work in Israel, following which at least 4000⁹³ former permit-holders then in Israel or the West Bank were detained before they were eventually

⁸⁸ See paragraph 19 above.

⁸⁹ Gisha, [Israel allows entry of aid into Gaza via Kerem Shalom Crossing, but it isn't enough](#), 3 January 2024.

⁹⁰ Opinion, para 160.

⁹¹ Opinion, paras 160-164.

⁹² See Opinion, para. 393.

⁹³ OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #28](#), 3 November 2023; OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #35](#), 10 November 2023.

returned to Gaza. Some have said that they were interrogated and mistreated,⁹⁴ and two died from medical conditions during their detention by Israel.⁹⁵ These measures were taken in a blanket way, and apparently without regard to security screening that the workers had undertaken to obtain permits. It is clear that the treatment was directed not against Hamas members, but against Palestinians from Gaza.⁹⁶ There is also evidence of similar measures against Palestinians from the West Bank since 7 October, including reports that thousands have been detained without trial, and many mistreated in detention.⁹⁷

42. It might be said that because Israel is now engaged in active hostilities with Hamas, the tightened restrictions are a necessary part of Israel's military campaign (rather than acts that deliberately target a particular population). However, this is not a new consideration, given the longstanding existence of an armed conflict that has intermittently broken out into hostilities. Neither does it change the discriminatory character of the restrictions: it remains that by their nature, the restrictions are directed at the whole population of Gaza, rather than exclusively at Hamas. As we have explained in our Opinion and below, international humanitarian law does not exempt military conduct from the prohibition on discrimination.
43. In our view, the material elements of persecution continue to be met by the intensified closure. If anything, the evidence of these elements has been strengthened.

4. MENTAL ELEMENTS OF PERSECUTION

44. As elaborated in section 8 of our Opinion, to commit the crime against humanity of persecution, a person must not only intend that their conduct causes the harm

⁹⁴ M. Butt, [Fears for thousands of Gazans missing in Israel as workers 'rounded up, arrested and blindfolded'](#), The Independent, 23 October 2023; H. Shezaf and C. Maanit, [Gazan Workers Describe Inhuman Treatment at Israeli Detention Centers Since Outbreak of War](#), Haaretz, 26 October 2023; OCHA, [Hostilities in the Gaza Strip and Israel Flash Update #28](#), 3 November 2023; B. McKernan and R. Carroll, [Israel deports thousands of stranded Palestinian workers back to Gaza](#), The Guardian, 3 November 2023;; Gisha, [Testimonies by two brothers, workers from Gaza, about their unlawful detention by Israel](#), 14 December 2023; Gisha, [Secretly and unlawfully, Israel detained thousands of Palestinians from Gaza](#), 14 December 2023.

⁹⁵ H. Shezaf, [Two Gazan Laborers Die in Israeli Custody, Army Fails to Open Investigation](#), Haaretz, 6 November 2023.

⁹⁶ Israel PM, [Post on X](#), 2 November 2023: "Israel cuts off all contact with Gaza. There will be no more Palestinian workers from Gaza and the workers who were in Israel on the day the war broke out will be returned to Gaza." [translation from Google Translate].

⁹⁷ Z. Al Tahhan, ['He threw up blood': Palestinian detainees face abuse in Israeli custody](#), Al Jazeera, 1 November 2023; H. Shezaf, [Six Palestinians Have Died in Israeli Prisons During the War, Two Found Bruised](#), Haaretz, 9 December 2023.

which constitutes a severe deprivation of human rights, they must also intend to discriminate.⁹⁸

45. For reasons we have previously elaborated,⁹⁹ our conclusions regarding these elements must be circumspect. Intent is specific to an individual and is often difficult to establish from open-source material alone. Nonetheless, after reviewing statements and conduct throughout the long duration of the closure, we concluded in our Opinion that there was reason to believe that some Israeli officials have intended that the closure imposes severe hardships on people in Gaza. We likewise found reason to believe that at least some Israeli officials have intended that the closure discriminates against Palestinians.
46. We now assess whether these conclusions extend to the intensified closure, with reference to explicit statements, conduct, and apparent knowledge. We also have regard to two types of contextual factors. First, we consider that evidence of intent concerning earlier phases of the closure can be relevant to the intensified closure, particularly because earlier statements may, in principle, inform later decision makers and/or indicate persistent views.¹⁰⁰ And secondly, intent pertaining to the closure can be inferred from statements and conduct in respect of matters other than the closure itself, where sufficiently related. Whilst we have focused our analysis primarily on evidence specific to the closure, we consider that more general statements concerning Israel's military campaign can be contextually relevant, particularly if there is reason to believe that its objectives overlap with those of the closure.
47. As previously, we recognise that neither Israel nor its leadership is a monolith. It is possible, indeed likely, that central actors¹⁰¹ in the closure possess a range of motivations and intents. Additionally, some highly probative sources of evidence regarding intent (such as internal government papers) are not available to us. Nonetheless, by the "reasonable basis to believe" standard, we believe it is possible to draw some general, if tentative, conclusions on this issue.

4.1 Intention regarding the severe deprivation of fundamental human rights

48. As we noted in our Opinion, it is not in doubt that Israeli officials intend to impose restrictions on Gaza.¹⁰² The question is whether they intend the hardships which

⁹⁸ Opinion, paras 362-368.

⁹⁹ Opinion, paras 377-381.

¹⁰⁰ Opinion, para. 382.

¹⁰¹ In the following analysis, we have limited our focus to senior officials who appear to have a decision-making power or influence in respect of the intensified closure.

¹⁰² Opinion, para. 383.

result, and which can be characterised as a severe deprivation of fundamental rights.

49. Israel has repeatedly denied any intention to harm civilians in Gaza. In December, Israel's Ministry of Foreign Affairs said that Israel "has no intent nor [sic] desire to cause suffering or hardship to civilians".¹⁰³ Its website states further, in relation to the provision of humanitarian assistance, that:

"Israel wishes no harm to civilians and is committed to addressing the humanitarian needs of those suffering as a result of Hamas's brutality and instigation of these hostilities... Israel is facilitating the entrance of consignments and additional aid to Gaza from Egypt and is working to significantly increase such assistance."¹⁰⁴

On 10 January 2024, Prime Minister Netanyahu said "Israel is fighting Hamas terrorists, not the Palestinian population".¹⁰⁵

50. Evidently, explicit statements denying criminal intent are not conclusive. It remains necessary to weigh such statements alongside other available evidence in order to understand the motives underlying Israeli leaders' decisions and policies.

Evidence of intent from earlier periods

51. A crucial consideration stems from the lengthy history of the closure which preceded 7 October 2023. As we recognised in our Opinion, evidence of intent at an earlier period might provide evidence of intent at a later period.¹⁰⁶ We pointed to statements and conduct suggesting that some Israeli leaders have imposed the closure, at least in part, to collectively sanction the people of Gaza for Hamas' actions, and with the intent to impose severe hardship.¹⁰⁷
52. It is possible for motive and intent to change. However, the measures imposed as part of the intensified closure are a continuation of restrictions imposed, in varying forms, since at least 2007. The pattern of conduct has not changed. That

¹⁰³ Israeli Ministry of Foreign Affairs, [Israel-Hamas Conflict 2023: Humanitarian Efforts](#), 14 December 2023 (updated 16 December 2023).

¹⁰⁴ Israeli Ministry of Foreign Affairs, [Israel-Hamas Conflict 2023: Key Legal Aspects](#), 3 December 2023 (updated 14 December 2023).

¹⁰⁵ Israeli Ministry of Foreign Affairs, [Statement by PM Netanyahu](#), 10 January 2024. A number of further statements of this kind were cited by Israel in its submissions before the International Court of Justice on 12 January: *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, [Verbatim Record](#), CR2024/2, 12 January 2024, pp. 32-34. In addition, an [Israeli Government website](#), sponsored through Google with the search result heading "Israel response to Hague ICJ", contains statements such as: "Israel is doing everything in its power to prevent harm to innocent civilians in Gaza", and "Israel's war is not with the civilian population in Gaza." (accessed 12 January 2024).

¹⁰⁶ Opinion, para. 382.

¹⁰⁷ Opinion, paras 383-414.

consistency of conduct permits the inference of unchanging motivations and, at the very least, must influence the way in which recent evidence of intent is interpreted.

Explicit statements suggesting punishment

53. At least some statements since 7 October suggest an intention to impose suffering on the residents of Gaza as a form of punishment. On 8 October, Defence Minister Yoav Gallant said:

The price the Gaza Strip will pay will be a very heavy one that will change reality for generations.¹⁰⁸

The following day, 9 October, in announcing the “total siege”,¹⁰⁹ he said:

I have ordered a complete siege on the Gaza Strip. There will be no electricity, no food, no water, no fuel, everything is closed. We are fighting human animals and we are acting accordingly.¹¹⁰

On the same day, the Head of the Israeli Defence Ministry’s Unit for COGAT, Major-General Ghasan Alyan produced a video in which he said:

Kidnapping, torturing and murdering children, women and elderly isn’t human! There is no justification! Hamas became ISIS and the citizens of Gaza are celebrating, instead of being horrified. Human beasts are dealt with accordingly. Israel has imposed a total blockade on Gaza – no electricity, no water, just damage. You wanted hell – you will get hell.¹¹¹

Two days later, on 11 October 2023, the then Energy Minister, Israel Katz, posted on X:

The line has been crossed. We will fight the terrorist organization Hamas and destroy it. All the civilian population in [G]aza is ordered to leave immediately.

¹⁰⁸ M. Lubell and N. Al-Mughrabi, [Israel retaliates after Hamas attacks, deaths pass 1,100](#), Reuters, 9 October 2023; B. Dodman, [“No place is safe’ in Gaza as Israel lays siege to Hamas-held enclave”](#), France 24, 10 October 2023.

¹⁰⁹ “Total”, “complete”, and “full” are variously used in translations of Gallant’s statement. See for example, B. Dodman, [“No place is safe’ in Gaza as Israel lays siege to Hamas-led enclave”](#), France 24, 10 October 2023; O. Holmes and R. Michaelson, [Israel declares siege of Gaza as Hamas threatens to start killing hostages](#), The Guardian, 9 October 2023; E. Both and A. Hill, [Israel reclaims territory and declares ‘full siege’ of the Gaza Strip: Morning Rundown](#), NBC News, 9 October 2023.

¹¹⁰ Yoav Gallant, [Post on X](#) [video], 9 October 2023 [translation from O. Holmes and R. Michaelson, [Israel declares siege of Gaza as Hamas threatens to start killing hostages](#), The Guardian, 9 October 2023].

¹¹¹ COGAT, [Post on X](#) [video with English subtitles], 10 October 2023.

We will win. They will not receive a drop of water or a single battery until they leave the world.¹¹²

54. It might be said that these statements show an intention to punish Hamas, rather than Palestinian civilians more broadly. However, we consider Alyan's reference to "the citizens of Gaza" celebrating to be telling. Moreover, the statements are indicative of a broader intention: the latter three explicitly seek to explain measures that necessarily affect Gaza's entire civilian population; it would not be possible to withhold water or power only from Hamas. Indeed, by the time these statements were made, water and electricity had been cut off, bombardments had begun, and the vast majority of Gaza residents were trapped in the territory and unable to avoid the measures.

Explicit statements suggesting the creation of leverage

55. Other statements from Israeli leaders suggest an alternative motivation for the intensified closure, namely, that it is a means of creating leverage over Hamas for the release of captives. Prime Minister Netanyahu issued a statement on 18 October 2023, saying:

Israel will not allow any humanitarian assistance from its territory to the Gaza Strip as long as our captives are not returned.¹¹³

That position has been repeated in later pronouncements by the Prime Minister:

There will be no entry of fuel or workers, and there will be no ceasefire without the release of our hostages.¹¹⁴

The same position had been expressed earlier by others. The then Energy Minister, Israel Katz, said in a post on X:

Humanitarian aid to Gaza? No electrical switch will be turned on, no water pump will be opened and no fuel truck will enter until the Israeli abductees are returned home.¹¹⁵

The Minister of National Security, Itamar Ben-Gvir, also posting on X, said:

As long as Hamas does not release the hostages in its hands – the only thing that needs to enter Gaza are hundreds of tons of explosives from the Air Force, not an ounce of humanitarian aid.¹¹⁶

¹¹² Israel Katz, [Post on X](#), 13 October 2023.

¹¹³ Israeli Ministry of Foreign Affairs, [Statement from the Prime Minister's Office](#), 18 October 2023.

¹¹⁴ Israeli Ministry of Foreign Affairs, [Statement by PM Netanyahu](#), 7 November 2023.

¹¹⁵ Israel Katz, [Post on X](#), 12 October 2023 [translation from [Energy minister: No electricity or water to Gaza until abductees returned home](#), The Times of Israel, 12 October 2023].

¹¹⁶ Itamar Ben-Gvir, [Post on X](#), 17 October 2023 [translation from Google Translate].

56. These statements are unambiguous in revealing an intention to deprive Palestinians of basic necessities, in order to effect a political outcome.

Measures imposed

57. As in our Opinion, we consider how conduct – both acts and omissions – allows for various inferences to be drawn about the motives of Israeli officials. In particular, we have sought to assess whether the restrictions imposed as part of the intensified closure seek to combat Hamas, or to impose suffering on the population of Gaza.

58. In the context of military bombardments, Israel’s leaders have said that high civilian casualties can be reconciled with the stated intention to avoid harming civilians because “Hamas has sought to use the Palestinian civilian population as its shield”.¹¹⁷ That rationale is of limited application in the context of restrictions on basic goods imposed as part of the intensified closure.

59. It is difficult to see how measures imposed during the period of “total siege”, between 7 and 21 October 2023, could be consistent with an intention to avoid civilian suffering and to target only Hamas. Israeli officials have repeatedly recognised that Hamas has maintained its own supplies (see below at paragraph 100 and footnote 176) and is unconcerned by civilian suffering.¹¹⁸ At best, therefore, the measures could reveal a strategy of targeting Hamas *via* the civilian population: eventually, and after the civilian population had depleted its supply of basic necessities, Hamas would also be affected. At worst, such measures support the view that the civilian population was simply to be punished together with Hamas.

60. The subsequent relaxation of these restrictions may also suggest that they were not necessary for Israel’s military campaign. On 18 November – six weeks into the intensified closure – a senior official announced that fuel would again be allowed into Gaza following a request from the US:

“...we asked officials in the security establishment, from the IDF [Israel Defence Forces] and from the ISA [Israeli Security Agency, also known as the “Shin Bet”] who were at the meeting, whether this decision would adversely affect operational targets, whether it would help Hamas, whether it would prevent us from achieving

¹¹⁷ Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Frequently Asked Questions](#), 6 December 2023 (updated 8 December 2023).

¹¹⁸ See, for example, Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Frequently Asked Questions](#), 6 December 2023 (updated 8 December 2023), which speaks of Hamas as having a “total contempt for Palestinian welfare”; and says that “Hamas is deliberately seeking to maximise [civilian harm] in the hope that the international community will condemn Israel rather than [it’s own strategy].”

the goals of the war. The unequivocal answer was that we could agree to the American request, and indeed that was the decision that was made.”¹¹⁹

61. Israel’s more recent public statements, including in its submissions before the International Court of Justice, were silent on the “total siege” (which applied to water, food, medicines, electricity and fuel) and how it could be consistent with civilian protection; to the contrary, they focused on the steps which Israel is now taking to support some humanitarian access.¹²⁰
62. We have considered whether those gradual moves to relax the intensified closure since 21 October, such as opening Kerem Shalom crossing¹²¹ or restarting the supply of water to Gaza,¹²² negate a suggestion that Israeli officials intend to harm civilians in Gaza. Whilst such measures *could* evidence a lack of intent to harm civilians, they are not determinative. We are also struck by the fact that the measures taken have occurred gradually and have clearly been insufficient to avert a humanitarian disaster in Gaza.¹²³ Israel has failed to take many steps within its power that would have been consistent with a desire to see more aid reach Palestinians. For example, it has declined to: allow commercial imports into Gaza; open additional crossings from Israel; enable aid to be sourced from or through Israel; restart electricity supply; or restart water supply from Israel to the north of Gaza.¹²⁴
63. Additionally, we take note of explanations suggesting that restrictions have been relaxed for reasons other than concern for civilians, such as pressure from the US and perhaps other foreign allies. On 18 October, in announcing that Israel would permit aid to enter Gaza from Egypt, Prime Minister Netanyahu made clear that this had been done:

“In light of the sweeping and vital American support for the war effort, as well as US President Biden’s request for basic humanitarian assistance...”¹²⁵

¹¹⁹ Prime Minister’s Office, [Statement by the Director of the National Security Council and National Security Advisor Tzachi Hanegbi at a press conference](#), 18 November 2023.

¹²⁰ Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Key Legal Aspects](#), 3 December 2023 (updated 14 December 2023); Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Frequently Asked Questions](#), 6 December 2023 (updated 8 December 2023); *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, [Verbatim Record](#), CR2024/2, 12 January 2024, pp. 44-48 and 50-52.

¹²¹ See above at paragraph 18.

¹²² See above at paragraph 22.

¹²³ See above at paragraphs 31-34.

¹²⁴ See above at paragraphs 37-38.

¹²⁵ Israeli Prime Minister’s Office, [Statement from the Prime Minister’s Office](#), 18 October 2023. See also above at paragraph 17.

On 29 October 2023, the same day that Israel's second water pipe to Gaza was reopened,¹²⁶ it was reported that a leaked US State Department document written a week earlier had recommended that the US pressure Israel to increase water and fuel supplies.¹²⁷ On 18 November 2023, Prime Minister Netanyahu explained the Cabinet's decision regarding fuel supplies (see above at paragraph 21) in the following way:

The humanitarian assistance is also essential to the continued assurance of international support. Without humanitarian assistance, even our best friends would find it difficult to support us over time, and it would be very difficult for us to continue the war until the end.

Therefore, when the IDF and the ISA recommended together that the Cabinet accede to the American request to allow the limited entry of two fuel trucks a day to the southern Gaza Strip, the War Cabinet unanimously agreed. This is a minimal emergency quantity of fuel to operate water and sewage pumps without which we could expect the immediate outbreak of disease. It must be understood: The outbreak of disease would harm both the residents of the Strip and the IDF soldiers in the Strip.

I want to emphasize: This is not a change of policy but a limited, localized response in order to prevent the outbreak of epidemics. These are some of the things that my colleagues and I are doing to ensure the continued diplomatic maneuvering [sic] room for the State of Israel, which we need to achieve the goals of the war.¹²⁸

The re-opening of Kerem Shalom crossing is also said to have followed US requests.¹²⁹ This material suggests that aid was permitted to enter Gaza not to alleviate civilian suffering, but to appease international demands. These steps therefore do not negate a conclusion that Israeli officials either actively sought to bring suffering to the population of Gaza, or were indifferent in the face of it.

64. We recognise that at least some of the measures taken by Israel to unwind its "total siege" might reflect the influence of Israeli officials who are genuinely motivated to protect Palestinians in Gaza. On balance, however, the relatively marginal steps taken – apparently reluctantly – are not sufficient to negate the overall inference that some members of Israel's governments *do* intend to harm Palestinians. In any

¹²⁶ See above at paragraph 22.

¹²⁷ A. Hass, [Internal U.S. State Dept. Document Urges Pressure on Israel to Renew Gaza Water Supply](#), Haaretz, 29 October 2023.

¹²⁸ Israeli Ministry of Foreign Affairs, [PM Netanyahu holds press conference with MoD Gallant and Minister Gantz](#), 18 November 2023 (updated 19 November 2023). For a similar explanation from another official, see Israeli Prime Minister's Office, [Statement by the Director of the National Security Council and National Security Advisor Tzachi Hanegbi at a press conference](#), 18 November 2023.

¹²⁹ The White House, [Statement from National Security Advisor Jake Sullivan on Government of Israel Decision to Open Kerem Shalom for Direct Delivery of Humanitarian Assistance](#), 15 December 2023; [Israel to reopen Karem Abu Salem to allow humanitarian aid into Gaza](#), Al Jazeera, 15 December 2023.

case, no such question arises in respect of the period of “total” closure: at least for two weeks, measures taken by Israeli officials revealed an unambiguous wish to harm Palestinian civilians.

Knowledge of hardships resulting from the measures

65. It is clear that Israeli leaders are aware of the hardships being suffered by the population in Gaza, and that they are caused by the closure and exacerbated by its intensification.
66. In our Opinion we referenced various statements to this effect, made by Israeli officials since 2014. Based on those findings, we consider that, as at 7 October, Israeli leaders knew of the serious humanitarian challenges facing Gaza as a result of more than 15 years of closure. The unceasing role of the Israeli political leadership and COGAT in imposing, amending, easing, and tightening restrictions over that period would also have given leaders knowledge about the impact of further and more dramatic restrictions.
67. We also note that from 12 October, during the period of “total siege”, Israel began to order civilians to evacuate from northern Gaza to the south.¹³⁰ We consider that Israeli leaders would have known that displacements on this scale would create significant humanitarian need, even in a well-resourced population.
68. In light of the IDF’s presence in Gaza, and the extensive coverage by international agencies and the media, it is also inconceivable that Israel has not observed the consequences of the intensified closure on the civilian population.

Conclusions regarding intent to severely deprive the population of human rights

69. We have been unable to reconcile Israeli leaders’ stated desire to protect civilians with the decision to impose a “total siege” on Gaza. Rather, in light of the historical context and some explicit statements, we consider that at least some Israeli leaders have seen the intensified closure as a means by which to punish Gaza’s population or create leverage through which to influence Hamas. Both would suggest a direct intent to create conditions which constitute a severe deprivation of human rights.¹³¹
70. In any event, we recall that “oblique” intent can also be established where a person is aware that a particular result will, as a matter of “virtual certainty”, result from their conduct.¹³² There is no question that Israel’s leaders knew (and know) that

¹³⁰ Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Frequently Asked Questions](#), 6 December 2023 (updated 8 December 2023).

¹³¹ For a brief explanation of the different types of “intent”, see Opinion, para. 368.

¹³² See Opinion, para. 368.

imposing the intensified closure would lead to extreme humanitarian suffering in Gaza. We consider that there is at least a reasonable basis to believe that Israel's leaders meet the requirement for oblique intent.

4.2 Intention regarding discrimination

71. The remaining mental element is that of intent to discriminate. Here, we consider that the reasoning in our Opinion continues to apply.¹³³
72. According to international caselaw concerning persecution, the existence of a broader context of discriminatory practices is persuasive in determining discriminatory intent.¹³⁴ In our Opinion, we considered the history of laws and policies in Israel which are designed to benefit Jewish people and ensure Jewish demographic dominance.¹³⁵ This systemic discrimination – which has normalised differential treatment between Jewish and Palestinian people – is the legal context against which the closure is situated and, in line with the caselaw cited above, is relevant to inferring discriminatory intent.
73. In our Opinion we also considered it important that Israeli leaders know that Gaza's population is almost exclusively entirely Palestinian, and, therefore, that extreme hardships inflicted on Gaza are hardships inflicted on Palestinians. A parallel can be drawn with findings of the International Criminal Tribunal for Yugoslavia (ICTY). There the accused Miletić's had been involved in drafting a directive to impose intolerable conditions on "the inhabitants of Srebrenica and Žepa". Discriminatory intent was inferred from the fact that those inhabitants were Bosnian Muslim.¹³⁶
74. The objection could of course be made that the measures in question are directed at Gaza's population not because it is Palestinian, but because Hamas is hidden within it. However, we consider it telling that there appears to be a willingness to ignore enormous "collateral" harm to Palestinian civilians which would not be tolerated against others. For example, it is difficult to conceive that similar measures would ever be taken against a territory known to include many Jewish or Israeli civilians, even if it concealed Hamas operatives.
75. As explained above, we believe that this discriminatory intent, which existed before 7 October 2023, is also relevant to the question of intent thereafter. The recent and current measures are an extreme heightening of an existing set of

¹³³ Opinion, paras 414-426.

¹³⁴ Prosecutor v Brđanin, IT-99-36A, [Judgement](#), 3 April 2007, paras 165-167; Prosecutor v Popović et al., IT-05-88-A, [Judgement](#), 30 January 2015, para. 727.

¹³⁵ Opinion, paras 418-425.

¹³⁶ Prosecutor v Popović et al., IT-05-88-A, [Judgement](#), 30 January 2015, para. 729.

measures and we consider it is possible, if not likely, that pre-existing discriminatory intent has continued.

76. The recent heightening of tensions has seen more aggressive statements from Israeli officials which bolster that conclusion. Key examples include the references cited above (at paragraph 53) to “human animals”; as well as references to “monsters” and “barbarians”¹³⁷ and “children of the darkness”,¹³⁸ as well as Prime Minister Netanyahu’s references to the biblical story of Amalek.¹³⁹
77. Whether speaking specifically to the closure, or to one or more parts of Israel’s broader military campaign, we see these statements as relevant in that they seek to dehumanise the “enemy”. We note that many of these statements are vague about whether their subject is Hamas or the people of Gaza more broadly.¹⁴⁰ However, the ambiguity is itself telling in that it reveals a tendency to conflate the population of Gaza with Hamas – a conflation based most obviously on shared ethnicity.
78. It might also be objected that this is simply a normal consequence of an armed conflict which is inter-ethnic in nature. An argument of this kind was made before the ICTY, but rejected:

Miletić seems to be suggesting that the targeting of a particular group is not discriminatory so long as this is done in furtherance of military goals. The argument is fallacious. So long as there is intent to discriminate against a person on one of the listed grounds, specifically, race, religion, or politics, any additional motive of pursuing a military goal is irrelevant.¹⁴¹

79. This reasoning leads us to the view that there is a reasonable basis to believe that our original categorisation of the Gaza closure as meeting the elements of the crime against humanity of persecution remains valid. Indeed, we take the view that the current restrictions are a continuation, albeit in extreme form, of the crime of persecution which was already being perpetrated before 7 October 2023.

5. POSSIBLE DEFENCES AND RELATED QUESTIONS

80. It remains for us to consider whether the continued (and intensified) closure is nonetheless justified or excused under the circumstances. Foremost among these

¹³⁷ Israeli Ministry of Foreign Affairs, [Christmas message from PM Netanyahu](#), 24 December 2023.

¹³⁸ Israeli Ministry of Foreign Affairs, [Excerpt from PM Netanyahu's remarks at the opening of the Winter Assembly of the 25th Knesset's Second Session](#), 16 October 2023.

¹³⁹ Israeli Ministry of Foreign Affairs, [Statement by PM Netanyahu](#), 28 October 2023; Israeli Prime Minister, [Post on X](#) [translation from Google Translate], 3 November 2023.

¹⁴⁰ See paragraphs 53-54 above.

¹⁴¹ *Prosecutor v Popović et al.*, IT-05-88-A, [Judgement](#), 30 January 2015, para. 733.

circumstances is the attack of Hamas and its allies. As with the closure itself, we consider that this attack must be understood within its context. Clearly, the violence initiated on 7 October was radically larger in scale than previous attacks by Palestinian armed groups. Nonetheless, its perpetrators, victims, and apparent motivations situate it within the same pattern of violence against Israel and its people which has long been articulated as the reason for the closure.

81. For this reason, much of the analysis and reasoning set out in our Opinion remains relevant. However, where questions of proportionality and necessity are involved, the escalation of an existing course of conduct may affect our conclusions regarding the availability of a defence, as may the advent of an especially egregious attack within a conflict.
82. In this section we highlight those conclusions from our Opinion that remain relevant, and assess whether events on and since 7 October require that we change our conclusion that no defences exist which would justify or excuse the closure of Gaza as the crime of persecution.

5.1 Tu quoque and reprisals

83. As explained in our Opinion, international criminal law does not permit conduct simply because it responds to a prior wrong by an opposing party to a conflict (“*tu quoque*”).¹⁴² Any scope which remains under international law for “reprisals” (measures to coerce compliance with international law by an adversary)¹⁴³ does not include attacks against civilians and would not justify the crime against humanity of persecution.¹⁴⁴

5.2 The relevance of international humanitarian law

84. Our Opinion also considered whether compliance with international humanitarian law can, *per se*, constitute a defence to a charge of crimes against humanity. We found no international caselaw indicating that it could. Certainly, no defence of this kind is included in the Rome Statute.¹⁴⁵
85. However, international humanitarian law is not unrelated to the question before us. It can be relevant to the material elements of a crime. For persecution, the question primarily arises in assessing the material element regarding a “severe deprivation of fundamental human rights”, which includes the requirement that the deprivation is “contrary to international law”. As we explained in our Opinion, this phrase refers to a narrow range of circumstances in which

¹⁴² Opinion, para. 461.

¹⁴³ See Opinion, para. 462.

¹⁴⁴ Opinion, paras 462-463.

¹⁴⁵ Opinion, paras 464-473.

international humanitarian law explicitly permits certain conduct which would be unlawful in peacetime. Examples include where a combatant kills an enemy combatant during hostilities; or where a civilian population is evacuated for its safety in a manner compliant with article 49 of the Fourth Geneva Convention.¹⁴⁶

86. In our Opinion, having taken the view that an armed conflict has continued between Israel and Hamas throughout the period of the closure,¹⁴⁷ we asked whether any principles of international humanitarian law might *permit* the closure. The two possibilities¹⁴⁸ suggested most clearly by statements made by Israel are addressed in detail below. Our reasoning on these issues is largely unaffected by factual developments since our Opinion. However, given the increased attention on this area of humanitarian law since 7 October 2023,¹⁴⁹ we consider that the matter warrants (re-)elaboration.

5.2.1 The closure and international humanitarian law

Siege warfare

87. Prior to October 2023, Israel had denied that the closure of Gaza constituted a siege, largely on the basis that its restrictions limited, rather than completely blocked, goods and people from crossing Gaza's borders.¹⁵⁰ That position may have changed, at least in respect of the period between 7 and 21 October 2023.
88. International humanitarian law does not contain any specific rule permitting sieges. Nor does it expressly prohibit siege warfare. Rather, the regulation of sieges arises indirectly from various more general rules regarding methods of warfare, protection of civilians, and humanitarian access. As we pointed out in our Opinion, all of these rules impose prohibitions or obligations. They prohibit the targeting of civilians, collective penalties and reprisals, and the use of starvation as a method of warfare, and require the passage of humanitarian

¹⁴⁶ Opinion, paras 215-221.

¹⁴⁷ Opinion, paras 276-278.

¹⁴⁸ In our Opinion we also considered the final sentence of article 27 of the Fourth Geneva Convention, but found that it does not permit measures of the kind or extent involved in the closure: Opinion, paras 289-293.

¹⁴⁹ See, for example: T. Dannenbaum, [The Siege of Gaza and the Starvation War Crime](#), *Just Security*, 11 October 2023; G. Corn and S. Watts, [Siege law and military necessity](#), *Articles of War*, 13 October 2023; R. Lauterbach, [A "complete siege" of Gaza in accordance with international humanitarian law](#), *Articles of War*, 16 October 2023; O. Pomson, [The obligation to allow and facilitate humanitarian relief](#), *Articles of War*, 7 November 2023; M. Sharpe, [Humanitarian Access to Gaza](#), *EJIL: Talk!*, 20 November 2023.

¹⁵⁰ Israeli Ministry of Foreign Affairs, [Behind the headlines: The myth of an Israeli siege on Gaza](#), 17 August 2014 (updated 2 April 2015).

relief.¹⁵¹ In a besieged or encircled area, efforts must be made to enable vulnerable civilians to leave and medical aid to enter.¹⁵²

89. While the various prohibitions and obligations do not constitute an outright ban on sieges, any scope left by them for lawful action by way of siege warfare is so narrow that it would rarely, if ever, be of military value. It surely remains lawful to besiege a group of enemy combatants who are unaccompanied by civilians. However, as soon as civilians are involved, the lawfulness of a siege becomes doubtful, given the various rules mandating civilian protection.
90. We are confident that the restrictions imposed on Gaza since 7 October have not complied with these rules. Most starkly, sufficient efforts have not been made to allow vulnerable civilians, such as the sick, wounded, elderly and children to leave the area (Gaza) which is being deprived of essential commodities. Aside from foreign nationals, only a very small number of people (relative to the affected population) have been able to leave Gaza, in the most extreme emergency medical cases.¹⁵³
91. It is telling that although civilians were given the opportunity to move from north to south Gaza, Israel did not exclude south Gaza from the area of “total siege” between 7 and 21 October and allow humanitarian relief to reach civilians there. Likewise, since 21 October, although some supplies have been able to enter Gaza, they have remained insufficient.¹⁵⁴ Electricity from Israel has continued to be cut to the entire area of Gaza.¹⁵⁵ Even without considering more complex questions such as collective punishment and starvation as a means of warfare, we are satisfied that the intensified closure cannot be considered a lawful siege.

Article 23 of the Fourth Geneva Convention

92. In our Opinion, we noted that Israel has at times claimed that the closure of Gaza is justified by one of the specific sources of civilian protection obligations touched on above, namely, article 23 of the Fourth Geneva Convention.¹⁵⁶ In a statement on legal aspects of the current Gaza conflict, Israel again suggested that article 23

¹⁵¹ Opinion, para. 281.

¹⁵² [Convention \(IV\) Relative to the Protection of Civilian Persons in Time of War](#), 12 August 1949, article 17. This is also recognised in Israel’s Manual on the Laws of War, which explains that the prohibition of starvation under international humanitarian law “clearly implies that the city’s inhabitants must be allowed to leave the city during a siege.” See ICRC, [IHL Database, Rule 53: Starvation as a Method of Warfare](#).

¹⁵³ Fewer than 2,500 at the time of writing: see paragraph 24 and footnote 55 above.

¹⁵⁴ See paragraphs 18-19 and 31-38 above.

¹⁵⁵ See paragraph 20 above.

¹⁵⁶ Opinion, para. 286.

permits it to block or restrict humanitarian aid.¹⁵⁷ We therefore return to this question here,¹⁵⁸ although we do not consider that recent developments have materially affected our conclusions.

93. Article 23 of the Fourth Geneva Convention¹⁵⁹ deals with “consignments” of certain categories of aid for civilians: medical supplies, objects for religious worship, and “essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.” It demands “free passage” of such consignments for “civilians of another High Contracting Party, even if the latter is its adversary.” Israel focuses on the fact that article 23 makes the obligation of free passage conditional on a party’s satisfaction that there are no reasons to believe that the aid will be diverted, that control may not be effective, or that the aid would provide a definite military or economic advantage to the enemy.
94. However, article 23 of the Fourth Geneva Convention has become redundant.¹⁶⁰ Article 70 of Additional Protocol I addresses the same subject matter in a more comprehensive way.¹⁶¹ Israel is not a party to Additional Protocol I, but it is widely accepted that customary international law is now aligned with article 70.¹⁶² Israel has itself recognised this and accepted that it is bound by this rule.¹⁶³

¹⁵⁷ Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Key Legal Aspects](#), 3 December 2023, (updated 14 December 2023), Annex 2, footnote 10.

¹⁵⁸ For our initial discussion, see Opinion, paras 284-288.

¹⁵⁹ [Convention \(IV\) Relative to the Protection of Civilian Persons in Time of War](#), 12 August 1949, article 23.

¹⁶⁰ See especially: ICRC, [IHL Database, Rule 55: Access for Humanitarian Relief to Civilians in Need](#); D. Akande and E. Gillard, Promoting Compliance with the Rules Regulating Humanitarian Relief Operations in Armed Conflict: Some Challenges, *Israel Law Review*, Vol. 50(2), 2017, p. 128; D. Akande and E. Gillard, [Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict](#), Commissioned by OCHA, 2016, paras 87-88, 92.

¹⁶¹ As cited in our Opinion (at para. 288), the ICRC has itself said that article 70 renders “obsolete” article 23 of the Fourth Geneva Convention: ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, [Commentary of 1987: Article 70 – Relief Actions](#), para. 2851.

¹⁶² ICRC, [IHL Database, Rule 55: Access for Humanitarian Relief to Civilians in Need](#); D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 4th edition, Oxford University Press, 2021, p357; D. Akande and E. Gillard, Promoting Compliance with the Rules Regulating Humanitarian Relief Operations in Armed Conflict: Some Challenges, *Israel Law Review*, Vol. 50(2), 2017, pp121, 128; D. Akande and E. Gillard, [Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict](#), Commissioned by OCHA, 2016, paras 6, 87-88, 92.

¹⁶³ [Jaber Al-Bassiouni and others v Prime Minister and Minister of Defense](#), 30 January 2008, HCJ 9132/07, para. 13. In its recent statement concerning legal aspects of the current conflict, Israel cites both article 23 of the Fourth Geneva Convention *and* article 70 of Additional Protocol I (as well as article 18(2) of Additional Protocol II) but goes on to provide the full text of article 23. See Israeli Ministry of Foreign

95. The rule reflected in article 70 applies where: civilians are inadequately provided with essential supplies, the party responsible for meeting these needs has not done so, and an offer of humanitarian services has been made. In such circumstances “rapid and unimpeded passage of all relief consignments” is required “even if such assistance is destined for the civilian population of the adverse Party”.¹⁶⁴ A party may prescribe searches or other technical arrangements and/or require that aid distribution be supervised by a neutral “protecting power”, but it may not divert or delay aid except “in cases of urgent necessity in the interest of the civilian population concerned.”¹⁶⁵
96. It could be argued that article 70 makes the above scheme subject to the “agreement of the Parties concerned”.¹⁶⁶ However, the prevailing interpretation of this caveat is reflected in the position of the ICRC:

It is ... self-evident that a humanitarian organization cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent. The 26th International Conference of the Red Cross and Red Crescent in 1995 stressed the obligation of all parties to a conflict “to accept, under the conditions prescribed by international humanitarian law, impartial humanitarian relief operations for the civilian population when it lacks supplies essential to its survival”. ...

Practice further indicates that a party that imposes a siege, blockade or embargo which has the effect of starving the civilian population has an obligation to provide access for humanitarian aid for the civilian population in need ...¹⁶⁷

97. Accordingly, a party may not “arbitrarily” or wrongly withhold consent for humanitarian relief. That interpretation is also found in the ICRC’s 1987 Commentary to Additional Protocol I, based on an analysis of the treaty

Affairs, [Hamas-Israel Conflict 2023: Key Legal Aspects](#), 3 December 2023 (updated 14 December 2023), Annex 2, footnote 10.

¹⁶⁴ [Additional Protocol \(I\) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts](#), 8 June 1977, article 70(2).

¹⁶⁵ *Ibid.*, article 70(3)

¹⁶⁶ *Ibid.*, article 70(1).

¹⁶⁷ ICRC, [IHL Database, Rule 55: Access for Humanitarian Relief to Civilians in Need](#).

negotiations,¹⁶⁸ and is accepted by the UN.¹⁶⁹ The ICRC has elsewhere explained further:

When a party to an armed conflict is unable or unwilling to fulfil its primary obligation to meet the needs of its population and when offers of services have been made by impartial humanitarian organizations, there are no more valid/lawful grounds to withhold or deny consent to the undertaking of humanitarian activities. Therefore, there are circumstances under IHL in which a party to the conflict is obliged to grant its consent to an offer of services.

It is important to underline that, under IHL, imperative military necessity is not a valid ground for a general and definitive denial of consent to humanitarian activities. An offer of services can be declined by the parties to the conflict when there are no needs to meet and/or when the offer of services is not humanitarian in nature or does not emanate from an organization being impartial and humanitarian in character. IHL does not foresee other grounds justifying a general refusal to consent to relief schemes.¹⁷⁰

98. Guidelines commissioned by the UN Office for the Coordination of Humanitarian Affairs (OCHA) have elaborated the circumstances in which the withholding of consent will be considered arbitrary or wrongful. They include, for example, if the refusal of consent was intended to starve or to punish a civilian population, or if it had the effect of discriminating against an ethnic or other protected group, or if it resulted in violations of fundamental human rights, such as rights to an adequate standard of living or to essential health services.¹⁷¹ Although this interpretation is yet to be judicially tested, we find it compelling and note that it has not been subject to significant challenge from scholars.¹⁷²

¹⁶⁸ ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, [Commentary of 1987: Article 70 – Relief Actions](#), para. 2805.

¹⁶⁹ UN Secretary-General, S/2013/689, [Report of the Secretary-General on the Protection of Civilians in Armed Conflict](#), 22 November 2013, para. 58.

¹⁷⁰ ICRC, [ICRC Q&A and lexicon on humanitarian access](#), *International Review of the Red Cross*, Vol. 96(893), 2014, p. 369. See also, ICRC, [International humanitarian law and the challenges of contemporary armed conflicts](#), 32nd International Conference of the Red Cross and Red Crescent, 2015, p. 29.

¹⁷¹ D. Akande and E. Gillard, [Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict](#), Commissioned by OCHA, 2016, paras 48 *et seq*, especially para. 51.

¹⁷² We note that a contrary view is put forward by at least one scholar, at the US Military Academy. See especially: S. Watts, [Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations](#), Harvard Law School Counterterrorism and Humanitarian Engagement Project, May 2014, pp. 17-18; S. Watts, [Humanitarian Logic and the Law of siege: A Study on the Oxford Guidance on Relief Actions](#), *International Law Studies*, Vol. 95, 2019, especially at pp. 28 *et seq*. Watts appears to posit an unfettered possibility for states to withhold consent to humanitarian relief. (Although *cf* his earlier reliance on Yoram Dinstein, who recognised the possibility that article 70

99. Israel's reliance on article 23 of the Fourth Geneva Convention is therefore misplaced. The provisos which had previously limited a state's obligations under article 23 no longer apply,¹⁷³ and international humanitarian law can no longer be said to leave space for restricting aid access to protect a military advantage.¹⁷⁴ Israel is certainly permitted to implement searches and other measures to ensure that aid shipments are not misused or diverted. However, the "total siege" (to 21 October), the closure of Israel's border to aid (to 17 November), and the continuing impediments to humanitarian access are almost certainly unlawful. We reach that view on several bases.

100. First, and most generally, the civilian population has been in need and there does not appear to be a question about the impartiality of aid agencies offering relief. According to the ICRC, consent for humanitarian access must be given in such circumstances.¹⁷⁵ Various statements made by Israel regarding the intensified closure do not alter that conclusion. Some statements implied that blocking or limiting supplies (especially of fuel) is permissible because Hamas is stockpiling supplies which it is withholding from the civilian population in Gaza.¹⁷⁶ Such a rationale for refusing humanitarian relief would clearly be incompatible with

could "be construed as precluding refusal of agreement to relief for arbitrary or capricious reasons.": Y. Dinstein, [The Right to Humanitarian Assistance](#), *Naval War College Review*, Vol. 53(4), 2000, p. 84; referenced in S. Watts, [Under Siege: International Humanitarian Law and Security Council Practice concerning Urban Siege Operations](#), Harvard Law School Counterterrorism and Humanitarian Engagement Project, May 2014, p. 18.) Ultimately, Watts is principally focused on critiquing the established interpretation of article 70, but does not explicitly put forward an alternative interpretation. We do not find his critique convincing. Allowing consent to be refused for any reason – that is, with no limit regarding 'arbitrariness' – would have the consequence of leaving humanitarian relief entirely at the parties' discretion, making it a step backwards in civilian protection from article 23 of the Fourth Geneva Convention. It is clear that this was not the intention of the drafters, as seen from Watts' own discussion of the drafting history. See S. Watts, [Humanitarian Logic and the Law of siege: A Study on the Oxford Guidance on Relief Actions](#), *International Law Studies*, Vol. 95, 2019, pp. 31-33.

¹⁷³ See the sources cited in footnote 160 above.

¹⁷⁴ See the sources cited in footnote 170 above.

¹⁷⁵ See above at paragraph 97.

¹⁷⁶ For example, a 24 October social media post by COGAT showed a satellite image of fuel tanks in Gaza with the words: "Take a look. Near the Rafah border crossing, Hamas owns fuel tanks, containing hundreds of thousands of liters of fuel. Please refer the ones complaining about no fuel in Gaza to Hamas. #BlameHamas": COGAT, [Post on X](#), 24 October 2023. The same day an IDF spokesperson posted: "Hamas has stockpiled more than 1M Liters of fuel in Gaza, but is not providing it to the hospitals in need. Hamas is accountable for the suffering in Gaza, not Israel", Jonathan Conricus, [Post on X](#), 24 October 2023. An explanatory document about the conflict from the Israeli Ministry of Foreign Affairs states that "demanding aid flow into Gaza, without also demanding that Hamas release the supplies it has stolen from the civilian population, is effectively rewarding the reprehensible behavior of Hamas and asking others to ensure that Hamas retains the capacity to launch armed attacks against Israel": Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Frequently Asked Questions](#), 6 December 2023 (updated 8 December 2023). See also Israeli Ministry of Foreign Affairs, [Hamas-Israel Conflict 2023: Key Legal Aspects](#), 3 December 2023 (updated 14 December 2023).

article 70, which does not call for any assessment of *why* the civilian population's needs have not been met.¹⁷⁷ Hamas' possible culpability for civilian privation is no justification for Israel's contribution to that privation. Neither is Israel permitted to refuse consent for aid consignments in a way which punishes civilians for the conduct of Hamas, for example, by making civilian aid access contingent on Hamas' release of captives.¹⁷⁸ Additionally, as noted above,¹⁷⁹ withholding consent to humanitarian access in a way which is discriminatory or leads to fundamental violations of social and economic rights is unlawful. Our findings regarding the discriminatory and grave deprivation of human rights occasioned by the closure and its recent intensification are set out in our Opinion and above.¹⁸⁰

101. Finally, we note that Israel's reference to article 23 depends on its position that Gaza is not occupied.¹⁸¹ We do not take a position on that question.¹⁸² However, we highlight that considerably more stringent obligations than those discussed above apply regarding the provision of essential civilian supplies within an occupied territory.¹⁸³

5.2.2 The nature of these rules of international humanitarian law

102. We have explained above why we consider that Israel's intensified closure does not comply with international humanitarian law. However, in any event, we do not consider that the rules we have considered above are of the kind which could negate the elements of the crime against humanity of persecution.

103. As explained above at paragraph 85, international humanitarian law would be relevant where it positively permits conduct that would otherwise be unlawful. True permissive rules, such as those referred to above concerning the killing of combatants and evacuations, actively negate a prohibition which would have applied in peacetime. They refer to conduct which is ordinarily impermissible due to its harmful consequences, but which is allowed in light of the exigencies of armed conflict.

¹⁷⁷ Article 70(1) refers to a situation in which the civilian population "is not adequately provided with supplies mentioned in Article 69."

¹⁷⁸ On this see the unanimity of opinion demonstrated at: [Legal Experts on Why Aid to Gaza Can't Be Conditioned on Hostage Release, in response to remarks by US Official](#), *Just Security*, 20 November 2023.

¹⁷⁹ See paragraph 98.

¹⁸⁰ Opinion, paras 222-272 and 301-310; and see above at paragraphs 26-43.

¹⁸¹ That position has been repeated in the context of discussions about the law applicable to the current hostilities. See Israeli Ministry of Foreign Affairs, [Hammas-Israel Conflict 2023: Key Legal Aspects](#), 3 December 2023 (updated 14 December 2023).

¹⁸² See Opinion, para. 276.

¹⁸³ [Convention \(IV\) Relative to the Protection of Civilian Persons in Time of War](#), 12 August 1949, especially articles 55, 59-61.

104. No such permissive rules exist in respect of sieges or the blocking or restricting of humanitarian supplies. Rather the rules of international humanitarian law which we have addressed above all *add to*, rather than negate, existing human rights obligations. As explained in our Opinion,¹⁸⁴ even if Israel complied with these rules, this would not have the consequence of permitting a discriminatory deprivation of fundamental rights.

5.3 *Mistake of law*

105. Although we consider it clear from the above analysis that the severe deprivation of human rights imposed in Gaza is “contrary to law”, a question may arise as to whether Israeli officials are operating on a mistaken understanding of international humanitarian law, which negates this element. We considered this possibility in Section 9.2.5 of our Opinion.¹⁸⁵ There, we noted that this is a question specific to the mental state of a given individual. However, we considered that the defence would be difficult to make out in light of the considerable debate and controversy that has surrounded Israel’s position on the international legality of the closure.

106. That position has now been made even clearer in light of the significant criticism with which the intensified closure has been met. At the peak of the intensified closure, respected international scholars¹⁸⁶ and the ICRC¹⁸⁷ identified the restrictions on aid access to Gaza as being contrary to international law. The UN Security Council has since passed two resolutions calling for humanitarian access compliant with international humanitarian law,¹⁸⁸ with one resolution also recognising the importance of resuming commercial imports into Gaza.¹⁸⁹

107. Moreover, it is unclear how the intensified restrictions could be seen as compatible with interpretations of international law articulated by Israel’s own state institutions. For example, the ICRC cites Israel’s 2006 Manual on the Rules of Warfare as stating:

¹⁸⁴ Opinion, paras 281-282 and 287.

¹⁸⁵ Opinion, paras 474-479.

¹⁸⁶ See, for example: K. Ambos, [Solidarity with Israel, but no Blank Check](#), *Verfassungsblog*, 17 October 2023; M. Weller, [Marc Weller on what international law has to say about the Israel-Hamas conflict](#), *The Economist*, 27 October 2023.

¹⁸⁷ “The instructions issued by the Israeli authorities for the population of Gaza City to immediately leave their homes, coupled with the complete siege explicitly denying them food, water and electricity, are not compatible with international humanitarian law.”: ICRC, [Israel and the occupied territories: Evacuation order of Gaza triggers catastrophic humanitarian consequences](#), 13 October 2023.

¹⁸⁸ [UN Security Council Resolution 2712 \(2023\)](#), 15 November 2023, paras 2 and 4; [UN Security Council Resolution 2720 \(2023\)](#), 22 December 2023, especially paras 1-3; see also paras 4 and 8.

¹⁸⁹ [UN Security Council Resolution 2720 \(2023\)](#), 22 December 2023, 13th preambular paragraph.

A siege of a military target is a completely legitimate means of warfare, even if it involves the starvation of the besieged soldiers. A question arises in the case of a military siege of a populated town. Until recently, there were no rules attached to this method of warfare, and it was permitted to exploit the suffering of the local population in order to overcome the enemy. The [1977] Additional Protocols to the Geneva Convention contain a provision banning starvation of the civilian population in battle. *The meaning to be extracted from this provision is that the residents of a city need to be allowed to leave it if it is besieged. In cases where civilians do not have the opportunity to leave the besieged city, a duty arises to supply them with food, water and humanitarian aid.*¹⁹⁰ [emphasis added]

108. Several decisions from Israel's Supreme Court have addressed the specific question of Israel's humanitarian obligations in Gaza. Most notably, in its 2008 decision in *Al-Bassiouni v Prime Minister*, the Court considered the extent of Israel's obligations to supply of fuel and electricity. It stated that:

...under the rules of customary international humanitarian law, each party to a conflict is obliged to refrain from disrupting the passage of basic humanitarian relief to populations in need of such relief in areas under its control... In the commentary to art. 70 of the First Protocol, too, it is stated that arts. 54 and 70 of the First Protocol should be read together, to the effect that a party to a conflict may not refuse to allow the passage of foodstuffs and basic humanitarian equipment necessary for the survival of the civilian population...¹⁹¹

109. The Court ruled that while Israel was not obliged to allow an "unlimited amount of electricity and fuel" into Gaza, it did have obligations under international humanitarian law to provide for "the essential humanitarian needs of the civilian population."¹⁹² The Court ruled in favour of the Israeli Government, based on assurances that fuel imports into Gaza were to be maintained at the level of 2.2 million litres per week,¹⁹³ and on the understanding that:

...not only are the [Prime Minister and Defence Minister] allowing the transfer [of] essential goods to the civilian population in the Gaza Strip, but they also regard this as a humanitarian obligation for which they are liable pursuant to international law....¹⁹⁴

110. The same approach regarding Israel's international humanitarian law obligations was taken in the subsequent case of *Physicians for Human Rights v Prime Minister*:

¹⁹⁰ Rules of Warfare on the Battlefield, 2nd edition, 2006, p. 37, quoted in ICRC, [IHL Database, Practice relating to Rule 53: Starvation as a Method of Warfare](#).

¹⁹¹ [Jaber Al-Bassiouni and others v Prime Minister and Minister of Defence](#), 30 January 2008, HCJ 9132/07, para. 14.

¹⁹² *Ibid.*, para. 11. See also, Opinion, para. 43.

¹⁹³ *Ibid.*, para. 17.

¹⁹⁴ *Ibid.*, para. 15.

...the protections given to the civilian population of all of the parties to the conflict also include the duty to allow free passage of humanitarian medical supplies, as well as consignments of essential foodstuffs and clothing for children, pregnant women and mothers at the earliest opportunity, subject to several restrictions (art. 23 of the Fourth Geneva Convention). Article 70 of the First Protocol provides a more general and broader duty, whereby parties to a conflict are obliged to allow the passage of articles that are essential for the civilian population, at the earliest opportunity and without delay.¹⁹⁵

111. The Court again ruled that Israel was meeting its obligations. In doing so, it explained the relevant obligations as follows:

It appears that there may soon be a ceasefire. Notwithstanding, the state of conflict is still continuing, and in this context, as long as Israel has control of the transfer of necessities and the supply of humanitarian needs to the Gaza Strip, it is bound by the obligations enshrined in international humanitarian law, which require it to allow the civilian population to have access, *inter alia*, to medical facilities, food and water, as well as additional humanitarian products that are needed to maintain civilian life.¹⁹⁶

112. In light of this well-established position in Israeli law, we foresee difficulties for a defence based on mistake of law regarding the intensified closure. As with the matters we had identified in our Opinion, it may at least cast doubt on whether an accused person *genuinely* believed that restrictions on humanitarian relief were permissible, and would likely exclude the defence in the event that the court applies objective requirements.¹⁹⁷ Given that the intensified closure, at least at its peak, so unambiguously diverged from the recognised position under Israeli law, our view is that mistake of law would be even more difficult to rely upon now than previously.

5.4 Self-defence (or the defence of others)

113. In our Opinion, we concluded that individuals charged with persecution in the context of the closure could not rely on self-defence under article 31(1)(c) of the Rome Statute.¹⁹⁸

¹⁹⁵ [*Physicians for Human Rights and others v Prime Minister of Israel and others; Gisha Legal Centre for Freedom of Movement and others v Minister of Defence*](#), 19 January 2009, HCJ 201/09 and HCJ 248/09, para. 21.

¹⁹⁶ *Ibid.*, para. 27.

¹⁹⁷ On this issue, see Opinion para. 479.

¹⁹⁸ Opinion, paras 442-447.

114. As set out in our Opinion,¹⁹⁹ self-defence can only justify harm directed against the originator of unlawful force, and not against third persons.²⁰⁰ The fact that the closure (including in its intensified form) imposes measures against civilians uninvolved in any use of force against Israel therefore precludes the application of article 31(1)(c).²⁰¹

115. We also note that Israel characterises the ongoing and additional restrictions as “defensive” in nature and invokes its right to self-defence under Article 51 of the UN Charter.²⁰² That characterisation is irrelevant to the application of article 31(1)(c). The final sentence of article 31(1)(c) provides:

The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.²⁰³

116. This confirms that the defensive character of an overall operation is not a basis for excluding the criminal responsibility of individuals for violations within it.²⁰⁴ The distinction it highlights – between an individual’s defensive action versus the broader defensive objective of a military operation – confirms that broadly characterising the intensified closure as “defensive” could not bring article 31(1)(c) into operation.²⁰⁵

5.5 *Necessity and duress*

117. Article 31(1)(d) of the Rome Statute sets out a defence which merges aspects of duress and necessity. It provides an excuse for criminal conduct where:

- (i) there existed a threat of imminent death or of imminent or continuing serious bodily injury against the accused or one or more other people (created by other persons or circumstances outside the control of the accused) which subjects the accused to “duress”;
- (ii) the accused acted “necessarily and reasonably” to avoid the threat;

¹⁹⁹ Opinion, para. 447.

²⁰⁰ A. Eser, Article 31: Grounds for Excluding Criminal Responsibility, in O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., Bloomsbury, 2016, p. 1148, fn. 138; H. Tonkin, Defensive force under the Rome Statute, *Melbourne Journal of International Law*, 2005, Vol. 6, pp. 103-104, citing British Military Court, *Trial of Yamamoto Chusaburo*, Case No. 20 (30 January – 1 February 1946).

²⁰¹ *Prosecutor v Martić*, IT-95-11-A, [Judgement](#), 8 October 2008, para. 268.

²⁰² [Charter of the United Nations](#), article 51, which provides an exception to article 2(4)’s prohibition on the use of force.

²⁰³ [Rome Statute](#), article 31(1)(c).

²⁰⁴ See also, *Prosecutor v Kordić and Čerkez*, IT-95-14/2-T, [Judgement](#), 26 February 2001, para. 452.

²⁰⁵ Opinion, para. 445-446.

- (iii) the accused did not intend to cause a greater harm than the one sought to be avoided.²⁰⁶

118. The essence of the defence is that, because of extreme circumstances, a person has *no choice* but to take steps which would ordinarily be criminal. In *von Leeb*, one of the Nuremberg Military Tribunal (“NMT”) cases, it was held:

To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in *such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.*²⁰⁷ [emphasis added]

119. In our Opinion, we concluded that article 31(1)(d) did not excuse the closure.²⁰⁸ We identified potentially relevant threats, including from rocket attacks, violence committed in Israel by individuals entering from Gaza, and harm to Israelis held prisoner in Gaza.²⁰⁹ But we considered that those harms had not been continuously “imminent” throughout the more than 15 years of the closure.²¹⁰ We also considered that, in any event, the closure was not a necessary and reasonable means by which to avoid the threats.²¹¹

120. The attack which began on 7 October may shift the calculus underpinning those conclusions.

121. A preliminary question is whether the attack warrants a revision of our original conclusions: does it provide new information which shows that the closure *was* in fact justified by article 31(1)(d) during the period considered in our Opinion? In our view it does not. Even if the events of 7 October show that the threat of such an attack occurring imminently existed in 2023, this does not mean that the threat had been imminent since 2007, as would be necessary to justify the closure in its entirety. Moreover, in the period shortly preceding 7 October 2023, during which the attack *was* imminent, it remains our view that the closure was of limited effectiveness in “avoiding” that threat. That conclusion is strengthened by the fact that the 7 October attack took place *in spite of* the closure.²¹² We also take note of information suggesting that prior to 7 October 2023, Israel’s leaders did not give

²⁰⁶ [Rome Statute](#), article 31(1)(d).

²⁰⁷ NMT, *United States of America v Wilhelm von Leeb, et al.*, [Judgment](#), 27 October 1948, p. 509.

²⁰⁸ Opinion, paras 448-455.

²⁰⁹ Opinion, para. 451.

²¹⁰ *Ibid.*

²¹¹ Opinion, paras 452-453.

²¹² It is not a requirement of the defence *per se* that the action taken *was* ultimately effective in avoiding the threat: *Prosecutor v Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, para. 2584. However, we consider that a failure to avoid the threat may be one factor, together with others, in determining whether the measure was an apt means to avoid the threat, and thus whether it was “necessary and reasonable” (see further below at paragraph 133).

serious credence to the possibility of a large scale incursion by Hamas, involving a breach of Gaza’s barriers.²¹³ To fall within the parameters of the Article 31(1)(d) defence, conduct must be an intentional response to a threat, done in order to avoid the threat.²¹⁴ We interpret this requirement to mean that, at the time of the conduct, the accused must have known of and believed in the existence of the threat (albeit perhaps without certainty).

122. A more difficult question is whether Israel’s conduct in intensifying the closure since the 7 October attack could be justified under article 31(1)(d) in light of the attack.

5.5.1 The threats and their imminency

123. Since our Opinion, the ICC Appeals Chamber has confirmed the *Ongwen* Trial Judgment’s analysis of the requirement in article 31(1)(d) for a threat of imminent harm,²¹⁵ including that the assessment is an objective one,²¹⁶ and that for the article 31(1)(d) to apply:

“[a] merely abstract danger or simply an elevated probability” that a dangerous situation might occur, “even if continuously present”, does not suffice.²¹⁷

The Chamber quoted Kai Ambos’s explanation that: “[a]n abstract danger or a mere increased general probability of harm, as is typical for dictatorial or war-torn societies, is [...] not sufficient.”²¹⁸

124. In our view, two discrete threats can be identified in the aftermath of 7 October:

- (i) A threat that serious bodily harm or death would be caused to the persons abducted during the 7 October attack who remain in captivity.
- (ii) A threat that Hamas and/or its allies will continue or repeat the attack of 7 October, causing deaths and/or serious bodily harm to civilians in Israel.

²¹³ R. Bergman and A. Goldman, [Israel Knew Hamas’s Attack Plan More Than a Year Ago](#), New York Times, 30 November 2023 (updated 2 December 2023); R. Bergman and A. Goldman, [Israel had a blueprint for the Oct. 7 attacks a year ago. Official dismissed it.](#), New York Times, 1 December 2023.

²¹⁴ K. Ambos, *Treatise on International Criminal Law: Volume 1*, Oxford University Press, 2013, p. 376.

²¹⁵ *Prosecutor v Ongwen*, [Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”](#), ICC-02/04-01/15-2022-Red, 15 December 2022, paras 1419-1424, 1427.

²¹⁶ *Ibid.*, para. 1424.

²¹⁷ *Ibid.*, para. 1422.

²¹⁸ *Ibid.*, para. 1423; K. Ambos, *Treatise on International Criminal Law: Volume 1*, Oxford University Press, 2013, p. 375.

(i) *The threat to captives*

125. Most clearly, we consider that while Hamas and others continue to hold captives in Gaza, there is a credible risk of immediate or continuing serious harm to those persons.

126. In making this assessment we leave aside the (clearly real) possibility that the captives may be killed or seriously injured by IDF action.²¹⁹ That is because under article 31(1)(d), the relevant threat must come from persons or circumstances beyond the actor's control. Israeli officials could not justify conduct as a necessary response to a threat of harm which originates from Israeli military forces acting under their control. We also do not take into account the undeniable risk of serious psychological harm caused by Hamas continuing to hold captives. A threat of psychological harm, no matter how severe, cannot engage article 31(1)(d).²²⁰ Disregarding those threats therefore, we focus solely on the threat of imminent death or serious bodily harm arising from the acts of Hamas and others who have detained captives in Gaza.

127. We consider first whether there has been or is a threat that captives might imminently be killed or physically harmed by their captors. Israel states that it has recovered the bodies of 8 captives, and that it believes at least 23 others are dead; however, the causes of these deaths are unclear or contested.²²¹ Some of those who have been freed reported that they were not subjected to physical violence after their abduction.²²² However, others have reported experiencing physical and/or

²¹⁹ Three captives are acknowledged by Israel to have been shot to death by the IDF ground forces in error: Israeli Ministry of Foreign Affairs, [Swords of Iron: War in the South – Hamas' Attack on Israel](#), 7 October 2023 (updated 14 January 2024). Hamas has made several statements claiming that captives have been killed in Israeli airstrikes. Israel has specifically refuted these claims, in some cases saying that hostages were killed intentionally by Hamas: [Hamas armed wing: More than 60 hostages are missing due to Israeli airstrikes](#), Reuters, 4 November 2023; [Hamas armed wing says youngest hostage, relatives killed in previous Israeli air strike](#), Reuters, 29 November 2023; [Hamas says lost contact with group responsible for five Israeli hostages](#), Reuters, 23 December 2023; M. Mpoke Bigg and A. Ragson, [Hamas Says Two More Israeli Hostages Are Dead](#), New York Times, 15 January 2024.

²²⁰ The text of article 31(1)(d) specifically requires a threat of death or serious *bodily* harm.

²²¹ Israeli Ministry of Foreign Affairs, [Swords of Iron: War in the South – Hamas' Attack on Israel](#), 7 October 2023 (updated 14 January 2024). Elsewhere on this website Israel refers to 25 captives "murdered by Hamas", including 1 who was "killed during a rescue operation". The website acknowledges that 3 captives were killed by the IDF by mistake, but does not appear to accept that any captives have been killed in airstrikes unless these are among the persons said to have been "murdered by Hamas". Hamas has claimed that more than 60 captives are missing or killed due to Israeli airstrikes (see references in footnote 219 above).

²²² See, for example: J. Frankel, [Irregular meals, benches as beds. As freed hostages return to Israel, details of captivity emerge](#), Associated Press, 27 November 2023; T. Goldenberg, [Freed Israeli hostage describes deteriorating conditions while being held by Hamas](#), Associated Press, 28 November 2023;

sexual violence or witnessing it against other captives,²²³ and it also seems plausible that allegations of mistreatment may be being suppressed to protect victims' privacy or out of concerns for those who remain in captivity. Some sources reported threats from Hamas to execute the captives.²²⁴ However, for the most part Hamas has been more ambiguous in its threats,²²⁵ and from the outset has also spoken of releasing the captives in return for Palestinian prisoners detained by Israel.²²⁶ The reliability of such statements is difficult to assess. Around 100 captives were released in November following negotiations,²²⁷ and it is plausible that those who remain have bargaining value to Hamas if kept alive. However, Hamas has also shown, not least through the events of 7 October themselves, that it is willing to kill civilians in order to generate terror and political pressure. Hamas has also stated that some captives are being held by other groups or individuals in Gaza.²²⁸ While the likelihood of the threat materializing is extremely difficult to assess,²²⁹ we believe that throughout the period since 7

[Israeli hostage, 85, shown shaking hands with Hamas captor after release](#), The Guardian, 24 October 2023.

²²³ See, for example: H. Goller, [Freed Israeli hostages tell families of beatings and death threats](#), Reuters, 29 November 2023; [At least 10 freed hostages were sexually abused in Hamas captivity, doctor says](#), The Times of Israel, 6 December 2023; [Former hostage tells lawmakers fellow captive was sexually abused by guard](#), The Times of Israel, 9 January 2024.

²²⁴ N. Al-Mughrabi and D. Williams, [Israel on War Footing, Hamas threatens to kill captives](#), Reuters, 9 October 2023; Human Rights Watch, [Hamas, Islamic Jihad: Holding Hostages is a War Crime](#), 19 October 2023.

²²⁵ In December many media reported Hamas as having stated that the captives would not leave Gaza alive. However, Al Jazeera reported the statement to have said: "Neither the fascist enemy and its arrogant leadership... nor its supporters... can take their prisoners alive without an exchange and negotiation and meeting the demands of the resistance." See [Nearly 300 killed in Gaza in 24 hours as Hamas, Netanyahu trade threats](#), Al Jazeera, 10 December 2023. This may amount to a threat to actively kill captives; or it may refer to the impossibility (according to Hamas) of military rescue or the possibility that captives will be killed by IDF activity.

²²⁶ See, for example: S. Ferguson, [VIDEO: Basem Naim on the hostage situation in Gaza](#) [video], ABC, 17 October 2023; [Hamas demands all Palestinian security prisoners be freed in exchange for 'enemy hostages'](#), The Times of Israel, 28 October 2023.

²²⁷ See paragraph 14 above.

²²⁸ See, for example: H. Sherwood, [Hamas says 250 people held hostage in Gaza](#), The Guardian, 17 October 2023; N. Al-Mughrabi, A. Mills and A. M. Hassan, [Can Hamas locate remaining hostages in mayhem of Gaza war?](#), Reuters, 29 November 2023.

²²⁹ International jurisprudence offers little guidance on what level of certainty article 31(1)(d) requires that the identified threat will materialize. In addition to the writings regarding "abstract" threats quoted above in paragraph 123, there is reference in the NMT's *Flick* decision to a "clear and present danger": see NMT, *United States of America v Friedrich Flick et al.*, [Judgment](#), 1947, in *Judgment of 22 December 1947 Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. VI, pp. 1187-1228 at 1201. However, we have found no detailed analysis of this question from international courts. In the absence of guidance on this question, we reason cautiously that any reasonably apprehended threat – a threat that is not so remote as to be dismissed by a reasonable person – would suffice. As elaborated

October a reasonable observer would perceive a threat that Hamas or others might at any time begin to kill their captives, or subject them to serious physical and/or sexual violence.

128. Additionally, and regardless of the possibility of intentional violence, we consider that the prisoners' detention conditions pose a threat of serious bodily harm or death. Available information suggests that some captives are suffering from serious injuries or illnesses and are without adequate medical treatment, food, and sanitation.²³⁰ We believe that a reasonable observer would consider that, since 7 October, at least some of these individuals have been at risk of imminent or continued serious bodily injury because of these conditions. Some have been at risk of imminent death.

(ii) The threat of a repeat or continued attack in Israel

129. In addition, we consider that the Hamas attack demonstrated the existence of a separate and broader threat. At least as at 7 October 2023, Hamas had both a capability to launch a grave attack on Israeli civilians, causing deaths and serious bodily injury, and an intent to do so immediately. Explicit statements by Hamas leaders that they will repeat the attack demonstrate that the intent is continuing.²³¹ Indeed, since 7 October, Hamas has launched thousands of rocket attacks into Israel,²³² which were reported to have killed 15 persons and injured 700 by the end of 2023.²³³ As Israel's military bombardment of Gaza continues, it will at some point become questionable whether Hamas continues to maintain an immediate *capability* to undertake similar attacks, because of fatalities, injuries, damage to infrastructure, and the depletion of weapons and ammunition stockpiles. From the evidence available to us, we are unable to identify whether that point has yet been reached. Nonetheless, we believe that for at least some period from 7 October onwards, there was a threat that Hamas could imminently cause death or serious bodily harm through a similar attack on Israeli territory.

below (see paragraphs 130 and 141), we consider that the likelihood of the threat materialising may also be relevant to other aspects of the defence, such as the existence of "duress" and whether the accused acted "necessarily and reasonably" to avoid the threat.

²³⁰ WHO, [WHO calls for immediate release, access to, and medical support for hostages taken by Hamas](#), 25 October 2023.

²³¹ [Hamas official says group aims to repeat Oct. 7 onslaught many times to destroy Israel](#), The Times of Israel, 1 November 2023.

²³² As at 14 January 2024, Israel reported that more than 14,000 rockets had been launched at Israel from Gaza, with 497 resulting incidents of rocket strikes within Israel: Israeli Ministry of Foreign Affairs, [Swords of Iron: War in the South – Hamas' Attack on Israel](#), 7 October 2023 (updated 14 January 2024).

²³³ N. Gavriellov, [Hamas and Other Militant Groups Are Firing Rockets Into Israel Every Day](#), New York Times, 27 December 2023 (updated 2 January 2024).

130. We note that, on a straightforward textual analysis, the first part of article 31(1)(d) contains an additional element: it appears to require not only that there is a threat, and that it is imminent, but that the imminent threat “subjects the accused to duress” and thereby causes the conduct in question. According to academic commentary, “duress” means that the “defendant’s will is overborne”, and also involves an objective requirement that the threat is such that “the defendant cannot be fairly expected to withstand or assume the risk”.²³⁴ In our view the latter, objective, requirement may involve a consideration not only of how grave the threatened harm is, but also how (un)certain it is to materialize.²³⁵ However, we note that when applying article 31(1)(d), the ICC has so far not treated this as a requirement additional to the existence of an imminent threat.²³⁶ Therefore, while we have doubts as to whether Israeli leaders’ wills could be said to have been overborne, and may question whether the threats here are sufficiently certain to create “duress”, we recognise that a court might not reject an article 31(1)(d) defence for this reason.

131. Accordingly, we consider that there is a reasonable basis to believe that the first requirement of the article 31(1)(d) defence can be established regarding the threat of imminent death or serious physical harm to captives, or the threat of an imminent repeat attack within Israel.

5.5.2 Necessity and reasonableness

132. Our Opinion considered briefly whether the closure was a necessary and reasonable way to avoid threats posed by Hamas, and concluded that it was not.²³⁷ We were persuaded by the argument that the closure was likely only minimally effective in avoiding serious harm in Israel, and may even have been

²³⁴ A. Eser, Article 31: Grounds for excluding criminal responsibility, in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court – A Commentary*, 3rd ed., Bloomsbury, 2016, p. 1152, mn 56. and p. 1153, mn 57. See also, K. Ambos, Defences in international criminal law, in B. S. Brown (ed.), *Research handbook on international criminal law* (Edward Elgar Publishing, 2011), pp. 312 and 313; K. Ambos, *Treatise on International Criminal Law: Volume 1*, Oxford University Press, 2013, pp. 374 and 375. Although Ambos does not mention “duress” explicitly when listing the elements of the defence in article 31(1)(d), he mentions its content in his commentaries regarding the first element.

²³⁵ On one possible reading of the *Ongwen* trial judgment, it could be said that the Court rejected the article 31(1)(d) defence because the alleged threats (including the threat of being killed by the Lord’s Resistance Army leadership) were unlikely to materialise. However, rather than analysing this as an absence of duress, the Trial Chamber held that there was no threat: see *Prosecutor v Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2668-2669.

²³⁶ See *Prosecutor v Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2581-2584 where the Trial Chamber set out its understanding of the elements of article 31(1)(d) and 2668-2669 where it applied them to the facts before it. Neither part of the judgment refers to a requirement that the threat of imminent harm creates duress which caused the conduct.

²³⁷ Opinion, paras 452-453.

counterproductive.²³⁸ Since we have now reached a different position on the imminence of the threats, this requirement assumes more significance. We therefore consider it here in greater detail.

133. We note at the outset that the terminology of “reasonableness” can belie the substantive requirements of this defence. Not any reasonable conduct will engage the defence. As explained above (see paragraph 118), the defence applies when an accused person had no real choice. The threshold is a high one. Kai Ambos has proposed three factors for assessing whether it has been met:

- (i) The conduct must be “apt and efficient” to avoiding the threat.²³⁹ Conduct that is not capable of addressing the threat cannot be reasonable or necessary.
- (ii) The harm arising from the conduct must be “limited to that which is absolutely necessary to avoid the threat”.²⁴⁰ This can be assessed, *inter alia*, by considering whether other, less harmful, options were available.²⁴¹ If so, the conduct will go beyond what is necessary to avoid the threat.
- (iii) The accused’s conduct should not cause greater harm than the harm sought to be avoided.²⁴² Article 31(1)(d) explicitly includes a separate condition that greater harm not be *intended*, but an objective requirement is implicit in the concept of “necessity and reasonableness”: seeking to avoid a lesser harm by inflicting a greater harm is not reasonable. In this sense article 31(1)(d) incorporates an assessment of the response’s proportionality to the threatened harm.²⁴³

134. In the section that follows, we consider the necessity and reasonableness of the intensified closure, focusing on the first and third of the factors above. The second factor – whether the conduct was limited to that which was “absolutely necessary” to avoid the threats – involves consideration of other steps that could have been taken to avoid the threats. It may well be that there are alternatives to the intensified restrictions which would address one or both of the threats. For example, it might be postulated that a repeat Hamas incursion into Israeli territory could be prevented by substantially increasing the IDF presence around the

²³⁸ Opinion, para. 453.

²³⁹ K. Ambos, *Treatise on International Criminal Law: Volume 1*, Oxford University Press, 2013, p. 375.

²⁴⁰ *Ibid.*

²⁴¹ *Prosecutor v Ongwen*, [Trial Judgment](#), ICC-02/04-01/15-1762-Red, 4 February 2021, paras 2583 (and see also, an example of the application of this principle at paras 2666-2667).

²⁴² K. Ambos, *Treatise on International Criminal Law: Volume 1*, Oxford University Press, 2013, p. 375.

²⁴³ *Ibid.*

perimeter of Gaza.²⁴⁴ However, we consider it impossible to make such an assessment without information regarding military capabilities that we do not possess. In any event, it is not necessary to take a view on what alternatives Israel could have adopted, given our conclusions on the first and third factors.

(ii) *The threat to captives*

135. We are unconvinced that the intensified closure is apt to avoiding the threat to captives.

136. First, the restrictions on basic supplies are unlikely to impact Hamas itself, at least in the short term. Israel has said that Hamas is well stocked and refuses to distribute its supplies to civilians.²⁴⁵ As a result, it is Gaza's civilians who are denied in times of scarcity, with less impact felt by Hamas. This strategy would therefore be highly inefficient (and thus unlikely to avert an *imminent* threat), since existing stockpiles will need to be exhausted before any effect can be seen.

137. Neither does it seem plausible that restricting civilian access to basic supplies could create effective political pressure on Hamas: Hamas appears entirely willing to observe suffering among the population of Gaza without intervening,²⁴⁶ particularly when this suffering can be used as a basis for criticising Israel. It is also clear that the residents of Gaza have little or no democratic power over Hamas.²⁴⁷

138. It might be suggested that the November 2023 deal, in which 100 Israeli captives were released, indicates that the intensified restrictions did effectively create leverage with Hamas to secure the release of civilian captives.²⁴⁸ However, the extent to which aid access in fact played a role in the captives' release remains

²⁴⁴ This, along with the laying of landmines, is reported to have been identified by an IDF official as the step which would likely have been taken if intelligence about the Hamas attacks had been taken seriously prior to 7 October: [The Oct. 7 Warning That Israel Ignored](#) [audio and transcript], The Daily (Podcast), New York Times. See also, R. Bergman and A Goldman, [Israel Knew Hamas's Attack Plan More Than a Year Ago](#), New York Times, 30 November 2023 (updated 2 December 2023).

²⁴⁵ See above at paragraph 100 and footnote 176. See also, Israeli Ministry of Foreign Affairs, [Israel-Hamas Conflict 2023: Humanitarian Efforts](#), 14 December 2023 (updated 16 December 2023).

²⁴⁶ As recognised by Israel: Israeli Ministry of Foreign Affairs, [Israel-Hamas Conflict 2023: Humanitarian Efforts](#), 14 December 2023 (updated 16 December 2023). See also footnote 118 above.

²⁴⁷ Opinion, fn 590.

²⁴⁸ The deal included a commitment to allowing 200 trucks of aid per day: Israeli Ministry of Foreign Affairs, [Israel to transfer food and humanitarian aid for the civilian population in Gaza](#), 15 December 2023. Hamas was also reported to have delayed implementing some agreed releases based on claims that Israel had violated agreements relating to aid access: G. Abdul, [Hamas says it will delay next hostage releases over Gaza aid dispute](#), The Guardian, 25 November 2023; J. Hayden, [Gaza hostage releases reported delayed amid dispute over aid trucks](#), Politico, 25 November 2023. See also the statements cited above in paragraph 55 in which Israeli leaders indicated that essential supplies would not enter Gaza until the captives are released.

unclear. Public demands by Hamas regarding further releases have focused on Palestinian prisoners being released from detention in Israel,²⁴⁹ or an end to military bombardments.²⁵⁰ Further, Israel has referred to its promise to allow 200 trucks of humanitarian aid to enter Gaza per day as being part of an “agreement between Israel and the United States”, as opposed to an agreement with Hamas.²⁵¹

139. In these circumstances, we do not consider that the intensified closure is capable of convincing Hamas to release its captives or to secure their well-being. Indeed, the conditions created by the intensified closure – including food, water and medicine shortages and a lack of electricity – seem very likely to *exacerbate* one of the threats to the captives, namely the risk of ill-health or death resulting from their conditions of detention.²⁵²

140. The third factor, proportionality, must be approached carefully: weighing one population’s suffering against another’s is a notoriously fraught exercise. However, in this instance, the sheer size of the population affected by the intensified closure is persuasive. More than two million persons have suffered months without electricity and with insufficient food and water. It is believed that more than 85% of these people are displaced and therefore at heightened vulnerability. Tens of thousands have been unable to access essential medical care, including for severe injuries caused by Israel’s bombing.

141. Finally, we consider that two further factors (beyond the framework set out at paragraph 133 above) suggest that the intensified closure is not a necessary and reasonable response to the threat. First, although there does not need to be certainty that a threat will materialise in order to meet the first requirement of article 31(1)(d),²⁵³ we consider that the certainty of the respective harms may be

²⁴⁹ Hamas’ political bureau chief is reported to have said: “They will never recover their hostages unless all our prisoners in the occupation prisons are released.” See [New talks on exchanging Hamas-held hostages for Palestinian Prisoners](#), Associated Press, 10 January 2024. See also, [Hamas demands all Palestinian security prisoners be freed in exchange for ‘enemy hostages’](#), The Times of Israel, 28 October 2023.

²⁵⁰ A number of Hamas leaders are reported as having rejected proposals to negotiate further releases until Israel’s military offensive in Gaza is ended (as opposed to paused): See [Israel’s Netanyahu hints new deal under way to release Gaza hostages](#), Al Jazeera, 16 December 2023; J. Borger, [Hamas insists on end to Israel’s offensive in Gaza before hostage talks can begin](#), The Guardian, 21 December 2023; [Hamas said to reject Israeli offer for 7-day truce in Gaza, release of 40 hostages](#), The Times of Israel, 21 December 2023.

²⁵¹ Israeli Ministry of Foreign Affairs, [Israel to transfer food and humanitarian aid for the civilian population in Gaza](#), 15 December 2023.

²⁵² T. Goldenberg, [Freed Israeli hostage describes deteriorating conditions while being held by Hamas](#), Associated Press, 28 November 2023; A. Rasgon, [Israel and Hamas Are in Talks to Deliver Medicine to Hostages in Gaza](#), New York Times, 11 January 2024.

²⁵³ See above at paragraph 130.

relevant to necessity and reasonableness. Likewise, we consider how certain it is that the measures taken will actually manage to avoid the threatened harm.²⁵⁴ In these respects we note that the intensified closure is virtually certain to inflict dire conditions of life on civilians, and is not likely to avoid the identified threat.

142. Taking all these factors into account, we do not consider the intensified closure is a necessary and reasonable response to this threat.

(ii) *The threat of a repeat or continued attack in Israel*

143. The position appears more complex in respect of the threat of a repeat or continued attack within Israel.

144. Some of the intensified restrictions could be considered apt to avoiding this threat. For example, temporarily restricting the movement of Gaza residents who have permits to work in Israel could prevent members of Hamas from entering Israel by this means. However, other measures imposed as part of the intensified closure appear ill-adapted to avoiding the threat of an imminent further or repeat attack. That is most clearly the case regarding restrictions on the food, water, and medical supplies entering Gaza. This is for the same reasons as are set out above at paragraphs 136 and 137: the restrictions are unlikely to have a meaningful impact on Hamas' own supplies in the short term, and are, therefore, not capable of avoiding imminent harm. There is likewise little evidence that Hamas would modify its tactics to protect Gaza's civilian population.

145. We also question whether a long-term measure such as a siege or closure can ever meet the requirements of article 31(1)(d). The requirement that a measure is apt to avoid a threat of "imminent" harm would seem to preclude measures which aim to achieve their impact over a long period of time. If the closure, or its intensification, is designed to achieve its results over months, years, or decades, it is difficult to conceive of how this could be an apt way of avoiding a threat of *imminent* harm. This does not imply that more distant threats or those which require a long-term response are less grave, but that in the absence of urgency, it should be possible to respond to the threat by means which do not constitute an international crime.²⁵⁵

146. As we observed in our Opinion, there is in fact a real possibility that the closure actually increases the risk of Hamas attacks. While in the short term the intensified

²⁵⁴ For an example of this reasoning in scholarly writing see P. Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, *Journal of International Criminal Justice*, 2004, Vol.2, p. 791.

²⁵⁵ Kai Ambos explains that "the materialization of the danger cannot lie too far in the future" because if so "alternative countermeasures would suffice to avert the danger": K. Ambos, *Treatise on International Criminal Law: Volume 1*, Oxford University Press, 2013, p. 374.

closure may have some impact on Hamas' means, in the longer term it risks contributing to anger and a sense of having "nothing to lose".²⁵⁶ Senior Israeli officials have remarked for years that measures imposed as part of the closure may have been counterproductive,²⁵⁷ and it does not appear that periodic steps taken to intensify the closure over the past fifteen years have successfully diminished the threat posed by Hamas. Indeed, the scale of the 7 October attack suggests that it may have grown over that time. Taken together, these factors persuade us that the intensified restrictions are not an apt means by which to avoid the threat of a repeat attack.

147. Further, as above, the closure and its intensification raise difficult questions about proportionality. The intensified closure is causing grave harm (see paragraphs 30 to 39 above), the full extent of which is not yet known. Although there are reports of deaths from inadequate access to medical care,²⁵⁸ we are not aware of any attempt yet made to calculate deaths from causes other than military activities. In any event, it is clear that grave harm is resulting from poor living conditions and lack of health care. As well cases of acute short-term suffering (such as surgical procedures performed without anaesthesia),²⁵⁹ potentially lifelong harm can be caused by the malnutrition and inadequate medical treatment that appear to be affecting the entire population of Gaza. On the other side, it is not clear how damaging a potential future attack by Hamas would be, though we observe that the scale of the 7 October attack (see paragraph 14 above) far exceeded any previous Hamas attacks. Ultimately, given indications that the intensified closure is threatening many thousands of lives through restrictions on basic supplies and disease outbreaks,²⁶⁰ we are persuaded that there are grounds to believe that the harm caused is disproportionate to the threat posed. We reiterate here that the conduct must be proportionate to the *physical* harm which is *imminently* threatened against persons. The possibility, as argued by some,²⁶¹ that Hamas

²⁵⁶ See Opinion, fn 809.

²⁵⁷ Opinion, para. 453.

²⁵⁸ See, for example, Euro-Med Monitor, [Hunger, lack of medical care claim lives of dozens of people in northern Gaza](#), 21 December 2023.

²⁵⁹ M. Khaled and H. Saleh, [Surgery without anaesthetic: a Gaza hospital on the brink](#), Financial Times, 30 October 2023; N. Al-Mughrabi, [In Gaza, hospital procedures without anaesthetics prompted screams, prayers](#), Reuters, 10 November 2023.

²⁶⁰ WHO, [Lethal combination of hunger and disease to lead to more deaths in Gaza](#), 21 December 2023; WFP, [Gaza on the brink as one in four people face extreme hunger](#), 20 December 2023.

²⁶¹ See, for example, A. Johnson, [Israeli military action to defeat Hamas is proportionate to the threat from Hamas](#), Fathom, October 2023. This rationale has also been suggested by the Israeli leadership, including Prime Minister Netanyahu: "We are in a war for our existence". See Israeli Ministry of Foreign Affairs, [Statement by PM Netanyahu](#), 16 December 2023.

poses a long-term threat to Israel's very existence as a state, is therefore not relevant to an analysis of article 31(1)(d).

148. In light of our conclusions above regarding "aptness" and proportionality, we believe that the intensified closure could not be considered a "necessary and reasonable" means by which to avoid the two threats identified above.

5.5.3 Intention to cause a greater harm

149. As in our Opinion,²⁶² we note that recourse to article 31(1)(d) may also be precluded for some Israeli officials because the defence cannot be relied on if the accused *intended* to cause a greater harm than the one sought to be avoided.

150. In application, assessing this requirement can overlap with the requirements of necessity and reasonableness considered above, since actual proportionality might provide evidence of intent. Statements made by some leaders are also relevant indicators of subjective intent. For example, the statements excerpted at paragraphs 53-54 above suggest that certain leaders have relished the suffering inflicted on civilians in Gaza and may have intended to inflict punitive and disproportionate harm. Other statements might be interpreted as suggesting that Israel's responses to 7 October are designed to demonstrate (whether to Hamas, Hezbollah or others) that violence against Israel will attract a crushing and disproportionate response.²⁶³ Given our conclusions above, it is unnecessary for us to consider whether such intentions do exist. This is also a matter which would be best determined in respect of identified individuals and based on materials which are not currently accessible to us.

151. Our conclusion thus remains that the intensified closure is not rendered lawful by article 31(1)(d) of the Rome Statute. While we accept that a real and imminent threat was demonstrated by the attacks of 7 October, we are unconvinced that Israeli leaders were left no choice but to block essential humanitarian supplies. As in our original Opinion, we do not consider that the result would differ under customary international law.²⁶⁴

²⁶² Opinion, para. 454.

²⁶³ For example Netanyahu's statement that "If Hezbollah decides to open an all-out war, then with its own hands it will turn Beirut and southern Lebanon, which are not far from here, into Gaza and Khan Yunis": [PM Netanyahu, Defense Minister Yoav Gallant and IDF Chief-of-Staff Lt.-Gen. Herzl Halevi hold Assessment at IDF Northern Command HQ](#), 7 December 2023.

²⁶⁴ Opinion, paras 456-460.

6. FINAL REMARKS AND CONCLUSION

152. Our assessment above has focused on the position under the Rome Statute. However, of the differences between the Rome Statute and customary law which we analysed in our Opinion, we have not been able to identify any which would lead to a different outcome under customary international law. For a fuller analysis of all elements of persecution and defences under the Rome Statute and customary international law, we refer to our initial Opinion.

153. Based on the analysis above, we remain of the view that there is a reasonable basis to believe that the closure constitutes the crime against humanity of persecution, including in its recent intensified form. We do not find any basis to believe that it is rendered lawful by any available defence.

16 January 2024

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