



**LPHR publishes landmark independent legal opinion by eminent team of experts that finds the closure of Gaza, including its intensification since 7 October 2023, to constitute the crime against humanity of persecution**

24 January 2024

Today, the UK legal charity, Lawyers for Palestinian Human Rights (LPHR), publishes a landmark independent legal opinion by an eminent team of legal experts that finds the closure of Gaza since 2007, including its intensification since 7 October 2023, to constitute the crime against humanity of persecution committed against Gaza's Palestinian population, including over 1 million children.

The defining features of this crime – considered the quintessential crime against humanity – are (i) there has been a severe deprivation of fundamental human rights, and (ii) this harmful deprivation is discriminatory against a protected group. The crime of persecution concurrently reduces a person to their membership in or identification with a protected group, and attacks the group itself.

Four specialist international criminal and human rights law practitioners and/or academics – Juan Mendez, Megan Hirst, Nikila Kaushik and Lauren Tipton<sup>1</sup> – with no background on Palestine/Israel, were instructed in 2021 by LPHR to prepare an intentionally technical legal opinion that specifically assesses whether or not the closure of Gaza constitutes the crime against humanity of persecution.

LPHR asked that the legal opinion address all possible justifications for the closure of Gaza. The work was undertaken on the basis that full payment be made irrespective of its legal conclusions.

The 210-page legal opinion was completed in two phases: a 159-page [legal opinion](#) (completed 5<sup>th</sup> December 2022) on the closure of Gaza since 2007, and a 51-page [addendum](#) (completed 16<sup>th</sup> January 2024) to the legal opinion that covers the intensified closure of Gaza since 7 October 2023. Together they provide vital and ample legal clarity for accountability and policy decision-makers.

The initial 159-page legal opinion finds that “despite contributions from others, the closure is overwhelmingly implemented by Israel.” Applying the law relevant for cases brought before the International Criminal Court (ICC) or under universal jurisdiction – and using the appropriate standard of proof adopted by the ICC in deciding whether to investigate – it concludes:

“480. Based on the above analysis, we have concluded that there is a reasonable basis to believe that the closure constitutes the crime against humanity of persecution.

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**Megan Hirst** is a barrister at Doughty Street Chambers. She is the former International Civil Party Lead Co-Lawyer at the Extraordinary Chambers in the Courts of Cambodia and has represented victims in several proceedings before the ICC.

**Nikila Kaushik** has recently been an associate lecturer at the University of Sydney and previously worked at the Extraordinary Chambers in the Courts of Cambodia and the ICC. She is undertaking pupillage at Doughty Street Chambers.

**Lauren Tipton** is a legal consultant who has worked with the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.



481. We consider that all material elements of the crime are met. In the light of Israel's statements and conduct, we also consider it probable that at least some individual officials within Israeli state institutions possess (or have possessed) the required mental elements.

482. We have also concluded that no defences apply so as to justify the closure and render it lawful. Excuses, which relate to the mental state of an individual accused, would need to be decided by reference to a specific accused.

483. We consider that this is the position under the Rome Statute, but also under customary international law."

The 159-page legal opinion was confidentially submitted by LPHR to the Office of the Prosecutor of the ICC on 10 January 2023. Its release into the public domain was paused to enable sufficient space for the Office of the Prosecutor of the ICC to carefully consider the legal opinion.

The mass atrocities by Hamas and other Palestinian armed groups against Israelis on 7<sup>th</sup> October 2023, followed by Israel's massive military response – including its 9<sup>th</sup> October order of "total siege" on Gaza – prompted LPHR to ask the independent legal experts to provide a supplementary opinion that specifically examines whether the events of and since 7 October 2023 alters their assessment.

Their 51-page "addendum", covering the period of 7<sup>th</sup> October 2023 to early January 2024, has also been submitted by LPHR to the Office of the Prosecutor of the ICC. Its final paragraph concludes:

"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."

LPHR encourages wide readership of this exemplary [legal opinion](#) and [addendum](#). We nonetheless provide the opening summary to the legal opinion dated 5 December 2022, and the opening summary plus several key excerpts from its addendum dated 16 January 2024, at the foot of this statement (see top of page 4 onwards) so as to illuminate a range of critical points and findings.

### **Accountability and policy implications: action is imperative and a clear warning for the future**

**For accountability decision-makers:** LPHR considers that the legal opinion and its addendum necessarily compels the prompt investigation and effective prosecution of individuals responsible for the closure of Gaza, including its intensification since 7 October 2023, on the basis that it plainly constitutes the crime against humanity of persecution.

LPHR specifically notes the relevance of the legal opinion's findings with ICC Prosecutor Karim Khan KC's key policy to prioritise ensuring accountability for crimes against or affecting children. Approximately half of Gaza's population of over two million are children. LPHR does not expect ICC Prosecutor Khan to arbitrarily exclude Palestinian children from his signature prosecutorial policy.



LPHR also emphasises that although the legal opinion specifically focuses on whether the closure of Gaza constitutes the crime against humanity of persecution, this does not preclude other possible – and co-existing – legal characterisations. The addendum to the legal opinion clarifies:

“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.”

It is relevant here to note that the crime of persecution is very gravely recognised as a precursor to the potential or actual commission of the crime of genocide. For example, the International Court of Justice, in its January 2020 order of provisional measures against Myanmar in a Genocide Convention case, cites the linkage made by the relevant UN Fact-Finding Mission [emphasis added]:

“The Fact-Finding Mission concluded that “on reasonable grounds... the factors allowing the inference of genocidal intent [were] present”... the Court further notes that the Fact-Finding Mission, in its 2018 detailed findings, also asserted, based on its overall assessment of the situation in Myanmar since 2011, and particularly in Rakhine State, **that the extreme levels of violence perpetrated against the Rohingya in 2016 and 2017 resulted from the “systemic oppression and persecution of the Rohingya”.**” [paragraph 55]

Inextricably-linked serious international crimes prior to and since 7 October 2023, should not, and cannot, be divorced from each other by ICC Prosecutor Khan, when undertaking his responsibility of delivering legal accountability. As recognised by then UN Secretary-General Ban Ki-moon in a landmark UN report, published in 2014, on preventing atrocity crimes [emphasis added]:

“Atrocity crimes take place on a large scale, and **are not spontaneous or isolated events; they are processes, with histories, precursors and triggering factors which, combined, enable their commission.**”

LPHR strongly encourages the ICC Prosecutor to fulfil his exceptionally significant duty to investigate and prosecute all present and past serious international crimes in Israel/Palestine, with a necessary leap-forward in prioritisation and pace by his Office, and without fear or favour.

**For policy decision-makers:** The grave findings of the independent experts legal opinion and addendum provide added legal clarity to bolster the “demand” within UN Security Council resolution 2720 (22 December 2023) that the parties “allow, facilitate and enable the immediate, safe and unhindered delivery of humanitarian assistance at scale directly to the Palestinian civilian population throughout the Gaza Strip.”

The legal opinion further provides an implicit clear warning that the future of Gaza must not amount to an effective return to the status quo of indefinitely prolonged closure that existed pre-7 October 2023. The crime of persecution against the Palestinian population of Gaza must end: its devastating effects are profoundly beyond measure, and acutely appal the conscience of humanity.



[Reproduction of opening to the independent legal opinion]

**Does the closure of Gaza constitute the crime against humanity of persecution?**

**Independent Legal Opinion**

**5 December 2022**

**Summary of reasoning and conclusions**

For more than 15 years, restrictions have been imposed on the passage of people, goods, and other commodities into and out of Gaza. The measures are largely instituted by Israel, although others also play a role. Previously existing restrictions were heightened in 2007 following the takeover of Gaza by Hamas, which opposes the existence of Israel and has also been in dispute with the leaders of the Palestinian Authority.

In this opinion we set out our analysis and conclusions on the question of whether this “closure” of Gaza constitutes the crime against humanity of persecution. In our view there is a reasonable basis to believe that it does.

The crime against humanity of persecution has its origins in the prosecutions which followed World War Two. The most extreme Nazi atrocities against Jewish people (mass detentions, murders, torture, forced labour) constituted crimes in their own right. The crime of persecution was developed to address an additional ill, namely, that these cruelties and many others (such as denial of citizenship, exclusion from public life, seizure of assets, creation of ghettos and restrictions on movement) were *directed specifically at a particular racial or religious group*. In this respect, the crime against humanity of persecution is the older sibling of genocide, born a few years later. Both crimes address acts of severe discrimination: genocide where they are intended to destroy the target group; persecution where they are not.

Thus, unlike genocide, persecution does not require an intent to destroy the group. Nor does it require mass killings. The essence of the crime is severe discrimination, which can take any form that violates fundamental rights.

Stepping back briefly from the minutiae of the law, it is possible to see the matter we have been asked to address as involving two basic questions about persecution. In this opinion we have sought to answer them not by reference to political debates, but by an analysis of the detailed and technical requirements of international criminal law.

Israel acknowledges that the closure leads to hardships for people in Gaza. However, it asserts that minimum humanitarian standards are maintained, and that this is sufficient. In simple terms: there is suffering, but the suffering is not so extreme as to constitute a wrong.

The first question, therefore, is: what kinds of measures can amount to persecution? If the crime can occur without massacres, must it nonetheless involve dramatic acts of direct physical violence?



Or is it possible to conceive of an equivalent level of cruelty imposed through more insidious measures, especially when maintained over years or decades?

The answer to these questions can be found clearly in the elements of the crime against humanity of persecution. Persecution involves the severe deprivation of fundamental human rights on a discriminatory basis. We have analysed at length the impact of the closure on the ability of people in Gaza to exercise human rights which are indisputably “fundamental”: rights to free movement, a family life, an adequate standard of living, and health. We have found that the closure prevents many people in Gaza from enjoying these rights. On the question of whether this situation is severe enough to constitute persecution, we find guidance in legal precedent which requires that the situation is assessed in the light of its context and considering the cumulative effect of the conduct in question. That cumulative effect is a crucial consideration. The numerous measures which constitute the closure interact with each other and are worsened by intermittent outbreaks of military hostilities. Their impact has been accumulating over a period of more than 15 years and is now felt by a population of around two million people, most of them civilians. During this period, most of these people have faced significant hurdles if they seek to travel outside an area that is about one quarter the size of London, including to visit family in the West Bank. For some, travel has been impossible. A significant proportion live in extreme poverty and without reliable access to water and electricity. These conditions contribute to health problems for which treatment is frequently hindered, delayed, or prevented because of the closure.

The consequence is a long-term state of impoverishment felt by two million people, who are unable to flee, even during episodic military bombardments. The very real prospect that the closure will continue indefinitely means that those who live in Gaza can reasonably expect to pass their entire lives under these conditions of hopelessness, adding a psychological toll.

We have concluded that the human suffering involved in this situation rises to the level of crimes against humanity. A point of comparison can be taken from cases regarding the crime against humanity of imprisonment which were decided by the International Criminal Tribunal for the former Yugoslavia. In one instance that crime occurred when several hundred people were held for around five months in an overcrowded village without heating and with the men made to undertake heavy and dangerous work. If conditions in Gaza are (at least for some) preferable to this, we consider that factor to be readily outweighed by the duration of the closure and the number of persons affected. It is true that international criminal law has to date focused largely on crimes of shorter duration and greater physical violence. But that does not convince us that the historical neglect of crimes which target economic and social rights over long periods of time is justified or should be continued.

We have also concluded that the closure is discriminatory. The population of Gaza is almost exclusively Palestinian. To harm people in Gaza is to harm Palestinians. The fact that some other Palestinians are not subjected to this (specific) set of harms is irrelevant. Persecution does not require that equal harm is meted out to every member of a targeted group.



When explaining its actions, Israel argues that it is embroiled in an armed conflict and that the closure is a necessary and permissible means by which to protect Israeli citizens from Hamas. This raises the second core question: could (discriminatory) measures apparently constituting persecution ever be justified as appropriate, for example to achieve military or political ends, or protect the security of others?

We have concluded that an armed conflict is ongoing. It is also clear that Israel faces serious security challenges. We do not question the sincerity of Israel's fears regarding its security, nor that a real threat of harm to Israeli citizens exists. International law undoubtedly permits certain measures to be taken in light of such a threat. And yet, whether the closure is such a permissible measure is a different question.

We have carefully assessed this from various angles. We have found that Israel's implicit suggestion that international humanitarian law permits its conduct cannot withstand detailed analysis. Compliance with international humanitarian law is not *per se* a defence to crimes against humanity (even if such compliance could be demonstrated). International humanitarian law may in theory permit conduct that would otherwise constitute persecution, however this occurs only in a narrow range of instances in respect of special measures permitted during conflict. We have been unable to identify any rule of humanitarian law permitting the closure. Similarly, having reviewed the defences which exist under the Rome Statute and customary international law (among them self-defence and necessity) we find that none appears applicable to the closure. Arguments from Israel that the measures are an exercise of state sovereignty can also have no relevance here. In the post-World War II legal order states are sovereign only up to a point; there is no sovereign right to engage in conduct which amounts to an international crime, whether against a state's own citizens, or others.

We have therefore concluded that the closure of Gaza constitutes the crime against humanity of persecution and is without legal justification or excuse. We note, however, that we have reached this conclusion based on the standard of proof appropriate before a prosecutorial investigation, i.e., that there is a reasonable basis to believe that a crime has occurred. This also reflects the fact that we have relied on open-source material, and have not had recourse to the means of investigation which would be available to the Prosecutor of the International Criminal Court or another investigative body.



**[Reproduction of opening to the addendum to the independent legal opinion]**

**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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**Key excerpts from addendum to the independent legal opinion (dated 16 January 2024)**

**[...] 3. MATERIAL ELEMENTS OF PERSECUTION[...]**

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, 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”, Israel had also established the conditions to push it over.



40. In our Opinion, we concluded that the closure is discriminatory. The 7 October attack does not alter that assessment. The denial of electricity, fuel, and tight limits 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.

43. We have no doubt that 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 which constitutes a severe deprivation of human rights, they must also intend to discriminate.

47. As previously, we recognise that neither Israel nor its leadership is a monolith. It is possible, indeed likely, that central actors 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.

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. 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.

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

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: “[t]he price the Gaza Strip will pay will be a very heavy one that will change reality for generations.” The following day, 9 October, in announcing the “total siege”, 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.

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.

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.

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

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 civilians "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.

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.

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.

The same position had been expressed earlier by others. The then Energy Minister, Israel Katz, 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.

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.

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

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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. Israel has repeatedly recognised that Hamas has maintained its own supplies (see below at paragraph 100 and footnote 172) and is unconcerned by civilian suffering. 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.

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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 focus on the steps which Israel is now making to support some humanitarian access.

62. We have considered whether those gradual moves to relax the intensified closure since 21 October, such as opening Kerem Shalom crossing or restarting the supply of water to Gaza, 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. 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.

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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 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

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.



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**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.

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. There is no question that Israel's leaders knew (and know) that imposing the intensified closure would lead to extreme human 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.

71. The remaining mental element is that of intent to discriminate. Here, we consider that the reasoning in our Opinion continues to apply.

72. According to international caselaw concerning persecution, the existence of a broader context of discriminatory practices is persuasive in determining discriminatory intent. 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. 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.

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 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” and “children of the darkness”, as well as Prime Minister Netanyahu’s references to the biblical story of Amalek.

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. 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.'

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[...]**

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*”). Any scope which remains under international law for “reprisals” (measures to coerce compliance with international law by an adversary) does not include attacks against civilians and would not justify the crime against humanity of persecution.

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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. Electricity from Israel has continued to be cut to the entire area of Gaza. 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.

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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, and international humanitarian law can no longer be said to leave space for restricting aid access to protect a military advantage. 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.

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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.<sup>196</sup> 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.

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114. As set out in our Opinion, self-defence can only justify harm directed against the originator of unlawful force, and not against third persons. 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) [legal defence of self-defence under the Rome Statute].

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. 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.



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. 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.

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121. A preliminary question is whether the attack [of 7 October 2023] 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) [legal defence of necessity or duress under the Rome Statute] 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.

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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.

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 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”. Senior Israeli officials have remarked for years that measures imposed as part of the closure may have been counterproductive, 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, 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), 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, 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.”

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.

## **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.