



**Palestinian Human Rights Organizations & Victims'
Communication to the International Criminal Court
Pursuant to Article 15 of the Rome Statute
Requesting Investigation and Prosecution of
The Illegal Closure of the Gaza Strip:
Persecution and Other Inhumane Acts Perpetrated
against the Civilian Population as
Crimes against Humanity**

Situation of Palestine: Closure of Gaza

Submitted By:

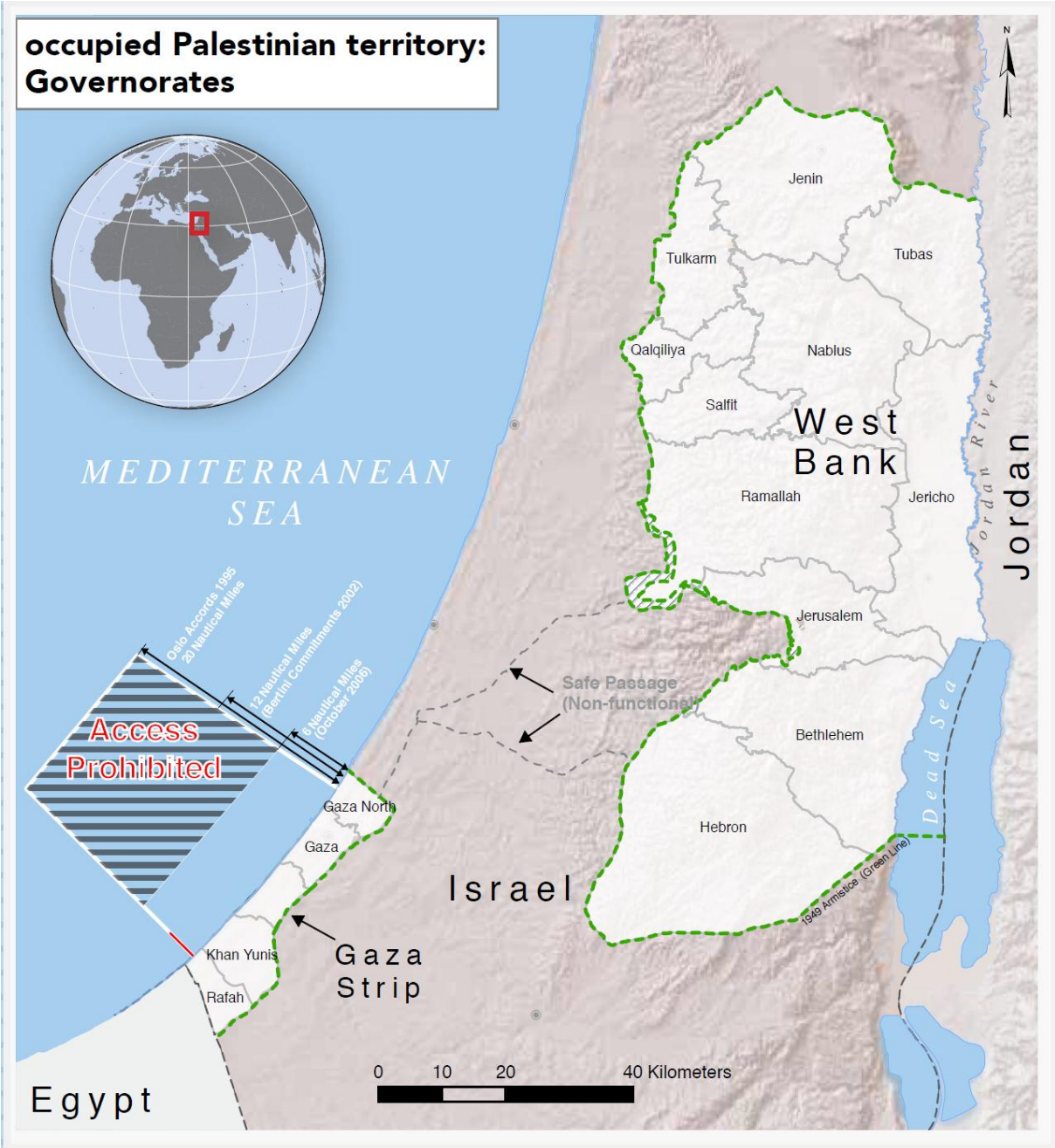
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November 2016

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Source: OCHA oPt August 2016

“In Gaza, no one is dying... But no one is living.”¹

Amr Hamad, Deputy Secretary General of the Palestinian Federation of Industries

“The closure of Gaza suffocates its people, stifles its economy and impedes reconstruction efforts. It is a collective punishment for which there must be accountability.”²

UN Secretary-General Ban Ki-moon

I. Introduction

1. This submission to the Office of the Prosecutor (“OTP”) of the International Criminal Court (“Court” or “ICC”) details the ongoing crimes against humanity committed by high-level Israeli military and civilian officials in the course of Israel’s imposition of a strict, continuous closure on the Gaza Strip from June 2007 to the present, with specific regard to those crimes falling within the Court’s temporal jurisdiction in relation to the State of Palestine, demonstrating that a sufficient basis exists for the Prosecutor to open an investigation into these crimes under Article 15 of the Statute of the ICC.

2. The Gaza Strip, a constituent part of the State of Palestine, is frequently described as the world’s largest open-air prison. This is not exaggeration: for the last nine years, approximately two million Palestinians have been effectively locked inside the tiny coastal territory,³ denied access to the remainder of the occupied Palestinian territory — and the outside world. In June 2007, following the assumption of power in Gaza by Hamas,⁴ Israel, the Occupying Power (also referred to in this submission as “Israeli authorities” and Israeli occupation forces “IOF” depending on the context), intensified the movement restrictions

¹ Amr Hamad, quoted in Ethan Bronner, “A Rising Urgency in Israel for a Gaza Shift,” N.Y. TIMES (10 June 2010), available at <http://www.nytimes.com/2010/06/11/world/middleeast/11gaza.html>.

² United Nations Secretary-General Ban Ki-moon, “Secretary-General’s Remarks at Press Encounter,” 28 June 2016, available at <https://www.un.org/sg/en/content/sg/press-encounter/2016-06-28/secretary-generals-remarks-press-encounter>.

³ The estimated Palestinian population in the Gaza Strip stood at 1,881,135 as of mid-year 2016, as published by Palestinian Central Bureau of Statistics, Jerusalem Statistical Yearbook 2016, 28 (Ramallah, Palestine June 2016), available at <http://www.pcbs.gov.ps/Downloads/book2206.pdf> (Arabic). However, on 12 October 2016, the population of the Gaza strip surpassed 2 million people, see “With baby Waleed, Gaza population reaches 2m,” *Gulf News Palestine* (12 Oct. 2016), available at <http://gulfnews.com/news/mena/palestine/with-baby-waleed-gaza-population-reaches-2m-1.1911390>.

⁴ For details on the developments in the Palestinian National Authority that followed the Palestinian parliamentary elections of January 2006, including several rounds of violence between the supporters of Fatah and Hamas movements that ended with Hamas’ June 2007 assumption of power in the Gaza Strip, as well as details regarding alleged violations of human rights and international humanitarian law perpetrated by the parties of the conflict, see Palestinian Center for Human Rights, *Black Pages in the Absence of Justice: Report on Bloody Fighting in the Gaza Strip from 7 to 14 June 2007*, (Oct. 2007) available at http://pchr.org/files/Reports/English/pdf_spec/Gaza%20Conflict%20-%20Eng%209%20october..pdf.

imposed since the 1990s on people and goods into and out of Gaza. This marked the beginning of the current Gaza closure, which has remained in force continuously to the present day, and which is the subject of this submission.⁵

3. Since June 2007, the population of the Gaza Strip has been locked in by an illegal closure, unprecedented in its duration and severity, imposed by Israel. As will be demonstrated below, Israel's closure of the Gaza Strip has been disproportionate, discriminatory and not justified by military purposes: in fact, the current restrictions on movement of goods and persons into and out of the Gaza Strip are not imposed for security reasons or military necessity; they constitute punitive and persecutory measures.

4. The closure of Gaza has been repeatedly declared illegal by the international community as a form of collective punishment that violates fundamental rights, including civil, political, economic, social and cultural rights.⁶ The UN Secretary General⁷ and the

⁵ This is the third submission by the Palestinian Human Rights Organizations. See "Situation of Palestine: Operation Protective Edge, Palestinian Human Rights Organizations & Victims Communication to the International Criminal Court Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-level Israeli Officials for Crimes Against Humanity and War Crimes, Committed in the course of "Operation Protective Edge," November 2015 (confidential) (hereinafter "November 2015 Submission"), and "Situation of Palestine: Operation Protective Edge/Rafah, Palestinian Human Rights Organizations & Victims Communication to the International Criminal Court Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-level Israeli Officials for Crimes Against Humanity and War Crimes, Committed in the course of "Operation Protective Edge: Rafah 1 to 4 April 2015," Feb. 2016 (confidential) (hereinafter "February 2016 Submission").

⁶ See, e.g., United Nations General Assembly Resolution, Peaceful settlement of the question of Palestine, A/Res/70/15, 4 Dec. 2015; UN General Assembly Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, UN A/66/358, 13 Sept. 2011, paras. 14, 16 and 41; UN Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/20/32, 25 May 2012, para. 33; UN Report by the Secretary-General Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem A/67/372, 14 Sept. 2012, paras. 4-10; UN Report by the Secretary-General Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/24/30, 22 Aug. 2013, paras. 10-23; UN Report of the Secretary-General Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/28/45, 5 Mar. 2015, para. 34; UN Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/13/53, 15 Jan. 2010, paras. 2 and 34; UN Note by the Secretary-General Situation of human rights in the Palestinian territories occupied since 1967, A/65/331, 30 Aug. 2010, paras. 16 and 6; UN Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/16/72, 10 Jan. 2011, paras. 23 and 25; and UN Report of the Special Rapporteur on the situation of human rights in Palestinian territories occupied since 1967, A/HRC/28/78, 22 Jan. 2015, paras. 73 and 74(a), *available at*

<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>,

⁷ Report of the Secretary-General on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, UNA/71/421, 14 Oct. 2015, paras. 23- 29; Report of the Secretary-General on the Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/31/44, 20 Jan. 2016, para. 40. See also Secretary-General's Remarks at Press Encounter, (28 June 2016), *available at* <https://www.un.org/sg/en/content/sg/press-encounter/2016-06-28/secretary-generals-remarks-press->

International Committee of the Red Cross (ICRC),⁸ among others, have found the closure of Gaza to contravene international humanitarian law, as its restrictions target and impose hardship on the civilian population, effectively penalizing them for acts they have not committed. The impact of this collective punishment has been extreme economic decline, de-development and a wholly preventable, human-made humanitarian disaster in the Gaza Strip. No part of the civilian population is spared the severe, negative consequences of the current closure regime.

5. The current Gaza closure is not constituted by a single rule or ban, but rather a comprehensive package of restrictions that must be viewed cumulatively in order to comprehend their full and ongoing effect. This includes the sealing off of the Gaza Strip by land, air, and sea; the enforcement of a no-go and access restricted “buffer zone” within the territory of the Gaza Strip itself; and the blocking, with tightly controlled exceptions, of all transit of people and goods through Gaza’s land crossings. Israel authorities control the five border crossings between Israeli territory and the Gaza Strip, which are: Erez (Beit Hanoun) crossing (for pedestrian traffic); Karem Shalom (Karm Abu Salem) crossing (for all authorized goods/ humanitarian aid); Nahal Oz (Shuja’iya) crossing (for industrial fuel/gas), which has been closed since 2010; Karni (Al-Mentar) crossing (a conveyor belt for grains), which was shut down in 2011; and Sufa (Sofa) crossing (for humanitarian goods/construction materials), which has been closed since 2008.⁹

6. During the course of the closure, Gaza’s isolation has been further exacerbated by heightened Egyptian restrictions on travel through the southern Rafah border crossing. Since 2011, Rafah, the sole border crossing located between the Gaza Strip and Egypt, has been opened only a small number of days per year.¹⁰ From January-November 2016, Rafah crossing was opened 43 days, inclusive of openings for humanitarian cases only, for one-way

encounter (“The closure of Gaza suffocates its people, stifles its economy and impedes reconstruction efforts. It is a collective punishment for which there must be accountability.”)

⁸ ICRC, “Gaza closure: not another year!” (14 June 2010), *available at* <https://www.icrc.org/eng/resources/documents/update/palestine-update-140610.htm>. See also ICRC, “Gaza: a never-ending effort to relieve suffering,” (28 July 2011), *available at* <https://www.icrc.org/eng/resources/documents/update/2011/palestine-update-2011-07-28.htm>.

⁹ See Department of Licensing and Consumer Affairs, OPT Road Network Additional Information, p. 3, *available at* <http://dlca.logcluster.org/download/attachments/854459/OPT%20Road%20Network%20Additional%20Information.docx?version=1>.

¹⁰ In 2015, it was opened for only 32 days during the entire year. See UN OCHA oPt, “Rafah Crossing: Movement of people into and out of Gaza,” *available at* <http://data.ochaopt.org/gazacrossing/index.aspx?id=2>.

passage, and for reduced passage.¹¹ Since 24 October 2014, traffic through the crossing, including for humanitarian assistance, has nearly ceased, as Egypt has kept Rafah mostly closed, citing security reasons.¹²

7. Under the closure, Palestinians are not allowed to travel in and out of Gaza as a general rule. The few exceptions are dictated by the Israeli authorities alone, according to narrow, pre-determined categories of people and subject to arbitrary quotas. Israeli authorities have also imposed a near-total ban on exports, while imports have been reduced to limited items in quantities dramatically insufficient to fulfill the needs of the two million people of Gaza.¹³ All forms of travel and external trade, both imports and exports, are subject to a strict Israeli-operated permit regime with opaque rules and procedures that are difficult to access (if they are published at all), often available only in Hebrew, subject to frequent change, and written in terminology open to a wide scope of interpretation that, in practice, is used to undermine Palestinian rights.¹⁴

8. The ongoing closure of the Gaza Strip restricts Palestinians' right to freely move and choose their residence within their State's territory, as well as other rights for which liberty of movement serves as a prerequisite, such as rights to work, health, education and family life. As a result of these movement restrictions, patients in need of life-saving medical care are often denied permission or critically delayed in obtaining treatment outside the Gaza Strip. Students from Gaza are unable to attend universities in the West Bank, including East Jerusalem, and are frequently denied or delayed when seeking permission to exit for study abroad. Palestinian families are forcibly divided between Gaza, the West Bank (including East Jerusalem) and abroad, with parents, children, spouses, brothers and sisters unable to visit each other, even within the Palestinian territory, for decades. Business people and traders are impeded in conducting their professional activities, as exports are virtually banned and imports grossly over-regulated and limited in ways that harm civilians and the economy of

¹¹ Al Mezan's fieldworker for the Rafah district retrieved the figures from the Head of the Media Office of the General Authority of Crossings and the Border in the Ministry of Interior.

¹² UN OCHA, "The Gaza Strip: The Humanitarian Impact of the Blockade," July 2015, available at https://www.ochaopt.org/documents/ocha_opt_gaza_blockade_factsheet_july_2015_english.pdf.

¹³ See, for example, PCHR, *The Illegal Closure of the Gaza Strip: Collective Punishment of the Civilian Population*, 4, 10 Dec. 2010, available at <http://www.pchrgaza.org/files/2010/Illegal%20Closur.pdf>; Palestinian Central Bureau of Statistics, "Palestine in Figures 2015," (Ramallah, Palestine Mar. 2016) available at <http://www.pcbs.gov.ps/Downloads/book2188.pdf>.

¹⁴ GISHA, *Information sheet: Dark-gray lists*, (31 Jan. 2016), available at http://gisha.org/UserFiles/File/publications/Dark_Gray_Lists/Dark_Gray_Lists-en.pdf; Natasha Roth, "How Israel's military gov't keeps Palestinians in the dark", +972 Magazine (14 Jan. 2016), available at <http://972mag.com/how-israels-military-govt-keeps-palestinians-in-the-dark/115933/>.

Gaza.¹⁵ Cumulatively, the closure undermines Palestinians' individual and collective rights to self-determination and has wrought a crisis of dignity on Gaza's civilian population.

9. Not only are Palestinians in Gaza restricted from leaving but, as a rule, visitors are not permitted to enter Gaza either. Only a tightly regulated number of internationals are allowed into the Gaza Strip under a strict and complicated system of permits.

10. These comprehensive restrictions have severely undermined living conditions in the Gaza Strip and fragmented the occupied Palestinian territory, straining its economic and social fabric. As of 2015, the closure had already led to a 50% reduction of Gaza's economy (since 2007).¹⁶ Unemployment in the Gaza Strip is now the highest in the world, with 41% unemployment in 2015, and youth unemployment closer to 60%.¹⁷ Despite Israeli authorities' pledge to allow enough humanitarian and commercial imports for the survival of the population, many Palestinians in Gaza lack access to the resources needed to fulfill their basic needs, including adequate food, medicine, fuel, electricity, potable water and other essential commodities. Due to access restrictions over land and at sea, many Palestinians in Gaza are unable to cultivate their land or fish their sea. Instead, the Palestinian population of Gaza has been made largely dependent on expensive Israeli goods and international humanitarian aid. Nearly 80% of Gaza's population receives some form of international aid, most of which is food.¹⁸

11. The impact of the illegal closure of Gaza has been further compounded by three intensive military offensives carried out by Israel on the captive population of Gaza between late 2008 and 2014.¹⁹ Each of these major military assaults has claimed a significant number of civilian lives, including hundreds of children, and left the population increasingly traumatized. During the Israeli offensives, Israel's closure prevented civilians from seeking

¹⁵ For the purposes of this communication, the Palestinian Human Rights Organizations exclude from the term "civilians" persons linked with any armed resistance groups, without prejudice to the determination of such persons' status under international humanitarian law.

¹⁶ World Bank, "Economic Monitoring Report to the Ad Hoc Liaison Committee," (27 May 2015), p. 6, available at <http://documents.worldbank.org/curated/en/563181468182960504/pdf/96601-REVISED-WP-Box391464B-AHLC-May-21-Book-fix-footnotes.pdf>.

¹⁷ UN OCHA, "The Gaza Strip: The Humanitarian Impact of the Blockade," *supra* n. 12.

¹⁸ *Id.*

¹⁹ The Palestinian Human Rights Organization's November 2015 Submission focuses on the last of the offensive, the July-August 2014 offensive which falls within this Court's jurisdiction. Information about the two offenses prior to June 2014 is included to provide the OTP with background and context for the criminal offenses which fall within the jurisdiction of the Court. *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 Nov. 2007, para. 315; *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, paras. 98, 102; *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 Sept. 1998, paras. 78-129 (hereinafter "Akayesu Trial Judgment"); *Prosecutor v. Haradinaj et al.*, Decision on Haradinaj's appeal on scope of partial retrial, IT-04-84bis-AR73.1, 31 May 2011, paras. 39-40.

safety and refuge outside the Gaza Strip, including blocking access to other parts of the Palestinian territory, and rendered 500,000 Palestinians in Gaza (28% of the population) either homeless or temporarily displaced.²⁰ Even after the cessation of these intense periods of military hostilities, civilians in Gaza have been unable to rebuild their homes and lives, as ongoing import restrictions as part of the closure bar the entry of crucial construction materials and other basic supplies. Two years after the last assault, at least 75,000 people are estimated to remain displaced, with nearly a quarter of them (23%) currently living in the rubble of their damaged homes.²¹ The nine-year closure combined with the three major military offensives on Gaza in the span of only six years has left basic infrastructure devastated and severely eroded Palestinian livelihoods and coping mechanisms. Without immediate “herculean efforts” to reverse the devastating environmental, health, and socio-economic consequences of the closure, the UN predicts that Gaza may be uninhabitable by 2020 – in less than four years.²²

12. UN Coordinator for Humanitarian and Development Activities in the occupied Palestinian territory, Robert Piper, reflected on the current state of affairs in Gaza after a visit in February 2016:

Progress is continuing on the recovery process, but there’s no changes to the underlying fragility of Gaza. It remains on a frankly disastrous trajectory of de-development and radicalization as far as I can tell...The blockade remains firmly in place and we are trying to work within the constraints of the blockade to get materials in and help, and I can report progress on that...But it remains a blockade. It remains an economy that is completely artificially blocked from the market...It’s a blockade that prevents students from getting to universities to further their studies in other places. It’s a blockade that prevents sick people from getting the health care that they need, even if there are every day a few ambulances coming through.²³

13. To halt and reverse the disastrous trajectory of de-development in Gaza and begin to make real progress in recovery and reconstruction, the closure must be fully lifted, not merely

²⁰ The area of Gaza available to Palestinian civilians was reduced by 44% over the course of the conflict, see OCHA oPt, “Occupied Palestinian Territory: Gaza Emergency Situation Report,” 22 July 2014 *available at* http://www.ochaopt.org/documents/ocha_opt_sitrep_23_07_2014.pdf.

²¹ OCHA oPt, “Gaza: Internally Displaced Persons,” Apr. 2016, *available at* http://www.ochaopt.org/sites/default/files/idps_report_april_2016_english_1.pdf.

²² United Nations Conference on Trade and Development, “Report on UNCTAD assistance to the Palestinian people: Developments in the economy of the Occupied Palestinian Territory,” 6 July 2015, TD/B/62/3, *available at* http://unctad.org/en/PublicationsLibrary/tdb62d3_en.pdf (hereinafter “UNCTAD Report”).

²³ AFP News, “Top UN official says war-hit Gaza on ‘disastrous trajectory,’” 4 Feb. 2016, *available at* <http://webcache.googleusercontent.com/search?q=cache:NOWFrTHsV6YJ:www.afp.com/en/news/top-un-official-says-war-hit-gaza-disastrous-trajectory+&cd=1&hl=en&ct=clnk&gl=de>.

eased.²⁴ Speaking in late June 2015, the area chief of the United Nations Development Programme's (UNDP's) Programme of Assistance to the Palestinian People stated that the housing stock in Gaza "is being reconstructed at such a snail's pace," that were this speed to continue, "you will have to wait 30 years to rehabilitate and to reconstruct what has been damaged."²⁵ He emphasized that simply easing access, as Israel has done sporadically, is not enough. Rather "the real solution is the lifting of restrictions."

14. The delay in rebuilding and reconstruction, deliberately brought about through the ongoing absolute closure, undermines Palestinian rights and must not be accompanied by a further delay in justice.

II. Submission's content

15. The Palestinian Centre for Human Rights (PCHR), Al-Haq, Al Mezan Centre for Human Rights, and Aldameer Association for Human Rights ("Palestinian Human Rights Organizations") make this submission pursuant to Article 15(2) of the Rome Statute of the ICC on behalf of themselves and Palestinian victims. This third communication by the Palestinian Human Rights Organizations, and the first to specifically focus on the Gaza closure,²⁶ seeks to assist the OTP in establishing that a reasonable basis exists for finding that, since 13 June 2014, crimes falling within the jurisdiction of the Court have been, and indeed continue to be, committed on the territory of Palestine, a State Party to the Rome Statute. The crimes described in this submission have been and continue to be committed by high-level Israeli military and civilian officials.

16. As set forth below in detail, the Palestinian Human Rights Organizations submit that the underlying criminal acts were committed on a widespread or systematic basis in the course of an attack directed against a civilian population pursuant to or in furtherance of a State policy to commit the attack, and as such constitute crimes against humanity under the ICC Statute.

17. In this submission, the Palestinian Human Rights Organizations provide an illustrative overview of the acts and omissions that underlie and constitute the unlawful closure policy, as

²⁴ See UN General Assembly, "Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967," 19 Oct. 2016, para. 61(b), UN Doc A/71/554;

²⁵ Karin Laub and Fares Akram, "At Current Pace, It Will Take 30 Years to Rebuild Gaza, Says Senior UN Official," *Haaretz* (25 June 2015), available at <http://www.haaretz.com/israel-news/1.662965>.

²⁶ The November 2015 Submission touched on the Gaza closure as it related to crimes committed in the course of "Operation Protective Edge," but it was not the focal point of the submission.

well as the impact of these acts on the civilian population of the Gaza Strip, and Palestine more broadly, as carried out in the course of Israel's closure of the Gaza Strip from June 2007 to the present. As will be further detailed below, the current closure of the Gaza Strip did not happen in a vacuum. Closure has been imposed on Palestinian civilians to varying degrees since the onset of Israel's military occupation of the Palestinian territory in 1967 – an occupation which continues to the present day, including over the Gaza Strip. The current closure policy is the latest and most severe manifestation of a broader Israeli policy and process of fragmentation and separation of the Palestinian territory, begun in the early 1990s.

18. The Palestinian Human Rights Organizations maintain that while the closure began prior to the date on which this Court was vested with jurisdiction, the policies have continued into the period in which this Court undeniably has jurisdiction over the territory of Palestine. The pre-13 June 2014 acts and omissions detailed herein provide critical historical context for the ongoing crimes.²⁷ The factual overview is accompanied by a legal analysis indicating the crimes the Organizations contend have been committed.

19. All facts and data provided in this submission, unless otherwise cited, come from the case files and institutional knowledge of the Palestinian Human Rights Organizations. The Organizations' case files include first-hand evidence related to the impact of the closure collected by trained staff and fieldworkers in the form of site visits, interviews and the taking of sworn witness statements, in accordance with established organizational protocols and practices.²⁸ The statistical data related to the closure included herein, such as the number of trucks and people traversing Gaza's land crossings, is tracked and recorded by a variety of competent authorities and bodies in the Gaza Strip and Ramallah, such as the General Authority for Civil Affairs and the Ministry of National Economy in Gaza, which do not publish the figures for public access. The Organizations gather information from these bodies through direct communication in the form of visits conducted by trained fieldworkers.

20. This submission also draws on the Palestinian Human Rights Organizations' unpublished as well as published materials and databases, with the publicly available material cited as such. Additional evidence is drawn from other credible human rights organizations and UN documentation. Particularly in relation to aspects of Israeli policy, the submission integrates Israeli state publications (*e.g.* security cabinet resolutions, policy plans published by the office for Coordination of Government Activities in the Territories ("COGAT")), and

²⁷ See, *e.g.*, *Nahimana Appeal Judgement*, para. 315; *Taylor Trial Judgement*, paras. 98, 102; *Akayesu Trial Judgment*, paras. 78-129.

²⁸ See November 2015 Submission, *supra* n. 6, Section III, Methodology.

Israeli court cases) as well as other public statements of Israeli officials documented by media outlets and scholars.

21. The Palestinian Organizations emphasize that **the facts and supporting evidence included in this submission are purely illustrative and are not intended to be exhaustive.**

22. The State of Palestine acceded to the ICC Statute on 2 January 2015 and lodged a declaration under Article 12(3) of the ICC Statute on 1 January 2015 accepting jurisdiction of the ICC with respect to crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.”²⁹ On 1 April 2015, Palestine became the 123rd State Party to the ICC. On 16 January 2015, the Prosecutor of the ICC, Mrs. Fatou Bensouda, opened a preliminary examination into the situation of Palestine.³⁰ The preliminary examination is currently listed as being in Phase 2,³¹ *i.e.*, determining whether the preconditions for the exercise of jurisdiction under Article 12 of the Statute are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject matter jurisdiction of the Court (temporal, material, and either territorial or personal jurisdiction). The OTP recently concluded its first visit to Palestine and Israel; that visit did not include travel to Gaza.³²

²⁹ Mahmoud Abbas, President of the State of Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 Dec. 2014, *available at* http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf. On 6 January 2015, the United Nations Secretary General, acting in his capacity as depositary for the Rome Statute, accepted Palestine’s accession to the Rome Statute. United Nations, Depository Notification, Ref: C.N.13.2015.TREATIES-XVIII.10, 6 Jan. 2015, *available at* <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>. On 7 January, the Registrar of the ICC informed President Abbas of Palestine of his acceptance of the Article 12(3) declaration. Letter from Herman von Hebel (Registrar) to Mahmoud Abbas President of the State of Palestine, Ref: 2015/IOR/3496/HvH, 7 Jan. 2015, *available at* <http://www.icc-cpi.int/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf>.

³⁰ See “Press Releases: The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine,” ICC-OTP-201501160PR1083, 16 Jan. 2015, *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx. A preliminary examination is a “process of examining the information available in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation pursuant to the criteria established by the Rome Statute.”

³¹ “Office of the Prosecutor: Report on Preliminary Examination Activities (2016),” 14 Nov. 2016, *available at* https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (hereinafter “OTP 2016 Preliminary Examinations Report”); see also “Office of the Prosecutor: Preliminary Examinations,” *available at* http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx

³² See “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of the Office’s visit to Israel and Palestine from 5 to 10 October 2016,” 5 Oct. 2016, *available at* <https://www.icc-cpi.int/Pages/item.aspx?name=161005-OTP-stat-Palestine>; “OTP 2016 Preliminary Examinations Report, para. 143.

23. Based on their own investigations and legal assessment under the framework of the ICC Statute, the Palestinian Human Rights Organizations conclude that crimes falling within the Court's jurisdiction have been and continue to be committed against the entire Palestinian civilian population of Gaza and respectfully urge the Prosecutor to proceed forthwith in submitting a request for authorization of an investigation to the Pre-Trial Chamber in order to **open an investigation pursuant to Article 15(3) of the ICC Statute into crimes against humanity**, including, but not limited to, **persecution and other inhumane acts**, comprising *inter alia* the deprivation of fundamental human rights on political, national and ethnic grounds, and the collective punishment of the civilian population by intentionally causing great suffering and serious injury to mental and physical health.

24. The Palestinian Human Rights Organizations urge the Prosecution to analyze the closure of Gaza by the Occupying Power, Israel, and the resulting crimes under Articles 7(1)(h) (persecution) and 7(1)(k) (other inhumane acts) of the Statute, as detailed below. In relation to other inhumane acts, the Submitting Organizations recall that collective punishment is prohibited under Article 33 of the Fourth Geneva Convention.³³

25. Based on their own investigations and a legal assessment under the framework of the ICC Statute, the Palestinian Human Rights Organizations assert that an investigation must be opened and respectfully request that the Prosecutor proceed expeditiously and seek authorization for an investigation as soon as practicable.

26. Moreover, the Palestinian Human Rights Organizations urge the Prosecutor and her staff to travel to the Gaza Strip, where they can meet with victims, and observe first-hand the effects of the continued closure on the daily lives of Palestinians in Gaza and their enjoyment of fundamental rights, such as freedom of movement, and the right to an adequate standard of living, including the right to housing. The Palestinian Human Rights Organizations stand ready to discuss continued cooperation with the OTP, including with respect to the preparation of a mission to Gaza, connecting the OTP with victims and witnesses including for the purposes of the OTP receiving oral testimony at the seat of the Court,³⁴ and discussing prepared legal files.

27. The Palestinian Human Rights Organizations assert that the incidents presented herein are not inadmissible under Article 17 of the Statute. There are currently no ongoing

³³ As anticipated, this submission to the OTP focuses in particular on the commission of crimes against humanity; however the Palestinian Human Rights Organizations maintain that many of the facts related to Israel's closure imposition on the Gaza Strip, as described in the submission, also integrate war crimes.

³⁴ See Office of the Prosecutor: Report on Preliminary Examination Activities (2016), para. 10.

investigations or prosecutions addressing the conduct that forms the basis of the crimes set forth in this submission.

28. The ICC was established because “the most serious crimes of concern to the international community as a whole must not go unpunished” and it stands as the embodiment of the international community’s determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”³⁵ For too long, Palestinians of Gaza have only known impunity for the perpetrators of the serious violations of international law inflicted upon them. With this communication, the Prosecutor is asked to break the cycle of impunity and take the necessary step towards accountability by opening an investigation.

III. Contextual Background

29. The crimes against humanity committed in the Gaza Strip in the course of and resulting from Israel’s imposition of the current Gaza closure cannot be considered in isolation from the overall legal and political context of the ongoing Israeli occupation of Palestine. This submission is predicated on the understanding that the Gaza Strip and the West Bank, including East Jerusalem, constitute a unified political, legal, economic and territorial entity – the State of Palestine. Between 1967 and 2012, the latter year being when the State of Palestine was formally recognized by the international community, this same territory was commonly referred to as the “occupied Palestinian territory” (oPt), a term which this submission uses interchangeably with “Palestine” or “State of Palestine,” which it views as occupied in its entirety.

30. The Gaza Strip and the West Bank, including East Jerusalem, came under a common regime for the first time following the 1967 War, when Israel occupied the territories and established a common military government over them.³⁶ Israel *de-facto* annexed East Jerusalem in 1980, but this move was never recognized by the international community, which still considers it occupied Palestinian territory as demarcated by the 1949 armistice line (commonly known as “the Green Line”).³⁷

³⁵ ICC Rome Statute, Preamble (12 July 1999).

³⁶ Israel also occupied the Sinai Peninsula and the Golan Heights as a result of the 1967 war.

³⁷ See UN Security Council Resolution 478 (1980); See also UN Security Council Resolution 476 (1980).

31. As part of the Oslo Accords, Israel officially recognized the legal and political status of the West Bank and Gaza Strip³⁸ as a “Single Territorial Unit” (STU) under the Declaration of Principles (1993)³⁹ signed between the Palestine Liberation Organization (PLO) and Israel, which it reaffirmed in the Gaza-Jericho Agreement (1994)⁴⁰ and the Interim Agreement (1995).⁴¹ The singularity of Palestine was further strengthened by the establishment of the Palestinian Authority, placing the Gaza Strip and West Bank under the same self-governing authority. Neither the IOF’s unilateral disengagement from the Gaza Strip (2005) nor the *de facto* assumption of power in the Gaza Strip by Hamas (June 2007) prejudice the legal or political status of the Gaza Strip as part of the “Single Territorial Unit” (STU) comprising the State of Palestine.

32. This section provides necessary contextual background information for an analysis of the elements of the relevant crimes under the ICC statute, particularly the elements of persecution. First, in section (A), it clarifies key terminology used throughout this submission. Namely, it defines the meaning of ‘closure’ as used herein, in comparison to other commonly used terminology such as ‘blockade’ and ‘siege.’ Second, it provides information on the previous use of closures throughout the occupied Palestinian territory in the course of Israel’s occupation since 1967 as necessary background for assessing the stated aims of the present Gaza closure policy in relation to its reasonably foreseeable effects.

33. Next, in Section (B), this submission explains the evolution of Israel’s closure policy, and identifies the closure as a critical component part of its protracted belligerent occupation of Palestinian Territory. It details how, from 1967 to 2007, Israel employed a policy of closure, with varying levels of severity, to fragment, isolate and dominate Palestinians and Palestinian territory.

34. Finally, in Section (C), it clarifies the legal framework applicable to the Gaza Strip during the current closure (June 2007 onwards). Specifically, the submission establishes that

³⁸ The status of East Jerusalem was left to be determined as part of the final status negotiations.

³⁹ Article IV: Jurisdiction: “The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.”

⁴⁰ Annex II, 7 – “...arrangements for safe passage of persons and transportation between the Gaza Strip and Jericho Area...”

⁴¹ Annex 1, Article I – “2. In order to maintain the territorial integrity of the West Bank and the Gaza Strip as a single territorial unit, and to promote their economic growth and the demographic and geographical links between them, both sides shall implement the provisions of this Annex, while respecting and preserving without obstacles, normal and smooth movement of people, vehicles, and goods within the West Bank, and between the West Bank and the Gaza Strip.” *available at* <https://unispal.un.org/DPA/DPR/unispal.nsf/eed216406b50bf6485256ce10072f637/577f8dd050bb55aa85256f1800676155?OpenDocument>.

Gaza was and still remains occupied after Israel's 2005 'disengagement.' This conclusion has important implications for assessing the specific and differential obligations incumbent on Israel as the Occupying Power in relation to the Palestinian population of Gaza, as opposed to other third-party States, particularly Egypt, which also shares a border and crossing point with Gaza at Rafah.

A. Terminology

35. In light of differences in the terminology used to describe the closure, particularly between the Palestinian Human Rights Organizations in this submission and key international institutions, such as the United Nations, some clarifications are in order.

36. 'Closure,' as used throughout this submission, refers to Israel's imposition of movement restrictions throughout the oPt either in whole or in part, enforced by Israel's armed forces and military courts through a regime of military orders and permits. Closure can be imposed to varying degrees, encompassing different gradations of control on the movement of goods, people and vehicles across *de jure* and *de facto* borders.

37. According to PCHR, which has been monitoring Israel's imposition of closures on the Palestinian territory since 1996, the closure policy is applied at different levels, with varying degrees of severity: from a "general closure" to a "strict" to an "absolute" or "total" closure," the latter of which is the most restrictive form of closure in that it prevents all movement of Palestinians and goods into or out of the occupied territory, except for some 'humanitarian' exceptions.⁴² According to this rubric, the current Gaza closure qualifies as an "absolute" or "total" closure.

38. The current "Gaza closure" has often been called a "blockade" (used by the United Nations), a "siege" (used by media), or "economic sanctions" (used by the Israeli Government). While the colloquial meanings of these terms may accord with the situation of "closure" described herein, the Palestinian Human Rights Organizations refrain from using these terms to describe the broad, cumulative package of restrictions, as these words may also refer to specific legal concepts not applicable in this context, or only applicable to one constituent, often geographically or temporally limited, part of the broader closure (e.g. the

⁴² PCHR, *The Israeli Policy of Closure: Legal, Political and Humanitarian Evaluation* (1996). Series Study 6, available at <http://pchrgaza.org/en/?p=4735>; PCHR, *The Illegal Closure of the Gaza Strip*, supra n. 13; PCHR, *Gaza Strip: Actual Strangulation and Deceptive Facilitation* (11 Mar. 2016), available at <http://pchrgaza.org/en/wp-content/uploads/2016/03/Gaza-Strip-Actual-Strangulation.pdf>.

naval “blockade”), and therefore more confusing than helpful in analyzing the present situation and policy in Gaza.

39. The Palestinian Human Rights Organizations consider the naval blockade to be a constituent part of the cumulative closure policy imposed on Gaza. United Nations independent experts criticized the conclusion of the 2011 “Palmer Report” of the Panel of Inquiry on the flotilla incident,⁴³ stressing that:

In pronouncing itself on the legality of the naval blockade, the Palmer Report does not recognize the naval blockade as an integral part of Israel’s closure policy towards Gaza, which has a disproportionate impact on the human rights of civilians . . . As a result of more than four years of Israeli blockade, 1.6 million Palestinian women, men and children are deprived of their fundamental human rights and subjected to collective punishment, in flagrant contravention of international human rights and humanitarian law . . . Israel’s siege of Gaza is extracting a human price that disproportionately harms Palestinian civilians.⁴⁴

B. Evolution of the Closure Policy: Israel’s Protracted Belligerent Occupation of Palestinian Territory and Gaza Restrictions Prior to June 2007

40. The current closure of the Gaza Strip is not a novel practice, but the most recent and severe application of Israel’s long-standing closure policy, used to fragment, isolate and dominate Palestinians and Palestinian territory, which are under its effective control. A number of statements from Israeli officials explain the current Gaza closure’s restrictions on movement of goods and people as flowing from a “policy of separation” between the Gaza Strip and West Bank, including East Jerusalem, that has both political and security goals.⁴⁵ Although Israeli officials only began publicly referencing the “separation policy” as such after

⁴³ “Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident” (September 2011), *available at* http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.

⁴⁴ The experts included: Special Rapporteur on the right to food, Olivier De Schutter; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover; Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque; Special Rapporteur on extreme poverty and human rights, María Magdalena Sepúlveda Carmona, Special Rapporteur on the situation of human rights on Palestinian territories occupied since 1967, Richard Falk. Published in United Nations Office of the High Commissioner for Human Rights (UNHCHR) News Release, “How can Israel’s blockade of Gaza be legal? – UN independent experts on the ‘Palmer Report,’” (13 September 2011), *available at* <https://unispal.un.org/DPA/DPR/unispal.nsf/0/D805C73314EFC9E78525790A0055784E>.

⁴⁵ GISHA, *Quotes by Israeli security and political figures about the connection between reconstruction in Gaza and Israel’s interests: 06/08/2014 - 27/06/2016*, (2016), *available at* http://gisha.org/UserFiles/File/publications/Gaza_reconstruction_quotes.pdf. Gisha, an Israeli NGO, has tracked and published statements by Israeli officials referencing the “separation policy” since 2010.

the start of the current Gaza closure,⁴⁶ the Palestinian Human Rights Organizations recall as important the context for assessing the present policy that the isolation and “separation” of the Gaza Strip from the West Bank (including East Jerusalem) actually began in the early 1990s with the imposition of a general closure that forced Palestinians in Gaza to obtain special permits in order to travel to the West Bank.⁴⁷

41. The policy roots of today’s closure, including the “separation policy,” can be traced back at least 25 years to Israel’s heightened restrictions on the freedom of movement of Palestinian residents of Gaza in response to the first intifada in 1987, and the initiation of a general closure policy applied to the Gaza Strip and West Bank in 1991. While this period marked a turning point for Palestinians’ freedom of movement, previous economic integration policies implemented by Israel towards the oPt since 1967 also laid the groundwork for the process of de-development catalyzed by the closure policy begun in the early 1990s and accelerated today under the current closure.

42. At the start of the 1967 occupation, Israel established military control and governance over the Gaza Strip and West Bank, declaring them closed military zones.⁴⁸ In 1968, the Military Commander of the Gaza Strip introduced a general permit that allowed all Gaza residents to exit Gaza, but only during specified hours, and only upon possession of an Israeli-issue identification card.⁴⁹ The closed-area status of the Gaza Strip and West Bank changed, however, in 1972, with the issuance a military order declaring “a general exit permit” for both of the two areas.⁵⁰ Palestinians living in Gaza could also change their residence to the West Bank with relative ease, and vice versa, by changing their address in the population registry maintained by the Israeli military administration. Certain exceptions to this general exit

⁴⁶ These statements point to 2006-2007 as the “beginning” of the policy. See GISHA, *2012: What is the separation policy?* (June 2012) p.3-4, available at <http://www.gisha.org/UserFiles/File/publications/Bidul/bidul-infosheet-ENG.pdf>.

⁴⁷ Extensive acknowledgement and documentation of Israel’s closure policy has taken place since the 1990s, carried out by the Palestinian Human Rights Organizations, as well as Israeli and international non-governmental organizations, international institutions and scholars. The timeline and summary of events presented in this contextual background section are well-established enough to be considered common knowledge, but can also find corroboration in, inter alia: PCHR, *The Israeli Policy of Closure*, *supra* n. 13; Human Rights Watch, *Israel: Israel's Closure of the West Bank and Gaza Strip*, (July 1996) Vol. 8, No. 3 (E), available at https://www.hrw.org/reports/1996/Israel1.htm#P196_38765; Amira Hass, “Israel's Closure Policy: An Ineffective Strategy of Containment and Repression,” (7 Nov. 2002) available at <http://www.miftah.org/PrinterF.cfm?DocId=1241>; *Chronologies* (Journal of Palestine Studies, Institute for Palestine Studies 1982-2016), available at <http://www.palestine-studies.org/jps/chronologies>.

⁴⁸ Military Order Closing Area (Gaza Strip and Northern Sinai) (No. 1), 1967; Order Regarding Closing of Territory (West Bank Area) (No. 34), 1967.

⁴⁹ Military Order No. 144.

⁵⁰ General Exit Permit (No. 5) (Judea and Samaria) [West Bank], 1972; A corresponding permit was issued for the Gaza Strip.

permit existed from the outset; tighter movement restrictions were placed on “security” suspects and convicted criminals. However, heightened restrictions on movement were an exception to the general rule, and, overall, most Palestinians enjoyed relatively unhindered movement between the parts of the oPt, Israel, and abroad.

43. The relative ease of movement for Palestinians during this time period was part of a political-economic policy advanced between 1967 and 1987 by then Defense Minister Moshe Dayan of “pacification, normalization and integration.”⁵¹ It accomplished this through the restoration of economic order in Gaza, the provision of key services (like water and electricity), the alleviation of unemployment by allowing Palestinians to work in Israel, and allowing the reestablishment of export trade for certain Palestinian production sectors. The policy’s three guiding principles were:

non-presence (minimizing visible signs of the Israeli authorities to lessen friction and conflict with the population); non-interference (placing responsibility for economic and administrative activities in Arab hands); and open bridges (renewing personal and economic contacts between the population and the Arab World).⁵²

In executing this policy, Israel used its control via the military administration to ensure maximum benefit for Israel. It fostered integration rather than fusion (the latter characterized by interdependence), and used normalization as a tool of control rather than development.⁵³

44. Through the institutionalization and bureaucratization of its military administration in the oPt, Israel established full control over all aspects of Palestinian life: the economy, agriculture, industry, services, transportation, water, electricity, and financial institutions. Tight regulation of what jobs Palestinians were allowed to hold in Israel ensured that they filled a low-wage labor gap in Israel, but did not compete with skilled Israeli workers. Similarly, Israel controlled opportunities for investment in Palestinian economic industries, which it kept limited and targeted. Certain industries were allowed to function, but restricted to sectors and markets inaccessible or unattractive for Israeli industry. Israel imposed tight quotas on Palestinian exports to Israel and blocked Palestinian access to export markets in countries where Palestinian goods might compete with Israeli products. Instead, it allowed access to Eastern European or Arab markets via Jordan, where Israeli trade prospects were low. Meanwhile, there were no quotas imposed on Israeli exports to the oPt, which became a

⁵¹Sara Roy, *The Gaza Strip: The Political Economy of De-development*, 3d ed., Institute for Palestine Studies, 2016.

⁵²Elie Rekhess, “The Employment of Arab Laborers from the Administered Areas,” (1975) 5 *Israel Yearbook on Human Rights* 389; see also Roy, *The Gaza Strip: The Political Economy of De-development*, *supra* n. 51 at 140.

⁵³Roy, *The Gaza Strip: The Political Economy of De-development*, *supra* n. 51 at 140.

“virtual dumping ground for subsidized Israeli goods.”⁵⁴ Israel turned the oPt into the second largest export market for Israeli products (after the United States), while requiring Palestinians to pay full tariffs on imports from Israel.⁵⁵

45. This period resulted in a situation of improved prosperity for individual Palestinians, but collective underdevelopment or stagnation of the Palestinian economy on the whole.⁵⁶ Structural changes and the gradual normalization of this integrated but asymmetric trade relationship forced the Palestinian economy, especially in Gaza, into dependence on Israel. Palestinian labor from Gaza became dependent on jobs in Israel, while traditionally strong sectors of local Palestinian production in Gaza, like agriculture, were undercut by Israeli-controlled trade policies. By physically linking Gaza to the Israeli power network rather than permitting the recovery and development of its own network, “Israel assumed control over a resource that would have been an important source of revenue for the local government and, more critically, that was vital to the development of an economic and industrial infrastructure in the Gaza Strip.”⁵⁷ The degree of integration and dependence fostered during these first two decades of occupation proved disastrous for the Palestinian economy when Israel shifted its policy of integration to one of separation from 1987 onwards, achieved through an evolving policy and practice of closure.

46. The outbreak of the first Palestinian intifada (“uprising”⁵⁸) in 1987 brought increased restrictions on Palestinian movement into and through Israeli territory.⁵⁹ The necessity of travel permits increased during these years, when villages, towns and cities were frequently placed under curfew for extended periods. In Gaza, the first strict, but tightly circumscribed closures were imposed by the Israel authorities in 1988, when a military order introduced a magnetic card system as a means of imposing mobility restrictions for all Palestinian residents in Gaza over the age of 16. The Israeli authorities refused to provide magnetic cards to those Palestinians with a record of “criminal” activities, which could include any history, even non-violent, of political activism.⁶⁰ This new system effectively doubled the burden for

⁵⁴ *Id.* at 146.

⁵⁵ *Id.*

⁵⁶ *Id.* at 138.

⁵⁷ *Id.* at 148–149.

⁵⁸ For an overview of the First Intifada, see, e.g., Joel Beinin and Lisa Hajjar, “Primer on Palestine, Israel and the Arab-Israeli Conflict,” Middle East Research and Information Project (MERIP), (February 2014), available at http://www.merip.org/sites/default/files/Primer_on_Palestine-Israel%28MERIP_February2014%29final.pdf.

⁵⁹ PCHR, *The Israeli Policy of Closure*, *supra* n. 13.

⁶⁰ *Id.*

Palestinians from Gaza wishing to travel, as one had to apply for both a magnetic card and exit permit, doubling the chances for delay and refusal.

47. A major turning point occurred in January 1991 when Israel revoked the 1972 general exit permit and replaced it with a system of personal exit permits.⁶¹ The new policy resulted in the division of the oPt into three areas – the Gaza Strip, West Bank, and East Jerusalem – requiring any Palestinian who wanted to move between them to apply to the Israeli authorities for a personal permit. Movement within the West Bank became more difficult, as Palestinians could no longer enter Jerusalem without a permit, prohibiting access to the shortest route between the northern and southern areas of the West Bank. From 16 January 1991 through the duration of the 1991 Gulf War, Israel imposed a strict closure on the Gaza Strip and West Bank, preventing all exits without a special permit. This closure had a devastating economic impact, particularly on Gaza, as laborers were prevented from reaching their jobs in Israel for six weeks; many laborers in Gaza lost their jobs as a result. Gradually, the Israel authorities' permit policy became stricter, and the number of Palestinian laborers allowed to enter Israel for work was drastically reduced.

48. In 1993, Israel instituted a general closure on the oPt in response to the violent clashes spurred by the signing of the Interim Agreements/Oslo Accords. When two Israeli security personnel were stabbed by Palestinians inside the Gaza Strip in March 1993, Israel imposed the longest and most severe closure experienced in the Gaza Strip until that point.⁶² As part of the Oslo Accords, Israel gained temporary jurisdiction over Gaza's internal and external borders, enabling it to enforce closure at will. The revocation of the general exit permit in 1991 and the continuation of the strict closure imposed in 1993 marked the beginning of Israel's permanent closure policy. Freedom of movement for Palestinians residing in the oPt was restricted. This critical shift in Israel's closure policy is the foundation on which today's closure of Gaza is built. Notably, this shift in policy occurred before the first Palestinian suicide bombing was carried out in Israel (1994) and before the first rocket was fired by resistance groups from the Gaza Strip (2001), raising serious questions about the justification for the policy.

49. The individual permit regime was consolidated and institutionalized during the post-Oslo years. The establishment of the Palestinian Authority in 1994 saw the bureaucracy of the

⁶¹ Order Regarding Suspension of the General Exit Permit (No.5) (Temporary Order) (Judea and Samaria), 1991 [West Bank]; Corresponding order for the Gaza Strip.

⁶² PCHR, *The Israeli Policy of Closure*, *supra* n. 13.

permit system take shape, with Palestinian officials cast in the role of middlemen, responsible for shuttling applications between Palestinian applicants and Israeli authorities, and then transmitting the approval or rejection decision, which was decided by Israel. During this period, Israel also transferred over 3,000 Palestinian prisoners and detainees from the Gaza Strip and West Bank to prisons within Israel, in violation of international law.⁶³ This meant family members of Palestinian prisoners now had to apply for permits to visit their detained relatives within strict parameters set by Israel.

50. In 1995, Israel built a perimeter barrier (part fence, part wall) around the Gaza Strip, enclosing it and separating it from Israel. Following this construction, Israeli authorities began to increase regulations on travel between Gaza and the West Bank, and preventing Palestinians with addresses registered in Gaza from entering the West Bank via Jordan. In 1996, Israeli authorities imposed sporadic “total” closures on the oPt, during which even those Palestinians with valid permits were not allowed to move, apart from exceptional cases. During these sporadic “total” closures, all existing permits would be immediately voided and all applications in process cancelled. After the Israeli authorities lifted the closure, old permits were no longer valid and, frequently, new requirements were issued for obtaining a new permit.⁶⁴ Changes might include new minimum or maximum ages of eligibility, or a reduction in the total quota of permits available to be issued. Permit-holders could lose their permits overnight and find themselves ineligible to apply for one the next day.

51. On 25 February 1996, Israeli authorities imposed a closure in response to two suicide bomb attacks carried out in Ashkelon and Jerusalem.⁶⁵ However, two more bomb attacks followed not long after, in Tel Aviv and West Jerusalem, on 3 and 4 March 1996, respectively. Israel responded by imposing the strictest closure to date, lasting two weeks, placing military checkpoints around cities and villages throughout the West Bank. Comprehensive closure restrictions were re-imposed with full force again between 26 September and 3 October 1996, in response to violent clashes sparked by Israeli archeological excavations close to the foundations of the al-Aqsa Mosque in East Jerusalem.

52. The implementation of closure policies from the late 1980s to 1996 had a dramatic impact on how many Palestinian laborers from Gaza were able to work in Israel. At the beginning of the first intifada in 1987, 85,000 residents of Gaza were permitted to work in

⁶³ Article 76 of Geneva Convention IV requires that protected persons who are detained or sentenced to prison terms be held in the occupied territory.

⁶⁴ PCHR, *The Israeli Policy of Closure*, *supra* n. 13.

⁶⁵ *Id.*

Israel. This number dropped to 55,000 upon introduction of the magnetic card system in 1988. In 1991, following the harsh Gulf War closure on Gaza, the number of workers fell again to 30,000. After the signing of the Interim Agreements, the total number of residents of Gaza allowed to work in Israel dropped to around 22,000. On the eve of the 1996 “total” closure of Gaza (25 February 1996), 22,447 workers from Gaza had permits to enter Israel. By 5 October 1996, following the easing of the September closure, only 8,232 Palestinians from Gaza were permitted to work in Israel.⁶⁶

53. In 1998, Israel banned Palestinian residents of Gaza from traveling via the Ben Gurion Airport in Tel Aviv, but also allowed the Palestinian Authority in Gaza to finally open an airport of its own. As part of the Oslo Accords, it was agreed that the IOF would retain full control over Gaza’s airspace with the provision that the Palestinians be allowed to build and operate an international airport in the Gaza Strip. The Arafat International Airport opened on 22 November 1998 and provided a limited number of weekly flights from Gaza to several Arab countries. For the security checks, passengers were transported by bus to the Rafah crossing, where they were checked alongside those leaving for Egypt by land (i.e. under the supervision and control of the Israeli authorities).⁶⁷ In 1999, Israel also allowed Palestinians to travel between Gaza and the West Bank via a long-promised “safe passage” corridor. However, this seeming reversal of the closure policy was short-lived.

54. The outbreak of the second intifada in September 2000 led to an increased tightening of the closure through new restrictions, many of which have never been lifted for Gaza. Israel promptly closed the “safe passage” corridor and limited all Palestinian entry or exit to or from Gaza to “humanitarian cases.” It imposed a blanket ban on all Palestinian students from Gaza, barring them from studying in universities in the West bank or East Jerusalem, a ban which is still in effect today. Also beginning in 2000, Israel refused to record changes of residence from the Gaza Strip to the West Bank in the Palestinian population registry. Prior to this, Israeli authorities often simply ignored such address changes and refrained from updating their copy of the registry. However, it became problematic when the Israeli authorities began using Palestinians’ addresses in the registry as a basis to control movement at checkpoints separating Israeli territory and East Jerusalem from Gaza and the West Bank, and as the basis for travel restrictions under the personal permit regime.⁶⁸

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ GISHA, *Disengagement Danger: Israeli Attempts to Separate Gaza from the West Bank*, (Feb. 2006), available at http://www.gisha.org/userfiles/file/publications_english/Disengagement_Danger_6feb_06.pdf.

55. After the first rockets were fired into the south of Israel by armed resistance groups from the Gaza Strip in 2001, the IOF targeted and destroyed Gaza's future seaport, still in the beginning stages of its construction, followed by the destruction of the Gaza airport's runway in 2002. In 2003, the Israeli authorities began prohibiting the presence of Palestinians registered with a Gaza addresses from being in the West Bank. Thousands of people essentially became illegal overnight, including some with established homes, families, and jobs in the West Bank. Israel also began relocating Palestinians in Gaza at will; no reason was needed other than presence in the West Bank with a registered Gaza address.⁶⁹ In the same year, Israeli authorities also began constructing its annexation wall, in the West Bank.⁷⁰ With this, the gradual isolation and increasing "separation" between Gaza and the West Bank became even more pronounced.

56. Israel justified the measures of its incipient closure policy on the basis of national security; however the increasingly punitive character of its restrictions directed collectively against the entire population of the oPt, already called its legality into question.⁷¹ The adverse effects of even short periods of total closure on Palestinian civilians and economic capacity, particularly in Gaza, were immediately evident and well-documented, providing a sufficient basis upon which to conclude that Israeli officials adequately understood the harmful implications that the current Gaza closure – which is of far greater magnitude and duration – would have on civilian life and rights.

C. Israel's 2005 "Disengagement" from Gaza and its Retention of Effective Control over the Gaza Strip

57. On 6 June 2004, the Israeli *Cabinet Resolution Regarding the Disengagement Plan*, published by the Prime Minister's Office, detailed a plan to "evacuate the Gaza Strip, including all existing Israeli towns and villages," and to "redeploy outside the Strip," except for "military deployment in the area of the border between the Gaza Strip and Egypt ("the Philadelphi Route")."⁷² The document continues: "Upon completion of this process, there

⁶⁹ *Id.* Israel based this policy on the 1967 order declaring the West Bank to be a "closed military area."

⁷⁰ For details, see the International Court of Justice's Advisory Opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," (9 July 2004), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=131&p3=4>.

⁷¹ PCHR questioned the legality of Israel's closure policy already in 1996, see PCHR, *The Israeli Policy of Closure*, *supra* n. 13.

⁷² Prime Minister's Office, 'Addendum A - Revised Disengagement Plan - Main Principles' (6 June 2004), available at

shall no longer be any permanent presence of Israeli security forces in the areas of Gaza Strip territory which have been evacuated.” It also claimed that the “completion of the plan will serve to dispel the claims regarding Israel's responsibility for the Palestinians in the Gaza Strip.” Less than a year later, in September 2005, Israel completed its disengagement plan, removing its settlements, settlers and soldiers and military bases from the Gaza Strip.⁷³

58. With the withdrawal of Israeli settlers and military forces from the Gaza Strip in 2005, Israel certainly changed how it engaged with the Gaza Strip and its population, but did not “disengage” from it or cede “effective control” over it. Rather than control and regulate Palestinian mobility through the physical presence of Israel’s military forces and infrastructure within the Gaza Strip, Israel withdrew its forces and inaugurated a new strategy of control based on comprehensive restrictions on the movement of people and goods through a complex permit regime, in combination with physical barriers and checkpoints administered and enforced by the military.

59. Israel’s retention of effective control of the Gaza Strip after its “disengagement” is evidenced by Israel’s complete control of all land borders and crossings between Israel and Gaza, as well as *inter alia* Gaza’s airspace and maritime areas,⁷⁴ telecommunications, water, electricity, sewage networks, population registry, monetary market and customs.⁷⁵ Moreover, Israel retains its capacity to immediately deploy ground troops to Gaza and indeed, it has explicitly reserved the right to do so whenever it deems necessary, as for instance during the 2014 military offensive, “Operation Protective Edge.”⁷⁶

<http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/revised%20disengagement%20plan%206-june-2004.aspx>.

⁷³ *Id.*

⁷⁴ *Id.* The 2004 Israeli Cabinet Resolution clearly states that “the State of Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.”

⁷⁵ UN Human Rights Council, “Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict,” 25 Sept. 2009, UN Doc A/HRC/12/48, available at http://www.unrol.org/files/UNFFMGC_Report.pdf (hereinafter “2009 UN Fact Finding Mission Report”) at paras. 277-78; UN Human Rights Council, “Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1,” 22 June 2015, UN Doc A/HRC/29/CRP.4, available _____ at <http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx> (hereinafter “2015 UN Commission of Inquiry Report”) at para. 29. See also The Office of the Prosecutor: Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report, (6 Nov. 2014) (hereinafter “OTP Flotilla Report”), para. 27. The report cited indicia of control including control of border crossing, territorial sea and airspace: “periodic military incursions”; enforcement of “no-go areas” within Gaza; regulation of monetary markets and control of taxes and customs duties.

⁷⁶ 2009 UN Fact Finding Mission Report, *supra* n. 75 at para. 187; OTP Flotilla Report, at para. 28; 2015 UN Commission of Inquiry Report, *supra* n. 75 at paras. 27, 30 (citations omitted); see Prime Minister of Israel’s Office, ‘The Cabinet Resolution Regarding the Disengagement Plan,’ (6 June 2004), available at

60. The continuation of Israel's belligerent occupation of the Gaza Strip, and its status as an Occupying Power, has been recognized by the international community, as articulated by the General Assembly and affirmed by, *inter alia*, the International Committee of the Red Cross (ICRC) and United Nations human rights mechanisms.⁷⁷

61. In 2012, the President of the ICRC stated that “[w]hile the shape and degree of this military occupation have varied, Israel has continuously maintained effective control” over the Gaza Strip.⁷⁸ No international organization or other relevant body at the international level has found Israel's “disengagement” from the Gaza Strip in 2005 to terminate its ongoing status as an Occupying Power.⁷⁹

<http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/Revised%20Disengagement%20Plan%206-June-2004.aspx> ¶ 3(1)(3): “The State of Israel reserves its fundamental right of self-defense, both preventative and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.”

⁷⁷ See UN General Assembly (UNGA) Resolution 64/92, Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories (19 Jan. 2010) UN Doc A/Res/64/92; UNGA Resolution 64/94, Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem (19 Jan. 2010) UN Doc A/Res/64/94, (UNGA Resolutions to be read jointly); Peter Maurer, *Challenges to International Humanitarian Law: Israel's Occupation Policy*, International Review of the Red Cross, Vol. 94, Number 888, p. 1504-1506 (Winter 2012); UN Human Rights Committee, “Concluding Observations on Israel,” (21 Nov. 2014), UN Doc CCPR/C/ISR/CO/4; UN, Department of Public Information, ‘Statement by the Special Advisers of the Secretary-General on the Prevention of Genocide, Mr. Adama Dieng, and on the Responsibility to Protect, Ms. Jennifer Welsh, on the Situation in Israel and in the Palestinian Occupied Territory of Gaza Strip’, (24 July 2010), available at www.un.org/en/preventgenocide/adviser/pdf/24.07.2014%20Special%20Advisers%20Statement%20on%20the%20situation%20in%20Israel%20and%20the%20occupied%20Gaza%20strip.pdf; UN Human Rights Council, “Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967,” (13 Jan. 2014), UN Doc A/HRC/25/67; 2009 UN Fact Finding Mission Report, *supra* n. 75 at para. 276; 2015 UN Commission of Inquiry Report, *supra* n. 75 at para. 30. See also ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ (Advisory Opinion), (9 July 2004), ICJ 136, paras. 78, 101.

⁷⁸ Peter Maurer, *Challenges to International Humanitarian Law: Israel's Occupation Policy*, *supra* n. 77 at p. 1504-1505. For authority on the “effective control” test, see, *Prosecutor v. Duško Tadić*, IT-94-1-T, 7 May 1997, para. 580; *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, (19 Dec. 2005), ICJ 168, paras. 172, 175-176; OTP Flotilla Report, at para. 24; 2015 UN Commission of Inquiry Report, *supra* n. 75 at para. 26 (“The commission agrees that the exercise of the ‘effective control’ test is the correct standard to use in determining whether a State is the occupying power over a given territory . . .”).

⁷⁹ See UN Economic and Social Council, Commission on Human Rights, “Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Special Rapporteur of the Commission on Human Rights,” (7 December 2004), UN Doc E/CN.4/2005/29, para. 19; 2015 UN Commission of Inquiry Report, *supra* n. 75 at para. 26. Indeed, the OTP has recognized that “Israel reserved its right to re-enter the Gaza Strip on the basis of military necessity and maintained control over the air and maritime space as well as borders of the Gaza Strip,” citing Israel's Ministry of Foreign Affairs, “The Cabinet Resolution Regarding the Revised Disengagement Plan,” (6 June 2004). OTP Flotilla Report, para. 25. The OTP recognizes that “the prevalent view within the international community is that Israel remains an occupying power in Gaza despite the 2005 disengagement” and concluded “there is a

62. The ICC confirmed this position in November 2014, when it found a “reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza” in its Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia:

63. Under international law, the general test for occupation is that of “effective control”, whereby a state will be regarded as an occupying power of territory over which it is capable of exercising effective control.”

64. In its advisory opinion in 2004, the International Court of Justice (“ICJ”) concluded that Israel continued to have the status of an occupying power in Gaza. Thereafter in September 2005, Israel completed its unilateral withdrawal from Gaza, including dismantling its settlements and withdrawing its forces. However, Israel reserved its right to re-enter the Gaza Strip on the basis of military necessity and maintained control over the air and maritime space as well as borders of the Gaza Strip.

65. Israel maintains that following the 2005 disengagement, it is no longer an occupying power in Gaza as it does not exercise effective control over the area. However, the prevalent view within the international community is that Israel remains an occupying power in Gaza despite the 2005 disengagement. In general, this view is based on the scope and degree of control that Israel has retained over the territory of Gaza following the 2005 disengagement – including, inter alia, Israel’s exercise of control over border crossings, the territorial sea adjacent to the Gaza Strip, and the airspace of Gaza; its periodic military incursions within Gaza; its enforcement of no-go areas within Gaza near the border where Israeli settlements used to be; and its regulation of the local monetary market based on the Israeli currency and control of taxes and customs duties. The retention of such competences by Israel over the territory of Gaza even after the 2005 disengagement overall supports the conclusion that the authority retained by Israel amounts to effective control.

66. Although it no longer maintains a military presence in Gaza, Israel has not only shown the ability to conduct incursions into Gaza at will, but also expressly reserved the right to do so as required by military necessity. This consideration is potentially significant considering that there is support in international case law for the conclusion that it is not a prerequisite that a State maintain continuous presence in a territory in order to qualify as an occupying power. In particular, the ICTY has held that the law of occupation would also apply to areas where a state possesses “the capacity to send troops within a reasonable time to make the authority of the occupying power felt.” In this respect, it is also noted that the geographic proximity of the

reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza despite the 2005 disengagement.” *Id.* at paras. 27, 29.

Gaza Strip to Israel potentially facilitates the ability of Israel to exercise effective control over the territory, despite the lack of a continuous military presence.

67. Overall, there is a reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza despite the 2005 disengagement. The Office has therefore proceeded on the basis that the situation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel.⁸⁰

68. On the basis of Israel's retained effective control over Palestinian residents of Gaza, Israel similarly retains its obligations to respect the rights of the occupied population of Palestine, including members of Gaza's civilian population, who maintain their status as 'protected persons' under international law.⁸¹

IV. The Current Closure of the Gaza Strip (post-2007)

69. The current closure of the Gaza Strip began on 15 June 2007 when the Hamas movement ousted Fatah to become the governing authority in the Gaza Strip. In 2006, Hamas won the majority of seats in the Palestinian Legislative Council elections, giving it the right to form the Palestinian Authority ("PA") cabinet. However, in response to Hamas' victory, the international community, led by "the Quartet" (the European Union, the Russian Federation, the United Nations and the United States), imposed an embargo on cooperating with the PA and suspended international assistance, as Israel withheld tax revenues and restricted the movement of goods within as well as into and out of the oPt.⁸² Internal tensions as a result of these restrictions and Fatah's refusal to cede control of PA institutions to Hamas eventually led to armed fighting between the rival political parties, and Hamas' routing of Fatah from the Gaza Strip.

70. In response to this development, the Israeli authorities implemented a policy of total closure, restricting all passage of goods and people through Gaza's land crossings other than tightly circumscribed exceptional cases.⁸³ These heightened restrictions compound the

⁸⁰ OTP Flotilla Report 2014, paras. 24-29 (internal citations omitted).

⁸¹ See, for example, Conference of High Contracting Parties to the Fourth Geneva Convention Declaration, (17 Dec. 2014), paras. 4-5, *available at* https://www.eda.admin.ch/content/dam/EDA-Event/GVA%20Convention/CHCP-Declaration_EN.pdf.

⁸² See "Transcript of Press Conference on Middle East by Secretary-General Kofi Annan, Quartet Principles, at United Nations Headquarters," (9 May 2006), UN Doc SG/SM/10453, *available at* <http://www.un.org/press/en/2006/sgsm10453.doc.htm>.

⁸³ The Palestinian Organizations recall that on the spectrum of Israeli closure policies from general to total, the latter does not imply that absolutely nothing enters or leaves Gaza in practice, but rather that as a matter

existing Israeli restrictions in place on Gaza since the early 1990s. The Palestinian Organizations emphasize that the current closure consists of the entire, cumulative package of restrictions, new and old, in force thereafter.

71. The current Gaza closure initiated in June 2007 differs from previous closures in that the Israeli government openly stated that its restrictions on the movement of people and goods to and from Gaza were explicitly designed to apply pressure on the Hamas regime.⁸⁴ On 19 September 2007, Israel's Security Cabinet issued a resolution in which it claimed Gaza to be a "hostile territory" and announced the imposition of "additional sanctions" to be placed on Gaza:

Additional sanctions will be placed on the Hamas regime in order to restrict the passage of various goods to the Gaza Strip and reduce the supply of fuel and electricity. Restrictions will also be placed on the movement of people to and from the Gaza Strip. The sanctions will be enacted following a legal examination, while taking into account both the humanitarian aspects relevant to the Gaza Strip and the intention to avoid a humanitarian crisis.⁸⁵

Indeed, the 2007 closure was a means of economic warfare, as Israel itself acknowledged in its response to a petition challenging restriction on the supply fuel and electricity to Gaza⁸⁶ – that is, a deliberate attempt to undermine Gaza's economy by restricting the flow of goods and utilities, as well as the free movement of people, necessary for industry and economic activity.

72. UN Secretary General Ban Ki-moon immediately issued a strong condemnation of the Israeli government's "hostile entity" designation, noting its incompatibility with Israel's obligations under international humanitarian and human rights law, and referring to it as collective punishment of Gaza's civilians:

of policy, the only entrance or exit of people and goods occurs on an exceptional basis and requires Israeli approval.

⁸⁴ See H CJ 9132/07 *Al-Bassiouni v. The Prime Minister* (not published 30 Jan 2008), para. 49, in the State's Response from 1 Nov. 2007: "The capacity of a country to make use of coercive economic measures during armed conflict is in principle permitted and is limited by international law only by the obligation to permit passage of essential goods and the prohibition on interfering in the ability of the population to survive. That is all." *available at* http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf.

⁸⁵ Israel Ministry of Foreign Affairs, "Security Cabinet Declares Gaza Hostile Territory," Press Release (19 Sept. 2007), *available at* www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm.

⁸⁶ *H CJ 9132/07 Al-Bassiouni v. The Prime Minister* (30 Jan 2008), State's Response. 1 Nov. 2007, paras. 43-44, *at* http://spg.org.il/docs_html/eng/Eng_traders/legal/doc%20full_eng%20trader_legal_01.pdf. *Id.* at 44 ("damaging the enemy's economy is in and of itself a legitimate means in warfare and a relevant consideration even while deciding to allow the entry of relief consignments"). Judgement, *available at* http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf.

I am very concerned at the decision taken today by the Israeli government to declare the Gaza Strip an “enemy entity” and its announced intent to interrupt essential services such as electricity and fuel to the civilian population. Such a step would be contrary to Israel’s obligations towards the civilian population under international humanitarian and human rights law. ... There are 1.4 million people in Gaza, including the old, the young and the sick, who are already suffering from the impact of prolonged closure. They should not be punished for the unacceptable actions of militants and extremists. I call for Israel to reconsider this decision.⁸⁷

73. Despite Israel’s claim that its intensified, comprehensive sanctions were “imposed on the Hamas regime,” the restrictions on the movement of people, goods, and services to and from the Gaza Strip, were and are in fact imposed collectively on the entire Palestinian population of Gaza, which has grown from 1.4 million people in 2007 to 2 million people today.⁸⁸

74. The Palestinian Human Rights Organizations note that Israel, and often some members of the international community use the term “Hamas” without explanation or apparent limitations. Hamas is a political party, serving as *de facto* governing authority in the Gaza Strip, where it fulfills administrative governmental functions, such as running schools, health sector, social affairs, policing, and security. The civil servants who carry out such administrative functions are civilians. Armed resistance groups exist, and operate within the Gaza Strip. Some of these - such as al Qassam Brigade - are associated with Hamas. However, as recognized under international humanitarian law, a clear distinction must be drawn between the political wings and the military wings of all organizations/groups. As such, a clear distinction must be drawn between those members of Hamas who are carrying out solely civilian functions and those members who may participate in armed resistance or directly participating in hostilities. Moreover, and most critically, civilians in Gaza must be granted the full protections of international humanitarian law, irrespective of political opinion.

75. Numerous and frequently changing Israeli protocols and procedures dictate the access privileges extended to Palestinian residents of Gaza to Israel, including for passage to the West Bank or abroad, as well as the entry and exit of goods to and from Gaza. Yet these policies and procedures are overwhelmingly opaque and difficult to access. For the majority of the current closure, including much of period after 13 June 2014, the policies and procedures regulating the permit regime for people and goods were not published. For the first

⁸⁷ United Nations Secretary-General Ban Ki-moon, ‘Statement by the Secretary-General on Gaza’ (19 September 2007), *available at* <https://www.un.org/sg/en/content/sg/statement/2007-09-19/statement-secretary-general-gaza>.

⁸⁸ Palestinian Central Bureau of Statistics, Jerusalem Statistical Yearbook 2016, *supra* n. 2.

four years of the closure (2007-2011), the rules of the permit system were not made published at the time of their entry into force, but only disclosed piecemeal and after-the-fact via individual lawsuits filed against the Israeli military.⁸⁹ As a result of litigation under Israel's Freedom of Information Act 5758-1998 ("FOIA"), COGAT first published the criteria for the travel of Gaza residents in May 2011.⁹⁰ However, the criteria were frequently only made available in Hebrew, rendering them essentially inaccessible to most Palestinian residents of Gaza.⁹¹

76. Following protracted FOIA litigation initiated in May 2014, an Israeli court ordered COGAT to make the protocols and procedures governing its operations available to the public, in Arabic as well as Hebrew, which it agreed to do in three phases, to be completed by 4 June 2015.⁹² In response to a June 2015 follow-up inquiry into COGAT's progress in this regard, the body announced that its main website had stopped functioning and that it was working to fix it. Around the same time, COGAT launched a Facebook page and Twitter account only in English, through which it published daily statistics and infographics depicting the movement of goods and people between Gaza, Israel and the West Bank.⁹³ Six months later, COGAT finally launched a temporary website that lists most COGAT policies and procedures for the movement of people and goods into and out of Gaza, in Hebrew and Arabic.⁹⁴ While their availability is a positive step, the restrictions placed on both the movement of people and goods to and from the Gaza Strip are still inadequate to fulfill the basic rights and needs of Gaza's civilian population.

77. The closed borders and the resulting lack of imports and exports after June 2007 led to the rapid decline of Gaza's economy and the current economic crisis, as further detailed in following sections. Periods of severely diminished to productive capacity have resulted in unprecedented rates of unemployment, food insecurity and aid dependency. The level of subsequent aid dependency is approximately 80%, while the unemployment rate was 41.5%

⁸⁹ HaMoked and B'Tselem, *So Near and Yet So Far: Implications of Israeli-Imposed Seclusion of Gaza Strip on Palestinians' Right to Family Life*, (January 2014), available at http://www.btselem.org/sites/default/files/201401_so_near_and_yet_so_far_eng.pdf.

⁹⁰ Sari Bashi, 'Controlling Perimeters, *Controlling Lives: Israel and Gaza* (2013) 7(2) *The Law & Ethics of Human Rights* 258, available at http://www.gisha.org/UserFiles/File/publications_english/Controlling_Perimeters_Controlling_lives.pdf.

⁹¹ GISHA, *Access Kit: A guide to procedures and protocols which regulate access*, (March 2016), available at <http://gisha.org/publication/4835>.

⁹² For details and additional links to source materials on the legal petition taken against COGAT by Israeli NGO GISHA, see GISHA, *COGAT pledges: Procedures and protocols will be posted to website within six months*, (3 December 2014), available at <http://gisha.org/legal/3868>.

⁹³ Roth, *How Israel's military government keeps Palestinians in the dark*, *supra* n. 14.

⁹⁴ COGAT, 'Temporary Site', available at <http://cogatinternet.wixsite.com/forms>.

in the second quarter of 2015 (compared to 18.7% in 2000).⁹⁵ In 2014, unemployment reached a record 44%. Notably, among the Palestinian population of Gaza, young women and refugees seem to fare worse in finding employment, with eight out of 10 women out of work.⁹⁶ In terms of per capita GDP, the rate in Gaza today is 72% of the 1994 level, and two thirds that of the present rate in the West Bank.⁹⁷ Since Israel imposed the absolute closure on Gaza in 2007, the gap between GDP in Gaza and the West Bank has significantly widened.⁹⁸

78. Moreover, despite successive purported periods of “easing” Israel’s total closure (the first of which was in June 2010 in the aftermath of the deadly attack on the “Freedom-Flotilla”⁹⁹) all observers agree that the adjustments have been inadequate and that the isolation of Gaza continues to severely restrict Palestinian life there, compromising attempts at recovery and reconstruction. As the ICRC emphasized in 2010: “The hardship faced by Gaza's 1.5 million people [now 2 million] cannot be addressed by providing humanitarian aid. The only sustainable solution is to lift the closure.”¹⁰⁰

79. The impact of the closure which was imposed in 2007 has been further compounded by three intensive military assaults on the captive Gaza population over a six-year period, each of which has claimed a disproportionate amount of civilian lives and left the population increasingly traumatized. These repeated military operations against the Gaza Strip - the Israeli codenamed “Operation Cast Lead” of 27 December 2008 – 18 January 2009; the Israeli codenamed “Operation Pillar of Defense” of 14-21 November 2012; and the Israeli codenamed “Operation Protective Edge” of 7 July – 26 August 2014 - further exacerbated the already dire socioeconomic conditions. The hundreds of thousands of Palestinians in Gaza rendered homeless or internally displaced as a result of Israeli military offences have been unable to rebuild their homes and lives due to continuing restrictions on the import of construction materials and other basic supplies.

⁹⁵ GISHA – Legal Center for Freedom of Movement, *The Gaza Cheat Sheet: Real Data on the Gaza Closure*, (10 Aug 2016), available at http://www.gisha.org/UserFiles/File/publications/Info_Gaza_Eng.pdf.

⁹⁶ UNCTAD Report, *supra* n. 22.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ The May 2010 flotilla has been described by the OTP as “an eight-vessel flotilla with over 700 passengers from approximately 40 countries, with the stated intentions (i) to deliver aid to Gaza; (ii) break the Israeli blockade; and (iii) draw international attention to the situation in Gaza and the effects of the blockade.” OTP Flotilla Report, at para.12. The flotilla was attacked in international waters by Israeli forces resulting in the death of nine Turkish citizens and one American, and the injury and detention of hundreds more. See UN Human Rights Council, “Report of the International Fact-Finding Mission to Investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance,” A/HRC/15/21, 27 Sept. 2010.

¹⁰⁰ ICRC, “Gaza closure: not another year!” *supra* n.8.

80. The socioeconomic impact of these attacks has progressively worsened, compounding losses incurred previously. The United Nations Conference on Trade and Development (UNCTAD) estimates that the damage done during the 2014 military operation “has undoubtedly had a far more catastrophic impact on the population, infrastructure and productive base, compared to the previous two,” particularly as nearly a third of Gaza’s population (*i.e.* roughly half a million people), were displaced, with many of those, approximately 100,000 still displaced as of mid-2015.¹⁰¹

81. The following sections outline the various restrictions imposed in practice, which cumulatively comprise the closure. These include restrictions on Gaza’s airspace, the enforcement of a maritime and land “buffer zone” within the coastal waters and territory of the Gaza Strip itself; restrictions on exports and imports of goods; restrictions on the travel of individuals into and out of the Gaza Strip; restrictions on currency exchange; restrictions on changes to Gaza’s population registry, and restrictions on telecommunication networks. The following briefly outlines the main restrictions comprising the closure and the dramatic changes observable in movement and access in the Gaza Strip before and after the closure’s imposition in June 2007. While pre-closure figures are used as a point of reference for comparison, the Palestinian Human Rights Organizations do not endorse pre-closure figures as an acceptable baseline to return to, as prior to the current closure, Gaza had already been under continuous military occupation and had faced progressively escalating restrictions for decades.

¹⁰¹ UNCTAD Report, *supra* n. 22.



(Source: UN OCHA oPt)

A. Restrictions by Air

82. The current closure of the Gaza Strip includes the continued exclusive control over and closure of Gaza's airspace by Israel. This control includes a continuation of a total ban on air travel, for people and goods, into, out of and over Gaza; the land crossings are the only means through which to enter or leave the Gaza Strip, subject to strict regulation, as Israel also continues to block all possibility of transit by air and sea.

83. Israel has controlled Gaza's airspace since it occupied the Gaza Strip in 1967. The Oslo Accords granted Israel complete control over Gaza's airspace, but provided that Palestinians could build an airport there. The Arafat International Airport was built in Gaza in 1998, operating a limited number of weekly flights to Arab countries until Israel unilaterally closed it on 8 October 2000, as part of the broader comprehensive closure it imposed on the oPt after the outbreak of the second intifada.¹⁰² On 4 December 2001, Israeli forces damaged a portion of the runway and bombed the control terminal. On 11 January 2002, bulldozers destroyed the runway, permanently shutting down the airport.¹⁰³ During the current Gaza

¹⁰² PCHR, *Weekly Report on Israeli Human Rights Violations in the Occupied Palestinian Territories*, (10 January 2002), available at <http://pchrgaza.org/en/?p=4578>.

¹⁰³ PCHR, *The Israeli Occupying Forces Close Gaza International Airport* (2000); PCHR, *Weekly Report on Israeli Human Rights Violations in the Occupied Palestinian Territories*, (29 Nov. 2001), available at <http://pchrgaza.org/en/?p=4484>.

closure, Israeli forces have continued to target the abandoned airport premises, which were gradually destroyed by multiple Israeli attacks.¹⁰⁴ Palestinians in Gaza began collecting rubble and recycling fragments from the old airport site in response to the shortage of construction materials caused by the closure.

84. Israel's revised unilateral "disengagement plan" of 2004 states that "Israel will hold sole control of Gaza airspace."¹⁰⁵ The Agreement on Movement and Access, signed by Israel and the Palestinian Authority in 2005, states that "[t]he parties agree on the importance of the airport. Discussions will continue on the issues of security arrangements, construction, and operation."¹⁰⁶ Since then, however, no action has been taken towards a new airport, let alone granting Palestinians any control over their airspace.

85. In addition to restricting travel, Israeli authorities' absolute control over Gaza's airspace serves other functions within the context of the current closure. It allows monitoring activities on the ground in Gaza, gathering intelligence, interfering with radio and TV broadcasts, and attacking targets at will.¹⁰⁷ Both Israeli combat and surveillance aircraft, including drones, are a common, daily presence in the skies over Gaza.

B. Restrictions by Sea

86. The current closure of Gaza also includes complete Israeli control over Palestinians' access to the sea for travel or transport, as well as strict limitations on access to Gaza's coastal waters for other purposes.¹⁰⁸ Plans to build an international sea port on Gaza's coast were included in the Oslo Accords and reaffirmed in the 2005 Agreement on Movement and Access,¹⁰⁹ for the transport of goods into and out of the Gaza Strip, as well as the external

¹⁰⁴ PCHR, *Weekly Report on Israeli Human Rights Violations in the Occupied Palestinian Territory* (18 March 2010), available at <http://pchrgaza.org/en/?p=4217>.

¹⁰⁵ Prime Minister's Office, "Addendum A - Revised Disengagement Plan - Main Principles," (6 June 2004) available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/revised%20disengagement%20plan%206-june-2004.aspx>.

¹⁰⁶ Agreement on Movement and Access (AMA) (15 Nov. 2005), available at http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf.

¹⁰⁷ B'Tselem, *Israel's control of the airspace and the territorial waters of the Gaza Strip* (1 Jan. 2013), available at http://www.btselem.org/gaza_strip/control_on_air_space_and_territorial_waters.

¹⁰⁸ Government of the State of Israel and the Palestine Liberation Organization, 'Declaration of Principles on Interim Self-Government Arrangements (Oslo I Accord) A/48/486-S/26560 of 11 October 1993', available at <https://unispal.un.org/DPA/DPR/UNISPAL.NSF/0/71DC8C9D96D2F0FF85256117007CB6CA>.

¹⁰⁹ Agreement on Movement and Access, *supra* n. 106. The AMA was an agreement signed between Israel and the PA with the intention "to facilitate the movement of goods and people within the Palestinian Territories..." and open "...an international crossing on the Gaza Egypt border that will put the Palestinians

travel of passengers by sea. However, Israel never genuinely supported the port's construction, as it has effectively blocked any progress on the port through the restriction of materials and repeated aerial bombardment of the existing port infrastructure. Moreover, Israel maintains a maritime blockade of Gaza's coastal waters as part of the current closure, preventing not only transit to and from Gaza via the Mediterranean sea, but also limiting Gaza residents' access to their coastal waters for, *inter alia*, livelihood, recreation, or educational activities (discussed below in the section on the buffer zone).¹¹⁰ An access limit of twenty nautical miles was agreed to in the Oslo Accords and formally established in the 1994 Gaza-Jericho agreement, but never implemented in practice.¹¹¹ As described below in the section on the "buffer zone," the 20NM limit has been gradually reduced, fluctuating regularly between only 3-6NM, and exceptionally extending to 9NM,¹¹² during the current closure.¹¹³

87. In 2008, boats of activists from the Free Gaza Movement managed to break the *de facto* blockade, reaching Gaza's port in a show of solidarity with the Palestinians of Gaza.¹¹⁴ However, on 3 January 2009, Israel formally declared and has since fully enforced a total naval blockade of the Gaza Strip. Since its imposition, no boats have been permitted to enter (from abroad) or leave the coastal waters (out to sea) belonging to Gaza. The blockade is enforced by the Israeli navy, as demonstrated in 2010 when Israeli soldiers boarded boats participating in the "Gaza Freedom Flotilla."¹¹⁵ Meanwhile, within the territorial 3-6NM waters of the Gaza Strip, Israeli forces regularly use live fire to enforce the blockade and maritime "buffer zone" on Palestinians, particularly fishermen, accessing the waters off Gaza's coast, elaborated upon below.

in control of the entry and exit of people...' (Agreed Documents by Israel and Palestinians on Movement and Access from and to Gaza. S366/05 Jerusalem 15 Nov. 2005) and thereby "...promote peaceful economic development and improve the humanitarian situation on the ground" (opening sentence of the AMA).

¹¹⁰ PCHR, *Under fire: Israel's Enforcement of Access Restricted Areas in the Gaza Strip* (Jan. 2014) pp.33–35, available at <http://www.pchrgaza.org/files/2014/palestine-under-fire-report-en.pdf>.

¹¹¹ Government of the State of Israel and the Palestine Liberation Organization, *supra* n. 108; Government of the State of Israel and the Palestine Liberation Organization, Agreement on the Gaza Strip and the Jericho Area (Gaza-Jericho Agreement/1994 Cairo Agreement) A/49/180-S/1994/727 (4 May 1994).

¹¹² On 3 April 2016 the Israeli authorities expanded the permitted fishing zone, temporarily, to 9NM, returning to 6NM on 6 June 2016. See Press Release, *IOF Escalation of Attacks against Fishermen in the Gaza Sea Continue*, Al Mezan, 22 May 2016, available here <http://www.mezan.org/en/post/21340>.

¹¹³ PCHR, *Under fire: Israel's Enforcement of Access Restricted Areas in the Gaza Strip*, *supra* n. 110.

¹¹⁴ Free Gaza Movement, *The Newsletter of the Free Gaza Movement 2/2008* (15 Dec. 2008), available at <http://www.freegaza.org/the-newsletter-of-the-free-gaza-movement-22008/>.

¹¹⁵ The ICC OTP notes the beginning of the naval blockade: "On 3 January 2009, Israel imposed a naval blockade off the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast. The naval blockade was part of a broader effort to impose restrictions on travel and the flow of goods in and out of the Gaza strip, following the electoral victory of Hamas in 2006 and their extension of control in 2007." See OTP Flotilla Report, para. 10.

88. As a result of the current closure's continued restrictions on Gaza's airspace and sea access, the only possibility for travel or the import or export of goods abroad is across the land crossings, either via the Erez crossing to Israel (with transfer to Karama/Allenby border crossing with Jordan), or via the Rafah crossing to Egypt.

C. Restrictions by Land

89. Under the current closure, the Israeli authorities has intensified restrictions on the passage of both people and goods into and out the Gaza Strip via land crossings, whether for transit to or from other parts of the Palestinian territory, or to or from abroad. During the period of ICC jurisdiction over crimes committed in Gaza (13 June 2014 onwards), the only Israeli crossing in operation for the movement of people to and from Gaza has been the Beit Hanoun "Erez" crossing, while the only Israeli crossing in operation for the transit of goods, including fuel, has been the Karm Abu Salem "Karem Shalom" crossing. The only other land crossing from the Gaza Strip is the Rafah crossing, operated by Egypt, but indirectly controlled by Israel through its control over the Palestinian population registry. The following section details the restrictions on the movement of people and goods via the land crossings during the current closure, with an emphasis on restrictions and actual movement during the period after 13 June 2014.

90. The Palestinian Human Rights Organizations have extensive documentary and testimonial evidence to demonstrate the severe restrictions on people and goods, and the resulting violations of rights detailed below, and can make such information available to the Office of the Prosecutor at the appropriate time.

1. Movement of Persons via Land Crossings

a) Beit Hanoun "Erez" Crossing

91. Under the current closure policy and in contravention of its obligations under international law, Israeli authorities do not recognize any right of Palestinian residents of Gaza to enter into Israeli territory, even for transit to other parts of Palestine (e.g. the West Bank¹¹⁶) or abroad.¹¹⁷ Similarly, it does not recognize the right of any Palestinian resident of

¹¹⁶ Passage through Israeli territory is not only the shortest route for Palestinian residents of Gaza to access the West Bank, but it is also the only route possible in light of Israel's ban on Gaza residents entering the West Bank via Jordan.

the West Bank or Israeli ID holder (Israeli citizens or residents of East Jerusalem) to exit Israeli territory into the Gaza Strip.¹¹⁸ According to the “separation policy” implemented by Israel since the beginning of the current closure, Palestinians whose place of residency is recorded as Gaza in the population registry are regarded by Israel as “foreign nationals” with regard to their presence not only in Israeli territory, but also in the West Bank. This runs counter to Israel’s formal agreement and widespread international recognition that the Gaza Strip and West Bank form a single territorial unit, now recognized by the international community as the occupied State of Palestine. However, as a “humanitarian” gesture, Israel operates a complex permit system that allows limited categories of Palestinian residents of Gaza to enter Israel through the Beit Hanoun “Erez,” crossing, restricted to “exceptional humanitarian cases, with an emphasis on urgent medical cases.”¹¹⁹

92. As outlined above, many of the policies and procedures regarding Israel’s permit system for the travel of Palestinians out of or into the Gaza Strip were not made available until mid to late 2015. According to general guidelines for the authorization of permits for the Palestinian population in the Gaza Strip, applications by Palestinian residents of Gaza wishing to enter Israel, even if only for transit to the West Bank or abroad, must submit an application to the Gaza District Coordination Office (“DCO”) from the Palestinian Civil Affairs Committee in Gaza (under the authority of the PA Ministry for Civil Affairs in Ramallah).¹²⁰ The application must not only comply with the current criteria, which are subject to frequent change, but are also determined by Israeli authorities in consideration of the “security, political and strategic interests of the state of Israel regarding the application.”¹²¹ The margin of interpretation built into these latter “integral checks” is so wide as to allow Israel the discretion to reject permits at will, and indeed, many applications from Gaza residents often simply go unanswered or are rejected for “security reasons” with no further explanation provided.¹²²

¹¹⁷ COGAT, “Unclassified Status of Palestinians Authorizations of Entry into Israel, their Passage between Judea and Samaria and the Gaza Strip and their Travel Abroad,” (GISHA (unofficial translation) 2016), available at <http://www.gisha.org/UserFiles/File/LegalDocuments/procedures/general/50en.pdf>.

¹¹⁸ *Id.*

¹¹⁹ *Id.* See also, GISHA, *A Guide to the Gaza Closure: In Israel’s Own Words* (Sept. 2011), available at http://www.gisha.org/userfiles/file/publications/gisha_brief_docs_eng_sep_2011.pdf.

¹²⁰ Chapter B, “General Guidelines” in COGAT, “Unclassified Status of Palestinians Authorizations of Entry into Israel, their Passage between Judea and Samaria and the Gaza Strip and their Travel Abroad” *supra* n. 117.

¹²¹ *Id.*

¹²² Illustrative examples of such cases can be found in the “impact” section, *infra* Section V. Numerous additional examples exist on file with the Palestinian Human Rights Organizations as well as with Israeli

93. For the purpose of the exceptional permit regime, entry to Israel, including for passage to the West Bank or abroad, is allowed for Palestinian residents of Gaza for “life-saving or life changing medical treatment, provided the requested treatment is unavailable in the Gaza Strip.”¹²³ Appointments with the necessary medical facility and payment via the Palestinian Authority must be arranged in advance. Depending on the case, permits can also be sought for a “companion” to accompany the patient. Beyond urgent medical cases, a limited number of permits are granted for professional medical training or for Gaza residents to visit a first degree relative (parent, sibling, spouse or child) who is “seriously ill with a potentially life-threatening condition or who requires protracted hospitalization.”¹²⁴ In such cases, the “seriousness” of the medical situation also takes into account the age of the patient.

94. Aside from urgent medical cases, other categories of people who can apply for a permit to travel through the Beit Hanoun “Erez” crossing include “traders and businessmen” whose entry “may contribute to improving the Gazan economy” and who trade in goods approved under the civil policy applicable at the time of application. A set quota of permits may also be approved specifically for a spouse to accompany approved traders. Longer, multiple-entry permits may also be granted to “BMG (Business Man Gaza)” traders, who Israel considers “senior Palestinian businessmen and traders.” Aside from traders, other categories of people allowed to apply for permits involving work during their entry into Israel include members of emergency medical teams and 10 workers for the Land Border Crossings Authority in the Ministry of Defense, who work in the operation of the land crossings between Israel and the Gaza Strip.

95. An umbrella category of “special” or “various” needs lays out provisions for additional Gaza residents to obtain a permit to enter Israel on an exceptional basis. These include the potential for Palestinian residents of Gaza to enter Israel, including for passage to the West Bank or abroad (via Jordan), in order to, *inter alia*,: attend a funeral or a wedding of a first-degree relative; accompany children under age 15 in possession of a permit to visit a first-degree relative due to serious illness, a funeral, or a wedding; visit a family member detained in Israeli prisons; participate in approved legal proceedings; attend an interview at a third-party state embassy or consulate; attend prayers at the Al Aqsa Mosque or visit Christian holy sites in accordance with quotas and age regulations; work as a journalist with a news

human rights organizations that litigate on behalf of Gaza residents in Israeli courts, such as HaMoked and GISHA.

¹²³ *Id*

¹²⁴ *Id*.

agency represented in Israel; participate in approved professional conventions (only in the fields of agriculture or medicine) or approved conferences and events (only sponsored by the Palestinian Authority); and participate in official team activities for members of national and local sports teams, including approved members of the Olympic Committee and the Palestinian Football Association. It is noteworthy that while the list of special purposes is extensive, the actual number of exit permits granted is low; fulfillment of the category classification does not guarantee a permit.

96. A weekly quota of Gaza residents may apply to enter Israel for the purpose of traveling abroad via the Karama “Allenby” border with Jordan for “exceptional medical treatment,” “exceptional conventions,” and “post-graduate academic studies abroad” (but not for study in East Jerusalem or the West Bank). In general, a Gaza resident may also apply to transit through Israel for the purpose of travel abroad with a written commitment not to return for a period of one year and pre-approval for entry granted by Jordan.

97. Palestinians from the West Bank or holders of Israeli IDs may also apply for exceptional permits to visit first-degree relatives in Gaza due to serious illness, a funeral, or a wedding. In contrast to Palestinian residents of Gaza, Palestinian residents of the West Bank or holding Israeli IDs (Israeli citizens or residents of Jerusalem) can apply to relocate their center of life to Gaza Strip, including for family reunification, as long as they “choose” to give up their existing residency rights. Additionally, a set number of diplomats, journalists and humanitarian aid workers from registered Israeli organizations, international NGOs, and the UN can apply for permits to enter Gaza via Beit Hanoun “Erez,” subject to security clearance and consideration of Israel’s political and strategic interests.

98. Those Palestinians in Gaza who qualify within the narrow categories designated by Israel for travel permits not only face complicated procedures, but often endure degrading treatment during both the application process, which forces them to reveal intimate details of their health as well as personal and familial relationships, as well as during their interaction with Israeli authorities at the Beit Hanoun “Erez” crossing itself.¹²⁵ Even medical patients suffering acute, life-threatening conditions have been subject to extensive delays, non-transparent and changing procedures, degrading interrogations and arbitrary success rates in

¹²⁵ PCHR, *The Illegal Closure of the Gaza Strip*, *supra* n. 13, at 22.

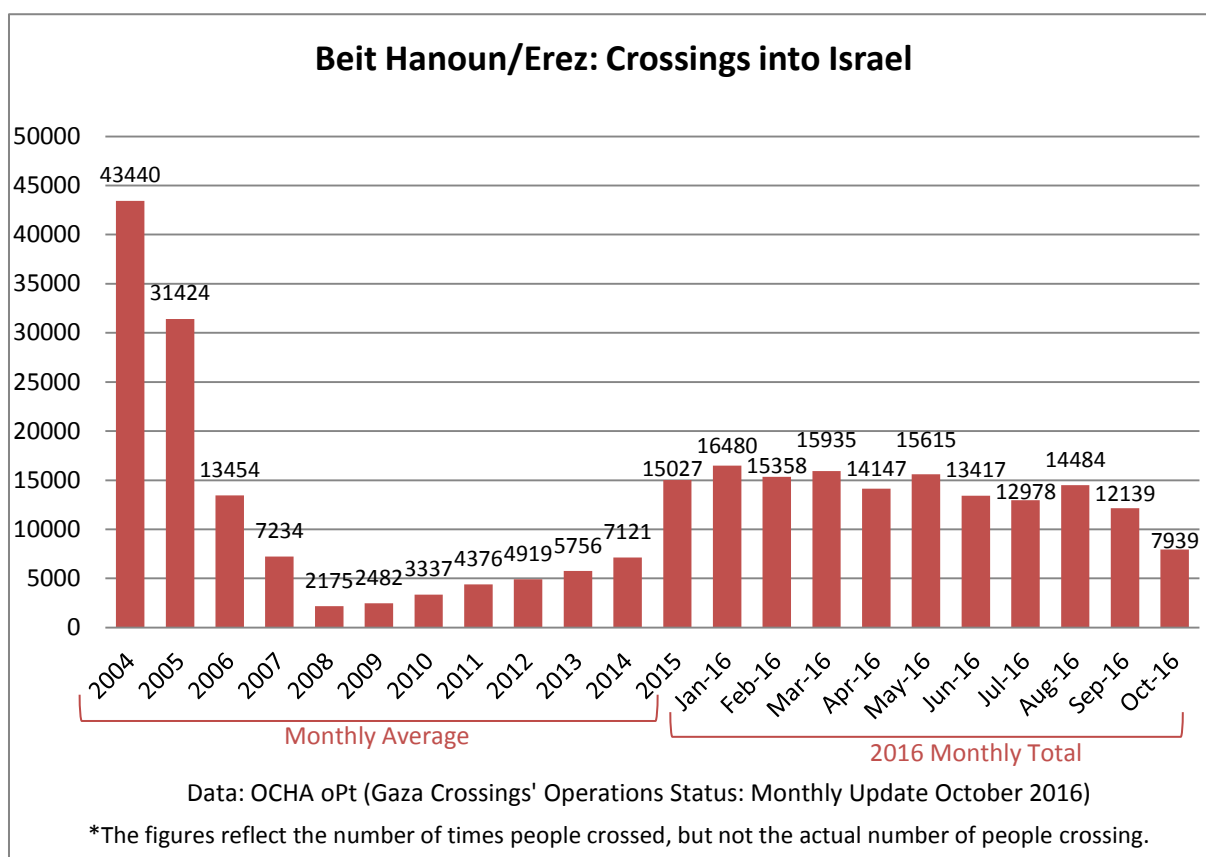
applying for a permit and actually crossing through the checkpoint in possession of a valid permit.¹²⁶

99. The following statistics show the difference in numbers and success rates for travel applications from Palestinians from Gaza traveling via Erez in accordance to the narrow categories provided by Israel during the current closure, as well as rates prior to the closure. The categories highlighted here are illustrative rather than exhaustive.

i. Total Number of People Traveling via Beit Hanoun/Erez Crossing

100. Since the imposition of the current Gaza closure in June 2007, the number of Palestinians travelling via the sole crossing for transit into Israel, including for the purpose of visiting East Jerusalem, transiting to the West Bank, or visiting family members detained in Israeli jails, has plummeted. Although 2016 has seen some of the highest monthly crossing rates since the closure's imposition, these numbers still represent just a fraction of the number of Palestinians who crossed through Erez prior to the closure. Records of the total number of permit applications submitted for travel via Erez are not publicly available, but given population growth over ten years and the fact that Palestinians in Gaza have been denied freedom of movement for just as long, the decline in crossings in the latter half of 2016 most likely reflects tighter Israeli restrictions rather than less Palestinian demand.

¹²⁶ Examples of such cases have been regularly monitored and documented by the Palestinian Human Rights Organizations after 13 June 2014. In addition to the illustrative examples of violations detailed in the "Impact" section of this submission, other cases have been made public in a range of weekly, monthly or other periodic, thematic reports published by the Palestinian Organizations. See, e.g., PCHR *Weekly Report[s] on Israeli Human Rights Violations in the Occupied Palestinian Territories*, available at <http://pchrghaza.org/en/?cat=47>. Confidential testimonies and case details of additional victims are also on file with the Palestinian Human Rights Organizations, which can provide case information and facilitate access to victims for the Office of the Prosecutor at the appropriate time.



101. In the period of the current closure within the jurisdiction of the ICC, crossings via Beit Hanoun/Erez have been relatively higher than during previous years of the closure, particularly mid-2007 – 2013. The monthly average in 2014 was 7,121 crossings per month, which almost doubled in 2015 to an average of 15,027. The monthly average for the first ten months of 2016 has been lower, at 13,849 crossing per month. However, assessing the real significance of these crossing rates requires looking further back than the years immediately preceding the current closure, as Israel also intensified movement restrictions in 2006, following Hamas’ victory in the Palestinian legislative elections and formation of a government (March), and again, after the capture of the Israeli soldier Gilad Shalit (25 June 2006).¹²⁷

102. The 12,978 crossings of permit holders allowed by Israeli authorities in July 2016, for instance, should be compared with the significantly higher monthly average of 43,440 crossings (30%) from 2004 and the higher still daily average of 26,000 before the outbreak of

¹²⁷ For details on these periods of intensified closure, see PCHR’s monthly closure updates: PCHR, *State of the Gaza Strip's Border Crossings* (1996-2016). Closure Updates, available at <http://pchr.org/en/?cat=65>.

the second intifada in September 2000.¹²⁸ At the daily level, this means that permit holders allowed to cross into Israel in July 2016 represented less than 2% of the pre-intifada rate.¹²⁹ More recently, in October 2016, the number of crossings dropped dramatically to 45% below the monthly average since the beginning of 2016, and the lowest since December 2014.¹³⁰ It must also be noted that the number of crossings does not correspond to the number of people who travelled, as certain permit holders, like businesspeople, are able to cross multiple times.

ii. *Medical Patients*

103. As one of the narrow categories of people permitted to exit Gaza despite the closure, Israel makes an ostensibly favorable concession to those in need of urgent medical care unavailable in the Gaza Strip. However, the Israeli authorities frequently deny or delay travel for medical treatment, often with dire medical consequences. Al Mezan has documented 11 deaths since 2011 subsequent to the Israeli authorities' rejection of the patients' applications to travel for medical treatment.¹³¹ The Israeli authorities obstruct the travel of patients under various pretexts, including security reasons, or demanding a change of the companion permitted to travel with the patient. Such delays often result in patients missing their scheduled appointments, forcing them to repeat the entire application process.¹³²

104. The application process for an urgent medical permit is complex. The World Health Organization (WHO) has confirmed the concerns of the submitting organizations, noting that the process is both "time-consuming for the patient and complicated, sometimes requiring multiple attempts which delays health care."¹³³ Palestinians needing to exit the Gaza Strip for treatment must possess a valid financial commitment from the Palestinian Ministry of Health (MoH) and documentation of an appointment from the hospital that will receive them. If the validity of either expires before the patient receives an answer from the Israeli authorities

¹²⁸ UN OCHA, "The Gaza Strip: The Humanitarian Impact of the Blockade," *supra* n. 12.

¹²⁹ *Id.*

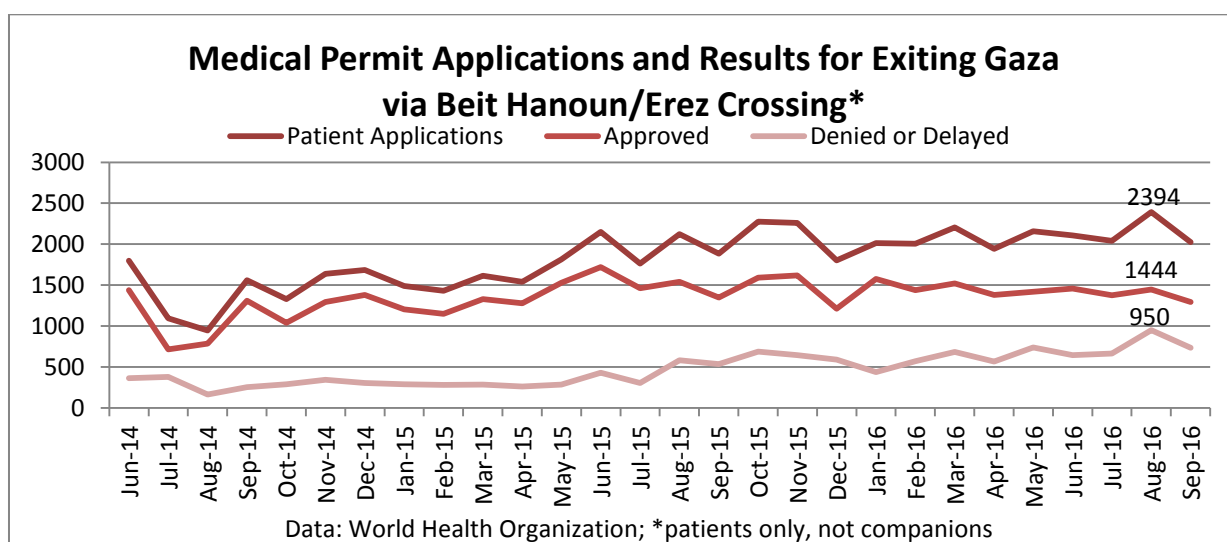
¹³⁰ UN OCHA Gaza Crossings' Operations Status: Monthly Update October 2016, *available at* http://www.ochaopt.org/sites/default/files/gaza_crossing_october_2016.pdf

¹³¹ Al Mezan conducts daily monitoring and documentation of violations of international law, including against patients throughout the Gaza Strip and compiles the information in a database.

¹³² PCHR, *Closure Report*, (Jan. 2016), *available at* http://pchrgaza.org/en/wp-content/uploads/2016/02/Clouser_Jan.2016%E2%80%93en.pdf. Al Mezan's recent documentary, *Security Check*, follows two Palestinian patients from Gaza who are being denied entry into Israel to receive urgent medical care. The film sheds light on the issue of coercion. *available at* <https://www.youtube.com/watch?v=ehe8S9o3ZR0&feature=youtu.be>.

¹³³ WHO Monthly Access Report (April 2016), *available at* http://www.emro.who.int/images/stories/palestine/documents/WHO_monthly_Gaza_access_report-April_2016_final.pdf?ua=1.

regarding the permit decision, the patient has to repeat the application process all over again.¹³⁴ If a patient’s permit application is denied or if the Israeli authorities simply do not send a response, then patients may re-apply, but have little recourse if they are denied for “security reasons” with no further explanation provided by the Israeli authorities. Why some patients are accepted and others denied for medical permits ultimately remains unknown. As the following chart demonstrates, success is unpredictable.¹³⁵

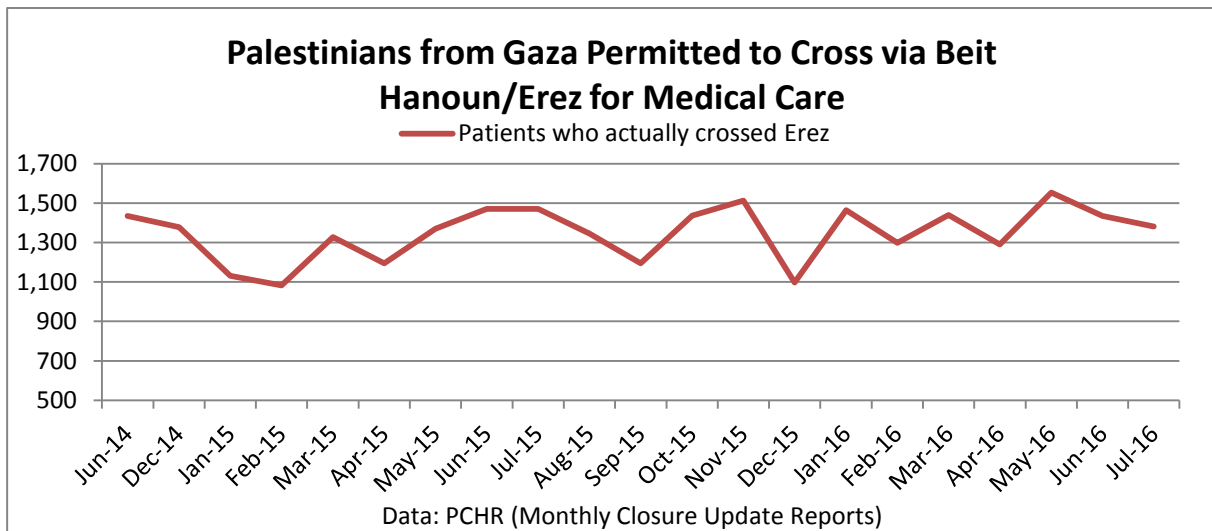


105. The number of Gaza patients who actually make the trip through the Beit Hanoun “Erez” crossing for medical care is often slightly less than the number of Gazan patients approved for travel.¹³⁶ Some patients who obtain permits for Beit Hanoun “Erez” may have already travelled to Egypt via the Rafah Crossing or chosen to delay their travel for a number of personal reasons. In the worst cases, patients may have died before being able to travel.

¹³⁴ *Id.*

¹³⁵ The chart only details patient applications and acceptance rates. Information on companions is also available in the WHO Monthly Access Reports. WHO, “Health access for Gaza patients” monthly reports 2011–2016, available at <http://www.emro.who.int/pse/publications-who/monthly-referral-reports.html>.

¹³⁶ PCHR collects information regarding patient travel from the General Department of Civil Affairs in Gaza, while the World Health Organization obtains its information from the Ministry of Health in the West Bank.



106. During the first two years of closure, only about ten patients were allowed to travel via the Beit Hanoun “Erez” crossing for advanced medical treatment in Israel or the West Bank on a daily basis, amounting to an average of approximately 300 per month. Since 2010, the number has increased and ranged between 25-45 patients per day, or between 750-1350 per month. Prior to the closure, patients traveling via the crossing used to number over 50 per day, or approximately 1500 per month.

107. Although the absolute number of patients travelling through “Erez” per month has hovered close to the pre-closure number of 1500 crossings per month since June 2015, looking only at absolute numbers misses both the increased demand for medical travel among residents of Gaza, and the starkly lower acceptance rates for medical permit applications. Since the beginning of the closure in 2007, the need for patients to seek medical treatment outside of Gaza has grown significantly.¹³⁷ Gaza’s population has not only grown by nearly half a million people since then, but as outlined, three major Israeli military offensives have caused significant damage to Gaza’s medical facilities and have left many residents in Gaza with injuries requiring treatment which is not available in Gaza. The closure’s restrictions on the movement of goods and people have meant that necessary medical supplies are limited, equipment has not been upgraded; further, doctors have not been able to update their skills by attending training courses outside of the Gaza Strip. Meanwhile, chronic issues like electricity cuts, food insecurity and drastically deteriorated health and sanitation conditions have increased the overall burden on Gaza’s medical system. As demand for medical permits has risen, however, approval rates have declined. In August 2016 only 60.3% of patient permit

¹³⁷ WHO monthly reports on referral of patients from the Gaza Strip, available at <http://www.emro.who.int/pse/publications-who/monthly-referral-reports.html>.

applications were approved, marking the lowest approval rating in 7 years.¹³⁸ That same month, 1 in 2 patient companion applications were denied or delayed (51.2%).

iii. *Family Visits to Palestinians Detained in Israel*

108. Another group of Palestinian residents in Gaza who depend on Israeli permission to travel via the Beit Hanoun “Erez” crossing on a monthly basis are family members of Palestinian prisoners and administrative detainees held in Israel.¹³⁹ For the first five years of the current closure, Israel barred *all* visitation rights for prisoners and detainees from Gaza, in a decision citing unspecified security reasons that was upheld by Israel’s High Court of Justice in 2009.¹⁴⁰ Prisoner visits were only resumed after an agreement was reached between Israeli authorities and hunger-striking Palestinian detainees in May 2012. According to the agreement, each prisoner and detainee has the right to two family visits a month, with two family members allowed on each visit. In addition to this, detainees’ children under the age of 16 are also permitted to visit.

109. With 340 Palestinians from Gaza detained in Israel as of July 2016,¹⁴¹ the number of permissible visits should reach a total of 680 per month. If two family members attend each

¹³⁸ WHO monthly reports on referral of patients from the Gaza Strip, (Aug. 2016), *available at* http://www.emro.who.int/images/stories/palestine/documents/WHO_monthly_Gaza_access_report-Aug_2016-Final.pdf?ua=1.

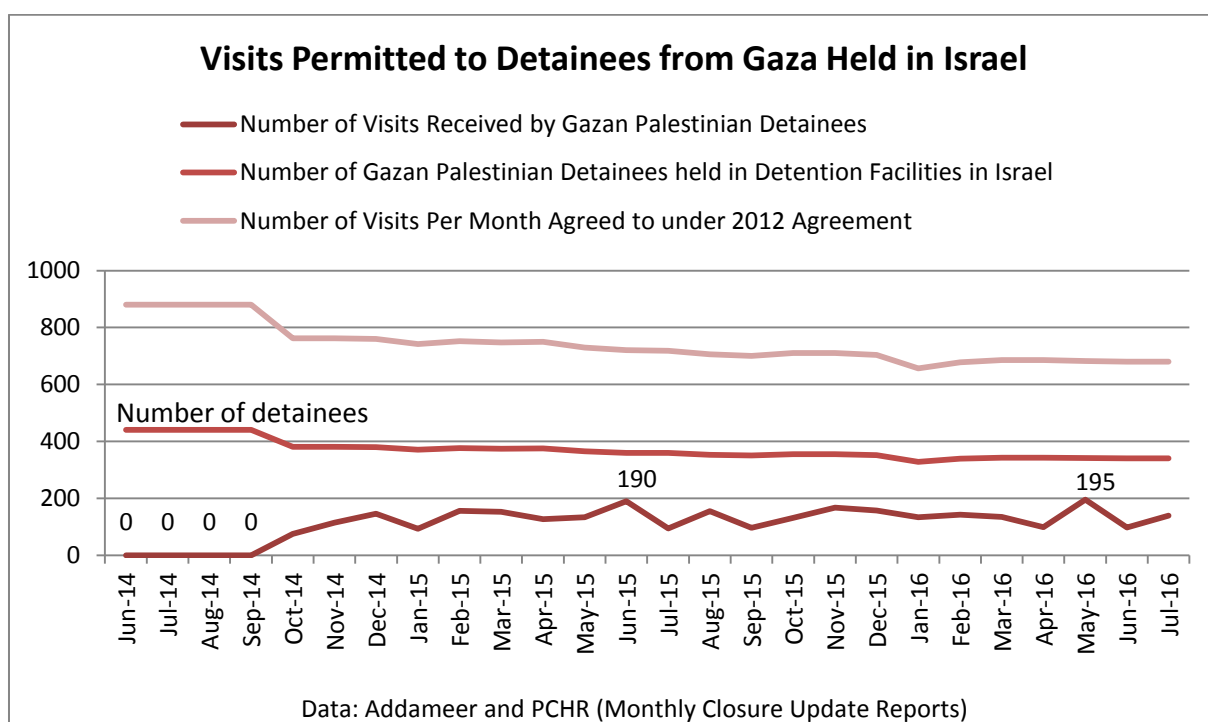
¹³⁹ Article 116 of Geneva Convention IV stipulates that “Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible. As far as is possible, internees shall be permitted to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.” Article 76 of the 1949 Fourth Geneva Convention requires that protected persons who are detained or sentenced to prison terms be held in the occupied territory in order to, among other things, prevent an undue burden being placed on family members wishing to fulfill their visitation rights. Israel has consistently violated Article 76 and, as of August 2016, holds 7000 Palestinian prisoners/administrative detainees from the oPt in prisons inside the Green Line. See Addameer, *available at* <http://www.addameer.org/statistics>.

¹⁴⁰ See Al Mezan (and partners’) appeal to Israel’s High Court, HCJ 5399/08, *Adalah, et al. v. The Defense Minister, et al.* (decision delivered 9 December 2009). See Joint Press Release, *Israeli Supreme Court: No Family Visits for Gaza Prisoners in Israeli Prisons*, 10 December 2009, *available at* <http://mezan.org/en/post/9334>; See also: Supreme Court decision (English translation), *available at* <http://www.adalah.org/features/prisoners/Isr%20Sup%20Ct%20decision%20No%20family%20visits%20Gaza%20prisoners%20English.doc>.

According to Addameer, “On 6 June 2007, citing unspecified security reasons, Israeli authorities suspended the ICRC Family Visits Programme in the Gaza Strip, effectively barring all means of communication between Gazan prisoners and the outside world. The family visits ban was upheld by Israel’s High Court of Justice in December 2009 and compounded by an IPS prohibition of telephone communication between all detainees and their families,” *available at* http://www.addameer.org/key_issues/family_visit. All data and information in this section is drawn from Addameer and from PCHR’s monthly monitoring of media statements by the Spokesperson of the International Red Cross, detailed with the dates of each visit and prison in PCHR’s monthly closure update reports: PCHR, *State of the Gaza Strip’s Border Crossings*, *supra* n. 127; Also see PCHR, *Gaza Strip: Actual Strangulation and Deceptive Facilitation*, *supra* n. 42 at 16.

¹⁴¹ See Addameer, *available at* <http://www.addameer.org/statistics/20160730>.

visit, this would amount to 1,360 exits by detainees' family members via the Beit Hanoun/Erez Crossing per month, not including exits by children.¹⁴² However, the actual reality of Israeli exit permits granted for family members of Palestinian detainees from Gaza is far less, as the chart below demonstrates. Although the Israeli Prison Service (IPS) allows for prison visits every two weeks, Palestinians from Gaza "can only obtain entry permits for a prison visit from the military every two months at most."¹⁴³ Moreover, the COGAT procedures for which family members from Gaza may receive visitation permits are more restrictive than the 2012 agreement.¹⁴⁴



110. Through the control of permits for traveling via the Beit Hanoun/Erez crossing, Israeli authorities exercise complete discretion over whether an individual from Gaza is able to visit a detainee. Potential visitors are limited by Israel to the detainee's father, mother or spouse, and only one or two of them per visit. If any of the individuals among these three categories is temporarily incapable of actually visiting the detainee after having already received a permit (e.g. due to an unforeseen scheduling conflict, sickness, or death), the Israeli authorities do not allow the change of the visitors' names, meaning the detainee simply loses the right to his or her visit. If any of the individuals among these three categories are permanently unable to

¹⁴² *Id.*

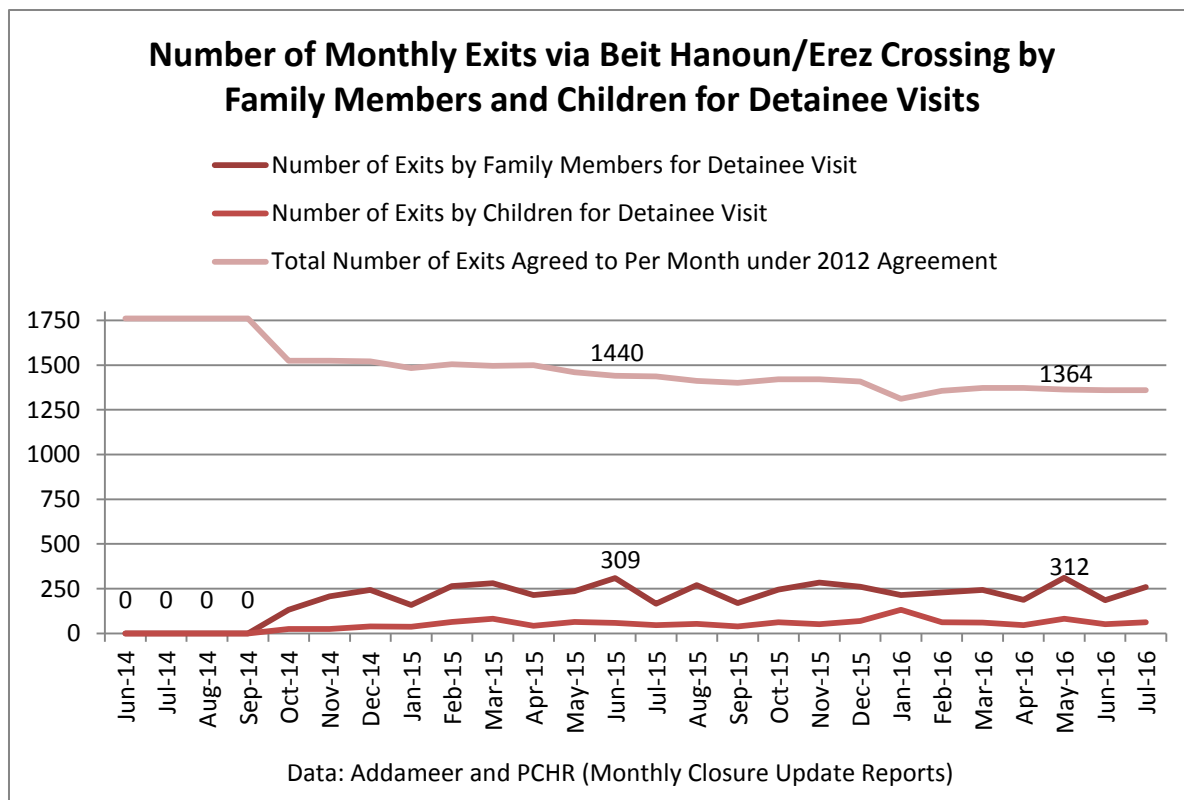
¹⁴³ Human Rights Watch, *Israel: Rules Curtail Gaza Family Visits to Prisoners* (31 July 2016), available at <https://www.hrw.org/news/2016/07/31/israel-rules-curtail-gaza-family-visits-prisoners>.

¹⁴⁴ COGAT, "Unclassified Status of Palestinians Authorizations of Entry into Israel, their Passage between Judea and Samaria and the Gaza Strip and their Travel Abroad," *supra* n. 117.

visit (e.g. parents who are too old and infirm, or are deceased), no other family members, such as siblings, cousins or children over the age of 16, are permitted to take their place. In this way, the closure's restrictions impose additional limitations on Palestinians from Gaza in visiting detained family members that are not applied to Palestinians from East Jerusalem or the West Bank, and which are narrower in scope than the parameters for visitation specified by the Israeli Prison Service.¹⁴⁵ In accordance with ISP regulations, siblings and adult children (over 16) of Palestinian detainees from East Jerusalem and the West Bank may apply to visit their detained loved ones, while those from Gaza may not.

111. According to the 2012 agreement, children under 16 should always be permitted to visit their detained parent, but in practice, Israeli authorities frequently deny permits for children of Palestinian detainees from Gaza. Detainees' families from Gaza are not allowed to bring personal items with them on visits, such as clothes, food or books for the detainees. They must endure long journeys to Israeli prisons that often begin in the early hours of the morning, and they are often subjected to arbitrary practices, obstacles and degrading treatment both in the course of applying for a permit and actually visiting their detained family member. They also endure coercion and threats to cancel their future visiting rights if they do not obey Israeli orders. Under the current Gaza closure, the Israeli government treats prison visits as a privilege rather than a right.

¹⁴⁵ See Israeli Prison Service, "Visit Hours and Rules," *available at* <http://ips.gov.il/Web/En/Prisons/Visits/Default.aspx>; see also "Conditions of Detention of Security Prisoners in IPS Detention Facilities" (16 Aug. 2015) *available at* <https://www.knesset.gov.il/mmm/data/pdf/m03603.pdf> (Hebrew).



iv. *Businesspeople*

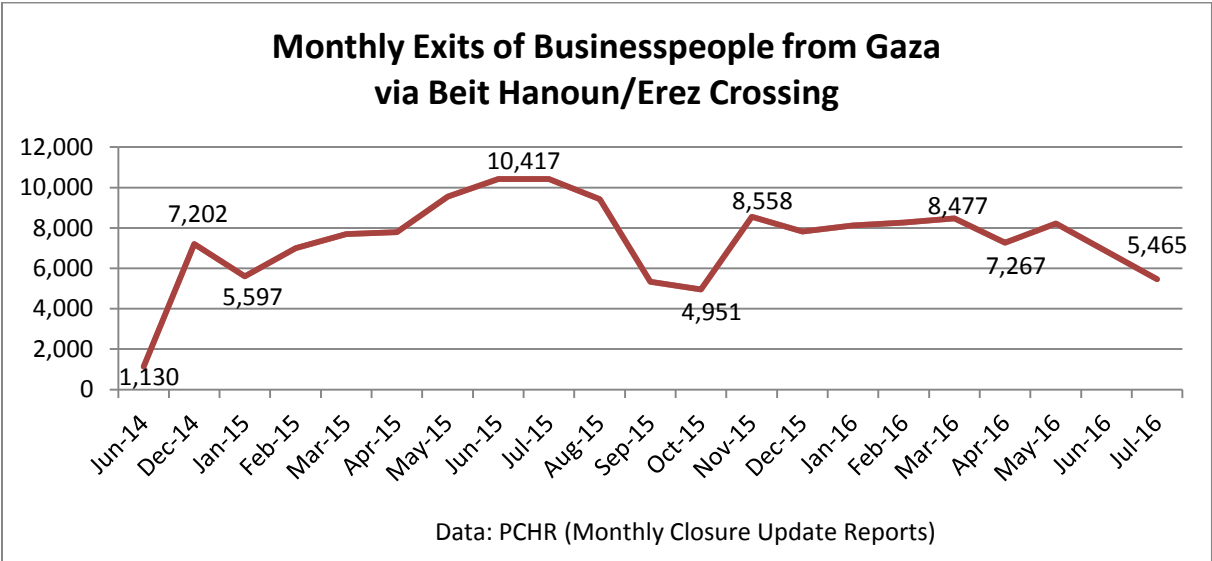
112. From June 2007 until late 2010, the Israeli authorities imposed heightened restrictions on the movement of businesspeople via Beit Hanoun “Erez” crossing.¹⁴⁶ During these years, they usually allowed less than 10 businesspeople to travel daily. This number increased to 27 businesspeople allowed to travel per day in 2011, and then to 65 per day in 2012-2014. In late 2014, after Israel’s 51-day military offensive, Israel began to change its stated policy towards economic development in the Gaza Strip, declaring it to be in Israel’s strategic and security interests¹⁴⁷ As a result, Israeli authorities significantly increased the number of businesspeople it permitted to enter Israel from Gaza via the Beit Hanoun “Erez” crossing to 250-300 per day.¹⁴⁸ On a monthly basis, approximately 10,400 crossings of business people from Gaza via Beit Hanoun “Erez” were occurring monthly in mid-2015. It should be noted that the monthly numbers displayed in the chart below do not actually represent the number of people allowed

¹⁴⁶ PCHR collects its information regarding permits and travel of Palestinians residents of Gaza via Beit Hanoun “Erez” for business purposes from the General Department of Civil Affairs in Gaza. This category includes people who are travelling to both the West Bank, including East Jerusalem, and persons traveling onward to Jordan.

¹⁴⁷ See, GISHA, *Quotes by Israeli security and political figures about the connection between reconstruction in Gaza and Israel’s interests*, supra n. 45.

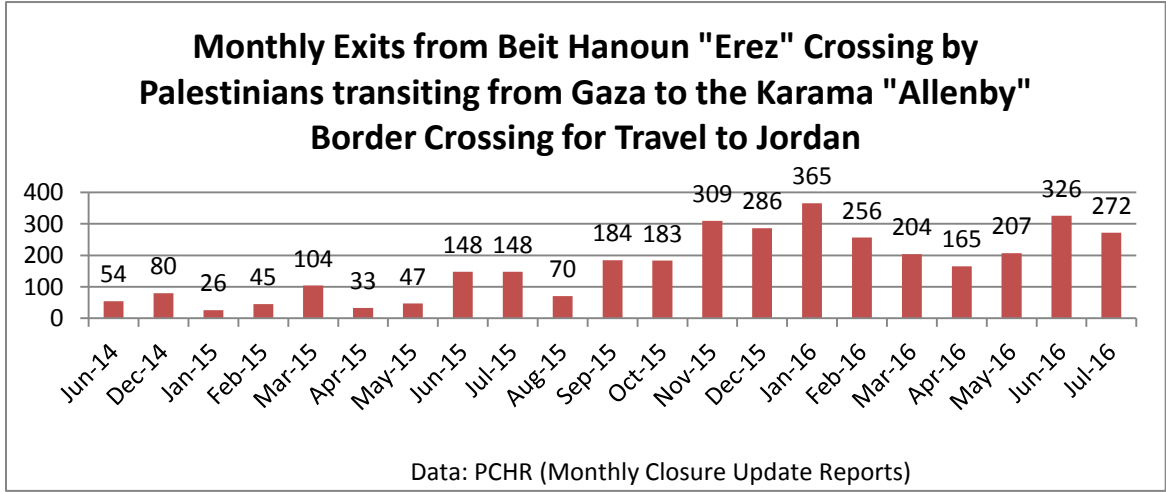
¹⁴⁸ But see, Shlomi Eldar, “Israel’s ‘death sentence’ for Gaza’s economy,” Al-Monitor, (5 Oct. 2016), available at <http://www.al-monitor.com/pulse/originals/2016/10/gaza-strip-businessmen-merchants-import-crossing-entry.html>.

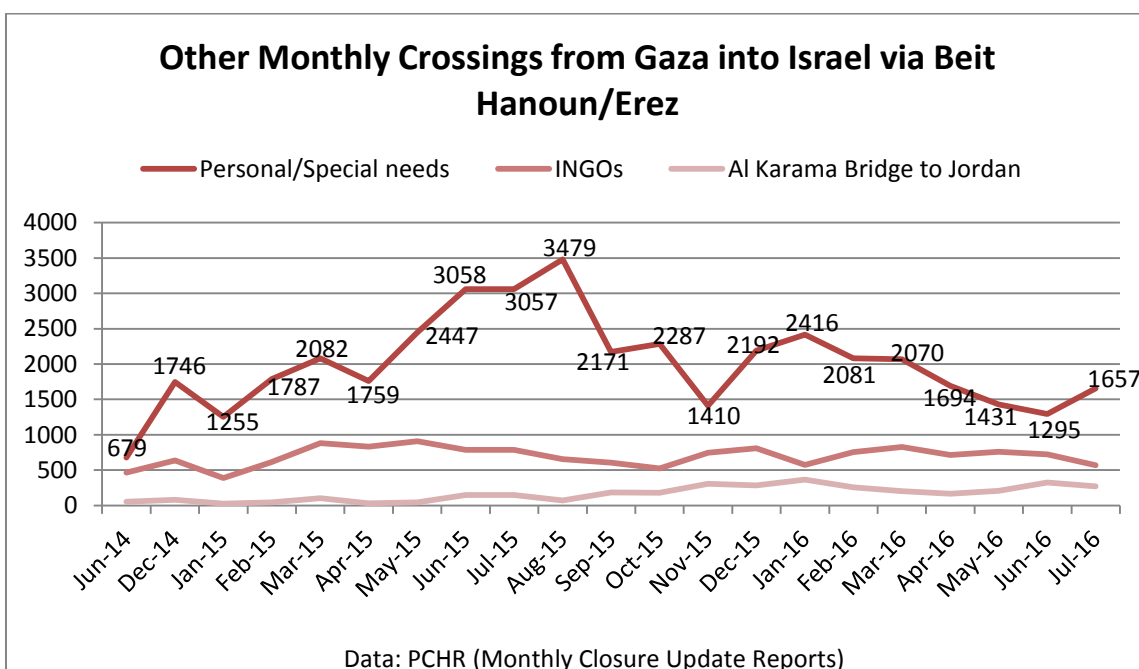
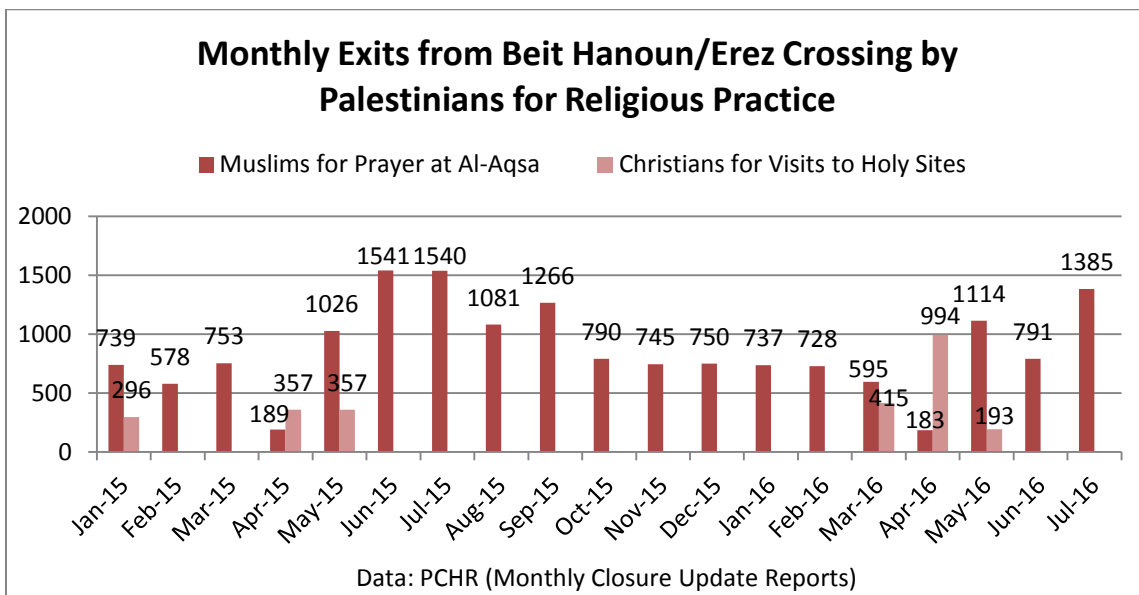
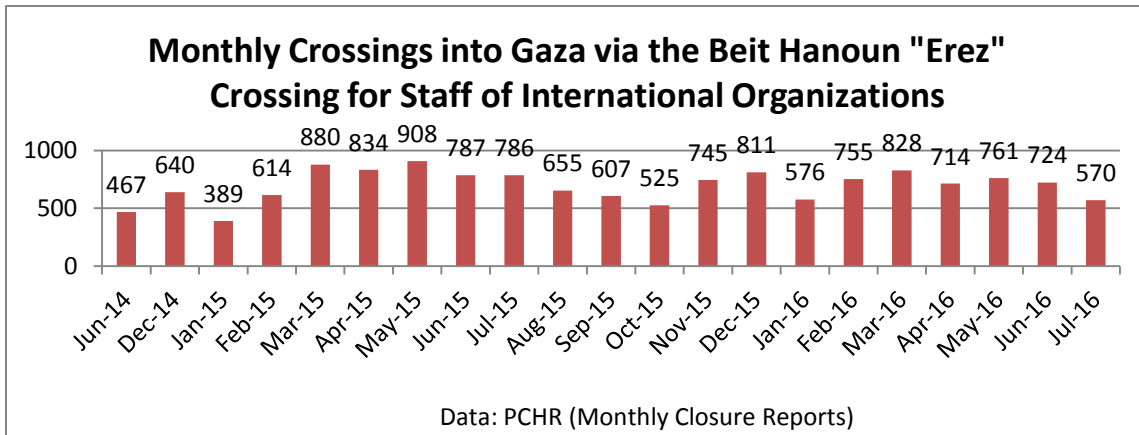
to travel, as those who obtain permits for business purposes can use the crossing repeatedly during the permit’s approval period.



113. In a concerning development, since May 2016, however, exit permits for about 1,400 businesspeople from Gaza were either cancelled or not renewed. This represents nearly a third of the approximately 3,700 businesspeople from Gaza who had received long-term exit permits over the last few years. A number of businesspeople in Gaza have also been recently banned from importing their merchandise for “security reasons” without further explanation.

v. *Other Palestinian Travel via Beit Hanoun "Erez" Crossing*





b) *The Rafah Crossing*

114. Since the beginning of the closure in June 2007, restrictions on the transit of people through the Rafah land crossing with Egypt has fluctuated greatly. With the Hamas assumption of power in the Gaza Strip and the beginning of the closure in 2007, Israel suspended its implementation of the Agreement on Movement and Access, which it had signed with the Palestinian Authority in November 2005.¹⁴⁹ After this point, the opening of the Rafah crossing was predominately controlled by Egypt, although Israeli authorities still exert indirect control over the crossing through Israel's continued control over the Palestinian population registration, which determines the issuing of Palestinian passports needed for travel through Rafah.

115. The actions of the Egyptian authorities in closing the Rafah border and failing to better facilitate humanitarian aid and access are certainly compound the effects of the Israeli closure. However, the Palestinian Organizations recall that it is Israel which is principally responsible for the well-being of the population of the Gaza Strip, as the Occupying Power. Moreover, the Israeli authorities alone control the ability of Palestinians in Gaza to travel to other parts of Palestine, their own territory, namely the West Bank, including East Jerusalem. The low frequency of transit allowed via Rafah is mentioned here, however, as a factor that compounds the impact of Israel's closure on the Gaza population. The Occupying Power should not look to Egypt to solve the dire problems for the civilian population created by the closure, but rather, in light of the instability of Egypt's crossing, take extra steps to ensure adequate freedom of movement and goods for residents of Gaza via the borders it unilaterally controls.

116. The Egyptian authorities have, since 24 October 2014,¹⁵⁰ strictly limited the days on which Rafah has been opened, as well as the types of travelers permitted to use the crossing. During the period of the Court's jurisdiction since 13 June 2014, the Rafah crossing's operation has been limited to only a few days every few months. During seven months over the last two years, the Rafah crossing has not been open at all.

¹⁴⁹ Agreement on Movement and Access, *supra* n.107.

¹⁵⁰ UN OCHA "The Gaza Strip: The Humanitarian Impact of the Blockade," *supra*. 12.

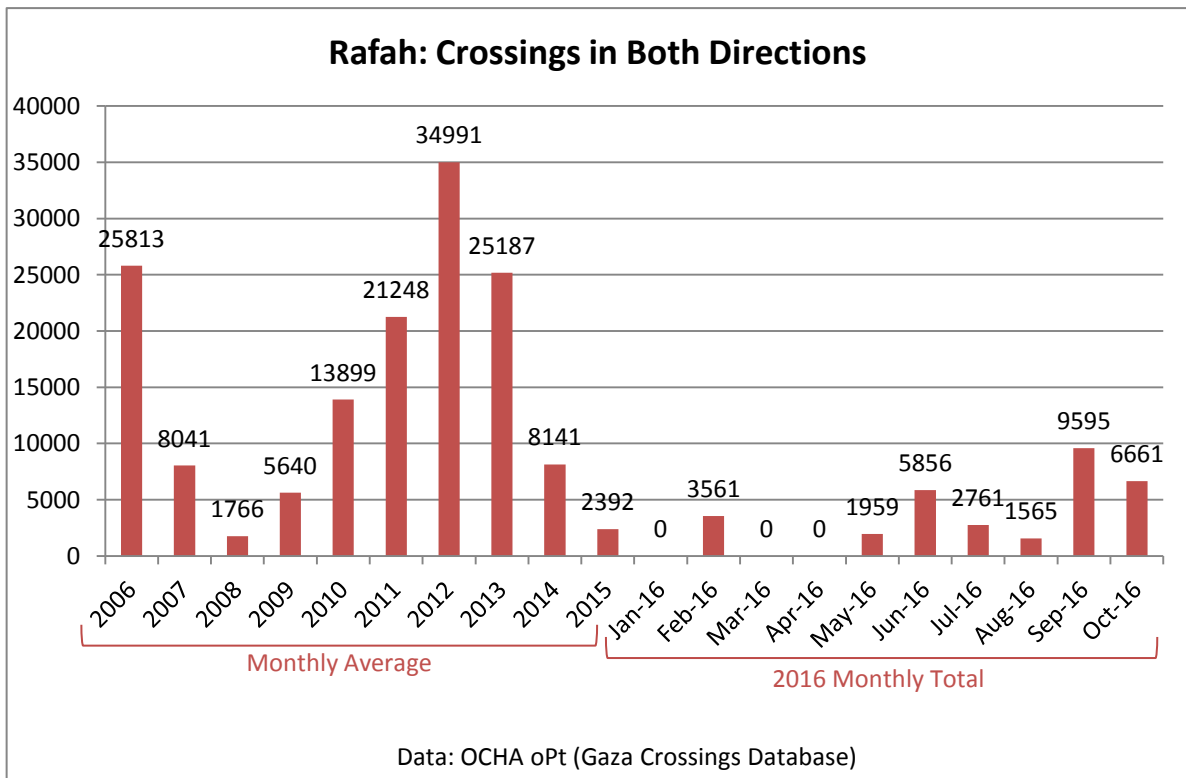
Rafah Crossing: Days Open (for passage in one or both directions)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2006	31	28	31	30	31	23	2	5	3	7	6	10
2007	8	6	15	11	8	5	0	0	0	0	0	3
2008	1	0	8	8	11	11	5	7	7	10	11	17
2009	30	28	31	30	28	26	30	29	30	26	27	26
2010	23	25	26	22	26	30	31	31	27	31	24	21
2011	20	10	23	19	23	26	25	25	24	29	23	26
2012	23	24	26	24	26	23	27	20	28	30	30	31
2013	31	28	31	30	26	30	22	18	14	15	10	8
2014	6	10	11	8	6	9	21	31	30	19	3	4
2015	3	0	2	0	3	10	0	4	5	3	0	2
2016	0	3	0	0	2	6	3	2	10	7		

Data: OCHA oPt (Gaza Crossings Database)

117. As a result, freedom of movement has been drastically limited. Importantly, it is recalled that the operation of the Rafah Crossing does not help Palestinians in Gaza reach the West Bank, as Israel bans their entry to the West Bank via the Karama “Allenby” border crossing with Jordan.

i. Total Number of People Traveling via the Rafah Crossing



2. Entry of Goods via Land Crossings

118. Since the current closure began in 2007, Israeli authorities have progressively intensified restrictions on its land crossings for goods with Gaza, completely shutting down three of them. In November 2008, the Israeli authorities closed Sofa crossing, which had been designated for the entry of construction materials. On 4 January 2010, the Israeli authorities closed Nahal Oz crossing, which had been designated for the entry of industrial fuel and gas into Gaza. Finally, on 2 March 2011, the Israeli authorities closed al-Muntar “Karni” crossing, which was the largest and best equipped commercial crossing serving the Gaza Strip. Prior to its closure, 75% of the supplies that entered the Gaza Strip came through the al-Muntar “Karni” crossing, which had the capacity to handle around 400 truckloads per day. Since the closing of the Sofa, Nahal Oz, and Karni crossings, all goods entering or leaving the Gaza Strip, including fuel, must do so via the Karm Abu Salem “Kerem Shalom” crossing, despite its lower operational capacity and lesser convenience due to its location in comparison to other crossings.¹⁵¹

119. Over the course of the closure, Israel has allowed the entrance of civilian goods into Gaza via the Kerem Shalom crossing, but with severe restrictions. Prior to the purported “easing” of the closure in 2010, imports were restricted to a “humanitarian minimum,” allowing in only certain kinds of food and other goods deemed necessary, while banning so-called “luxury items,” which included things like crayons, coriander and notebooks.¹⁵² Since the 2010 “easing,” Israel has allowed in a wide range of civilian goods, but maintains a list of prohibited “dual-use” goods, which includes many construction materials and raw materials necessary for production, agricultural and other productive sectors of Gaza’s economy.¹⁵³ Banned commodities include industrial equipment, machines, production lines, iron pipes, bars used for welding metals and some types of wood.¹⁵⁴

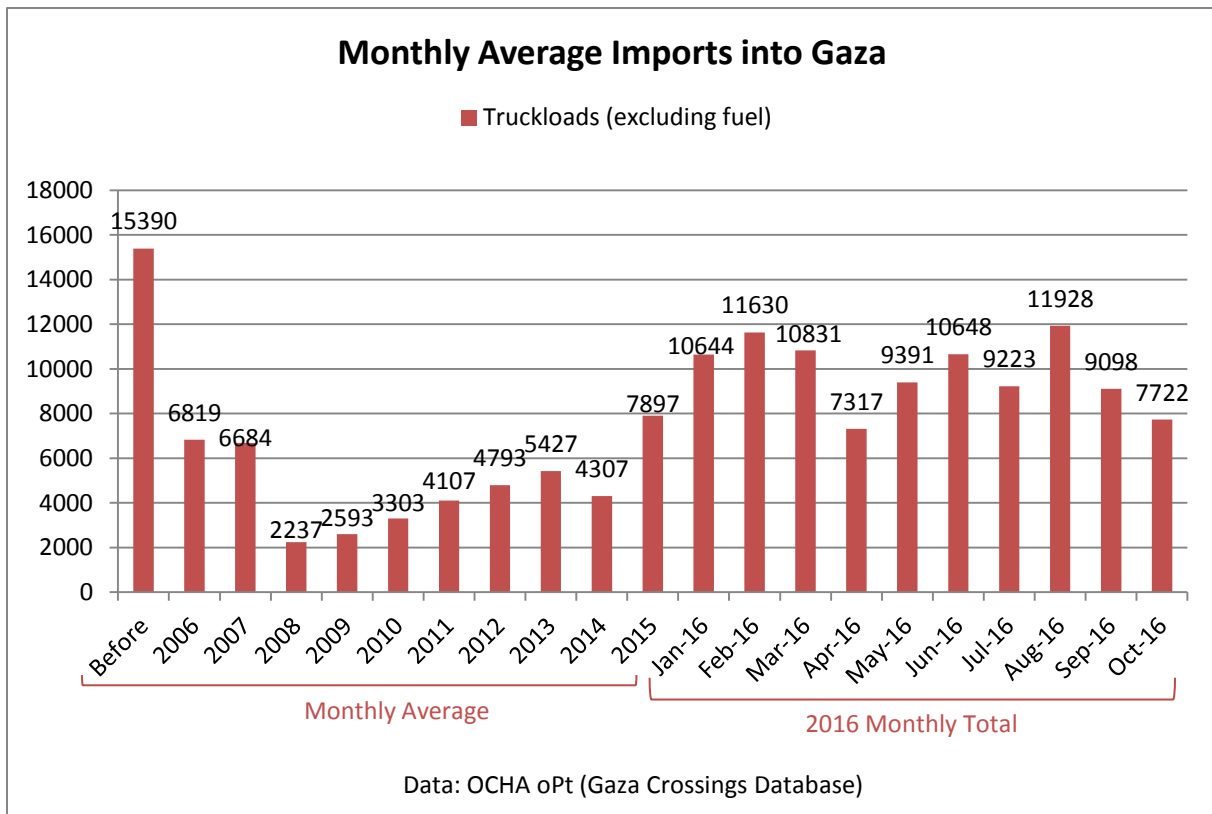
120. Although the number of truckloads of imports allowed in the Gaza Strip has increased since the beginning of the closure, particularly in more recent years, the quantity is still low compared with pre-closure import levels. Meanwhile, demand for imports has risen.

¹⁵¹ The timeline for Gaza’s land crossing closures is detailed on a monthly basis in PCHR, *State of the Gaza Strip's Border Crossings*, *supra* n. 127.

¹⁵² GISHA, *Food Consumption in the Gaza Strip - Red Lines* (October 2012), available at <http://www.gisha.org/UserFiles/File/publications/redlines/redlines-position-paper-eng.pdf>.

¹⁵³ PCHR, *Gaza Strip: Actual Strangulation and Deceptive Facilitation*, *supra* n. 42.

¹⁵⁴ *Id.*

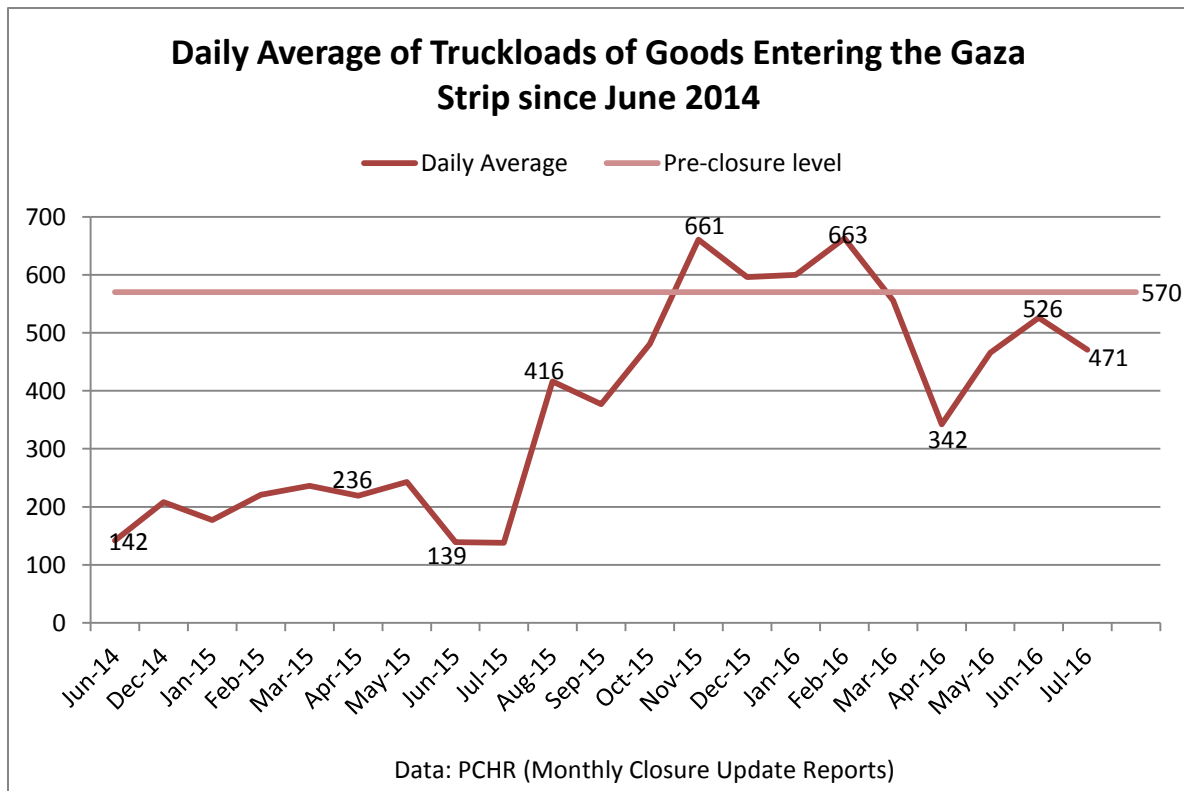


a) *Karm Abu Salem “Kerem Shalom” Crossing for Goods*

i. *Daily Average of Goods Entering the Gaza Strip*

121. During the period of the ICC’s jurisdiction over crimes in Gaza, from mid-2014 through mid-2016, around 200 truckloads of goods per day (approximately 6,000 per month) were allowed to enter into the Gaza Strip via Kerem Shalom, constituting only 35% of the number of truckloads that used to enter Gaza before the closure, which was 570 truckloads daily, or 17,100 truckloads per month.¹⁵⁵ During the first seven months of 2016, the average number of truckloads of goods allowed to enter Gaza remained relatively high, though it began to dip a bit in the latter months. Although the permitted imports surpassed the pre-closure daily import levels, it was not enough to account for the additional needs resulting from population growth over the last nine years and the massive reconstruction needs caused by Israel’s three offensives against the Gaza Strip carried out since the beginning of the closure in June 2007.

¹⁵⁵ *Id.* PCHR, *Gaza Strip: Actual Strangulation and Deceptive Facilitation*, *supra* n. 42 at 9-10.



ii. Construction Materials

122. The import of construction materials into the Gaza Strip has been severely restricted under the current closure, despite the increased demand for materials needed for the reconstruction of Gaza following the three major military offensives. In June 2007, Israeli authorities stopped the entry of construction materials for the private sector. In June 2010, Israeli authorities allowed the entry of limited quantities for international organizations. On 31 December 2013, Israeli authorities declared that construction materials for the private sector were allowed to enter, but in reality the import ban has still been imposed on cement and construction steel, while construction aggregate¹⁵⁶ is allowed only in for the private sector. On 17 September 2013, Israeli authorities declared they would allow the entry of 20 truckloads of cement (800 tons), 10 truckloads of construction steel (400 tons) and 40 truckloads of construction aggregate (1,600 tons) daily.

123. These quantities constituted only 20%, 33% and 26%, respectively, of the actual needs of the Gaza Strip. However, Israel has not even been able to remain committed to the entry of these minimum quantities to the Gaza Strip. In a sudden decision taken by the Israeli authorities, on 13 October 2013, a total ban was imposed on the entry of all types of

¹⁵⁶ Aggregate is a broad category of coarse particulate material used in construction; it can include sand, gravel, crushed stone, slag, recycled concrete and geo-synthetic aggregates.

construction materials into the Gaza Strip for a period of two months. As a result, construction projects were obstructed and other infrastructure and construction projects stopped. On 10 December 2013, the Israeli authorities allowed the entry of limited quantities of construction materials. According to the Ministry of National Economy in Gaza, the quantities allowed into Gaza were very limited and did not meet the minimal needs.

124. On 3 April 2016, Israeli authorities instituted a two-month ban on the entry of construction materials for the private sector in Gaza City. As a result, hundreds of private under-construction housing projects were stopped, in addition to other reconstruction projects carried out by the private sector. The cessation of the construction projects in question has exacerbated unemployment as well as preventing the rebuilding of destroyed houses.

125. The progressive closure of the tunnels by Egypt from mid-2013, when the Egyptian military deposed the Hamas-friendly government of Mohammed Morsi in a coup, through mid-2014, resulted in significant shortages of basic goods in Gaza, including most fuel types and all construction materials. By 27 July 2014, the Egyptian army claimed to have destroyed 1,639 tunnels from Gaza,¹⁵⁷ meaning that during the period of ICC jurisdiction over crimes in Palestine, the informal lifeline that the tunnel industry used to provide for Palestinian civilians in Gaza against the closure's harsh restrictions was almost completely cut off.

126. Despite the significant need for construction materials, fuel and gas in the aftermath of "Operation Protective Edge," Israeli authorities continues to ban most construction materials listed on its "dual use" list.¹⁵⁸ This list is modeled on the "dual-use" prohibitions outlined in the international "Wassenaar Agreement," but with a consistently growing list of additions that comprise basic materials needed for a wide variety of civilian projects. Examples of such restricted items include castor oil (used in the production of brake fluid, insulation materials, lubricants, glue, and beauty products); "uninterrupted power supply" switches (necessary to prevent frequent power outages and especially essential in intensive care and dialysis units); and wooden planks more than 1 cm thick and 5 cm wide (used for many purposes, from basic construction projects to Gaza's furniture production industry).¹⁵⁹

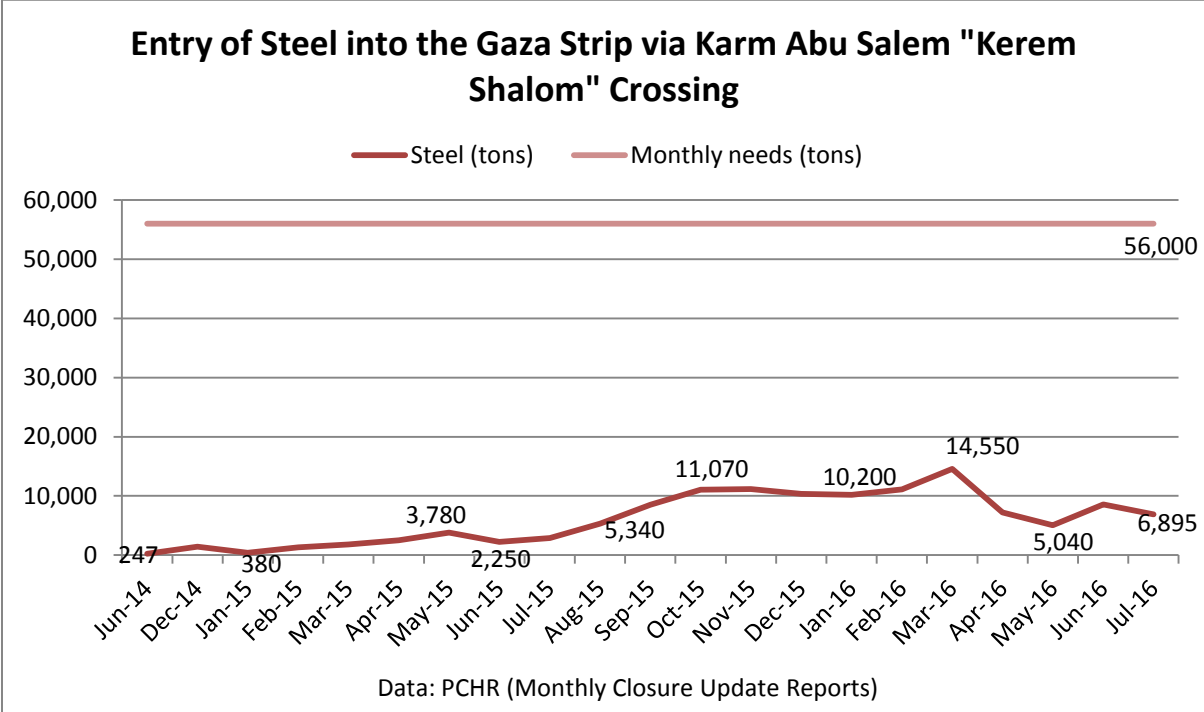
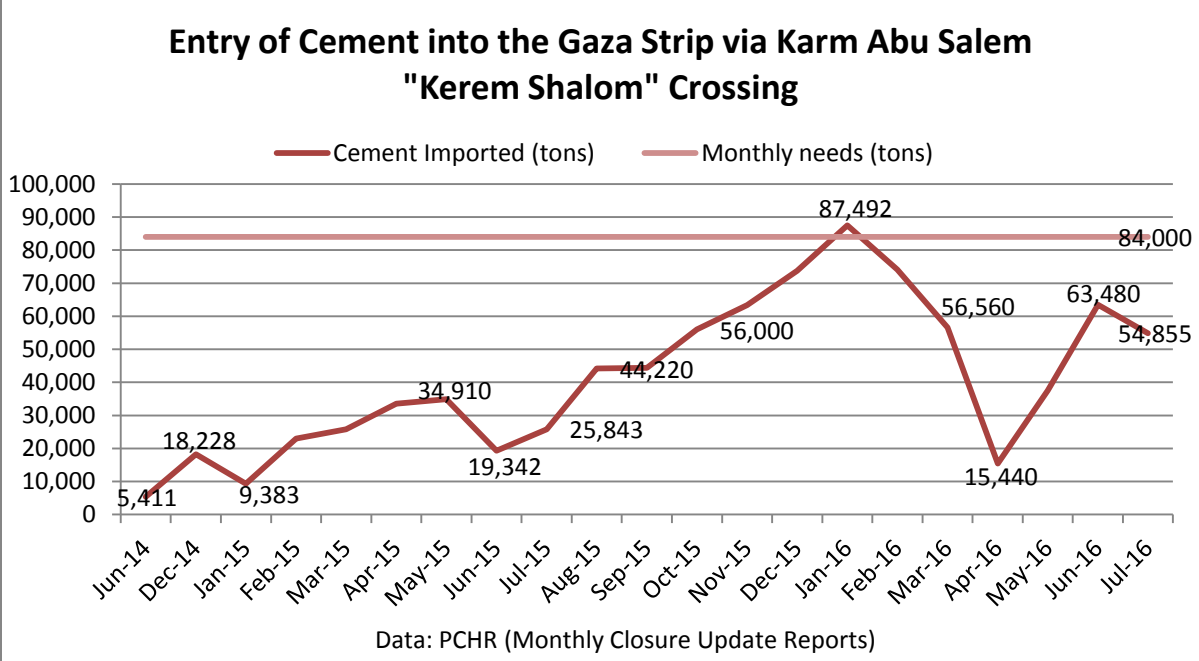
127. The statistics of the construction materials that are imported into the Gaza Strip after the 2014 military offensive ended demonstrate that the current Gaza Reconstruction

¹⁵⁷ See AFP, "Egyptian Army Destroys 13 More Gaza Tunnels" (27 July 2014), *available at* <http://www.timesofisrael.com/egyptian-army-destroys-13-more-gaza-tunnels/>.

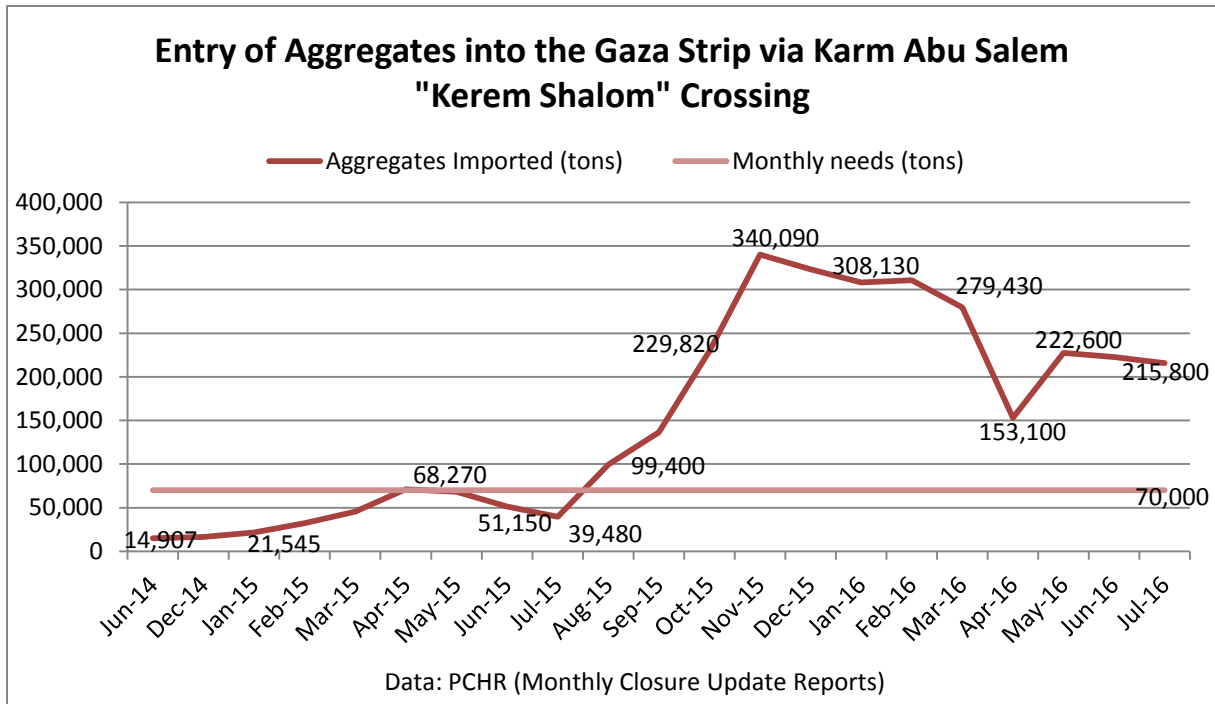
¹⁵⁸ Dual-use list (Hebrew) 2008 (State of Israel, Ministry of Defense) For detailed information on the evolution of the list, see GISHA, *Dark-gray lists*, *supra* n. 14.

¹⁵⁹ *Id.*

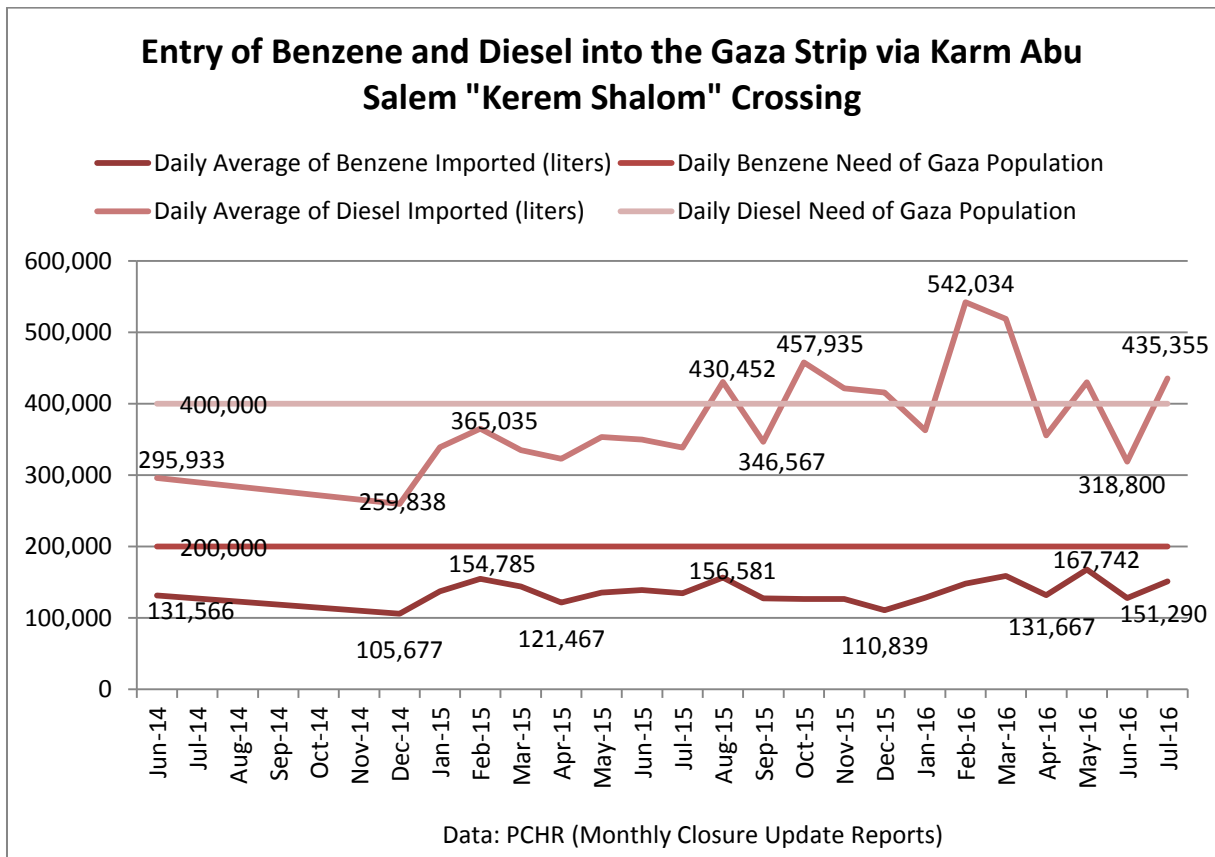
Mechanism is inadequate: the quantities of imported cement, construction steel and aggregate are very limited and do not meet Gaza’s minimum needs. As a result, over a 100,000 civilians whose houses were destroyed in the 2014 offensive suffer due to their inability to rebuild or repair about 32,000 housing units.¹⁶⁰



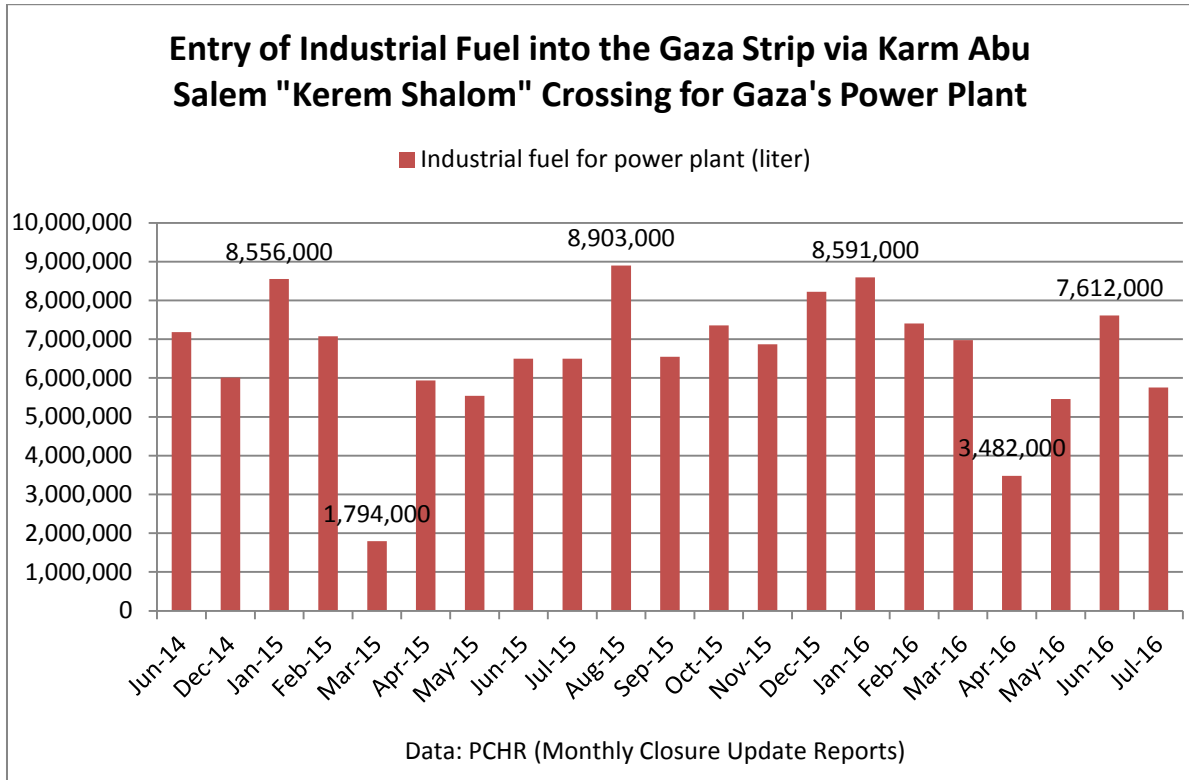
¹⁶⁰ PCHR, *Gaza under Closure and Rubble, UN Mechanism to Reconstruct Gaza Fails and the Only Solution Is Lifting the Closure*, (11 Mar. 2015), available at <http://pchrgaza.org/en/?p=5348>; PCHR, *Gaza Strip: Actual Strangulation and Deceptive Facilitation*, *supra* n. 42.



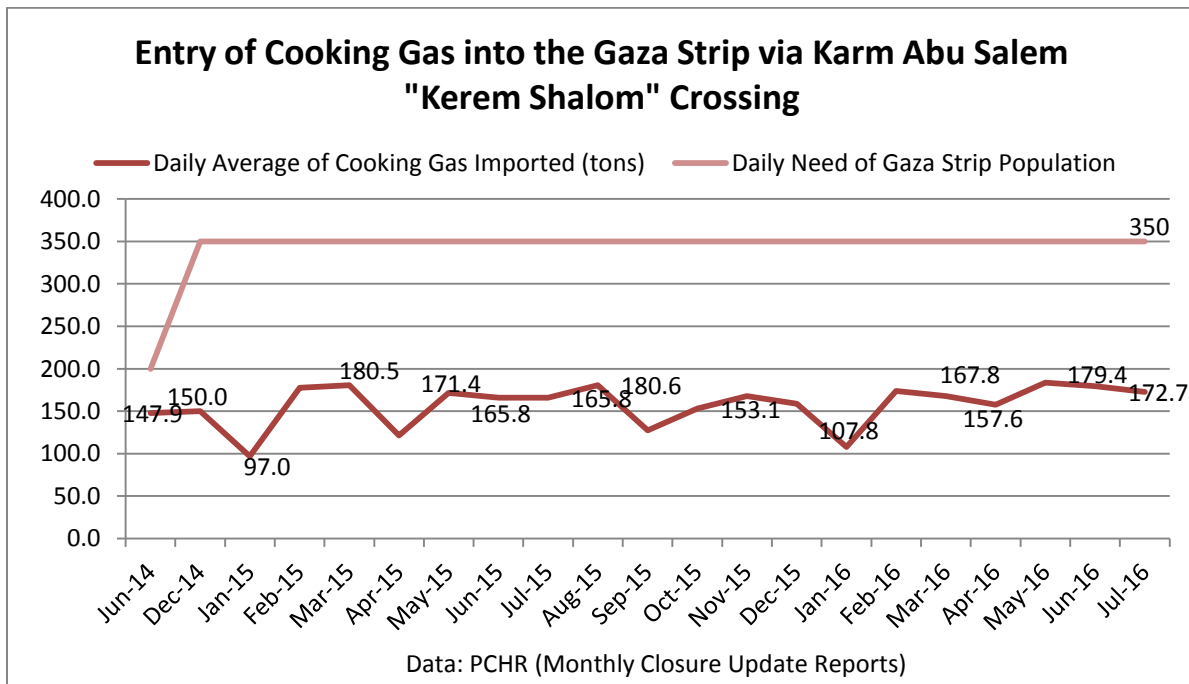
iii. Benzene and Diesel



iv. Industrial Fuel for Running Gaza's Power Plant



v. Cooking Gas Imports into Gaza



3. Exit of Goods via Land Crossings

a) *Karm Abu Salem “Kerem Shalom” Crossing for Goods*

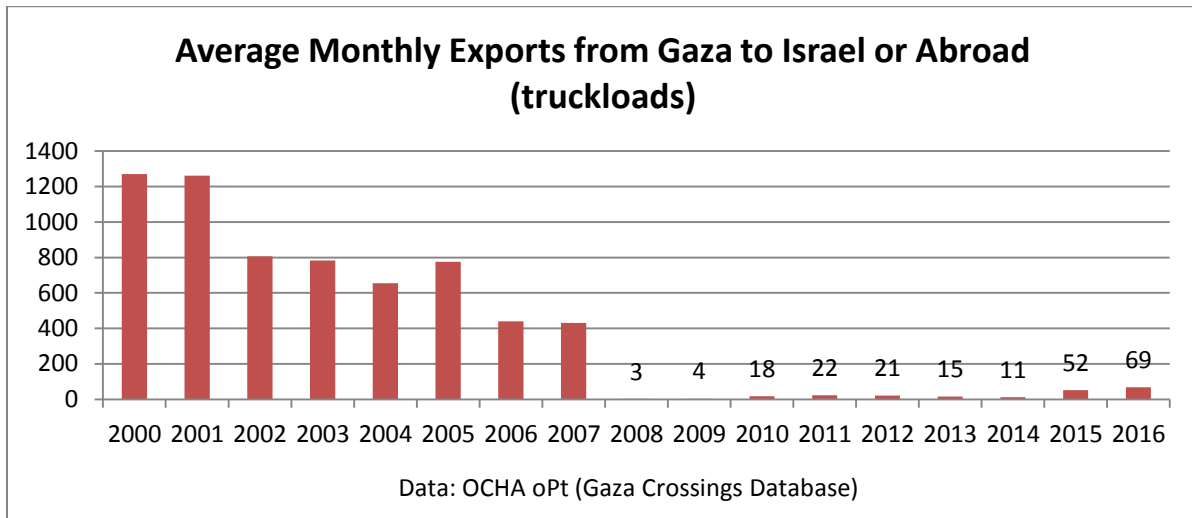
128. Since the imposition of the absolute closure began in 2007, exports from Gaza have been almost completely prohibited. As described by a World Bank official in 2015, “Gaza’s exports virtually disappeared.”¹⁶¹ At the beginning of the current closure policy in June 2007, Israeli authorities banned all export activity from Gaza. Minor exceptions to the absolute ban on sending exports to countries beyond Israel have been occasionally negotiated, such as by the Government of the Netherlands for sporadic export of limited quantities of two goods: flowers and strawberries.¹⁶² Before the current closure, several major sectors of Gaza’s economy relied on the sale of products outside of Gaza, such as the agriculture sector, manufacturing industries, and textile and furniture sectors. Before the closure, 85% of goods shipped from Gaza were destined for markets in Israel or the West Bank.

129. Until November 2014, the Israeli closure practice resulted in an almost-complete ban on the export of Gaza Strip products to the West Bank, Israel and other countries. If calculated on a daily basis, the limited exceptions allowed by Israeli authorities in the early years of the current closure resulted in less than one truckload of export goods leaving Gaza daily. Meanwhile, the Strip’s exports used to reach a daily average of 150 truckloads before the imposition of the closure. On 6 November 2014, for the first time since the 2007 closure began, Israel began to allow a very limited amount of Gazan goods to be shipped to the West Bank for sale. This permission initially only extended to agricultural goods, but later expanded to textiles and other industries. On 12 March 2015, Israel also allowed the sale of limited goods from Gaza within Israel, including textiles, furniture and scrap metal. After experiencing a sharp increase to 274 truckloads per month exiting Gaza in January 2016, the number of exports permitted by Israel has gradually come down again. In 2016 thus far, the monthly average of total exports has been 172 truckloads per month, just barely over the *daily* average prior to the closure, or only 3.8% of the monthly average.

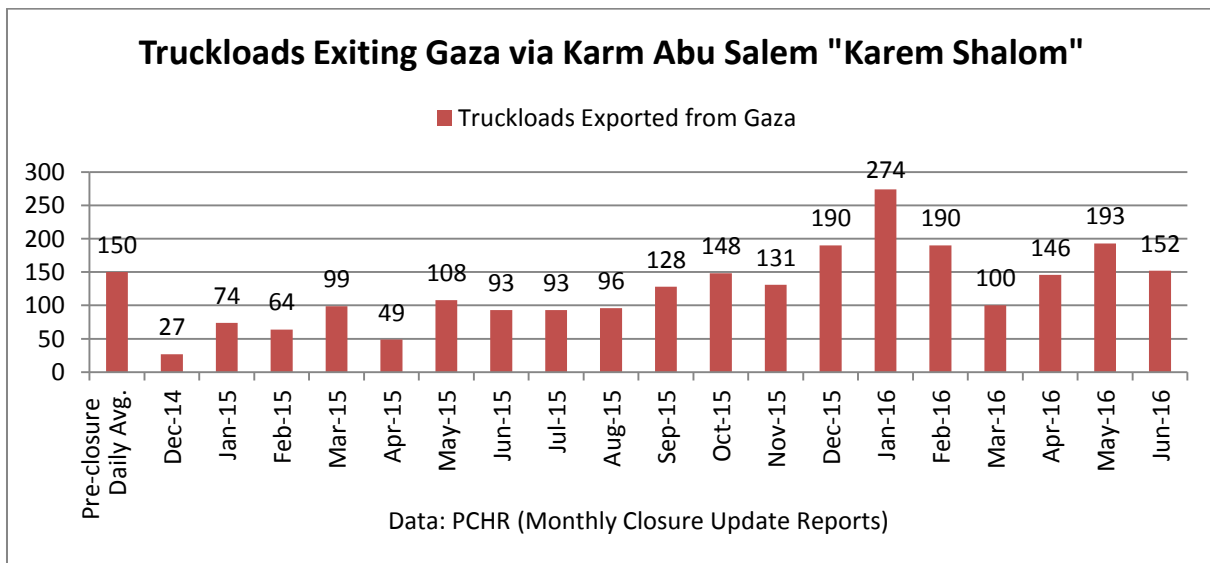
¹⁶¹ Steen Lau Jorgensen, World Bank Country Director, oPt, 2015, cited in UN OCHA “The Gaza Strip: The Humanitarian Impact of the Blockade,” *supra* n. 12.

¹⁶² PCHR, *Report of the Total Siege and Closure of Border Crossings and Their Impacts on the Civilian Population in the Gaza Strip* (16 July – 30 Sept. 2007) (11 Oct. 2007), available at <http://pchrgaza.org/en/?p=5130>; PCHR, *The Illegal Closure of the Gaza Strip*, *supra* n. 13 at 22.

i. Exports from the Gaza Strip (only to Israel and abroad)



ii. Total Exports from the Gaza Strip from December 2014 onwards



D. The imposition of a “Buffer Zone”

130. Another constituent part of the current closure of Gaza is Israel’s enforcement of a maritime and land “buffer zone” within the coastal waters and territory of the Gaza Strip itself. Gaza’s civilian population, especially fishermen and farmers, can only access the maritime and land areas within the “buffer zone” by incurring considerable personal risk.

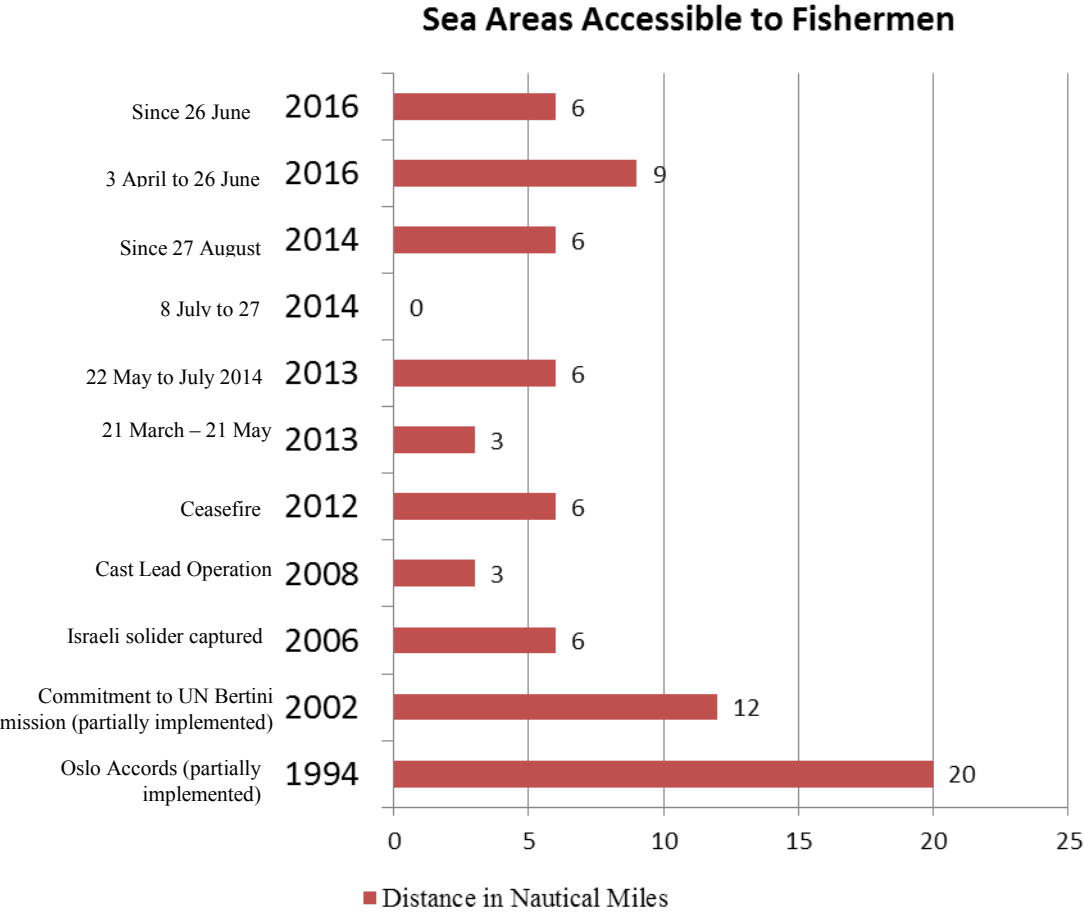


Source: OCHA oPt¹⁶³

131. For most of the time since 2007, the area permitted for fishing and sailing off of Gaza’s shore has been unilaterally restricted by Israel to three nautical miles from the coastline. Since June 2014, the period for which the ICC has jurisdiction over crimes in Palestine, the area in which Palestinians have been permitted to fish has been restricted by Israeli authorities to 6NM, with one exception of a two-month period of extension to 9NM in mid-2016 as referenced above—despite the internationally recognized limit of 20NM agreed

¹⁶³ OCHA oPt, “Fragmented Lives: Humanitarian Overview 2015 -Movement and access restrictions,” (13 June 2016), available at <http://www.ochaopt.org/content/2015-overview-movement-and-access-restrictions>

to in the Oslo Accords and formally established in the 1994 Gaza-Jericho agreement.¹⁶⁴ In April 2016, the permitted fishing zone was extended to nine nautical miles in certain areas, but returned to six on 26 June 2016. Gazan fishermen are further prevented from fishing in areas extending up to 1.5 nautical miles bordering the northern (Israeli) and the southern (Egyptian) border of the Strip, which are completely inaccessible.¹⁶⁵



132. On land, Israel unilaterally established a so-called “buffer zone” within the Gaza side of Israel’s border, impeding access to a significant portion of Palestinian farmland. The exact boundaries of the “buffer zone” have never been made clear. Although the Israeli military carries out land incursions into the buffer zone on average three-four times per week,¹⁶⁶ Israel has not physically demarcated its perimeter, nor adequately informed the civilian population

¹⁶⁴ Government of the State of Israel and the Palestine Liberation Organization, *supra* n. 109.
¹⁶⁵ OCHA oPt, “Fragmented Lives: Humanitarian Overview 2015 -Movement and access restrictions,” *supra* n. 163.
¹⁶⁶ See the series of relevant monthly (PCHR) and quarterly (Al-Mezan) reports and news items published by the Palestinian Organizations. For example, First Quarter Report of 2016, “Israeli Violations against Palestinian Fishermen in the Naval Part of the Access Restricted Area” (22 May 2016), available at <http://www.mezan.org/en/uploads/files/1465381086377.pdf>; PCHR *Attacks in the Border Areas and Their Consequences: October 2016*, (7 Nov. 2016), available at <http://pchrgaza.org/en/?p=8526>.

of its changing extent or applicable access regime; Israeli forces often enforces the buffer zone by live fire. At the time of the Second Intifada (2000), the buffer zone was thought to extend roughly 150 meters into the Gaza Strip from the border fence, expanding to 300 meters in 2010.¹⁶⁷ However, attacks have been documented against civilians up to 1.5 kilometers inside the border, meaning the buffer zone covers approximately 17% of the total land area of the Gaza Strip.¹⁶⁸ Within the buffer zone, roughly 95% of the restricted access area, or 27,000 dunums, is arable land. This accounts for approximately 35% of the agricultural lands in the entire Gaza Strip – land not rendered unusable.

V. Impact: Illustrative Factual Overview

133. The closure has dramatically impacted – and continues to impact – upon almost every aspect of life for Gaza’s 2,000,000 residents. The effects of closure are felt in both the private and public spheres, with direct and interconnected impacts at a variety of levels, from the individual family to neighborhoods and entire economic sectors. The section below discusses some of the concrete effects under three broad categories: infrastructure, economy, and individuals.

134. The facts and examples below demonstrate not only the widespread and interrelated effects of the policy and system of closure, but how these effects, especially when viewed cumulatively, violate a broad range of fundamental human rights. After discussing the impacts of the closure, the Palestinian Human Rights Organizations will directly link the devastating effects described below with the consequent denial of fundamental rights guaranteed to all human beings – and the international crimes committed.

A. On Infrastructure

1. Energy and Electrical Infrastructure

135. For the last nine years and continuing today, civilian population of the Gaza Strip has suffered from a chronic power deficit due to the Israeli authorities’ decision to cut electricity

¹⁶⁷ Following Israel’s “Operation Pillar of Defense” in November 2012, a statement was released online by the Israeli COGAT on 25 February 2013 informing farmers that they could access lands up to 100 meters from the border fence. After 21 March 2013, however, the buffer zone was again thought to extend 300 meters. In reality, the depth and size of the buffer zone is subject to opaque criteria and constant change.

¹⁶⁸ PCHR, Gaza Strip: Attacks in the border areas and their consequences (14 Jan. 2016), available at <http://pchrgaza.org/en/?p=7744>.

and fuel supplies to the Gaza Strip as part of its closure restrictions, a decision upheld by the Israeli Supreme Court, and repeated targeting of Gaza's power plant and electrical infrastructure during Israeli military offensives.¹⁶⁹ In the wake of these decisions, family homes, businesses, schools and hospitals share a grossly inadequate ration of electricity, with outages currently reaching over 20 hours per day.¹⁷⁰ Currently, two million Palestinians are forced to survive on quotas of electricity ranging from three to six hours, followed by 12-hour gaps before the power comes back on. The civilian population is not only left literally in the dark by these outages, but crucial services requiring electricity are severely curtailed: lights and respirators in hospital emergency rooms go out, pumps bringing potable water to homes stop, and treatment for waste water and sewage stalls before it flows back into the environment. Food spoils without adequate refrigeration and factories fail to produce enough during the short windows with electricity to maintain their operations.¹⁷¹ Key industries and services are forced to rely on precarious generators, while the fuel supply needed to run them remains scarce and overpriced. Cuts in internet access caused by the blackouts further sever Palestinians in Gaza from the rest of the world, as the internet is one of the few ways that individuals and families overcome the physical isolation of the closure.

136. For the woefully insufficient supply of electricity that Gazans receive, they pay artificially inflated prices, nearly triple that compared to neighboring countries.¹⁷² Under the current closure, the Gaza Strip is largely dependent on Israel for its electricity; approximately 90% of Gaza's electricity comes from Israel either directly or indirectly. Directly, the Palestinians purchase 120 MW from Israel's main supplier of electrical power, the Israeli Electric Corporation (IEC), which is delivered via 10 feeder lines crossing into Gaza. The rest of the territory's power comes from the grossly underperforming (as detailed below) Gaza Power Plant (60 MW) and purchases from Egypt (28 MW, delivered via three feeder lines located in the southern Gaza Strip). The electricity produced by the Gaza Power plant indirectly comes from Israel, as the plant relies on imported fuel to operate. At a total of 208 MW, this maximum potential output amounts to less than half the power supply required in Gaza, and is premised on the rather optimistic assumption that Gaza's electrical grid and transmission infrastructure operate as expected, which is frequently not the case due to the

¹⁶⁹ See GISHA, *Starting Tomorrow: Escalation in Collective Punishment of Gaza – Further Electricity Cuts Planned*, News Release, (6 Febr. 2008), available at <http://gisha.org/press/989>.

¹⁷⁰ PCHR, *In View of the Increasingly Aggravating Crisis, PCHR Organizes Panel Discussion on Electricity Crisis*, (27 Jan. 2016), available at <http://pchrghaza.org/en/?p=7784>.

¹⁷¹ Human Rights Watch, *Gaza: Widespread Impact of Power Plant Attack*, (10 Aug. 2014), available at <https://www.hrw.org/news/2014/08/10/gaza-widespread-impact-power-plant-attack>.

¹⁷² PCHR, *Affidavit of VW1* (18 Jan. 2016), see Annex 1.

severe damage incurred by repeated military bombardment and rehabilitation with outdated and limited stocks of spare parts.

137. The availability of the fuel for the power plant and back-up generators in Gaza is determined by Israeli closure policies, which also drive up the fuel's cost. Notably, the Israeli state does not pay for the electricity or fuel it provides to the Palestinians captive in Gaza; rather Israeli companies make upwards of \$2 billion per year per supplier for multi-year fuel supply contracts.¹⁷³ As the PA is required to pay these bills when they are not offset by tax revenue, contributions from international donors also indirectly contribute towards the bill for Israel's punitive power cuts.¹⁷⁴

138. Since the imposition of the current closure, the energy and electrical infrastructure in Gaza has drastically deteriorated. Built in 2003, the Gaza Strip's sole power plant, located in the northwestern Al-Nussairat area, used to provide 120 MW of electricity. The total power requirements for the Gaza Strip at the time were estimated at around 380 MW, leaving a deficit of 240 MW, or 36.8% of need.¹⁷⁵ However, on 28 June 2006, the Israeli military targeted and bombed the power plant in "Operation Summer Rains".¹⁷⁶ According to VW1 (pseudonyms are used throughout this Submission), the xxxxxxxx, six power transformers were destroyed in the attack and the power plant's production came to a complete halt for four months. Forced by Israeli import restrictions to use only the parts and materials already on hand, the destroyed transformers were replaced with much less powerful ones. The plant's capacity was restored to only half of its former output level (65 MW compared to 120 MW).

139. During the subsequent large-scale military attacks, 2008-2009 "Operation Cast Lead" and the 2012 "Operation Pillar of Defense", Gaza's power plant, electrical grid, and additional energy infrastructure were repeatedly damaged.¹⁷⁷ In April 2013, the Gaza Power Plant was only producing 60 MW and, with demand rising to 400 MW, the deficit climbed to

¹⁷³ "Israel's supply of electricity to Gaza no act of generosity," AlMonitor (14 July 2014), available at <http://www.al-monitor.com/pulse/security/2014/07/electricity-gaza-protective-edge-idf-humanitarian-crisis.html>.

¹⁷⁴ *Id.*

¹⁷⁵ PCHR, Affidavit of VW1 (18 Jan. 2016), see Annex 1.

¹⁷⁶ Human Rights Watch, 'Gaza: Israel's Energy Cuts Violate Laws of War' (7 February 2008), available at <https://www.hrw.org/legacy/english/docs/2008/02/07/isrlpa17994.htm>. See also B'Tselem, *Effects of the bombing of the Gaza power plant on the operating of a-Shifa hospital, 2006* (July 2006), available at <http://www.btselem.org/video/2006/07/effects-of-bombing-of-gaza-power-plant-operating-of-shifa-hospital>.

¹⁷⁷ 2009 Fact-Finding Report, *supra* n. 76; PCHR, *Gaza Power Plant Forced to Shut Down, PCHR Concerned by Deterioration of Humanitarian Conditions of Approximately 1.6 million Palestinians in the Gaza Strip, (14 Feb. 2012)* available at <http://pchrghaza.org/en/?p=1994>.

48%.¹⁷⁸ In the aftermath of 2014 military offense, the electricity crisis worsened even further. Israeli tank shelling damaged the steam generator and later hit the power plant's fuel depot, causing the fuel tanks to catch fire and forcing the plant to fully shut down.¹⁷⁹ At the same time, VW1 recounts, "the Israeli forces demolished six power lines coming into Gaza from Israel and a power unit. As a result, the shortage of power reached 90%," severely hindering services that rely on power, especially related to water, sewage networks, and hospital operations.¹⁸⁰

140. Six months after the 2014 Israeli military offensive, the Gaza Power Plant "declared its modest readiness to return to re-operation," though enough fuel has not been available to actually run the plant at full capacity.¹⁸¹ Moreover, the 28 MW provided by the Egyptians has dropped to 20 MW, the stability of which was unreliable, after one of the three lines was disconnected. That means that of the present 400 MW need, there is a 120 MW, or 38%, shortage.

141. VW1 reports that "Gaza's power network needs to be fully rebuilt all over again."¹⁸² Repairs and reconstruction of Gaza's energy infrastructure remain grossly inadequate due to difficulties accessing infrastructure in and around the buffer zone and border areas, and the sheer scale of the damage incurred throughout the entire power distribution network. The reliance on existing, often outmoded stocks and spare parts due to import restrictions inevitably means that the repairs made are not up to the required technical standards. Rationing the power in 3-6 hour interval bursts places added strain on the already weakened infrastructure, leading to their rapid deterioration and posing increased risk to both electrical workers and beneficiaries. The situation is worsened by the fact that Gazan engineers are unable to develop their skills by continuing professional development courses in the West Bank or elsewhere, as a result of the restrictions on freedom of movement..

¹⁷⁸ Gaza Electricity Distribution Corporation, "Technical Statistics: The status of the feeding lines from IEC, Power Plant and Egypt as per April 2013," (April 2013), *available at* <http://www.gedco.ps/en/showtechreports.php?id=TjJVMk16WTFPVE0yTXpneU5tVTVaR1F5TWpRNFp qUTJNalkwWmpka01UbE9VVDA5ZTZkMmNiZjc4Mjg5OWI2MGFjZjkyM2JjNTU5ZWZWRmMjA>.

¹⁷⁹ HRW, 'Gaza: Widespread Impact of Power Plant Attack' (10 August 2014), *available at* <https://www.hrw.org/news/2014/08/10/gaza-widespread-impact-power-plant-attack>.

¹⁸⁰ PCHR, Affidavit of VW1 (18 January 2016), see Annex 1. See also UN OCHA "The Humanitarian Impact of Gaza's Electricity and Fuel Crisis" (July 2015), *available at* <http://gaza.ochaopt.org/2015/07/the-humanitarian-impact-of-gazas-electricity-and-fuel-crisis/>.

¹⁸¹ *Id.*

¹⁸² PCHR, Affidavit of VW1 (18 January 2016), see Annex 1.

142. In response to the long power outages, many Gaza residents resort to alternative energy sources, such as candles and small, independent generators. “Because some of these alternatives are not safe,” VW1 cautions, their misuse results in widespread incidents of fume inhalation and carbon monoxide poisoning, and even generator explosions and fires. “Dozens of fatalities and injuries have been documented, most of them children.”¹⁸³

143. The cumulative consequences of Israel’s current closure policy, combined with repeated military assaults on Gaza’s power network and energy infrastructure, have a profound impact on daily life and economic activity in the Gaza Strip. For Palestinians in Gaza and especially the businesses which have yet to shutter their factories and shops due to economic hardship, the chronic electricity shortages, inconsistent quality and extra costs of power add yet another layer of precariousness to the already catastrophic and further deteriorating economic context.

2. Water, Sanitation and Hygiene Infrastructure

144. The closure has taken a heavy toll on Gaza’s water, sanitation and hygiene (WASH) infrastructure which faces chronic and continuing deterioration. With the closure hindering the import of resources and human capital needed to repair, maintain and upgrade it, Gaza’s collapsing WASH infrastructure further intensifies the already dire water crisis. In combination with the damage inflicted on the WASH infrastructure in multiple Israeli military assaults since 2007, the closure has elevated the crisis to catastrophic levels. In March 2015, the Palestinian Water Authority Minister Mazen Ghoneim declared that “[t]he biggest coastal aquifer water is unfit for human use because of seawater intrusion and leakage of sewage water into it.”¹⁸⁴

145. Gaza relies almost entirely on the coastal aquifer for its freshwater needs. However, extraction from the aquifer has long outpaced its capacity to replenish itself. Annual abstraction of water from the aquifer occurs at almost twice the sustainable rate.¹⁸⁵ Experts have long understood the dangers of this dynamic:

The over-abstraction and scarcity of drinking water have been exacerbated by crumbling sanitation infrastructure, while the blockade creates chronic shortages of electricity and fuel, which in turn aggravate contamination and the water crisis. Untreated wastewater is often dumped into the sea and ultimately finds its way into the

¹⁸³ *Id.*

¹⁸⁴ Melhem, Ahmad, “Palestine’s lingering water crisis,” *Al Monitor*, (31 March 2015), *available at* <http://www.al-monitor.com/pulse/originals/2015/03/palestine-water-resources-israel-agreement-resolution-291.html#>.

¹⁸⁵ UNCTAD Report, *supra* n. 22.

coastal aquifer. About 33 million cubic meters of untreated or partially treated wastewater are dumped every year in the Mediterranean. The damage of contamination and over-abstraction is such that the aquifer may be unusable by 2016 and, if unaddressed, the damage may be irreversible by 2020.¹⁸⁶

146. Already in 2009, the United Nations Environment Programme (UNEP) warned that continuous over-use and pollution might irreparably harm the aquifer unless it was “rested.”¹⁸⁷ In order to allow such rest, alternative solutions would need to be sought, such as “desalination, water importation, reduction of the loss of water in the distribution network, wastewater treatment and repairing of the sewage network.”¹⁸⁸ Israeli authorities continue to obstruct rather than facilitate such alternatives, however, through the continuation of the harsh import and travel restrictions, preventing the rehabilitation and expansion of WASH infrastructure. At least 23 important WASH items, like pumps, drilling equipment and disinfectant chemicals, are on Israel’s “dual use” list, meaning that they are only permitted to enter Gaza on a selective basis.¹⁸⁹

147. Meanwhile, the periodic military assaults further debilitate what infrastructure remains, setting back efforts to combat the water crisis even further. Israel’s 2014 military assault inflicted heavy damage on key water and sanitation infrastructure.¹⁹⁰ 20 to 30% of Gaza’s water and sewage network was damaged, including a main water desalination plant in Deir al-Balah and 220 agricultural wells.¹⁹¹ According to the Palestinian Water Authority, the total damage to water wells and networks, tanks, desalination units, wastewater networks and pump stations was estimated at more than USD \$34 million.¹⁹²

148. The damage caused to the WASH infrastructure during the 2014 military offensive followed the \$US 6 million damage caused during the 2008-2009 offensive.¹⁹³ Significantly,

¹⁸⁶ *Id.* at para.46.

¹⁸⁷ UNEP, Environmental Assessment of the Gaza Strip (2009), p. 3 available at http://www.unep.org/PDF/UNEP_AR_2009_FINAL.pdf.

¹⁸⁸ UNCTAD Report, *supra* n. 22.

¹⁸⁹ See UN OCHA, “200 displaced families living in the rubble of their homes connected to the water network” (March 2016), available at <http://gaza.ochaopt.org/2016/03/responding-to-water-needs-of-hundreds-of-vulnerable-households-in-southern-gaza-strip/>.

¹⁹⁰ See Palestinian Water Authority (2014) Water Sector Damage Assessment Report, available at https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/assessments/20140819_PWA%20Water%20Sector%20Damage%20Assessment%20-%20August%202014_0.pdf.

¹⁹¹ UNCTAD Report, *supra* n. 22.

¹⁹² *Id.* at para. 44.

¹⁹³ UN, ‘Gaza in 2020 A Liveable Place? A report by the UN Country Team in the occupied Palestinian territory, (August 2012), available at <http://www.unrwa.org/userfiles/file/publications/gaza/Gaza%20in%202020.pdf>. According to Amnesty International, three water facilities were destroyed and the emergency sewage treatment plant was damaged, along with water distribution networks. Raw sewage inundated over a square kilometer of agricultural and residential land ruining the crops and Israeli tanks

the UN Fact Finding Mission tasked with investigating that operation found that there had been “a deliberate and systematic policy on the part of the Israeli armed forces to target... water installations.”¹⁹⁴ The Mission concluded that, in the destruction by the Israeli armed forces of, *inter alia*, water wells and water tanks, “there was a specific purpose of denying sustenance to the population of the Gaza Strip.”¹⁹⁵ Similarly, “a strike against a wall of one of the raw sewage lagoons of the Gaza wastewater treatment plant, which caused the outflow of more than 200,000 cubic metres of raw sewage onto neighbouring farmland,” was found to be “deliberate and premeditated.”¹⁹⁶ This deliberate destruction of WASH infrastructure, the Mission concluded, “aggravated the pre-existing situation,” referring to the water crisis, already significantly heightened amid Israel’s absolute closure.¹⁹⁷ The effects of the 2008-09 destruction and damage to the WASH infrastructure continue to this day, as proper repair has been impossible due to the ongoing and continuing closure. Indeed, as the closure continues, and subsequent Israeli military assaults continue to devastate large portions of the Gaza Strip, the aggravation of the water crisis has only grown more severe.

149. When viewed cumulatively, the overall damage and decay to Gaza’s WASH infrastructure, which was already in need of large scale investment before the 2014 Israeli military operation, has been estimated at closer to USD \$620 million.¹⁹⁸ Without ending or at least significantly easing the closure, the state of Gaza’s WASH infrastructure will only continue to worsen, posing heightened risk for irreparably damaging the coastal aquifer. Unless action is taken soon to meet Gaza’s urgent WASH needs, the UN’s most recent humanitarian response plan (2016) warns that over 1,000,000 Palestinians in Gaza are likely to be exposed to severe public health risks, including waterborne diseases.¹⁹⁹ It is estimated that by 2020, the Gaza Strip will be unlivable.²⁰⁰

3. Health Infrastructure

150. Years of closure, conflict and socio-economic decline have left Gaza’s health sector without adequate physical infrastructure. Facilities are often overstretched and services

dug up or damaged water mains in northern and eastern Gaza, (October 2009), p. 64, *available at* <https://www.amnestyusa.org/pdf/mde150272009en.pdf>.

¹⁹⁴ 2009 UN Fact Finding Report, *supra* n. 75 at para. 54.

¹⁹⁵ UNCTAD Report, *supra* n. 22 at para. 73

¹⁹⁶ *Id.* at para. 52

¹⁹⁷ *Id.* at para. 67

¹⁹⁸ *Id.*

¹⁹⁹ OCHA, “2016 Humanitarian Response Plan: Occupied Palestinian Territories,” (Nov. 2015), *available at* http://www.ochaopt.org/documents/2016_hrp_22_january%202016.pdf.

²⁰⁰ UN, “Gaza in 2020: A Livable Place?” *supra* n. 193.

frequently disrupted by power outages. The lack of appropriate infrastructure for healthcare service provision today is accompanied by insufficient human capital and supplies, also impacted by the closure together with increasing health risks as a result of growth in food insecurity, poverty, pollution, and the lack of access to potable water further compound the challenges posed by inadequate health infrastructure.²⁰¹

151. Experts agree that even before the 2014 Israeli offensive, health services were already significantly “strained by a rapidly increasing population, financial constraints and scarcity of medical supplies.”²⁰² Prior to 2014, most existing health centers and medical facilities were already in need of rehabilitation and upgrading to meet the growing demand on Gaza’s health services. Medical equipment and infrastructure routinely suffered breakdowns due to power cuts and water impurities, among other factors.

152. Although health infrastructure such as hospitals qualify as protected objects during armed conflicts, the Israeli assaults on the Gaza Strip during June 2006, December 2008-January 2009, November 2012 and July-August 2014 did not spare Gaza’s health facilities.²⁰³ These military operations have contributed to the destruction and decline of Gaza’s health infrastructure, occurring within the context of the ongoing absolute closure, which actively hinders their reconstruction and rehabilitation.

153. The 2015 *Detailed Needs Assessment and Recovery Strategy* for the health sub-sector found that “13 health structures belonging to public and private health providers were destroyed and 104 were damaged during the conflict, comprising 20 hospitals, 57 clinics, 29 pharmacies, seven ambulance stations and laboratories, and four drug warehouses,” requiring repairs estimated US\$24 million, excluding other economic losses.²⁰⁴ Moreover, the destruction left 2.5 million tons of debris, “with the distinct possibility that the material used in building the destroyed property included harmful substances that endanger public and environmental health.”²⁰⁵

²⁰¹ United Nations Relief and Works Agency, “Health in the Gaza Strip,” available at <http://www.unrwa.org/activity/health-gaza-strip>.

²⁰² UNDP, “Detailed Infrastructure Damage Assessment,” (2014), available at www.ps.undp.org/content/dam/papp/docs/Publications/UNDP-papp-research-damageassessment2014.pdf.

²⁰³ For details of exemplary cases of attacks on hospitals and medical infrastructure during “Operation Protective Edge” as war crimes, see November 2015 Submission, *supra* . n. 5, pp. 46-48.

²⁰⁴ OCHA, “Reconstruction of health sector facilities impaired by shortages of materials and funding,” (April 2015), available at <http://gaza.ochaopt.org/2015/04/reconstruction-of-health-sector-facilities-impaired-by-shortages-of-materials-and-funding>. See also UN, ‘Gaza: 2 years after’ (26 Aug. 2016), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/BE3E65B01D2A4CE78525801B004A550B>.

²⁰⁵ UNCTAD Report, *supra* n. 22, citing World Health Organization, 2014.

154. During the 2014 military offensive, the ICRC found that “the health care system was not sufficiently protected and respected, which affected health-care workers’ ability to save lives.”²⁰⁶ In the eight months that followed, OCHA reported that “the reconstruction and rehabilitation of health facilities damaged during the course of the conflict has made only moderate progress due to the shortage of construction materials in Gaza and shortfalls in funding.”²⁰⁷

155. While some of the damaged or completely destroyed hospitals and primary health clinics falling under Gaza’s Ministry of Health (MoH), have been restored to pre-conflict standards, the rehabilitation and new development work for seven of the MoH hospitals and 12 clinics “has been slowed or stopped due to the unavailability of construction materials.”²⁰⁸ The extensive damage to vital health infrastructure across the Gaza Strip, particularly combined with the closure’s hindering of reconstruction will undoubtedly have long-lasting effects on the present and future health and total well-being and of Gaza’s civilian population.

156. Nadia Abu Nahla, a 52-year-old civil society activist and Director of the Women’s Affairs Center (WAC) in Gaza, is among the many Palestinians suffering from the compromised health service in the Gaza Strip.²⁰⁹ Nadia was diagnosed with breast cancer in 2009 and among the medical infrastructure that Gaza lacks as a result of closure import and travel restrictions are the adequate facilities, equipment and specialized doctors needed to test and treat many types of cancer. After receiving surgery at Tel HaShomer Hospital in Israel, Nadia’s doctors advised that she would need continuous medical follow-up for her condition. However, Gaza’s hospitals lack the radiological examination devices necessary for her check-ups and future treatments, making her reliant on Israel’s arbitrarily-meted-out travel permits for access to critical medical treatment. Despite the seriousness of her condition and her history of having been granted patient permits many times before, Nadia’s latest application was rejected on 30 March 2016. Legal intervention since December 2015 by the submitting organizations has not been successful in her being issued with a permit, to cross Erez for treatment. Without the current closure’s restrictions on medical infrastructure, Nadia would be

²⁰⁶ ICRC, “Gaza: Protecting health care in conflict,” (7 Aug. 2015), *available at* <https://www.icrc.org/en/document/gaza-protecting-healthcare-conflict>.

²⁰⁷ OCHA, “Reconstruction of health sector facilities impaired by shortages of materials and funding,” *supra* n. 206.

²⁰⁸ See *id.*

²⁰⁹ For more details, see PCHR, In latest Cases of Travel Ban: Israeli Authorities Prevent Nadia Abu Nahla from Travelling for Medical Treatment, (26 Sept. 2016), *available at* <http://pchrghaza.org/en/?p=8400>.

able to seek treatment in the Gaza Strip for her breast cancer, without the need to obtain Israeli permission.

4. Housing and Other Civilian Structures

157. The restrictions on the import of construction materials into the Gaza Strip as part of the Israeli closure mean that Gaza's housing and other civilian infrastructure is compromised, even under normal circumstances. The situation is further exacerbated by the effect of the military offensives referred to above. In the context of such mass destruction of homes and civilian infrastructure, the closure policy's barring of adequate reconstruction materials leaves an already devastated and deeply traumatized civilian population – many homeless or displaced – without the ability to rebuild and recover.

158. The extensive damage to housing and civilian property in the 2014 Israeli offensive included the destruction of entire neighborhoods; Khuza'a, Al-Shuja'iyya, and Rafah were left in ruins. Over the course of the offensive, Israeli forces completely destroyed 8,377 houses, and partially destroyed 23,597. This destruction affected 250,918 residents in total, including 67,448 women, and 124,678 children. This destruction followed that of 5,000 housing units from previous military operations which had still not been rebuilt.²¹⁰

159. Crucial civilian infrastructure, much of which contributes to the survival and well-being of the civilian population, was also severely damaged or destroyed by Israeli forces, including: agricultural land, industrial institutions, commercial entities, schools (including several serving as shelters), mosques and churches, banks, NGOs and civil society buildings, police stations, sports clubs, and as discussed above, water wells, water treatment stations, entities related to the production and distribution of power in the Gaza Strip, including partial damage to the main power plant in the Gaza Strip.²¹¹ The restriction on construction materials under the current closure has slowed or altogether hindered the ability to rebuild and repair this vital civilian infrastructure.

160. During the period of the Court's jurisdiction and in the aftermath of "Operation Protective Edge," from December 2014 to July 2015, Israeli authorities allowed in an average of 43,062 tons of cement, 159,606 tons of aggregate, and 6,315 tons of steel for construction. These numbers represent just 2.9%, 5.3%, and 1.3%, respectively, of the need for these

²¹⁰ See November 2015 Submission, *supra* . n. 5, para. 83.

²¹¹ For exact figures, *id.*

construction materials solely for reconstruction efforts, not taking into account the normal monthly demand for these materials within the Gaza Strip.²¹² Most of these construction materials were allowed to enter for international organizations or Palestinian companies under the mandate of the UN Gaza Reconstruction Mechanism, which is a wholly inadequate response.²¹³ If followed according to plan, the UN Gaza Reconstruction Mechanism would take 20 years to rebuild Gaza and, critically, in the meantime, it actively contributes to the institutionalization of the nine-year closure imposed on the Gaza Strip.

161. Within the two-year period after the 2014 military assault, *i.e.*, post-13 June 2014 when the Court was vested with jurisdiction over crimes committed on the territory of Palestine, only 1,308 houses of the 11,000 that were totally destroyed during the 2014 offensive have been successfully rebuilt (11.8%).²¹⁴ An additional 3,205 are under construction, while funding has been secured for rebuilding 2,494 more. The remaining 3,993 destroyed housing units currently have no funding for reconstruction, along with 59,000 homes damaged (but not completely destroyed) during the 2014 attack.²¹⁵ Until funding is found, the remaining houses cannot be added to the list for rebuilding and, thus, all progress within the framework of the Gaza reconstruction mechanism remains stalled.

162. VW2, a xx-year-old driving instructor from the southern district of Rafah lost his father and eight members of his extended family, including four children, when his family home was destroyed by shelling during the 2014 Israeli military offensive. He and his wife, along with several other members of his extended family, are among those who have not been able to rebuild their homes: “Until this moment, almost two years after our homes were destroyed, our houses have still not been added to the list of houses to be rebuilt.”²¹⁶ He directly attributes his problem to the closure, noting, “This is due to the delay in reconstruction as a result of the Israeli siege [closure of Gaza]. The closure of the crossings prevents the entry of reconstruction materials or only allows the entry of limited amounts. This affects the process of reconstruction and rebuilding of houses that were destroyed during the last Israeli offensive on the Gaza Strip.”²¹⁷

²¹² The averages were calculated with figures recorded in PCHR’s monthly closure updates: PCHR, *State of the Gaza Strip's Border Crossings*, *supra* n. 127.

²¹³ See PCHR, *Gaza under Closure and Rubble*, *supra* n. 161.

²¹⁴ Shelter Cluster Palestine, “Palestine: Key Facts September 2016,” (Sept. 2016), *available at* <http://shelterpalestine.org/Upload/Doc/75fcb754-0447-4f8b-8b81-38a40f1ac375.pdf>.

²¹⁵ *Id.*

²¹⁶ PCHR, *Affidavit of VW2* (15 June 2016), see Annex 1.

²¹⁷ *Id.*

163. The effects of homelessness and displacement are far-reaching, as described by VW3, a mother of five whose family also lost their house during the 2014 offensive, who described her family's experienced as follows:

After our house was destroyed, we moved around, living some time in my family's house and the houses of my brothers and family-in-law. We then had to rent a house for months. Due to the delayed reconstruction, bad economic conditions, my husband's irregular salary (he is an officer in the Gaza Police) and the financial strain of having four daughters and a son in school, my husband was only able to build a temporary shelter for us in place of our destroyed house, something like a greenhouse made of a steel arc and covered with nylon. Life has been very tough for us.

Because our destroyed house is still uninhabitable, we now live with reptiles [*i.e.* lizards and vermin] and especially rats sneaking through the nylon in our makeshift shelter. Sometimes we find them in our clothes, which we keep on shelves as we do not have a closed cupboard. This causes fear among my children, especially the girls.

It should be noted that during the first year after our house was destroyed, my eldest daughter, xx, finished high school with excellence and obtained a university scholarship to study English literature. After a year, my second daughter, xx, finished high school as well, and started studying medicine at the Islamic University in Gaza. In light of our un-reconstructed house, my daughters have been deprived of the chance to welcome their friends into our home, as how could they host them in an arc structure covered in nylon? Moreover, due to the unbearably hot summer and the water leaks in winter [when it rains a lot], it was very hard on them, as they had to study with all of this.

At the end of 2015, my husband's name was chosen in the Kuwaiti grant, but the reconstruction is still suspended due to reasons we do not understand. After months, the grant was distributed in banks and my husband received the first batch in April 2016. We were then surprised that the Israeli authorities banned the entry of cement, so we kept living in the nylon-arc house. In June 2016, we received a cement coupon for ten tons, so we destroyed the nylon arc to start the reconstruction.

We now live in a temporary shed house on the roof of my family-in-law's house. The foundation of our new house has been established, but the construction work has stopped now, as we are waiting to get another cement coupon in order to complete it.

The reconstruction process is very slow and humiliating. No one has shown mercy on us, in recognition, at least, of our suffering. When we finally started feeling happiness after our suffering, at the prospect of finally rebuilding our house, we found that things go slowly and there are many complications. Every hour that passes matters to us due to the bad living conditions we have suffered since our home was destroyed.²¹⁸

²¹⁸ PCHR Affidavit, VW3 (16 June 2016), see Annex 1.

164. The Palestinian population in the Gaza Strip is facing a severe housing and infrastructure crisis; tens of thousands of homes, hundreds of new schools, and a range of other buildings are urgently required. In the face of this crisis, Israel's closure policy continues to intentionally create an artificial scarcity of much-needed construction materials that makes both repairs and new construction projects either impossible or overly expensive.

5. Telecommunications and Information Technology (Telecom/IT) Infrastructure

165. The nine-year closure has taken a heavy toll on Gaza's telecommunication and information technology (Telecom/IT) infrastructure, stalling progress in a sector vital for the social, economic and political development of the Gaza Strip. Obstacles imposed on the entry of equipment and devices needed to advance the sector have significantly slowed its progress, while power outages have driven up existing Telecom/IT operating costs, and Israeli military offences have badly damaged or destroyed large portions of existing Telecom/IT infrastructure.

166. The three Israeli military offensives have inflicted substantial losses on the Telecom/IT sector, particularly the 2014 offensive. Based on information gathered by the Palestinian Human Rights Organizations, Israeli military forces directly targeted Telecom/IT networks, offices, devices and equipment.²¹⁹ Widespread damage was incurred "to landline, mobile and internet infrastructure, including the destruction of switches, fixed-line networks, cellular stations, networks, cables and the headquarters of companies."²²⁰ Jawwal, the only Palestinian mobile company permitted to operate in Gaza, had 81 out of 500 of its towers knocked offline during the offensive, with 31 of them partially or totally destroyed.²²¹ Since the end of the operation, only 30 new stations have been allowed to enter Gaza and have been added to the network to replace the damaged ones. The total losses in the Telecom/IT sector from Operation Protective Edge were estimated at approximately USD \$34 million.²²²

167. Power shortages, also a result of the closure, force Telecom/IT operators to run generators to cover the periods of outage, greatly increasing both their unreliability and operating costs, as fuel prices in Gaza soar. Gaza's Director General of Licensing at the Ministry of Telecommunication and Information Technology, engineer VW4, explains the gravity of the situation for companies: "The power outage threatens the existence of a number

²¹⁹ See PCHR, Case Report on VW4 (10 Jan. 2016), see Annex 1.

²²⁰ UNCTAD Report, *supra* n. 22.

²²¹ PCHR, Case Report on VW4, *supra* n. 221.

²²² *Id.*

of organizations, such as radio stations, whose expenditures [out]weigh revenues. Recently, some radio stations have stopped broadcasting when the electricity goes out, and this absolutely inflicts losses.”²²³

168. Another impact on the Telecom/IT sector is the ban on crucial imports under the Israeli closure regulations. VW4 emphasizes the sensitivity of much Telecom/IT technology infrastructure and devices, noting that they require consistent maintenance and a ready supply of spare parts. The Israeli ban on the entry of spare parts into the Gaza Strip under the closure policy leads to the continued use of damaged devices, which hinder and can further damage other parts of the Telecom/IT networks.

169. Another obstacle to the Telecom/IT sector’s progress resulting from the closure includes the ban on entry of fiber optic cables, which help ensure better quality internet access, usage, and affordable prices. Before the closure, the Palestine Telecommunication Company (Paltel) was allowed to import such cables.²²⁴ While the world of Telecom/IT has significantly expanded beyond Gaza, with both the number of companies and internet users proliferating, the Israeli authorities continue to restrict the entry of fiber optic cables and wireless devices (receiver modules) that could drastically improve WiFi services throughout the Gaza Strip. Under the closure, Palestinians in Gaza do not have access to any Israeli Telecom/IT services or networks. As such a relationship would be financially advantageous for Israeli companies; the closure’s access restrictions appear punitive rather than based on economic incentives.

170. In terms of the level of technology available to the population in Gaza, VW4 notes that Israel already operates with 4G technology, and while some countries are already beginning the transition to 5G, Palestine is restricted to 2G technology. The hope for Gaza is to obtain permission from Israel and adequate infrastructure to run 3G technology. “Until this year, we are working on 3G, but still we are ten years behind the rest of the world.”. Advancing to 4G technology would bring significant benefits to the Gaza Strip and “lead to a quantum leap” in the economic life of Gaza. It would potentially increase access to the internet for users in the Gaza Strip from the current 7,000 subscribers to 1 million, and boost Gross National Income by a whole percentage point.²²⁵ Moreover, VW4 points out, “4G will offer job opportunities

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

for young persons and facilitate communication,” while organizations and banks would also stand to significantly gain from using the technology in their operations.²²⁶

171. Official negotiations related to Telecom/IT advances in Gaza have thus far met a dead end. Eight years ago a new Palestinian mobile company named Wataniya was established and although it operates in the West Bank, Israeli authorities denied permission for it to operate in Gaza and banned the entry of the equipment and signal towers needed to initiate services in the Gaza market. VW4 explains, “the Gaza Strip population was deprived of utilizing and enjoying the benefits and offers [that would have resulted] from the competition between Jawwal [the other major Palestinian mobile provider] and Wataniya,” as has occurred in the West Bank.²²⁷ In addition, young people in Gaza lost out on potential jobs that would have been created if Wataniya had been able to operate: “if Wataniya offices open, they will absorb a lot of employees from all fields and have authorized agents and branch offices,” VW4 predicts.²²⁸

6. Other Public Infrastructure

172. A range of other public infrastructure was damaged or destroyed during OPE with significant financial and social consequences. For instance, most of the postal facilities, especially in Rafah and Beit Hanoun, were completely destroyed during the operation, causing losses of US \$35,000. Below is a table compiled by PCHR’s documentation unit of public infrastructure damaged in the 2014 offensive:

Distribution of public entities which sustained damages during the 2014 military offensive.

Type of entity	Number of entities that sustained total destruction	Number of entities that sustained partial destruction	Total number
Hospitals	1	10	11
Clinics	6	17	23
Mosques	64	128	192
Churches	0	1	1
Banks	1	3	4
NGOs	30	49	79
Schools	7	58	65
Kindergartens	8	44	52
Universities and faculties	1	5	6
Police Stations	15	7	22
Sports clubs	1	6	7

²²⁶ *Id.*
²²⁷ *Id.*
²²⁸ *Id.*

Overall number	134	328	462
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B. On the Economy

173. The economic impact of the prolonged closure of Gaza is pervasive and cannot be overstated. The closure has paralyzed all economic sectors in Gaza and resulted in a human-made humanitarian crisis that impacts the entire civilian population. The interlinked effects of the closure have deeply and adversely affected every sector of Gaza’s economy, leading to unprecedented rates of unemployment and inducing widespread dependence on external donor intervention for survival. Gaza’s core industries such as fishing and farming have been decimated by the closure, as have telecommunications and IT, with the consequent loss of employment potential. Manufacturers face harsh restrictions on the inputs needed for production, while barriers on exports and the freedom of movement for traders prevent those goods that are still produced from reaching potential markets, whether in Israel, the West Bank or further abroad. Millions of dollars have been lost to these barriers and obstacles to travel, while productive capacity across a range of sectors has steeply declined. As a result of the closure, every aspect of Gaza’s economy - from infrastructure and equipment to the human knowledge and capacity needed for production - is not only stalled, but swiftly and steadily eroding.

1. Farming

174. Farming has long been a staple industry and way of life in the Gaza Strip, yet the closure has decimated the sector. Under the closure policy, Israel has intensified restrictions first imposed on Palestinian access to land and water in the Gaza Strip in 2000 with particularly detrimental consequences for the safety, stability and economic viability of farming. As indicated above the “buffer zone” significantly reduces the area of land available for agriculture; farmers have to take significant risks to access their land. Combined with the destruction of agricultural infrastructure during the three major Israeli offensives and regular cross-border incursions, as well as crippling import and export restrictions, farmers face overwhelming obstacles in their quest to work their land and make a living.

175. Israeli forces also attempts to enforce the buffer zone as a “no-grow zone” through the indiscriminate aerial spraying of herbicides. In December 2015, Wael Thabet, the general manager of the plant protection department in Gaza’s Ministry of Agriculture denounced Israeli forces deliberate and periodic spraying of chemicals on agricultural lands near the

Gaza-Israel border in order to destroy crops.²²⁹ Farmers report that such spraying has occurred repeatedly, without warning or coordination, over the last several years, often causing effects far afield from the fence.²³⁰ On 27 December 2015, an Israeli military spokesperson confirmed “the aerial spraying of herbicides and germination inhibitors...in order to enable optimal and continuous security operations.”²³¹ Even if, as the Israeli military claims, the spraying only takes place in the first 100-meters of the “buffer zone” the effects of the toxic chemicals still reach much further away due to winds and the large quantities used. After observing the area, the ICRC reportedly assessed the damage of the December spraying as having harmed approximately 1500 dunums of land in central Gaza and an additional 200 dunams in eastern Khan Younis, damaging crops of spinach, parsley, peas and wheat.²³² Coupled with other impacts of the closure policy, the spraying poses additional financial and safety hazards to Gaza’s already-at-risk farmers.

176. The closure has also led to a massive shortage of necessary agricultural requisites, such as fertilizers, pesticides, spare parts for irrigation water pumps, and the raw materials needed to build and maintain green houses, like wood and iron frames, as well as plastic sheeting. According to VW5, xxxxxx, a number of fertilizers and pesticides have been banned from import altogether due to their supposedly “dual-use” capabilities.²³³ Similar bans on iron and several types of wood have led to soaring inflation in prices that affect the maintenance of existing greenhouses and prevent the building of new ones. VW5 reports 100% increases in the price of wood, while the rising cost of iron has meant that a one-dunum greenhouse, which would previously cost a farmer USD \$5,000, now costs USD \$8,000 for iron of lesser quality. Import restrictions also prevent the entry of modern agricultural machinery; some pieces are occasionally allowed in, but on an arbitrary basis. Coupled with restrictions imposed on the movement of farmers and their business representatives outside of the Gaza Strip for marketing or capacity development, the closure has significantly stunted the development and growth of the entire agricultural sector.

²²⁹ Ma’an News, “Israel sprays crop-killing pesticides on Gaza farmland,” (23 Dec. 2015), *available at* <http://www.maannews.com/Content.aspx?id=769483>.

²³⁰ Al Mezan Center for Human Rights, *Adalah, Gisha, and Al Mezan seek redress for Gaza farmers' losses due to Israeli military spraying of their land* (1 Aug. 2016), *available at* <http://www.mezan.org/en/post/21468/Adalah%2C+Gisha%2C+and+Al+Mezan+seek+redress+for+Gaza+farmers%27+losses+due+to+Israeli+military+spraying+of+their+land>; see also, Al Mezan Center for Human Rights and Al-Haq Highlight Rights Violations of Farming and Fishing Communities within Gaza Closure in Submission to UN Special Rapporteurs, see <http://www.mezan.org/en/post/21620>.

²³¹ Schaeffer Omer-Man, Michael, “IDF admits spraying herbicides inside the Gaza Strip,” +972 (28 Dec. 2015), *available at* <http://972mag.com/idf-admits-spraying-herbicides-inside-the-gaza-strip/115290/>.

²³² Ma’an News, “Israel sprays crop-killing pesticides on Gaza farmland.”

²³³ PCHR Affidavit of VW5, (5 January 2016).

177. More urgent than the steep input costs, however, is the near blanket ban on agricultural exports from Gaza to the West Bank or Europe. Prior to the imposition of the closure in 2007, Gaza's agricultural sector produced approximately 400,000 tons of agricultural products annually, with one third intended for export. The 2005 Agreement on Movement and Access, brokered between Israel and the Palestinian Authority, set the target for exports from Gaza at 400 trucks per day. During the three-year period between July 2007 and mid-2010, however, only 259 trucks of agricultural exports left the Gaza Strip, leading to a 40% decrease in income for the agricultural sector.²³⁴ In 2008 alone, the sector lost an estimated US\$6.8 million.²³⁵ As the closure has continued into the period over which the ICC has jurisdiction, so too has the economic loss and hardship caused by the export restrictions placed upon Palestinians. Farmers are not compensated for losses incurred as a result of Israel's arbitrary export procedures. In 2015, despite a relative easing of agricultural export restrictions, farmers still faced disproportionate difficulties in getting their produce to market. As VW5 summarizes the challenges:

A year ago [in 2015], the Israeli authorities allowed the export of certain types of agricultural products, but under a procedure that was both complicated and expensive for farmers. Each farmer had to prepare the vegetables a day before export and put them in one-meter-high containers. The next day, the containers would be transported to Karem Abu Salem, "Kerem Shalom" crossing, where they would be kept in special rooms. At this stage, the Israeli authorities would decide whether the containers would be allowed or banned. The containers were often returned arbitrarily without explanation or the crops would rot because the crossing would suddenly close. The crops that are approved to be exported only arrive at market on the third day, due to Israel's slow and complicated export measures. The produce often ripens in this time, and subsequently, prices are negatively affected. Eventually, the export process becomes almost useless.²³⁶

178. Meanwhile, some crops are simply banned from export altogether, such as potatoes, carrots, strawberries and leafy vegetables, under the pretext that the soil in Gaza is too polluted to meet requisite health standards, despite testing confirming the opposite.²³⁷ And indeed, if this claim were to be true, it must be recalled that the Israeli forces are responsible for polluting soil in Gaza by spraying, as indicated above, and within the context of its military offensives.

²³⁴ PCHR, *Illegal Closure*, *supra* n. 14.

²³⁵ PCHR, *The Economy of Occupation, Narratives Under Siege*, 20 July 2010, available at www.pchrgaza.org.

²³⁶ PCHR, Affidavit of VW5, (5 January 2016), see Annex 1.

²³⁷ *Id.*

179. In addition to the significant challenges farmers face in attempting to export their produce, they must also endure the artificial flooding of Gaza's domestic local market as a result of the closure's export restrictions. Local prices are often driven down to such an extent that farmers fail to recover their production costs, much less make a profit.

180. Major military offensives have compounded the effect of the closure on agriculture in the Gaza Strip. After Israel's 2014 military offensive, the Ministry of Agriculture estimated losses from damage and destruction of crops and agricultural infrastructure to USD \$550 million.²³⁸ 42,000 acres of farmland and associated greenhouses, wells, irrigation systems, livestock and fodder were devastated by the Israeli military offensive, causing acute effects on the livelihoods of approximately 40,000 people.²³⁹ After the offensive ended, Gaza suffered shortages in staple produce items like tomatoes, potatoes, zucchini, cucumbers and eggplants, for the first time in the last 20 years.²⁴⁰ As a result of scarcity after the 2014 offensive, the prices for healthy produce were driven up, often forcing impoverished families to turn to cheaper, unhealthier alternatives.²⁴¹

2. Fishing

181. Fishing has been economically significant due to Gaza's position on the Mediterranean. Gaza's once thriving fishing industry has been significantly compromised by the closure, however, and along with it, the livelihoods of a large segment of the population. Israeli gunships frequently open fire on—and injure or sometimes kill—Palestinian fishermen, and routinely confiscate their fishing boats, nets and other equipment.²⁴² The harsh import restrictions under the closure regime also mean that Gaza's fishermen now have difficult accessing the nets, rope, twine, spare parts and new motors needed to maintain their fishing operations.

²³⁸ OCHA, "Gaza Initial Rapid Assessment," (27 Aug. 2014), *available at* ochaopt.org/documents/gaza_mira_report_9september.pdf.

²³⁹ Institute for Middle Eastern Understanding (IMEU), "50 Days of Death & Destruction: Israel's 'Operation Protective Edge,'" (10 Sept. 2014), *available at* imeu.org/article/50-days-of-death-destruction-israels-operation-protective-edge.

²⁴⁰ Food Security Sector, "Report of the Rapid Qualitative Emergency Food Security Assessment Gaza Strip," *available at* <http://reliefweb.int/report/occupied-palestinian-territory/report-rapid-qualitative-emergency-food-security-assessment>.

²⁴¹ Frykberg, M., "Gaza's Food Insecurity made even worse by Environmental Damage of Israel's War, Blockade," (2 Mar. 2015), *available at* www.juancole.com/2015/03/insecurity-environmental-blockade.html.

²⁴² PCHR, *Israeli Attacks on Fishermen in the Gaza Sea*, (14 Jan. 2016), *available at* <http://pchrgaza.org/en/?p=7753>; PCHR, *Israeli forces Release 5 Fishermen, 2 of whom Wounded, and Keep 2 Fishing Boats in Custody* | Palestinian Center for Human Rights (2016); See also: PCHR monthly update reports entitled *Attacks in the border areas and their consequences*, (Oct. 2016), *available at* <http://pchrgaza.org/en/?p=8526>.

182. For most of the period of the closure, the area permitted for fishing has been unilaterally restricted by Israel to three nautical miles from the Gaza shore, despite the internationally recognized limit of twenty nautical miles agreed to in the Oslo Accords and formally established in the 1994 Gaza-Jericho agreement. During the 2014 military offensive, all access to the coastal waters for fishing was prohibited. From 27 August 2014 until the present, the area in which Palestinians in Gaza are permitted to fish has typically been restricted by Israel to six nautical miles, except for periodic temporary extensions of certain geographic areas to 9NM.²⁴³ Palestinian fishermen in Gaza are further prevented from fishing in areas extending up to 1.5 nautical miles bordering the northern (Israeli) and the southern (Egyptian) border of the Strip, which are completely inaccessible, thus shrinking the actual area available for fishing even further. The head of the Palestinian Fishermen's Professional Association notes that in practice, Israeli military vessels frequently attack and harass fishermen well within this ostensibly approved area.²⁴⁴ Ultimately, the limitations are arbitrary and seem to depend on the mood of Israeli naval forces on any given day.

183. For many fishermen in Gaza, fishing constitutes a way of life stretching back generations. Yet, in attempting to carry on this tradition, fisherman now risk their lives and equipment in the face of armed Israeli naval vessels that arbitrarily harass and attack them. As documented by the Palestinian Human Rights Organizations, incidents related to fisherman occur almost on a daily basis. During the 2014 offensive, 100 fishermen were forcibly removed from the sea by Israeli armed forces and taken to Israeli detention facilities. Forty fishing boats were also confiscated, while another five were sunk by Israeli forces in 139 different incidents and shelled in six.²⁴⁵ Israeli authorities detained 71 Palestinian fishermen from Gaza and injured 24. In addition, Israel confiscated 22 fishing boats, five other pieces of fishing equipment, and damaged a further 16 pieces of equipment in 2015.²⁴⁶ These attacks not only threaten the fishermen's physical safety, but also the security of their livelihoods.

184. VW6 has been a fisherman in Gaza since 1994 and owns and operates two fishing boats along with his son. His experience demonstrates just how dangerous and difficult fishing has become: "The permissible fishing area depends on the mood of the Israeli

²⁴³ Between 3 April 2016 and 6 June 2016, the fishing zone was off Gaza's southern coast was temporarily extended from 6 to 9 nautical miles ("NM"). Subsequent temporary extensions from 6 to 9 NM have occurred from 20-26 June and for the month of November 2016. See Maan News Agency, "Israel reduces fishing zone off Gaza coasts to 6 miles" (30 May 2016) *available at* <https://www.maannews.com/Content.aspx?id=771686> .

²⁴⁴ PCHR, Affidavit of VW17 (5 January 2016), see Annex 1.

²⁴⁵ PCHR, *Israeli Attacks on Fishermen in the Gaza Sea*, *supra* n. x.

²⁴⁶ *Id.*

soldiers,” he notes, who “systematically open fire against us and our fishing boats, leading to holes that are hard to fix.”²⁴⁷ Omar has been chased on a number of occasions while fishing within the limited confines of Palestinian waters, and suffered financial setbacks due to damage caused by Israeli forces to both his boats and nets. Six years ago, he remembers, “Israeli forces put demarcation points at about six nautical miles off the Gaza shore, and when we put our nets east of the demarcation points, two to three nautical miles within the approved zone, they chased us and opened fire against us.”²⁴⁸ Omar not only lost his fishing nets in this incident, but his two badly damaged boats were also confiscated. Again more recently, in May 2015, Israeli military vessels opened fire on and chased Omar towards the shore, despite the fact that he was fishing well within the permissible fishing zone. When he later returned to retrieve his nets, he found only two out of a total of 17 pieces of his fishing nets, a devastating economic blow to his small and struggling fishing operation.²⁴⁹

185. The 6NM limit imposed and enforced by Israeli gunships makes it very difficult for Palestinian fishermen to haul adequate catch. At the same time, they are being forced to fish unsustainably, over-fishing the shallow waters in close proximity to the Gaza coast. In addition to reduced hauls, fishermen face additional financial burdens under the closure in the form of inflated costs for supplies due to scarcity and import restrictions. Boat engines that used to cost USD \$5,000 before the closure, now cost closer to USD \$7,000, while nets that once cost NIS 200 are now NIS 300. Materials for repairs have risen much more drastically. The fiberglass needed to repair the boats now costs USD \$500 versus USD \$50 before the closure, a tenfold increase.²⁵⁰

186. As a result, fishermen like Omar find it increasingly difficult to endure Gaza’s already catastrophic economic climate. With two sons in university and five other children to support, he explains: “I work day and night to make my living, but it is really hard along with the increase in the cost of living due to the closure. I think that fishermen in other countries probably pay one third of our expenses and efforts, but are able to live a decent lifestyle, while we can hardly fulfill our basic needs.”²⁵¹ Like the vast majority of Palestinians in Gaza, Omar and his family receive a quarterly assistance voucher from the UN Relief and Works Agency (UNRWA), but even with this to supplement his income from fishing, his family still struggles to meet even their basic needs.

²⁴⁷ PCHR, Affidavit of VW6 (5 Jan. 2016), see Annex 1.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ PCHR, Affidavit of VW17 (5 Jan. 2016), see Annex 1.

²⁵¹ PCHR, Affidavit of VW6 (5 Jan. 2016), see Annex 1.

187. Once a centerpiece of Gaza's economy and society, today more than 6,000 of the approximately 10,000 people who worked in various aspects of the fishing sector are now unemployed. Today there are still around 4000 fishermen in Gaza operating approximately 1000 boats. However, the impact of the closure and the restrictions imposed on access to the sea has been disastrous for the fishing industry. From a time-honored tradition and respected profession, the prolonged closure has transformed fishermen in the Gaza Strip "into one of the most marginalized and poorest working classes in Gaza."²⁵²

3. Industry/Manufacturing Sector

188. Gaza's private industry and manufacturing sector employs the largest workforce and has been perhaps the most affected by the ongoing absolute closure and 2014 offensive. The sector includes a wide range of small scale enterprises, such as food industries, furniture, construction, metal, wood, and small business and commerce. The areas where many of these businesses are located, either on rented or owned properties, were severely damaged during the 2014 offensive. Combined with other effects of the closure, the destruction wrought by Israel's 2014 offensive has resulted "in an untold hardship on the national economy."²⁵³

189. Prices of goods and services have risen sharply, alongside widespread unemployment and the overall scarcity of basic goods. With limitations on imports accompanied by other consequences of the closure - interruptions in communication, electricity and fuel shortages, and hikes in transportation costs - many of Gaza's industries have been forced to close down.²⁵⁴ Those that manage to continue operations face immense challenges, including the likelihood that whatever they manage to produce will not reach its intended external market. As the World Bank Country Director for the oPt noted in July 2015, "Gaza's exports virtually disappeared and the manufacturing sector has shrunk by as much as 60%. *The economy cannot survive without being connected to the outside world.*"²⁵⁵ (emphasis added)

²⁵² PCHR, Affidavit of VW17 (5 Jan. 2016), see Annex 1.

²⁵³ UNDP, "Detailed Infrastructure Damage Assessment," (2014) available at www.ps.undp.org/content/dam/papp/docs/Publications/UNDP-papp-research-damageassessment2014.pdf.

²⁵⁴ *Id.*

²⁵⁵ Steen Lau Jorgensen, World Bank Country Director, oPt, 2015, cited in UN-OCHA "The Gaza Strip: The Humanitarian Impact of the Blockade," *supra* n. 12.

190. VW7 has worked as a trader in construction materials for 28 years, selling cement and steel reinforcement, among other materials. He comments that: “My situation as a merchant is very difficult and terrible due to the Israeli-imposed blockade and the closure of commercial crossings,” he says. “My work has been almost terminated. Recently, a small positive change has occurred with the allowance of some construction materials to enter, but it is not comparable to the time before the closure was enforced by Israel.”²⁵⁶ Whereas VW7 used to sell approximately 2000 tons of cement and 3000 tons of steel reinforcement per month, he now sells less than 50 and 30 tons, respectively. Some materials that he used to sell, like white cement or a substance used to make plaster, are now completely banned. The closure has also caused prices to fluctuate drastically; the price of one ton of cement, for instance, has risen from 420 NIS in 2006 to 900 NIS in 2016, and is not available in the amount needed to meet demand. For him, the vast disparity in availability and price of materials “clearly shows how the closure has affected commercial activities in Gaza.”²⁵⁷

191. The combination of the closure with damage from Israel’s three large-scale military offensives since 2008 has been particularly hard on Gaza’s manufacturing sector. VW8, remembers vividly when the commercial crossings closed, flour and gas were banned from entry, and then the 2008-09 military offensive began. That year, the Israeli air force targeted Hamada Mill, which stored some 5000 tons of flour for Gaza’s bakeries. As a result, he remembers, “90% of Gaza bakeries stopped operating” and “the demand for bread rose by 500%.”²⁵⁸ To cope with the shortage, the Ministry of National Economy diverted flour from markets and distributed it among the few bakeries capable of producing bread to scale of up to two tons per day. Yet, they still failed to produce enough to meet the beleaguered Strip’s needs.

192. During the 2014 Israeli offensive, Gaza’s only remaining large bakery was destroyed, along with 350 other factories, including cement and sponge factories, as well as dairies.²⁵⁹ Approximately 100 smaller bakeries in the Gaza Strip continue to operate, but are forced to rely on backup generators due to the regular power shortages. These generators, however, cannot keep pace with the bakeries’ 24-hour schedules.²⁶⁰ The duration of the offensive and the resulting widespread displacement drove up demand for bread across the Gaza Strip, as an

²⁵⁶ PCHR, Affidavit of VW7, (5 January 2016), see Annex 1.

²⁵⁷ *Id.*

²⁵⁸ PCHR, Affidavit of VW8, (5 Jan. 2016), see Annex 1.

²⁵⁹ Palestinian Economic Council for Development And Reconstruction, “Gaza Strip A Reconstruction & Development Plan,” (undated), *available at* pecdar.ps/new/userfiles/file/PECDAR-Gaza-English-spr.pdf.

²⁶⁰ PCHR, Affidavit of VW8, (5 Jan. 2016), see Annex 1

easy staple to turn to with many homes and kitchens damaged. Bakeries were unable to keep up and some located in dangerous areas were completely sealed off, with their bread (if they could produce it) unable to reach the population. Only five bakeries remained in operation, supported by UNRWA and UNDP with generators and diesel to ensure the provision of bread for the masses of displaced people sheltering in schools.²⁶¹ Like other sectors, bakers also suffer under the closure from the lack of spare parts needed to repair or replace broken machinery. For some time, bakers could still access parts via the tunnels from Egypt, albeit at exorbitant prices, but since late 2012, when the Egyptian military authorities flooded and then blocked most of the tunnels, this is no longer an option.

4. Increased Unemployment and Cost of Living: Poverty

193. The closed borders and the resulting lack of imports and exports has led to the rapid decline of Gaza's economy. Periods ranging from severely diminished to no economic productive capacity have resulted in high rates of unemployment, food insecurity and aid dependency. The level of aid dependency for Palestinians in Gaza is estimated to be over 80%, while the unemployment rate was 41.2% in the first quarter of 2016 (compared to 18.7% in 2000).²⁶² In 2014, unemployment reached a record 43% – that is, the highest in the world.²⁶³ When considered on its own, youth unemployment exceeded 60%.²⁶⁴ Among the Palestinian population of Gaza, young women and refugees fare worse in finding employment, with 8 out of 10 women currently out of paid work.²⁶⁵ In terms of per capita GDP, the rate in Gaza today is 72% of the 1994 level, and two-thirds that of the present rate in the West Bank;²⁶⁶ Indeed, since Israel imposed the current closure on Gaza in 2007, the gap between GDP in Gaza and the West Bank has significantly widened.²⁶⁷

²⁶¹ *Id.*

²⁶² Palestinian Central Bureau of Statistics, Results of the Labour Force Survey (January- March, 2016) (2016); UNRWA, "Gaza Situation Report 149, 14 June - 21 June 2016," (23 June 2016), *available at* <http://reliefweb.int/report/occupied-palestinian-territory/gaza-situation-report-149-14-june-21-june-2016>.

²⁶³ UN OHCA, "The Gaza Strip: The Humanitarian Impact of the Blockade," *supra* n. 12.

²⁶⁴ *Id.*

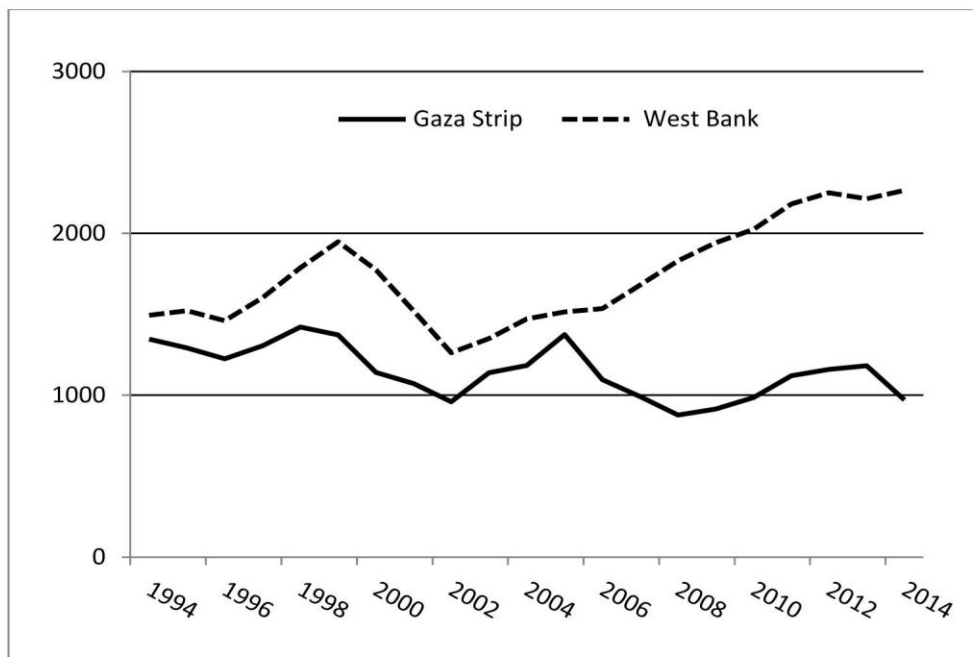
²⁶⁵ UNCTAD Report, *supra* n. 22.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

Real gross domestic product per capita in the Gaza Strip and the West Bank

(Constant 2004 dollars)



Source: UNCTAD²⁶⁸

194. VW's story of struggle with unemployment under the current closure demonstrates the difficulties facing Gazans, particularly youth, today. In 2006, as a graduate with a degree in accounting from Gaza's xxx University, VW9 quickly found a job working as a branch accountant at xxx Company. However, with the onset of the current closure, the company was forced to close and VW9 lost his job: "xxx Company, faced, as any other business entity in Gaza, a full ban from the Israeli authorities [on] importing their commercial goods."²⁶⁹ VW9 spent the next year looking for work in Gaza, but faced a lack of opportunities and a job market teeming with qualified youth. He began to consider post-graduate studies as a way to better his job prospects, noting that: "In fact, the job opportunities were available before the closure and [a] Bachelor [degree] was enough for having a good job. However, after the closure, so many private companies had to close off, and consequently, I found myself and my graduated fellows had lost and did not find new jobs. Side by side, lots of new graduates joined us in looking for new jobs." In late 2008, VW9 applied and was admitted to a xxx University in the UK. "At that time," he recalls, "the Rafah Crossings was almost totally closed. At that particular period as well, Erez Crossings was not an option due to the Israeli blockade." Then "Operation Cast Lead" occurred. By the time VW9 was able to finally leave

²⁶⁸ *Id.*

²⁶⁹ PCHR, Affidavit of VW9 (2 Feb. 2016), see Annex 1.

Gaza via the Rafah border with Egypt, it was already June 2009, though his university course had begun in April. The university could not allow him to join so late and told him to either change his visa status or return to Gaza. “The university did not understand that my delay was not caused by me, but by the hard situation in the Gaza Strip,” VW9 notes. He then endured significant extra costs, but enrolled in a new Master’s degree program in International Business Studies in xxx, working to cover his expenses while studying.

195. In 2012, VW9 returned to Gaza with his new qualification, but still found no job: “I thought that I can find a good job with my new master [degree] and improved written and spoken English skills. I was wrong. Notably, the blockade affected deeply the supply of the job market.” VW9 stayed unemployed until 2013: “I could not go on with my personal expenses, without mentioning that a xx-year-young man cannot go further in marriage plans in a society of Middle Eastern culture.” In September 2014, VW9 found work as a part-time lecturer at xxx University that paid only \$250 per month, which he often received months late.

196. VW9 decided to create and operate Gaza’s first xxx, what he thought would be “a profitable and easy to [finance] project with a unique idea.” He took a loan from the Ministry of National Economy, part of which he used to procure his xx machine from China. However, due to Israel’s current closure, the delivery of the machine was delayed and held at Israel’s Ashdod Port for more than six months, while he waited for the necessary Israeli import permit.

197. Finally, in March 2015, VW9 launched his xx business. He solved the problem with power shortages by buying an electricity generator. After not too long, VW9 notes: “My work started to bring some modest earnings. With those modest earnings, I thought that my financial situation would get better gradually and my father sponsored me in getting married.” However, when the machine suffered an operational failure and needed a small spare part, VW9’s business was hard hit because “the needed spare part was not available in the local market.” Because of the closure, importing it was out of the question. Instead, VW9 asked an electrical engineer to adapt a spare part that could get the job done, which ended up costing him \$1000. The delays and extra costs put a large strain on his business: “All of those delays and extra costs had been putting me under financial hardships to pay off my loan installment on time. Basically, the whole project cycle suffered from the [closure], which is the main reason for the high unemployment rate.”

198. VW9 believes that “the bad economic effects of the [closure] cannot be measured, as it affects not only all small and big details of business, but also extends to psychological

[outlook and health] and all of our life details.” VW9 insists that: “My story is not exceptional in the bad economic situation of the Gaza Strip, with taking into account all of those related Israeli bans attached with the blockade. My story is similar to the stories of my colleagues who live in the Gaza Strip and they suffer to get their livings. The Israeli closure, offensives, and policies affected badly every single element of life in the Gaza Strip.”

C. On Individuals, Families, Communities

1. Health: Physical and Psychological

199. The prolonged closure has directly induced a steep decline in Gaza’s local healthcare sector. “Equipment exhaustion, limited technical capacity and the chronic shortages of medicines and medical disposables have increased the need for patients to be referred for more costly referral treatment outside of Gaza,” noted the head of the WHO office in the Gaza Strip.²⁷⁰ In mid-2015, approximately 50% of the medical equipment in the Gaza Strip was not functioning for various reasons, including the inability to import the spare parts needed to fix or adequately maintain the equipment.²⁷¹ Dr. Mohammad Shatat, the Deputy Director of the Dialysis Unit at Al-Shifa hospital in Gaza City, has “witnessed a shortage of almost fifty percent in the medicine and machines we need to run this unit at its capacity due to the Israeli occupation and closure.”²⁷² Meanwhile, receiving life-saving dialysis treatment on what equipment remains operational can quickly become life-threatening due to the closure-induced electricity crisis; if the power goes out during a treatment, the patient can lose up to 300cc of blood.²⁷³

200. In addition to regular electricity cuts, sudden outages frequently threaten patients’ lives and put the medical machines at risk. The fuel crisis also severely hinders the delivery of humanitarian aid and emergency medical services. Basic emergency services such as ambulances are stretched well beyond their capacity, and can only run as much as the restricted fuel supply allows. As PCHR has documented, emergency patients regularly resort

²⁷⁰ WHO, ‘WHO hosts donor roundtable to discuss health barriers in Gaza, June 2015’ (June 2015), available at <http://www.emro.who.int/pse/palestine-news/who-hosts-donor-roundtable-to-discuss-health-barriers-in-gaza-june-2015.html>.

²⁷¹ UN Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, (25 Sept. 2015), A/70/392, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/43441567D813196C85257EE00051C177>.

²⁷² See PCHR, *The Illegal Closure of the Gaza Strip*, *supra* n. 13 at 65.

²⁷³ See PCHR, *Gaza patients continue painful wait for urgent medical treatment*, *Narratives Under Siege*, (21 Aug. 2008), available at www.pchrgaza.org.

to using donkey carts to get to hospitals for treatment.²⁷⁴

201. The shortages of basic medicine and supplies in Gaza's hospitals force patients like Ahmed Zourob, who suffers from chronic kidney failure, to seek their medications in private pharmacies, where they pay artificially inflated costs out of pocket for medicines they used to receive for free. As many patients already face dire economic circumstances, paying these prices is out of the question. For Ahmed, the consequences of going without the necessary medicine are obvious and harmful: "The hospital told me that my medicine was no longer available in the hospital pharmacy, but without a job I cannot afford the medication on my own. I don't know what I can do. Now, because I haven't taken the medication, the doctors tell me that I have anemia as well."²⁷⁵

202. In November 2015, the MoH in Gaza reported that 33% of essential medicines in Gaza were at zero-stock, which means they had less than a month's supply, while it was even higher for psychiatric, cancer, pediatric, blood, immunosuppressant, primary health and ophthalmic medications.²⁷⁶ Zero stock for medical disposables, like gloves and needles, was 41%. However, for certain categories, like hearing, dental and ophthalmic and cardiac procedure supplies, including for open heart surgeries, zero stock was 86% to 100%.²⁷⁷ According to WHO, the requirements for cardiac catheterization supplies alone represent 27% of the total list of medical disposables needed by the MoH, while the high cost of resupply has resulted in chronic shortages and the need to refer more patients outside of Gaza for these procedures.²⁷⁸

203. Within the already significant healthcare circumstances wrought by the closure, recurring military offences drastically exacerbate the harm to health and resiliency among Gaza's residents. In the course of the last three major military assaults on Gaza, WHO reported damage to 34 hospitals, 105 clinics and 84 ambulances.²⁷⁹ In the 2014 offensive, the Israeli military destroyed seven health facilities, damaged 67 hospitals and clinics, killed 23 health workers (16 while on duty), and injured 83 health workers, mostly while carrying out

²⁷⁴ PCHR, Rafah Ambulance Drivers Struggle Amidst "Miserable" Work Conditions, *Narratives Under Siege*, (13 May 2008), available at www.pchrgaza.org.

²⁷⁵ See PCHR, *The Illegal Closure of the Gaza Strip*, *supra* n. 13 at 65-66.

²⁷⁶ WHO, "Situation Report #2: occupied Palestinian territory," (27 Dec. 2015), available at http://www.emro.who.int/images/stories/palestine/documents/WHO_Sitrep_on_oPt_health_attacks_12.2015_-_final.pdf?ua=1

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

emergency services.²⁸⁰

204. In response to lowered medical capacity in Gaza after the 2014 Israeli offensive, the number of patients applying for urgent medical treatment outside of Gaza has risen. Applications for exit via the Beit Hanoun “Erez” crossing for medical care outside of Gaza nearly doubled from 1,093 in July 2014 to 2,105 in June 2016. Over the same period, approval rates have gradually declined, from an average of 77% in 2015 to 71% in the first half of 2016. Moreover, in 2016, permit approval has dropped from 78% in January to 69% in June 2016.

205. Many Palestinians in Gaza are hindered or prevented from accessing medical care that is readily available in other parts of the oPt, namely East Jerusalem or the West Bank. They are instead forced to endure precarious delays and arduous trips abroad due to opaque and often blanket restrictions imposed by Israel on Palestinians wishing to travel from Gaza to the West Bank and East Jerusalem. For some Palestinians in Gaza, like VW10 a xx-year-old widow and mother of 11 from Rafah, Israel’s refusal for a permit to seek treatment in East Jerusalem or the West Bank is essentially a denial of her ability to obtain medical treatment at all.²⁸¹ VW10 was diagnosed with brain cancer in Gaza in 2015. On 18 April 2016, she was referred by her doctor to the xxx Hospital in Ramallah and granted a medical coverage certificate from the Palestinian Ministry of Health to cover the costs. In late April 2016, she submitted what would come to be her first of many applications to the Israeli authorities (via the General Authority of Civil Affairs office) for a permit to travel to the West Bank for treatment.

206. VW10’s first application was delayed, with the decision stating “pending.” Her second application was met with “refusal,” while her third resulted in instructions to change her travel “companion,” who had been a 65-year-old family member. Her fourth application, which included a request for a different 52-year-old family member to serve as her travel companion, was met with an outright “rejection of the file.” No further explanations were provided.

207. On 29 May 2016, PCHR intervened legally on VW10’s behalf, at the request of her family, and appealed to the Israeli authorities to permit her passage to the West Bank on humanitarian grounds, particularly given her age, the gravity of her illness, and the urgency of her need for prompt medical treatment for her tumor. In response, the Israeli authorities

²⁸⁰ *Id.*

²⁸¹ PCHR, Case Report on VW10, (7 Sept. 2016), see Annex 1.

agreed to grant her transit to the Jordanian border. However, without a Jordanian visa, required but rarely granted to Palestinians from Gaza, and without the personal funds or physical stamina to undertake such an arduous journey in her condition, traveling to Jordan was not a realistic possibility. PCHR sent another request for reconsideration, but, on 15 August 2016, VW10 received a repetition of the previous decision. As a result, Israel has not only exacerbated VW10's condition through the stress and delays of the permit application process, but its decision has impeded her freedom of movement in a way that essentially strips her of her right to health for no reason other being a Palestinian in the Gaza Strip.

208. While VW10 remains alive, other Palestinian patients in Gaza have not been so fortunate. VW11, a xx-year-old stomach cancer patient from northern Gaza underwent a similar experience in applying for an Israeli travel permit, only eventually receiving the Israeli authorities' permission to transit to Jordan for treatment after a series of rejected applications to attend his scheduled appointments at Augusta Victoria Hospital in Jerusalem.²⁸² By refusing to allow VW11 access to treatment in Jerusalem, despite the Israeli authorities' knowledge that Jordanian permits for Palestinians from Gaza have been essentially blocked all year, Israel not only impeded VW11's freedom of movement and right to health, but in doing so, contributed to his death, which occurred on 26 October 2016. No reason was ever given for VW11's permit rejection, despite the fact that he had travelled through Erez for treatment at Israeli hospitals many times before, the last time having been in August 2013.

209. PCHR and WHO have documented numerous cases of other patients who have died or suffered significant setbacks in their health as a result of having their permits to seek medical treatment outside of Gaza denied or unduly delayed since Israel's imposition of the absolute closure in 2007. As the United Nations Secretary-General has observed, "the notion of quotas for medical treatment raises serious human rights concerns. Timely access to medical care ought to be based on clinical need, as determined by a medical expert, and not restricted by an arbitrary quota."²⁸³ The Palestinian Human Rights Organizations provide some of the individual cases herein, with a focus on the period of the Court's jurisdiction, after 13 June 2014.

210. VW12, a xx-year old father of 12 from northern Gaza who suffers from an esophageal tumor, is one of many who cannot access the medical treatment they urgently need. Like

²⁸² PCHR, Case Report on VW11 (26 Oct. 2016), see Annex 1.

²⁸³ Report of the Secretary-General on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, UN A/70/421, (14 Oct. 2015), para. 25.

others for whom there exists no proper treatment options in Gaza, VW12 sought treatment outside. In January 2016, VW12 received a referral and appointment at xxx in Jerusalem. He applied to the Palestinian General Authority of Civil Affairs, which in turn sent his application to the Israeli counterparts responsible for issuing permits to transit via the Erez pedestrian crossing with Israel. VW12's appointment date on 31 January came and went, before he finally heard from the Israeli authorities that he would be granted an interview at the Erez cross a week later, on 8 February 2016. Despite taking all of his medical documents, VW12 waited all day at Erez, from 8:00 to 13:00, until the Israeli authorities told him to go back home. VW12 obtained a new appointment at xxx for the end of February and began the arduous process of applying for a permit all over again. This time, the Palestinian General Authority of Civil Affairs informed him that his permit request had been rejected by the Israeli authorities. PCHR's Legal Aid Unit filed an urgent request to the Humanitarian Center at Erez Crossing, to no avail. The Israeli authorities repeated the rejection of VW12's medical permit request, citing undisclosed "security reasons." VW12 – now in desperate need of surgery for his tumor – remains confined to the Gaza Strip, left to live and wait in pain, discomfort and uncertainty.²⁸⁴

211. VW13 a xx-year-old man who suffers from a severe physical and mental disability for which there is not adequate treatment available in Gaza, was also referred to xxx in Jerusalem after obtaining a referral and medical coverage for expenses from the Palestinian Ministry of Health.²⁸⁵ Before his first appointment on 22 December 2015, VW13 successfully applied for and obtained an Israeli permit, meaning he passed the lengthy and intensive security check process, and attended his appointment. For his follow-up appointment scheduled for three months later, on 15 March 2016, VW13 again applied for and obtained an Israeli permit, meaning he once again passed the lengthy security check process. However, when VW13 arrived at the Erez Crossing on the day of his appointment, he was stopped by an Israeli soldier between the first and second exit gates. The soldier, who identified himself as an intelligence officer confiscated VW13's permit and ordered him to: "Go back to Gaza because your relatives are Hamas." VW13 returned, and immediately contacted PCHR, which sent a letter to the Israeli personnel at Erez requesting they reconsider the decision in light of VW13's urgent humanitarian needs. As in so many other cases, the response came back negative, citing a security reason that the Israeli authorities "could not disclose."

²⁸⁴ PCHR Case Report on VW12 (21 Mar. 2016), see Annex 1.

²⁸⁵ PCHR Case Report on VW13 (5 Apr. 2016), see Annex 1.

212. The refusal to let VW13 attend his follow-up appointment significantly jeopardizes his health. The fact that VW13 had already passed the full security check involved in having his two permits issued demonstrates that he was not a security threat. The reason behind Israel's decision to deny him freedom of movement was best summarized by the intelligence officer saying "Go back to Gaza because your relatives are Hamas." VW13's case is illustrative of Israel's closure policy against the civilian population in the Gaza Strip; his case shows that the absolute closure negatively affects every citizen in the Gaza Strip, far beyond members of Hamas.

213. VW14, a xx-year-old university student and aspiring teacher suffers from a tumor in his left shoulder that causes him chronic pain.²⁸⁶ He obtained a referral for treatment in xxx in the West Bank, on 3 August 2015, but was denied a travel permit by the Israeli authorities each of the three times he applied. Now he has given up hope on making it to his appointment in xxx and has opted to change his referral to a hospital in Egypt, hoping that the Rafah border will open sometime soon. Until then, he waits. His tumor goes untreated and he lives with daily pain.²⁸⁷

214. VW15, a father of eight who suffers from cancer and must seek specialized treatment outside of Gaza, knows how long and precarious the wait at Rafah can be, on both sides of the border.²⁸⁸ Having been on several trips to Cairo for cancer treatment, he has experienced the long waiting periods both to exit and return to Gaza, dependent on when Egyptian authorities open the border: "During my travels to Egypt, I suffered a lot, as I had to remain in Egypt, waiting for long periods until the Rafah crossing opened again so I could return to Gaza. My psychological suffering increased due to the uncertainty and waiting, as I did not get to see my children for 56 days."²⁸⁹ When he found a doctor in xxx who could provide the same treatment and successfully obtained an official referral, VW15 excitedly applied for a travel permit to the West Bank, only to be told by the Israeli authorities that his application was denied for "security reasons." Instead of being able to travel within the Palestinian territory for treatment, VW15, VW14 and many other Gazans are forced to endure extensive delays and onerous burdens on their personal, professional and family lives, often to the detriment of both their physical and mental health.

²⁸⁶ PCHR, Affidavit of VW14 (14 June 2016), see Annex 1.

²⁸⁷ *Id.*

²⁸⁸ PCHR, Affidavit of VW15 (12 June 2016), see Annex 1.

²⁸⁹ *Id.*

215. Dr. Gerald Rockenschaub, the WHO Head of Office emphasizes that “[s]ocial determinants of health such as poverty, lack of employment opportunities, insecure water and energy resources and movement restrictions, have a significant impact on Gaza residents and also hinder the health system.”²⁹⁰

216. Israel’s denial of Palestinian access to an adequate standard of health in the Gaza Strip extends to the realm of mental health as well. UNRWA, which provides health-care services to the vast majority of the over 1.2 million registered Palestine refugees in Gaza, notes that: “Across the Gaza Strip, psychological trauma, poverty and environmental degradation have had a negative impact on residents’ physical and mental health; many, including children, suffer from anxiety, distress and depression.”²⁹¹ Children in particular, deal with “a range of problems, including fear of violence, sleeplessness, a lack of motivation in school or the inability to concentrate.”²⁹² Already in 2009, the UN Special Rapporteur on the situation of human rights in the Palestinian territories pointed out that “96% of the Gaza population suffers from depression” and that “such mental deterioration is itself an indication of a failure by the occupying power to discharge its basic duty to safeguard the health of civilians living under the occupation.”²⁹³ Since then, the circumstances have only continued to worsen. As noted by the UN Special Rapporteur in 2015, “It is a fact that the blockade keeps the Gaza health sector in a state of dependency, on crutches donated by the international community.”²⁹⁴

2. Education

217. Students at every educational level have been the targets and victims of the Israeli-imposed closure. The closure impacts upon both the accessibility and quality of education available within the Gaza Strip, as well as the ability of Gaza’s civilian population to pursue educational opportunities elsewhere, whether in other parts of Palestine or abroad.

218. Within the Gaza Strip, years of closure have compromised the education sector by restricting the movement of people and goods necessary to meet even the baseline needs of Gaza’s students. Construction materials for the maintenance, rehabilitation and construction

²⁹⁰ World Health Organization, “WHO hosts donor roundtable to discuss health barriers in Gaza,” (June 2015), *available at* <http://www.emro.who.int/pse/palestine-news/who-hosts-donor-roundtable-to-discuss-health-barriers-in-gaza-june-2015.html>.

²⁹¹ UNRWA, “Health in the Gaza Strip,” (undated) *available at* <http://www.unrwa.org/activity/health-gaza-strip>.

²⁹² *Id.*

²⁹³ UN Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/10/20, 11 Feb. 2009, para 8.

²⁹⁴ UN, Situation of human rights in the Palestinian territories occupied since 1967, A/70/392, *supra* n. 273.

of new schools are repeatedly denied entry into Gaza under the closure policy, hampering efforts to improve access to education. Even before the 2014 Israeli offensive destroyed 125 educational facilities,²⁹⁵ Gaza was already in need of 250 new schools to accommodate the swelling number of students among the Gaza Strip's growing population.²⁹⁶ According to the latest figures, 94% of Gaza's schools operate on a double or sometimes even triple shift basis, meaning they host one "school" of students in the morning, and another in the afternoon.²⁹⁷ Classes that were severely overcrowded before the destruction of the 2014 offensive are even more packed.²⁹⁸ As a result, "children's education is severely truncated," notes UNRWA, which operates 252 schools serving over 240,400 students in the Gaza Strip.²⁹⁹

219. Years of supply shortages and underfunding have left Gaza's education system overstretched. In a decision that can only be interpreted as punitive, items such as books, textbooks, notebooks and pencils have also been banned along with construction materials as potential "dual-use" or "luxury" items. The chronic lack of fuel and frequent power cuts mean that most (95% in 2012) primary and secondary school students often lack adequate electricity to complete their homework and external assignments on time.³⁰⁰ In addition to the regular challenges of teaching children, Gaza's educators and school staff must also integrate food and psycho-social support services for the vastly food insecure and traumatized population of children in the Gaza Strip.

220. For students wishing to pursue higher education, financial barriers and restrictions on movement resulting from the closure limit their options. Students in the Gaza Strip are systematically deprived of their right to enroll in or continue their education beyond Gaza's borders, whether in other parts of Palestine, neighboring Arab countries, or elsewhere abroad. As a direct result of the closure, hundreds if not thousands of students have remained trapped in the Gaza Strip, unable to embark on or rejoin their educational institutions abroad.

²⁹⁵ PCHR Annual Report 2014, available at http://www.pchrgaza.org/files/2015/annual_pchr_eng_2014.pdf.

²⁹⁶ OCHA, Humanitarian Bulletin: Monthly Report," (August 2013), available at http://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2013_09_27_english.pdf

²⁹⁷ UNRWA, "Education in the Gaza Strip," available at <http://www.unrwa.org/activity/education-gaza-strip>.

²⁹⁸ UNDP. "Detailed Infrastructure Damage Assessment Gaza –2014," available at ps.undp.org/content/dam/papp/docs/Publications/UNDP-papp-research-damageassessment2014.pdf.

²⁹⁹ UNRWA, "Education in the Gaza Strip," (undated) available at <http://www.unrwa.org/activity/education-gaza-strip>.

³⁰⁰ OCHA, 2014 Humanitarian Needs Overview: Occupied Palestinian Territories, (Nov. 2013), p. 17, available at http://www.ochaopt.org/documents/ochaopt_hno_2014.pdf.

221. VW16 finished high school in 2014 hoping to study medicine. He was accepted to xxx University in Sudan, but though he successfully obtained a student visa to enter the country, he remains stuck in Gaza. After being accepted, VW16 immediately contacted the Palestinian Civil Liaison to arrange his travel via the Beit Hanoun “Erez” crossing, which requires a visa to enter Jordan. However, one week after submitting his paperwork, he received the news that his application for a Jordanian visa had been denied. He then sought to leave Gaza via Rafah crossing with Egypt, for which he had already registered his travel request with Gaza’s Ministry of Interior. Between then and the time his classes started in December 2015, however, the crossing only opened once and VW16’s name did not make the travelers list. “This is the second year of university education that I have missed out on due to the closure,” VW16 complains, “I did not register in any university in Gaza because I want to study medicine and refuse to register for another field in the Gaza universities.”³⁰¹ VW16 hopes that he will be able to leave Gaza for his studies soon, “so I will not waste more years.”

222. Myriad opportunities earned by students have gone squandered due to the closure, jeopardizing the future of not just the individuals whose travel permits are delayed or rejected, but also the families and communities that both support and depend on them. Even those students who manage to successfully exit the Gaza Strip must endure the constant anxiety and stress of uncertainty; many are forced to spend years without visiting their families due to the well-founded fear that if they return for a visit, they might not be allowed to exit again.

223. In addition to denying Palestinians in Gaza the opportunity to develop human capital and technical expertise, through the closure Israel has denied Gaza’s youth of the opportunity for cultural exchange and intellectual stimulation. Students in Gaza remain isolated from the outside world, forced to pursue educational advancement with the vastly inadequate resources available to them locally. As a result, Gaza’s students and the young adults they grow into have an increasingly narrow view of the world. The enforced isolation of Gaza and lack of interpersonal exchange among Palestinian students also damages social and cultural ties between Palestinians in Gaza and other parts of Palestine. Serving the Israeli state’s broader separation policy, the absolute closure imposed on Gaza has deepened the intellectual and cultural divide within the Palestinian territory itself. Palestinians from Gaza used to constitute approximately 35% of the student population in West Bank universities, including those in Jerusalem.

³⁰¹ PCHR, Affidavit of VW16, (5 Jan. 2016), see Annex 1.

224. Finally, Israel's unilateral imposition of the "buffer zone" represents another negative impact on Gazan students' access to education. Some schools are located within 1.5 km of the border and consequently are exposed to frequent Israeli fire. UN sources have noted that the safety of approximately 4,400 students and 250 teachers and employees is compromised by the proximity of educational institutions to the buffer zone. Similarly, the quality of education provided in these institutions has been seriously undermined due to class interruptions, building evacuations, and damages to the school facilities.³⁰²

3. Family and Community Life

225. Palestinian family and communal life has suffered immensely under the Israeli-imposed near-absolute closure. The closure policy is an extreme manifestation of Israel's long-held separation policy, by which Israel systematically divides Palestinian families and social networks by enforcing absolute control over the residency rights of every Palestinian within the occupied Palestinian territory. Under varying gradations of closure and confinement, the Palestinian population is subjected to an incredibly complicated and opaque system of permits, described in detail above.

226. Israel actively and aggressively obstructs Palestinian family reunification efforts, including through the arbitrary or punitive revocation of residency and travel rights.³⁰³ This means that Palestinians like Nisreem Karam, who was born in Be'er Sheva in 1977, but married a man from Gaza in 1994, cannot return to visit her relatives across the Green Line. After her marriage, and due to the impossibility that the Israelis would grant her Gazan husband a permit to reside in Israel, she was forced to give up her Israeli ID and assume, after ten years of obstacles and struggle, a Palestinian ID with assigned residency in Gaza to match that of her husband. When her elderly father fell ill, she was denied a travel permit to visit him in Be'er Sheva, due to generic "political and security reasons." Although PCHR appealed against her rejection and submitted thorough documentation of her father's illness certified by Israeli doctors, she was still denied. When PCHR sought further clarification from the Israeli authorities, the Attorney General responded, claiming that his health conditions were "not serious enough."³⁰⁴

³⁰² OCHA-WFP Report, "Between the fence and a hard place: The humanitarian impact of Israeli-imposed restrictions on access to land and sea in the Gaza Strip", (Aug. 2010), p. 28, available at https://www.ochaopt.org/documents/ocha_opt_special_focus_2010_08_19_english.pdf.

³⁰³ See PCHR, *Alternative Report Submitted to the UN Committee on Economic, Social and Cultural Rights in Response to Israel's Third Periodic Report*, E/C.12/ISR/3, (18 Oct. 2010), p.15-20, available at www.pchrgaza.org.

³⁰⁴ PCHR, *The Illegal Closure of Gaza Strip*, supra n. 14.

227. Unfortunately, cases such as Nisreem's are not isolated incidents, but a common occurrence. Under the current closure regime, numerous Palestinians are not only prevented from visiting their relatives and loved ones, but even nuclear families are prevented from living together. Not all married couples have been able to successfully change the ID and residency of one among the pair. For example, A.B. who is originally from Gaza, was prevented from living with his wife and family in Jaffa. Despite an Israeli Court decision granting him a residency permit to live in Israel, security authorities refused to implement the decision and he was forcibly expelled back to Gaza in 2007. He has been forcibly separated from his family ever since, with his wife permitted to visit him in Gaza once a year for only five days.³⁰⁵

228. Such residency and travel restriction not only impact already existing families, but actively prevents new marriages from occurring between individuals residing in different parts of Palestine. In this way, the absolute closure of Gaza reinforces and works to entrench the current geographic divisions in Palestinian society. The forced separation of families is one of the most detrimental effects of the prolonged isolation and illegal closure of the Gaza Strip on Palestinian family life. As a result of Israel's illegitimate restrictions on the freedom of movement of the Palestinian population, the West Bank and Gaza have progressively drifted apart to become two virtually separate entities, in violation of international laws and agreements.

229. Other impacts of the closure on Palestinian family life in the Gaza strip result from the chronic strain and stress put on family members by the cumulative toll of poverty, aid dependency, food insecurity, unemployment, restrictions on movement and recurring trauma from repeated military assaults. The Palestinian Ministry of Health has called attention to the "unseen effects" of repeated hostilities on the population, particularly children.³⁰⁶ As mentioned earlier, many children in Gaza suffer from post-traumatic stress syndrome. Following Israel's 2014 offensive, the Special Rapporteur on the situation of human rights in the Palestinian territories reported that "almost 425,000 children were estimated to be in need of immediate psycho-social support after having experienced war, including having fled or lived through attacks on their homes and suffering injuries themselves and the death or injury of family and friends." However, he added, "the communities in Gaza that need to nurture

³⁰⁵ *Id.*

³⁰⁶ UN Report of the Special Rapporteur, A/70/392, *supra* n. 273.

these children back to health following physical and psychological trauma are themselves devastated.”³⁰⁷

230. The Special Rapporteur has noted that community health workers in Gaza deal with many cases of “children suffering from bedwetting, difficulties in sleeping, nightmares, panic attacks, speech problems, a loss of appetite and alienation from parents.”³⁰⁸ This alienation can also work the other way around, with parents unsure of how to relate to their children in the context of constant crisis on so many fronts, particularly when their ability to keep their children safe is so frequently beyond their control. He cites increases in “physical violence against children within their families and communities occurring in the context of increased stress faced by parents and relatives,” including cases of sexual abuse “particularly of adolescent girls in shelters and in host communities.”³⁰⁹

231. A fact-finding mission to the Gaza Strip commissioned by the Palestinian Human Rights Organizations and international NGOs in the wake of Israel’s 2014 offensive also found the cumulative impacts of the closure and military assaults to bode ill for family and communal life in Gaza:

The physically and psychologically injured and disabled of this war will join survivors of previous wars to swell the population of those suffering grievous personal assaults on their human potential and dreams of the future... The damage caused to the Gazan people’s sense of security and trust ... is likely to erode inter-generational relationships and social solidarity, with deep and long-lasting destabilizing effect on the community - despite its great resilience ... The further fact that many of those displaced and otherwise affected in this war were already traumatised (as refugees, wounded, disabled and bereaved) from previous rounds in this decades-long conflict compels the stark recognition of how necessary it is to bring about an immediate and permanent resolution.³¹⁰

4. Food Insecurity and Aid Dependency

232. The closure policy intentionally impedes the preconditions necessary for the civilian population’s attainment of an adequate standard of living, particularly by obstructing access to food, along with safe water and housing.

³⁰⁷ *Id.*

³⁰⁸ Office for the Coordination of Humanitarian Affairs, Humanitarian Bulletin, Monthly Report (Oct. 2014) available at https://www.ochaopt.org/documents/ocha_opt_the_humanitarian_monitor_2014_11_26_english.pdf.

³⁰⁹ *Id.*

³¹⁰ See, e.g., No Safe Place: Gaza 2014 - Findings of an independent medical fact-finding mission, (20 Jan. 2015) available at (<https://gazahealthattack.com/2015/01/20/no-safe-place-gaza-health-attack-full-report/>).

233. As a result of the protracted Israeli occupation, now in its 50th year, and the closure of the Gaza Strip since June 2007, the population is unable to access safe foodstuffs in sufficient quantities and at affordable prices, and is largely dependent on foreign aid and the import of Israeli products. Nearly 80% of Gaza's population receives some form of international aid.³¹¹ The closure's severe restrictions on the entry of foodstuffs combined with damage to the agricultural sector has resulted in the unprecedented deterioration of nutrition in the Gaza Strip, with severe impacts on the overall health of the civilian population.

234. Before Israel's 2014 military offensive and the subsequent economic contraction in Gaza, UN sources note that food insecurity throughout the occupied Palestinian territory was already very high. According to the 2010 report of the UN Special Rapporteur on the Right to Food, food insecurity had already risen from 34 % in 2006 to 38 % in 2008 due to the shortages of basic essential items.³¹² Meanwhile, 2014 data from Palestinian Central Bureau of Statistics (PCBS) suggests that nearly 6 in 10 households in the Gaza Strip were food insecure compared to 1 in 5 households in the West Bank.³¹³

235. Harsh restrictions are imposed, inter alia, on supplies of meat, fish, wheat, flour, rice, oil, fruits and dairy products, while limitations on the quantities actually allowed to enter artificially drive up prices for such goods in Gaza's local market. Most of Gaza's impoverished population can no longer afford the soaring prices of healthy, nutritious foods. In these conditions, children – who comprise half of Gaza's population - often suffer the most. According to a recent study conducted by UNICEF and the Ministry of Health, nearly a third of children under five in some areas of Gaza are stunted due to chronic malnutrition. Long-term malnutrition such as that seen among children of Gaza is a disease of poverty and particularly pernicious. "It's easy to sweep it under the carpet as it's not an emergency issue," says Dr. Andy Ferguson with Medical Aid for Palestine, "but once a child is chronically malnourished the effects are irreversible. They can never catch up that growth, and it impacts on the social, economic, academic and health potential of that child" in the long term.³¹⁴

236. The UN Special Rapporteur for the oPt has asserted that by restricting "the flows of food to sub-subsistence levels," Israel's absolute closure has been "responsible for a serious

³¹¹ UN OCHA, "The Gaza Strip: The humanitarian impact of the blockade," *supra* n.12.

³¹² Report of the Special Rapporteur on the right to food, Olivier De Schutter –Addendum - Summary of communications sent and replies received from Governments and other actors, U.N. Docs A/HRC/13/33/Add.1 (2010), (26 Feb. 2010), para. 49.

³¹³ Palestinian Central Bureau of Statistics et al., 2014, as cited in UNCTAD Report, *supra* n. 23, at p.4.

³¹⁴ Medical Aid for Palestinians, 'Malnutrition: Gaza's hidden health threat' (29 July 2015), *available at* <http://www.map-uk.org/news/archive/post/303-malnutrition-gazas-hidden-health-threat>.

overall decline in the health of the population and of the health system,” in violation of the Fourth Geneva Convention.³¹⁵

5. Physical Attacks against Individuals in the “Buffer zone” at Land and Sea

237. The 2014 military offensive resulted in the killing of 2,217 Palestinians, nearly 70% of them civilians, including 556 children and 293 women, and the injury of more than 11,000.³¹⁶ Sixty-six Israeli soldiers were killed, as well as five civilians, including one foreign national.³¹⁷

238. Aside from physical attacks within the context of Israel’s successive military offensives on the Gaza Strip, civilians in Gaza are routinely targeted and attacked in the access-restricted buffer zone unilaterally established by Israel as part of its absolute closure of Gaza. Those civilians injured and killed frequently include farmers trying to access their lands; impoverished civilians collecting rubble and construction scraps to sell; protestors participating in demonstrations at Gaza’s border crossings or near the perimeter barrier; children who accidentally venture into restricted access areas; and fishermen well within the permissible maritime fishing zone.

239. The following table includes figures of civilians physically attacked in the buffer zone, both on land and at sea, noting how many were arbitrarily detained, injured and killed by Israeli armed forces.

Statistics of fatalities, injuries, and detainees at the Ground and Maritime Access Restricted Areas (ARA)

Year ³¹⁸	Ground ARA			Maritime ARA		
	Killed	Injured	Detained	killed	injured	detained
2014 (excluding 7 July – 26 August, during Israeli offensive)	5 people, including a child and a woman	108 people, including 23 children, 3 women	56 detainees, including 20 children	0	4 fishermen	28 fishermen

³¹⁵ A/HRC/10/20, *supra* n. 295, para 9. As noted by the UN Fact Finding Mission on the Flotilla incident, “Since the imposition of the blockade [...] there has been a shift in diet (from protein rich to low cost and high carbohydrate foods), triggering concerns over mineral and vitamin deficiencies, *supra* n. 76, para. 41.

³¹⁶ See November 2015 Submission, *supra* n. 5.

³¹⁷ UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, submission to UNGA, (2014), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/e13242a6e076237c85257d8200663e22?OpenDocument>.

³¹⁸ For information going further back than 2014, see PCHR, *Under fire: Israel's Enforcement of Access Restricted Areas in the Gaza Strip*, *supra* n. 111.

2015	20 people, including 3 children(protestors),	665 people, including 647 protestors (among them 98 children and women)	49 people, including 20 children	1 fisherman	4 fishermen	77 fishermen, including 6 children
2016 (Jan)	2 people	34 protestors, including 6 children	1 child	1 fisherman	3 fishermen	6 fishermen

Note: These statistics do not include 7 July 2014-26 Aug. 2014 (2014 military offensive)

VI. Legal Analysis of Crimes against Humanity Committed by Israeli Officials in the Implementation of the Gaza Closure

240. In accordance with Article 5 of the Rome Statute and taking into account the jurisprudence of the Court, the Palestinian Human Rights Organizations submit that there is reasonable basis to believe that the conduct in question constitutes crimes against humanity within the jurisdiction of the court. Namely, **the Organizations assert that the implementation of Israel’s closure policy in relation to the Gaza Strip from 2007 to the present, and particularly the policy in effect since 13 June 2014 and the cumulative, continuing impact and effects of the policy from June 2007 through the present on the Palestinian civilian population,** constitutes crimes against humanity of persecution in violation of Article 7(1)(h) and other inhumane acts causing great suffering, or serious injury to body or to mental or physical health in violation of Article 7(1)(k).

241. The international community has widely described the deprivations inhering to the current closure of the Gaza Strip as forms of “collective punishment” in violation of international humanitarian law.³¹⁹ The Palestinian Human Rights Organizations submit that this collective punishment of the civilian populations manifests through the deprivations of fundamental rights (including the right to be free from collective punishment) that clearly breach the threshold of “severe” deprivation required to constitute the crime against humanity of persecution in violation of Article 7(1)(h) of the Statute. In this case, the crime against humanity of persecution also includes and is committed in connection with other inhumane acts causing great suffering arising from this regime of collective punishment in violation of Article 7(1)(k).

242. Crimes against humanity are recognized by the international community as among the highest class of atrocity crimes, “characterized by a strong element of cruelty and a particularly odious quality,”³²⁰ as their reach extends beyond harming the individual victims to “in the end offend against and injure a transcendent good, the value of the human being in the moral code, a value that cannot be compromised.”³²¹

³¹⁹ See Geneva Convention IV, Art. 33.

³²⁰ A. Cassese, “Crimes Against Humanity,” in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1A (Oxford University Press, 2002), p. 353 (hereinafter “*Crimes Against Humanity*”).

³²¹ B. et al., Case, 4 May 1948, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Vol. 1 (1950) 3, quoted in *Crimes Against Humanity*, p. 355, supra n. 322.

243. The Palestinian Human Rights Organizations focus the following legal analysis on an integrated reading and characterization of the conduct in question as the crime against humanity of persecution, as it best captures the contextualized and compound nature of the crimes inhering to the current closure of the Gaza Strip. The Organizations respectfully submit that the scope, severity, and significance of these crimes can only be properly understood and addressed as component parts of a highly organized persecutory policy. Persecution cannot and should not therefore be viewed separately, as an ancillary crime to others within the jurisdiction of the Court, but rather as the primary crime applicable to the facts and State policy related to the closure, which has led and continues to lead to the deliberate de-development of an entire society, the persistence of a wholly preventable humanitarian crisis, and the continued domination and degradation of the Palestinian people, resulting in the severe deprivation of fundamental rights, based on political, national, ethnic, cultural and/or religious grounds.

244. The Palestinian Human Rights Organizations further submit that the crime against humanity of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Article 7(1)(k) of the Statute) has been committed as both an underlying act of, and in connection with, persecution, and should fall with the Prosecutor's examination and investigation related to the ongoing closure of Gaza.

245. The Organizations respectfully set forth that the legal characterization and analysis in this section to serve as a roadmap for the OTP in its ongoing preliminary examination, and respectfully submit that it should form the basis for an application to the Pre-Trial Chamber to open an investigation forthwith into these crimes and serve as a framework for future cases. The Organizations emphasize that the description and legal analysis of the conduct presented in this submission as the crime against humanity of persecution and other inhumane acts should not prejudice any future submissions to (or findings by) the Chamber at later stages of the proceedings or in relation to these acts or other potential crimes committed by Israeli officials in the broader context of its prolonged military occupation of Palestinian territory or military operations carried out therein.³²²

³²² See Pre-Trial Chamber II, *Situation in the Republic of Kenya*, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," ICC-01/09, 31 Mar. 2010, para. 75 (hereinafter "*Kenya Authorization to Investigate Decision*"). See also Pre-Trial Chamber III, *Situation in the Republic of Côte d'Ivoire*, "Decision Pursuant to Article 15 of the Rome

A. Contextual Elements of Crimes Against Humanity

246. All crimes against humanity share certain contextual elements. Article 7(1) of the ICC Statute requires that the enumerated underlying acts of be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” In a departure from previous codifications of crimes against humanity in international legal instruments, Article 7(2)(a) further specifies that an “[a]ttack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

247. The Palestinian Human Rights Organizations incorporate by reference paragraphs 190-203 of the November 2015 Submission, and provide herein a succinct overview of the relevant law.

1. Existence of an attack directed against any civilian population

248. The term “attack” is defined in Article 7(2)(a) of the ICC Statute as “a course of conduct involving the multiple commission of acts referred to in paragraph 1.” Paragraph 3 of the Introduction in Elements of Crimes Article 7 further clarifies that the attack, or the multiple commission of such acts, “need not constitute a military attack.”³²³ A number of ICTY judgments define “attack” more generally, as a “course of conduct involving the commission of acts of violence.”³²⁴ Indeed, the Pre-Trial Chamber recently found that “a campaign of violence” against civilians from an ethnic group (Georgians) over the course of approximately 15 weeks in a geographically limited area (South Ossetia and a “buffer zone”) “constitutes an attack against the civilian population within the meaning of article 7(2)(a) of

Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire,” ICC-02/11, 3 Oct. 2011, paras. 36-38, 74 (hereinafter “*Cote d'Ivoire* Authorisation to Investigate Decision”).

In submitting that persecution is the most appropriate crime to reflect the totality of the criminal acts associated with and arising from the ongoing closure of Gaza, the Palestinian Human Rights Organizations recall their November 2015 submission setting forth an extensive number of crimes against humanity and war crimes arising out of the July-August 2014 Israeli offensive on Gaza requiring investigation by the Prosecutor which occurred in the context of the occupation, and do so without prejudice to future claims for investigation of other crimes, including but not limited to deportation and forcible transfer, and apartheid arising out of the prolonged belligerent occupation of Palestinian territory.

³²³ Elements of Crimes, Introduction to Article 7 of the Statute, para. 3.

³²⁴ *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgment, 31 Mar. 2003, para. 233; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment, 30 Nov. 2005, para. 182.

the Statute.”³²⁵ It is recalled that this violence need not be purely physical, but notably, can include other types of violence, *inter alia*, psychological, economic or juridical violence.³²⁶

249. The Palestinian Organizations submit that, in regards to the Situation of Palestine, the “attack” is most appropriately characterized as Israel’s prolonged belligerent occupation of Palestinian territory, which is considered an attack against the entire Palestinian civilian population. Hallmark features of this “attack” include the dual and progressively elaborated policies of separation and fragmentation of the Palestinian people and territory. See *supra*, Sec. III(B), Evolution of the Closure Policy. The current closure of Gaza directly ties into and compounds the Israeli State policies of separation and fragmentation in the implementation of the occupation.³²⁷ Indeed, it is only by analyzing the closure of the Gaza Strip within the context of the “attack” that is the occupation as a whole, that the true extent and gravity of the crime committed in the course of Israel’s current policy imposed on the Gaza Strip may be fully grasped. In the particular case set forth herein, within the context of the prolonged belligerent occupation, the longstanding closure itself constitutes an “attack” against the Palestinian civilian population, and particularly in this case, the civilian population of Gaza.

2. Target of the attack as a civilian population

250. Article 7(1) of the Statute and the Elements of Crimes stipulates that the “attack” must be “directed against any civilian population.” At the level of the individual, the term “civilian” refers to those persons who are not members of armed forces or who otherwise constitute legitimate combatants.³²⁸ In case of any confusion or doubt as to an individual’s

³²⁵ Pre-Trial Chamber I, *Situation in Georgia*, “Decision on the Prosecutor’s request for authorization of an investigation,” ICC-01/15, 27 Jan. 2016, para. 30 (hereinafter “*Georgia Authorization to Investigate Decision*”).

³²⁶ H. Brady, R. Liss, “The Evolution of Persecution as a Crime Against Humanity,” in Morten Bergsmo et al. (eds.), *Historical Origins of International Law*, Vol. 3 (Torkel Opsahl Academic EPublishers, 2015), p. 505 (hereinafter “*Evolution of Persecution*”) (internal citations omitted).

³²⁷ To leave out the historical existence and evolution of this broader discriminatory framework and constituent national struggle for dignity and self-determination, would lead to a distorted understanding and incomplete accountability for the manufactured and wholly avoidable atrocity currently visited upon Palestinian civilians, and particularly, those trapped in Gaza.

³²⁸ Additional Protocol I provides: “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1)(2)(3) and (6) of the Third Convention and in Article 43 of this Protocol.” Article 50(1) of the Protocol I 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, 1125 U.N.T.S. 3 (hereinafter “*Additional Protocol I*”). See also *Côte d’Ivoire Authorisation to Investigate Decision*, para. 33; Trial Chamber II, *Prosecutor v. Germain Katanga*, “Judgment pursuant to article 74 of the Statute,” ICC-01/04-01/07, 7 Mar. 2014, para. 801 (hereinafter “*Katanga Trial Judgment*”).

status, international law clearly stipulates that status determinations should always err on the side of presuming a person is a civilian.³²⁹

251. At the level of the population as a whole, the civilian status or characterization of a population is not compromised by the mere presence of combatants or other non-civilians within the population.³³⁰ The bounds of the civilian population may, but need not be, based on factors of nationality, ethnicity or other distinguishing features, also including perceived political affiliations or group memberships.³³¹ In the Article 15 investigation-authorization stage for both Côte d'Ivoire and Kenya, the element of "attacks directed at any civilian population" was found satisfied when civilians were singled out as ethnic or political targets because of their memberships.³³² However, for the purpose of determining the status of a civilian population against whom an attack is waged in the context of crimes against humanity, it may also be enough that they share the same territory or place of residence.³³³

³²⁹ Additional Protocol I, Art. 50(1): "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian." The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law provides that the concept of "civilian" in international armed conflict is understood as "all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities." International Committee of the Red Cross (ICRC), Nils Melzer (ed.), *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC, 2009), p. 26.

³³⁰ See Additional Protocol I, Art. 50(3). See also *Katanga* Trial Judgment, para. 729: "whilst the Chamber cannot rule out that on 24 February 2003, some inhabitants who were members of the self-defence group participated directly in the hostilities, or that some soldiers were dressed in civilian clothing, it considers that most of the inhabitants were readily identifiable as civilians who were not taking direct part in combat" and the population cannot be deprived of its civilian character if "most of the inhabitants [are] readily identifiable as civilians"; *id.* at para. 1105 ("the population so targeted must be primarily composed of civilians – the presence of non-civilians in its midst has therefore no effect on its status of population"); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment, 29 July 2004, para. 113 ("the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter the civilian characteristic").

³³¹ Pre-Trial Chamber I, *Prosecutor v. Katanga et al.*, "Decision on the confirmation of charges," ICC-01/04-01/07, 30 Sept. 2008, para. 399 (hereinafter "*Katanga* Confirmation of Charges Decision"); Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo," ICC-01/05-01/08, 15 June 2009, para. 76 (hereinafter "*Bemba* Confirmation of Charges Decision"); Bemba, as cited in W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p.153; see, e.g., *Côte d'Ivoire* Authorisation to Investigate Decision, para. 62. See also *id.* at paras. 24-25 (discussing Prosecutor's submissions) and para. 41 (conclusions of the pre-trial chamber). Notably, while the attack has to be directed against a civilian population, not all victims of the underlying crimes qualified as crimes against humanity must be civilians; persons *hors de combat* can be victims of the crime. See *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgment, 8 Oct. 2008, para. 313.

³³² See, e.g., *Côte d'Ivoire* Authorisation to Investigate Decision, para. 41 (civilians perceived to support the opposition and members of specific ethnic and religious communities in Abidjan and the western part of the country were targeted from 28 November 2010 onwards) and 95 (civilians perceived to support Gbagbo and from specific ethnic communities were the object of attacks in the western part of Côte d'Ivoire in March 2011).

³³³ Schabas, p.153, *supra* n. 333.

Notably, the civilian population need not be the only target of the attack, just the primary target. Accordingly, a military target may also comprise a secondary target or objective in the attack,³³⁴ but the attack's primary aim must be directed against the civilian population "as a whole" and not only "randomly selected individuals"³³⁵

252. The Palestinian Human Rights Organizations submit that the civilian population of the Gaza Strip "as a whole" was and remains the primary target of the attack inhering to Israel's closure. Although Israeli officials claim that " Hamas"³³⁶ is the target of the attack comprised by the current closure of Gaza, the collective nature of the attack against the territory of Gaza as a whole – as a "hostile entity" – with its population of 2,000,000 people, necessarily implicates the civilian population as the target of the attack. In this sense, the civilian population of Gaza is being singled out for attack under the current closure, with the only purported justification for this attack against them being because they share the same territorial space with Hamas.

253. Moreover, the civilian population of Gaza is also being targeted on the basis of its perceived political support "as a whole" for Hamas, the current governing body in Gaza.³³⁷ This targeting of Gaza's civilian population on these grounds is evident in the language of official Israeli State policy towards the Gaza Strip, particularly following Israel's 2004 *Cabinet Resolution Regarding the Disengagement Plan* and the 2007 Israeli Security Council declaration following the Hamas assumption of power in the Gaza Strip. (Israel has made no change to that policy in the intervening years, and it has remained in place to the present). In that declaration, the Israeli Security Council formally declared Gaza to be in its entirety a "hostile entity."³³⁸ This designation intentionally elides any distinction between military/combatants and civilian persons in Gaza into one imagined, de-humanized, and innately hostile target, which in the assessment of Israeli policy, is subject to attack. Despite claims from Israel's then-Prime Minister Ehud Olmert's Office that the heightened, comprehensive sanctions were to be "imposed on the Hamas regime," the means and methods used in the course of Israel's closure, namely the near absolute ongoing restrictions imposed on the movement of people, goods, and services to and from the Gaza Strip, whether by land,

³³⁴ See *Katanga* Trial Judgment, para. 1136; see also *id.* at para. 730 ("although Bogoro was a strategic military position, those who lived there also led civilian lives").

³³⁵ *Côte d'Ivoire* Authorisation to Investigate Decision, para. 32.

³³⁶ See *supra* para. 69, on how " Hamas" must be understood and the protections due the civilian population.

³³⁷ This is purportedly evidenced by only Hamas's success in the 2006 Palestinian Legislative Elections.

³³⁸ Press Release, Isr. Ministry of Foreign Affairs, Security Cabinet declares Gaza hostile territory (19 Sept. 2007), <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm>.

sea or air, were not restricted to targeting Hamas, but in fact were imposed, and remain imposed, *in toto* on the entire civilian population of Gaza.³³⁹ Hamas has not been singled out or differentiated for different treatment under the current closure's restrictions, rather the civilian population and Hamas are targeted in the same way.

254. High-level Israeli politicians have repeatedly articulated the notion that Hamas, rather than Israel, is “responsible” for the ongoing closure. In an absurd reversal of facts, Deputy Foreign Minister Danny Ayalon proclaimed that “Hamas built an open-air prison for the million and a half inhabitants who fell into its grasp,”³⁴⁰ despite the fact that Israel, not Hamas, controls who and what can enter and leave the territory of Gaza. Referring again to the closure that Israel imposes on the Gaza Strip, Ayalon has also asserted: “Unfortunately, Hamas has established a blockade on the Palestinian people in Gaza. The future of the blockade depends *solely* on Hamas.”³⁴¹ Making clear that Israel considers Gaza's civilian population to be the target of its closure regime and military deterrence efforts, Ehud Olmert, while he was Prime Minister, claimed that “there is no justification for demanding we allow residents of Gaza to live normal lives while shells are fired from their streets and courtyards.”³⁴²

255. No Israeli official has rejected Ayalon, Olmert's comments in the intervening years, and certainly not since 13 June 2014. Indeed, during the deadly July-August 2014 Israeli military offensive “Operation Protective Edge,” Israel's Prime Minister Benjamin Netanyahu announced in a speech at the Ministry of Defense that “We regret every injury to innocents but insofar as they are harmed, Hamas – and Hamas alone – is to blame.”³⁴³ Equating, without evidence, all civilians in Gaza to human shields for Hamas, Netanyahu told the UN Secretary

³³⁹ Population figures reported by UNRWA as of 1 July 2014. *Where We Work – Gaza Strip*, UNRWA, <http://www.unrwa.org/where-we-work/gaza-strip>. UNRWA defines Palestine refugees as “persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict.” See *Palestine Refugees*, UNRWA, <http://www.unrwa.org/palestine-refugees>.

³⁴⁰ Danny Ayalon, *Hamas leaves Israel no choice*, THE GUARDIAN, 19 Nov. 2012, <http://www.theguardian.com/commentisfree/2012/nov/19/hamas-leaves-israel-no-choice>.

³⁴¹ Press Release, Isr. Ministry of Foreign Affairs, DFM Ayalon meets with senior Italian officials (16 June 2010), <http://mfa.gov.il/MFA/PressRoom/2010/Pages/DFM-Ayalon-meets-with-Italian-officials-16-Jun-2010.aspx>.

³⁴² *WikiLeaks: Israel Aimed to Keep Gaza Economy on Brink of Collapse*, HAARETZ, 5 Jan. 2011, <http://www.haaretz.com/israel-news/wikileaks-israel-aimed-to-keep-gaza-economy-on-brink-of-collapse-1.335354>.

³⁴³ Press Release, Israeli Prime Minister's Office, PM Netanyahu's statement at the Defense Ministry in Tel Aviv, 20 July 2014, available at <http://www.pmo.gov.il/english/mediacenter/speeches/pages/speechkirya200714.aspx>.

General that “ Hamas is responsible when civilians in Gaza are hit by mistake.”³⁴⁴ Later, he suggested that Hamas, rather than Israel, was holding Gaza’s civilians hostage: “ I think the people of Gaza...are the victims of the brutal Hamas regime. They are holding them hostage and they are hiding behind them,”³⁴⁵ though Israel kept Gaza’s border crossings closed to civilians and Hamas alike during the 2014 military offensive, preventing civilians from seeking refuge outside of Gaza. The Deputy Speaker of Israel’s parliament, Moshe Feiglin, directly stated the assumption of guilt by association for Gaza’s civilians when he asserted that “ The only innocents in Gaza are the IDF soldiers.”³⁴⁶

256. As evidenced in these illustrative statements, Israel imposes closure restrictions to punish the civilian population of Gaza, ostensibly for the actions and political posturing of Hamas – although the punishment of the closure continues unabated irrespective of any military activity or armed resistance. Effectively, as the ICRC has acknowledged, “ The whole of Gaza’s civilian population is being punished for acts for which they bear no responsibility.”³⁴⁷ UN independent experts have similarly concluded that “ ...the human rights of the people of Gaza are disregarded because of the positions adopted by political leaders,” noting that “[i]t is not the Hamas Government that is being punished, but ordinary Gazans.”³⁴⁸ Indeed, as the Occupying Power, Israel bears responsibility to ensure the welfare – not the punishment – of the civilian population in Gaza under its effective control.

257. Even further, Israel actually uses the political designation of Gaza as a “ hostile entity” to illegally categorize and justify both its ongoing closure policy and periodic military attacks on Gaza as “ self-defense,” a categorization of conduct not applicable to the relationship of hostilities between an Occupying Power and armed resistance groups within the territories occupied, even if said resistance groups commit violations of international humanitarian law.

258. The means, method and overwhelmingly punitive nature of the crimes committed also demonstrate that the civilian population is the primary target rather than solely Hamas-

³⁴⁴ Press Release, Israeli Prime Minister’s Office, PM Netanyahu Speaks with World Leaders in Wake of Operation Protective Edge, 9 July 2014, *available at* <http://www.pmo.gov.il/english/mediacenter/spokesman/pages/spokecon090714.aspx>.

³⁴⁵ Press Release, Israeli Prime Minister’s Office, PM Netanyahu’s Remarks at his Meeting with UN Secretary General Ban Ki-moon, 22 July 2014, *available at* <http://www.pmo.gov.il/english/mediacenter/events/pages/eventkimoon220714.aspx>

³⁴⁶ Moshe Feiglin, *We Are the Good Guys*, JEWISH ISRAEL, 28 July 2014, <http://www.jewishisrael.org/good-guys-moshe-feiglin/>.

³⁴⁷ ICRC, “ Gaza closure: not another year!” *supra* n. 8.

³⁴⁸ Press Release, U.N. Office of the High Comm’r on Human Rights, How can Israel’s blockade of Gaza be legal? (13 Sept. 2011), <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11363&LangID=E>.

affiliated or other militants. The mechanisms of the current closure take direct aim at the fundamental building blocks of physical life, psychological stability, social and national structures, and basic dignity. Depriving the civilian population of adequate food, fuel, sanitary water, and healthcare supplies, all while strangling the economy to the point of destroying productive capacities and actively reversing the society's development process appear designed to manufacture a humanitarian crisis so severe that the population would abandon its support of the ruling Hamas government — and punish it for such support. In this respect, the target of Israel's absolute closure policy is clearly the civilian population of Gaza.

3. Nexus to State Policy

259. According to the Elements of Crimes, the nexus between State policy and the attack in question must be such that an organization “actively promoted or encouraged” the attack. While the policy in question does not have to be explicitly formalized, it should be organized and follow a regular pattern.³⁴⁹ It can be conducted in furtherance of a common policy involving public or private resources, and implemented by a group who governs a specific territory or otherwise has the capability to commit a widespread or systematic attack against a civilian population.³⁵⁰ According to the Trial Chamber in *Katanga*, “[i]n most cases, the existence of such a State or organizational policy can therefore be inferred by discernment of, *inter alia*, repeated actions occurring according to the same sequence, or the existence or preparations or collective mobilisation orchestrated and coordinated by the State or organization.”³⁵¹

260. The main purpose behind the policy requirement is to distinguish between spontaneous or isolated criminal acts or “crime sprees,” as opposed to crimes against humanity,³⁵² in which the elements comprising the attack must be “widespread” or “systematic.”³⁵³ In this situation, the “policy” in question is the multi-tiered State policy of

³⁴⁹ The policy itself does not need to be discriminatory (only the accumulated acts that amount to persecution); see Elements of Crimes.

³⁵⁰ *Côte d'Ivoire* Authorisation to Investigate Decision, para. 43 (“indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this particular criterion”).

³⁵¹ *Katanga* Trial Judgment, para. 1109. Notably, the Chamber further found that the policy “may therefore become clear to the perpetrators, as regards its modalities, only in the course of its implementation, such that definition of the overall policy is possible only *in retrospect*, once the acts have been committed and in the light of the overall operation or course of conduct pursued.” *Id.* at para. 1110.

³⁵² See, e.g., “[T]he policy element only requires that the acts of individuals alone, which are isolated, uncoordinated, and haphazard, be excluded.” R. Dixon, C.K. Hall, “Article 7,” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2d. ed. (Beck/Hart, 2008), p. 236.

³⁵³ See, e.g., *Kenya* Authorization to Investigate Decision, paras. 83-86.

closure, namely that of the Israeli political and military leadership governing the planned, coordinated and organized conduct of Israeli forces in physically and administratively dominating the civilian population of Palestine, by, *inter alia*, restricting flows of individuals, goods and services into, out of Gaza and even within the occupied Palestinian territory.

261. Although the nexus between the attack and State policy is self-evident, as the attack in question is the implementation and impact of Israel's closure policy in relation to the Gaza Strip, the Trial Chamber's finding in *Katanga* are germane for establishing that the Palestinian civilian population of Gaza is the primary target of Israel's current closure policy. In assessing the "policy" element of the attack against the Hema civilian population in the *Katanga* case, for instance, the Trial Chamber found it relevant that the combatants "called the Hema their 'enemies' as they were believed to be oppressors and potential invaders of their territory." The Chamber noted that the combatants "were driven by vengefulness arising from the previous attacks to which they had been subjected," and considered it relevant that the combatants thought of the opposing military force, the UPC, and the Hema, as an ethnic group and "their enemy – to them, the two were of the one ilk."³⁵⁴

4. Establishing the Widespread and/or Systematic scope of the attack

262. The underlying attack in crimes against humanity must be *either* widespread *or* systematic in scope.³⁵⁵ Importantly, it is the attack considered as a whole, and not the individual acts alleged that must be widespread or systematic.³⁵⁶

263. The Pre-trial Chamber has found that a "*widespread*" attack reflects "the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims."³⁵⁷ "Widespread" refers to "both the large-scale nature of the attack and the number of resulting victims,"³⁵⁸ but "is not exclusively quantitative or geographical"³⁵⁹ in its reference. "Widespread" can refer to "the singular effect of an inhumane act of extraordinary magnitude," or, as is particularly relevant for the attack under consideration, the "cumulative effect of a series of inhumane

³⁵⁴ *Katanga* Trial Judgment, paras. 1143-44.

³⁵⁵ The requirements that acts be widespread or systematic was agreed upon as the appropriate "threshold" in order to distinguish crimes against humanity from common or local crimes, and to bar sporadic acts from being considered crimes against humanity. *See, e.g.*, Darryl Robinson, "The Elements of Crimes Against Humanity," in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 58.

³⁵⁶ *Id.*

³⁵⁷ *Kenya* Authorization to Investigate Decision, para. 95, citing *Bemba* Confirmation of Charges Decision, para. 83.

³⁵⁸ *Kenya* Authorization to Investigate Decision, para. 95.

³⁵⁹ *Côte d'Ivoire* Authorisation to Investigate Decision, para. 53.

acts.”³⁶⁰ There is “no specific numerical threshold” that must be met to consider an attack “widespread.”³⁶¹ Rather, a case-by-case assessment of the size of the civilian population that was attacked must be made, and the “means, methods, resources and results of the attack” must be analyzed in turn.³⁶²

264. In contrast, the Pre-trial Chamber has found the criteria for a “systematic” attack to include being “organized and follow[ing] a consistent pattern.”³⁶³ A systematic attack further refers to the “improbability of their random occurrence,”³⁶⁴ and can “often be expressed through a pattern of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.”³⁶⁵ An attack may be both widespread and systematic in accordance with the extended time period in which crimes were carried out, the geographical range of the alleged crimes and the “high number of reported victims” can distinguish an attack that is both.”³⁶⁶

265. The attack in question in the framework of the ongoing collective closure policy towards the Gaza Strip satisfies the criteria for both a widespread and systematic attack. Although it is impossible to calculate the exact number of victims, it is not exaggeration to say that the current closure of Gaza significantly impacts the daily life and future prospects of all 2 million Palestinians residing in Gaza, and many other Palestinians living in other parts of occupied Palestine (2.7 million in the occupied West Bank, including East Jerusalem). The extensive codification of the policies and procures of the closure policy, such as the

³⁶⁰ Kenya Authorization to Investigate Decision, para. 95 (citations omitted).

³⁶¹ Special Rapporteur on Crimes Against Humanity, First rep. on crimes against humanity, Int’l Law Comm’n, U.N. Doc. A/CN.4/680 (17 Feb. 2015) (by Sean D. Murphy), para. 128 (hereinafter “Special Rapporteur on Crimes Against Humanity report”).

³⁶² *Id.*, citing *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23/1-A, Judgment, 12 June 2002, para. 95.

³⁶³ *Id.*

³⁶⁴ *Katanga* Confirmation of Charges Decision, para. 394 (citations omitted). *See also* Kenya Authorization to Investigate Decision, para. 96 (citations omitted) (qualification of “systematic” is understood to reflect the “organized nature of the acts of violence and the improbability of their random occurrence.”).

³⁶⁵ Kenya Authorization to Investigate Decision, para. 96. *See also* *Katanga* Trial Judgment, para. 1113, finding that analysis of systematic: “entails inquiry as to whether a series of repeated actions seeking to produce always the same effects on a civilian population was undertaken with consideration – identical acts or similarities in criminal practices, continual repetition of a same *modus operandi*, similar treatment meted out to victims or consistency in such treatment across a wide geographic area.”

³⁶⁶ *See* Côte d’Ivoire Authorisation to Investigate Decision, para. 62. The Prosecutor submitted that the violence included three main elements: raids by State security forces against neighborhoods that were perceived to be allied with a political opponent; excessive force to disperse protestors; and military roadblocks and checkpoints at which killings occurred. *Id.* at para. 55. *See also* Kenya Authorization to Investigate Decision, para. 131, finding that in a two-month period, 1,133-1,220 killed, 3,561 injured, approximately 350,000 displaced, and an increase in the number of rapes and other acts of sexual violence.

restrictions regulating the movement of people and goods in exceptional circumstances, easily demonstrate the systematic nature of the closure policy and its restrictions.

B. The Crime against Humanity of Persecution

266. Persecution, as an extreme form of discrimination used to particularly repugnant ends, has been called “one of the most vicious of all crimes against humanity,” because it “nourishes its roots in the negation of the principle of equality of all human beings.”³⁶⁷ Indeed, “discrimination is the essence of the crime of persecution.”³⁶⁸ For this reason, persecution has been described as “the quintessential international crime on some definitions, or at the very least the quintessential crime against humanity,”³⁶⁹ as it cuts “to the heart of what it is to be human” by targeting “the combination of a person’s very individuality and his or her ability to associate and identify with others.”³⁷⁰ Persecution not only “reduces a person to their identification with or membership in a group,” but also “attacks the group itself.”³⁷¹ The criminalization of persecution at the international level attempts to protect these fundamental aspects of “humanness,” and as with all crimes against humanity, “the entire community of humankind has an interest in [its] punishment.”³⁷²

267. The terms “persecute” and “persecution” are generally associated with discriminatory practices that aim to cause harm or suffering.³⁷³ Importantly for the conduct in question in the context of Gaza, such discriminatory suffering need not be purely physical, but may also be of a, *inter alia*, economic, judicial, and psychological nature.³⁷⁴

³⁶⁷ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 Jan. 2000, para. 568, para. 751 (hereinafter “*Kupreškić Trial Judgment*”). The Trial Chamber further found that persecution is “one step away from genocide.” *Id.* See also *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 697 (hereinafter “*Tadić Trial Judgment*”) (“It is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution” when done on a recognized discriminatory basis).

³⁶⁸ Darryl Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference,” in *Developments in International Law*, 93 AM. J. INT’L L. 43, 46 (1999).

³⁶⁹ Evolution of Persecution, *supra* n. 328 at 554.

³⁷⁰ *Id.*

³⁷¹ *Id.* (referencing David Luban, “A Theory of Crimes Against Humanity,” in 29 YALE J. INT’L L. 116, 116-117 (2004)).

³⁷² Special Rapporteur on Crimes Against Humanity report, para. 27.

³⁷³ See Cherif M. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011), p. 396.

³⁷⁴ See *Tadić Trial Judgment*, para. 710; *Kupreškić Trial Judgment*, para. 568 (“It is clear that persecution may take diverse forms, and does not necessarily require a physical element.”). See also *United States v. Josef Altstoetter et al.* (“*Justice Case*”), “Opinion and Judgment,” 3-4 Dec. 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. III, , 1951, pp. 1063-64, 1114 (hereinafter “*Justice Case*”) (addressing “lesser forms of racial persecution” such as exclusion from certain professions, economic deprivations, restrictions on rights to marry, and passing of other discriminatory laws, noting

268. Though persecution has no direct counterpart in war crimes and historically had none in domestic criminal justice systems (except where the ICC Statute's crimes have been domestically incorporated),³⁷⁵ it has been included amongst the acts comprising crimes against humanity since their inception in international law in the Charter of the International Military Tribunal established at Nuremberg (hereinafter "Nuremberg Charter").³⁷⁶ Persecution on such grounds was also included in Control Council Law No. 10; the Tokyo Tribunal for the Far East; the Statutes of the International Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

269. While persecution can manifest in many different forms, its central characteristic across its several codifications in international law has been the deprivation of fundamental rights that every individual is entitled to without distinction.³⁷⁷ According to a composite definition approximating the universally accepted meaning of this crime, persecution is:

State policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or **membership in a given identifiable group (religious, social, ethnic, linguistic etc.),** or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.³⁷⁸

1. Legal Requirements of the Crime against Humanity of Persecution under Article 7(1)(h) of the Statute

270. Article 7(1)(h) of the ICC Statute proscribes the crime of persecution as follows:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

271. Article 7(2)(g) of the ICC Statute further defines the concept, elaborating that "persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

some acts may seem "to be a small matter compared to the extermination of Jews by the millions under other procedures" but which formed part of a plan for persecution "not only by murder and imprisonment but by depriving [Jews] of the means of livelihood and of equal rights in the courts of law").

³⁷⁵ See Evolution of Persecution, *supra* n. 328 at 501.

³⁷⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, Charter of the International Military Tribunal, art. 6(c), 8 Aug. 1945, 82 U.N.T.S. 280.

³⁷⁷ Special Rapporteur on Crimes Against Humanity report, para.81, 88; Rep. of the Int'l Law Comm'n, 48th Sess., 6 May-26 July 1996, U.N. Doc. A/51/10, p.49 (hereinafter "ILC Report").

³⁷⁸ Bassiouni, Crimes Against Humanity, *supra* n. 375 at 396.

272. The Elements of Crimes (EoC) developed by the Preparatory Commission established after the 1998 Rome Conference defines the elements of persecution as follows:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

273. Persecution can be committed through acts or omissions that discriminate in fact.³⁷⁹ In addition, the chapeau elements for crimes against humanity must be established, *inter alia*, a widespread or systematic attack against a civilian population pursuant to a State or organizational policy. These requirements distinguish a crime against humanity from an ordinary crime, or an alternative international crime.

274. While the elements of crimes against humanity must be seen as a whole, the following section will analyze each sub-element of persecution in turn. It first discusses the *actus reus* elements of the crime, including the underlying acts constituting deprivations of fundamental rights, as well as the target of the crime and relevant grounds for discrimination. The last two elements of the crime of persecution are features of all crimes against humanity, which will then be addressed. Finally, the *mens rea* elements will be discussed and analyzed.

a) *The Actus Reus Elements of Persecution in the ICC*

275. When assessing the *actus reus* of persecution, courts often rely on a cumulative assessment of underlying acts rather than considering each act in isolation,³⁸⁰ with the focus

³⁷⁹ See, e.g., *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgment, 24 Mar. 2016, para. 498 (hereinafter “*Karadžić Trial Judgment*”) (citing authorities omitted).

³⁸⁰ See, e.g., *Kupreškić Trial Judgment*, paras. 615 and 622, referencing the *Justice Case* at 1063: “the record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offence charged in the indictment.”

being on the cumulative effect of the various persecutory acts.³⁸¹ To properly assess the effect, courts examine the context in which the discriminatory acts occur.³⁸²

276. In this case, persecution is effectuated by the deprivation of a range of fundamental human rights, the deprivation of the right to be free from collective punishment and other inhumane acts, in a situation where Israel has occupied Palestinian territory, including Gaza, for 50 years and instituted a series of policies and practices, including the ongoing closure policy for Gaza, that have discriminated against, punished and denied Palestinians enjoyment of many of their most basic rights. The Palestinian Human Rights Organizations respectfully submit that examining each of these acts individually, and certainly examining the cumulative effect, demonstrates that the crime of persecution has been committed and is ongoing as a result of the Israeli closure policy for the Gaza Strip and the Palestinian civilians living there and impacted directly and on a daily basis by it.

i. Denial of Fundamental Human Rights and Freedoms

277. There is no question that a range of well-recognized rights have been violated in the context of Israel's current closure policy as imposed on the Gaza Strip since 2007, and particularly in the period since 13 June 2014. According to the Statute and its EoC, such deprivation of rights resulting from the closure must be shown to amount to "the intentional and severe deprivation of fundamental rights contrary to international law."

278. This standard echoes the "gross and blatant denial of fundamental rights" standard established by the ICTY and ICTR, and indeed, that reflected under the crime of persecution in customary international law.³⁸³ The meaning of "fundamental rights" is not defined or

³⁸¹ See *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment, 15 Mar. 2002, para. 434 (hereinafter "*Krnojelac* Trial Judgment"). It is recalled, however, that a single act may be sufficient if it discriminates in fact and is carried out with the requisite intent. See, e.g., *Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-T, Judgment, 1 Sept. 2004, paras. 994 and 1031 (hereinafter "*Brdjanin* Trial Judgment") (citations omitted).

³⁸² See, e.g., *Kupreškić* Trial Judgment, para. 622 (opining that "acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect"); *Brdjanin* Trial Judgment, para. 995 (citations omitted).

³⁸³ Despite the consistent inclusion of persecution as a crime against humanity in post-World War II legal proceedings, it was only in the ICTY and ICTR jurisprudence that the content of the crime began to be elaborated upon. The ICC definition is largely in accord with those of other international tribunals. The ICTY has defined "persecution" as "an act or omission which does the following: 1.[D]iscriminates in fact and which denies or infringes upon a fundamental right laid down in international or customary or treaty law (the *actus reus*); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)." *Krnojelac* Trial Judgment, para. 431. This definition has been consistently adopted at the ICTY. See e.g., *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgment, 17 Sept. 2003, para. 185 (hereinafter "*Krnojelac* Appeal Judgment"); *Karadžić*

further elaborated in either the Statute or the EoC. Significant debate regarding this omission occurred in the Preparatory Commission negotiations on the drafting of the EoC, as “[s]ome delegates wanted to ensure that persons would not be held criminally liable at the ICC for failing to observe values or norms recognized in some states but not others.”³⁸⁴ The delegates wanted to ensure that the provision only covered those rights recognized as universal rights under customary international law, or those agreed to through treaty by the State in question. This was integrated into the ICC Statute and the EoC with the language of deprivation of fundamental rights “contrary to international law.”³⁸⁵

279. The issue of whether rights qualify as “fundamental” for the purpose of the crime of persecution is to be decided by the Court on a case-by-case basis. As the jurisprudence of the ICTY instructs, “courts [require] flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits.”³⁸⁶

280. The jurisprudence of the *ad hoc* tribunals and international instruments such as, *inter alia*, the 1948 Universal Declaration of Human Rights (“UDHR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), and the International Covenant on Civil and Political Rights (“ICCPR”), provide the Court with instructive guidance in determining which rights constitute “fundamental rights” such that denial of the enjoyment of that right on a discriminatory basis can constitute an underlying act of persecution.³⁸⁷ With

Trial Judgment, paras. 497-500. The ICTR has also applied the ICTY’s definition of persecution as set out in the *Krnjelac* Appeal Judgment. See *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Judgment, 28 Nov. 2007, para. 985.

³⁸⁴ Evolution of Persecution, *supra* n. 328 at 545.

³⁸⁵ The necessity that the right in question be universally recognized is included in the first paragraph of the Elements of Crimes’ Introduction to Crimes against humanity, though not in the elements of persecution specifically.

³⁸⁶ *Kupreškić* Trial Judgment, para. 623.

³⁸⁷ *Id.* at para. 621. The Trial Chamber found:

Drawing upon the various provisions of these texts it proves possible to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity [and accordingly defines] persecution as the gross or blatant denial, on discriminatory grounds of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 [of the ICTY Statute].(emphasis in original)

Israel ratified the ICCPR and ICESCR in 1991; Palestine acceded to the ICCPR and ICESCR in 2014. Israel ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1979 and Palestine acceded to ICERD in 2014. See also International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature and ratification by G. A. Res. 3068 (XXVIII) of 30 Nov. 1973, 1015 U.N.T.S. 243.

respect to the type of rights recognized in the jurisprudence of the Court thus far, a particular trend has emerged whereby:

To date the prosecution's charging of persecution at the ICC has been based on acts that are arguably more 'traditional' violations of fundamental rights, namely, the right to life, the right to physical and mental integrity, the right to remain in one's own home and community and the right to property (manifest as acts of murder, deportation and forcible transfer, rape and sexual violence, inhumane acts, destruction or pillaging of property) and which are also in and of themselves criminal under the ICC Statute.³⁸⁸

281. However, this does not in any way infer that the denial of other universally recognized rights could not also be charged. Both the post-Second World War tribunals as well as the ICTY and ICTR have included a wider range of fundamental rights within the purview of persecution charges. Notably, the underlying acts that constitute persecution need not be considered a crime under international law.³⁸⁹ It has been observed that the development of crimes against humanity, and specifically persecution, and the human rights movement have been "mutually reinforcing" in advancing the protection of the individual – all individuals – against State or organized power.³⁹⁰ Indeed, this was made clear by the International Law Commission commentary, "what was intended to be captured by the offence was broad, and deeply informed by the human rights protections codified in, *inter alia*, the UN Charter and the ICCPR's provision on non-discrimination."³⁹¹ Accordingly, fundamental rights covered

³⁸⁸ Evolution of Persecution, *supra* n. 328 at 547. The recent *Georgia* Authorization to Investigate Decision affirms that trend. *See id.* at para. 31 (referencing evidence of killings, displacement, severe beatings, threats and intimidation, detention, looting and destruction of property).

³⁸⁹ *See Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-A, Judgment, 3 Apr. 2007, para. 296 (hereinafter "*Brdjanin* Appeal Judgment"). *See also Krnojelac* Appeal Judgment, Separate Opinion of Judge Shahabuddeen, para. 6, quoting *United States v. Ernst von Weizsaecker et al.*, "Judgment", 11-13 Apr. 1949, in *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. XIV, 1951, p. 470 (hereinafter "*Ministries* Case") for the finding that the underlying acts of persecution need not be criminal or specified anywhere in international criminal law: "The persecution of Jews went on steadily from step to step and finally to death in foul form. The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, and to practice professions, to obtain education, to engage in business enterprises, they were forbidden to marry except among themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, mutilation, and torture; their property was confiscated; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they were worked to exhaustion and death; they became slave laborers; and finally over six million were murdered."

³⁹⁰ Evolution of Persecution, at 497-98.

³⁹¹ Evolution of Persecution, *supra* n. 328 at 499, referencing ILC Report, p.49: "The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Arts. 1 and 55) and the [ICCPR] (Art.2)."

under the crime of persecution at the ICC could also include, *inter alia*, the right to adequate food, housing and health, as well as the right to obtain education.³⁹²

282. The factual section above makes clear that the closure policy imposed on Gaza since 2007, and particularly the ongoing closure of Gaza in the period since 13 June 2014, has resulted and continues to result in the severe deprivation of a wide range of rights for the Gaza Strip's 2 million Palestinian residents.³⁹³ In this regard, the Palestinian Human Rights Organizations recall the findings of an ICTY Trial Chamber that "it is appropriate...to look at the cumulative denial of the rights to employment, freedom of movement, proper judicial process and proper medical care in order to determine whether these are fundamental rights for the purposes of establishing persecutions."³⁹⁴ An illustrative rather than exhaustive list of the rights deprived by Israel's implementation of its closure policy, include, *inter alia*: **the right to freedom of movement;**³⁹⁵ **the right to life and physical security;**³⁹⁶ **the right to work;**³⁹⁷ **the right to an adequate standard of living, including the right to adequate food, water, and housing;**³⁹⁸ **the right to health;**³⁹⁹ **the right to obtain an education;**⁴⁰⁰

³⁹² Evolution of Persecution, *supra* n. 328 at 547.

³⁹³ The Palestinian Human Rights Organizations recall that the violations resulting from the ongoing closure are committed in the context of an ongoing belligerent occupation which constitutes an international armed conflict (*see, e.g., Georgia Authorization to Investigate Decision*, para. 27) and could also be characterized as war crimes, including but not limited to under Article 8(2)(a)(ii) and 8(2)(a)(iii).

³⁹⁴ *Brdjanin* Trial Judgment, para. 1031.

³⁹⁵ See UDHR, Art. 13; ICCPR, Art. 12(1). This right includes being "free to leave any country, including his own," *Id.* 12(2), and cannot be restricted "except those which are provided by law, are *necessary* to protect national security, public order, public health or morals or the rights and freedoms of others, *and are consistent with the other rights recognized in the present Covenant.*" Art. 12(3) (emphasis added). As the General Comment on freedom of movement states: "it is not sufficient that the restriction serve the permissible purpose; they must be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."

U.N. Human Rights Committee, General Comments adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 27 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 1 Nov. 1999, Para. 14. The General Comment further provides that "[t]he application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination...it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin[...]" *Id.* at para 18. *See also Brdjanin* Trial Judgment, paras. 1042-1043, 1049.

³⁹⁶ See UDHR, Art. 3; ICCPR, Art. 6(1).

³⁹⁷ See, ICESCR, Art. 6. *See also Brdjanin* Trial Judgment, paras. 1032-1041, 1049.

³⁹⁸ See UDHR, Art. 25; ICESCR, Art. 11. See Al Mezan and Lawyers for Palestinian Human Rights "Complaint concerning destruction and damage to family houses in the Gaza Strip with associated loss of life and injury to Palestinian residents, during Israel's military operation between 7 July 2014 and August 26 2014," 30 Sept. 2014, *available at* <http://lphr.org.uk/latest-news/lphr-al-mezan-submit-comprehensive-complaint-united-nations-concerning-large-scale-destruction-damage-family-homes-gaza-strip-associated-profound-loss-life-injury/>; ICESCR, General comment No. 4, The right to adequate housing (1991). See

freedom from discrimination and equal protection of the law;⁴⁰¹ the right to family life;⁴⁰² the right to self-determination;⁴⁰³ and finally, the overarching right to dignity of the entire civilian population of Gaza.⁴⁰⁴

283. Indeed, the closure imposed on the Gaza Strip, at its most elemental, denies the Gaza population's basic and critical right to freedom of movement,⁴⁰⁵ and largely flowing from the denial of freedom of movement of goods and people, it also deprives the population of Gaza to fundamental rights such as an adequate standard of living, both as to physical well-being and to pursue a livelihood: the entire civilian population of Gaza suffers from the closure's impact on key infrastructure and resource flows, namely limitations on electricity, fuel, water, medical supplies, and construction materials necessary for rebuilding homes and infrastructure destroyed during Israeli military operations. The civilian population as a whole has had their right to health severely compromised due to the lack of clean water, functioning sanitation systems, and fully operational and supplied medical facilities. These deprivations, even if not directly caused by the closure alone, are actively perpetuated by the closure's denial of the material resources and human capital required to fix and sustain these necessary systems. The closure infringes on the right to education of children, university students and the general population due to the destruction of education infrastructure and cuts to power that have kept schools shuttered for significant portions of the school year as well as the denial of

also, U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (The right to water (arts. 11 and 12 of ICESCR)), E/C.12/2002/11, 20 Jan. 2003, para. 1 (“The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”); *Blaškić* Appeal Judgment, para. 155 (finding that subjecting Bosnian Muslim civilians to *inter alia* physical or psychological abuse and intimidation, inhumane treatment, and deprived of adequate food and water, all rise to the level of gravity of other crimes enumerated in Article 5 [of the ICTY Statute]).

³⁹⁹ See UDHR, Art. 25; ICESCR, Art. 12. See also U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (The right to the highest attainable standard of health (art. 12 of ICESCR)), E/C.12/2000/4, 11 Aug. 2000, para. 11 (The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.”). See also *Tadić* Trial Judgment, para. 707.

⁴⁰⁰ See UDHR, Art. 26; ICESCR, Art. 13(1). See, e.g., *Ministries Case*, p. 471.

⁴⁰¹ See UDHR, Art. 7; ICCPR, Art. 26; ICERD, Arts. 2 and 5. See also *Karadžić* Trial Judgment, para. 535.

⁴⁰² See ICERD, Art. 5(d)(iv); ICCPR Arts. 23 and 17(1). See *Adalah et al v. Minister of Interior*, Petition, Supreme Court in Jerusalem sitting at the High Court of Justice, H.C. 7052/03, August 2003, available at: http://www.adalah.org/uploads/oldfiles/features/famuni/2003july_fam_uni_pet-eng.pdf.

⁴⁰³ See ICCPR, Art. 1(1); ICESCR, Art. 1(1).

⁴⁰⁴ See, e.g., ICCPR, Preamble.

⁴⁰⁵ Indeed, the Human Rights Committee has found that “[l]iberty of movement is an indispensable condition for the free development of a person.” U.N. Human Rights Committee, General Comment No. 27, para. 1.

the right to pursue educational opportunities, including advanced professional training, outside of Gaza.

284. An illustrative, rather than exhaustive, list of the underlying acts of persecution in relation to Israel's closure policy imposed on the Gaza Strip since 2007 and ongoing through the period during which this Court indisputably has jurisdiction include the establishment and maintenance of a naval blockade, land closures, and air closure; ultimate control of the Palestinian population registry, including control over, *inter alia*, residency in the Gaza Strip; economic restrictions and sanctions on imports and exports; displacement of people, particularly during military operations such as "Operation Protective Edge"; wanton destruction; destruction of productive economic capacity; terrorizing the civilian population; denial of proper judicial process and medical care; denial of employment; denial of freedom of movement; harassment; humiliation and psychological abuse; denying choice of spouse; and hate speech.

285. As a group of five UN experts have found in relation to the absolute closure of Gaza:

Under human rights law and international humanitarian law the people of Gaza, even while living under occupation, have the right to an adequate standard of living, and to the continued improvement of living conditions. This right includes access to affordable and adequate food, and sufficient quantities of safe, accessible and affordable water, as well as proper sanitation services and facilities. Gazans also have the right to the highest attainable standard of physical and mental health, but for many years have been experiencing declining and subsistence standards that are below minimum levels.⁴⁰⁶

286. The opening of an investigation by the Office of the Prosecutor into the ongoing closure of Gaza and resulting denial of fundamental rights could bring about a much-needed and long overdue end to the ongoing violation.

ii. Deprivation of the Right to be Free from Collective Punishment

287. In addition to the fundamental human rights denied by Israel's discriminatory closure policy, Palestinians of Gaza are denied the right to be free from collective punishment – a right codified in Article 33 of the Fourth Geneva Convention.⁴⁰⁷ This provision is absolute and mandatory in character and cannot be derogated even in case of military necessity.⁴⁰⁸

⁴⁰⁶ OHCHR, "How can Israel's blockade of Gaza be legal? – UN independent experts on the 'Palmer Report.'" (13 September 2011), available online at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11363&LangID=E>

⁴⁰⁷ Article 33 provides: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited."

288. The prohibition of collective punishment under international humanitarian law was already codified in Article 50 of The Hague Regulations of 1907 which states that “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible”. The principle is also enshrined in the First Additional Protocol to the Geneva Conventions of 1977, which is considered to have acquired customary status.

289. Moreover, it is a general principle of criminal law that no one shall be punished for an offence committed by others, thus confirming the illegality of collective punishments under international customary law.⁴⁰⁹

290. The entire civilian population of Gaza is being punished by Israel’s closure policy because the governing authority is Hamas and/or for acts committed by armed resistance groups.

iii. Other Inhumane Acts

291. The acts and omissions through the Israeli policy of closure also constitute other inhumane acts causing suffering or serious injury to body or mental or physical health, when such acts are similar in character to those listed in Article 7(1) of the Statute.⁴¹⁰ The Court has clarified that an act is “similar in character” to other crimes in section 7(1)(a)-(j) when it has a

As the occupying power, Israel has to respect and protect the rights of persons in the Gaza Strip, and refrain from taking any action that would violate the rights of Palestinian civilians in the Gaza Strip. See, e.g., Conference of High Contracting Parties to the Fourth Geneva Convention: Statement, Geneva, 15 July 1999; See also ICJ, *Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 78. See November 2015 Submission, *supra* n. 5, paras. 16-18, 237-241.

⁴⁰⁸ The ICRC observed that the penalties referred to in this Article are “penalties of any kind inflicted on persons or entire groups of persons in defiance of the most elementary principles of humanity, for acts that those persons have not committed.” ICRC Commentary on IV Geneva Convention (1958, reprint 1994) p.225. The ICRC was prescient when expressing its concerns about the impact of collective punishment and terrorizing a civilian population – a warning that Israel should take heed of: “...in resorting to intimidatory measures to terrorise the population, the belligerents hoped to prevent hostile acts. Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance. They strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be.” *Id.* at p. 226.

⁴⁰⁹ See, e.g., ICRC Commentary on IV Geneva Convention (1958, reprint 1994). P. 225: “The first paragraph [of Article 33] embodies in international law one of the general principles of domestic law, i.e., that penal liability is personal in character...Responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of.”

⁴¹⁰ See, e.g., *Côte d’Ivoire Authorisation to Investigate Decision*, para. 83. See also *Karadžić Trial Judgment*, para. 509 (finding that “subjecting victims to constant humiliation and degradation may amount to psychological abuse as an underlying act of persecution.”).

similar “nature and gravity” to those crimes.⁴¹¹ The crime of persecution is committed both in connection with the crime of other inhumane acts and through inhumane acts committed of a discriminatory basis. These acts are discussed under Section VI(C), The Crime against Humanity of Inhumane Acts.

b) *The Targets of the Crime and the Discriminatory Grounds*

292. For the severe deprivations of fundamental rights described above to qualify as the crime of persecution, the act or the omissions of the perpetrator must have “targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.”⁴¹² As specified by element three of the EoC with regard to the crime of persecution, the targeting of the persecuted group must be “based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.”

293. The group must be “‘identifiable,’ either based on objective criteria or in the mind of the accused.”⁴¹³ The discriminatory grounds can be cumulative.⁴¹⁴ In assessing these terms in

⁴¹¹ *Katanga*, Decision on the Confirmation of Charges, para. 451 (citing ICC Elements of Crimes n. 30).

⁴¹² EoC, Article 7(1)(h), Element 2.

⁴¹³ Machteld Boot, “Article 7,” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2d. ed., 2008, p. 147. See also *Prosecutor v. Jelisić*, Judgement, Case No. IT-95-10-T, T. 14 Dec. 1999, paras. 70-71:

Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily respond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators. ... A group may be stigmatised in this manner by way of positive or negative criteria. A ‘positive approach’ would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical or racial or religious group. A ‘negative approach’ would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.

⁴¹⁴ Indeed, in relation to the grounds upon which the discrimination is based, the observations of the Military Tribunal at Nuremberg are instructive:

It makes little difference whether the subject of mass hate be a political party, race, religion, class, or another nation. The technique is the same, the results are identical, and the hate thus engendered inevitably brings on resistance and in the end ruin upon those who start and participate in it.

Ministries Case, p. 470.

the context of genocide,⁴¹⁵ the ICTR advised that “these concepts must be assessed in the light of a particular political, social and cultural context.”⁴¹⁶ Also instructive is the ICTY’s observations of the meaning of certain of these grounds in relation to genocide:

The preparatory work of the [Genocide] Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second world war, as “national minorities”, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.⁴¹⁷

294. With these provisos, the following guidelines, if not definitions, can apply to the discriminatory grounds for persecution. “National” is “broader than citizenship and includes attributes of a group which considers that it is a nation even though the members of the group are located in more than one State.”⁴¹⁸ An ethnic group has been defined as “a group whose members share a common language or culture.”⁴¹⁹ Notably, persecution – unlike genocide – also includes “cultural,” which can be read to overlap in part with ethnic, but should be “given an ordinary broad meaning: of or involving culture, that is, ‘customs, arts, social institutions, etc. of a particular group or people.’”⁴²⁰ “Political” does not necessarily imply membership in a particular political party,⁴²¹ and can include identity based on perceived political support of a party, ideology or political figure.⁴²²

295. The persons discriminated upon herein are Palestinians, and in particular Palestinians in Gaza as recognized by Israel as part of, but a distinct group from Palestinians in other parts of the oPt. The discrimination is on national, political, ethnic, religious and/or cultural grounds. The target of Israel’s closure policy is the entire civilian population of Gaza, numbering approximately 2 million people. However, it is important to recall that although

⁴¹⁵ It is appropriate to look to the jurisprudence for the crime of genocide, as genocide and persecution belong to the same *genus* of crime, “as both encompass targeting of persons belonging to a particular group.” Evolution of Persecution, *supra* n. 328 at 535. referencing *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgement, 12 Dec. 2012, para. 849.

⁴¹⁶ *Prosecutor v. Rutaganda*, Judgement and Sentence, Case No. ICTR-96-3-T, 6 Dec. 1999, paras. 55-58. See also *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, 2 Aug. 2001, para. 557.

⁴¹⁷ *Krstić* Trial Judgment, para. 556.

⁴¹⁸ Machteld Boot, “Article 7,” *supra* n. 415 at 149. The Trial Chamber in *Akayesu* opined that a national group is “as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.” *Akayesu* Trial Judgement, , para. 512.

⁴¹⁹ *Akayesu* Trial Judgement at para. 513.

⁴²⁰ Machteld Boot, “Article 7,” *supra* n. 415 at 149. See also *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 98: “An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).”

⁴²¹ Machteld Boot, “Article 7,” *supra* n. 415 at 148.

⁴²² See *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, paras. 204-06,

the civilian population of Gaza bears the brunt of the closure policy's impact that forms the basis of this submission, additional consequences – including the deprivation of fundamental rights - are also experienced by the entire population of occupied Palestine, and indeed, the Palestinian people as a whole. The isolation and fragmentation of Gaza and Gazans from the rest of Palestine as a result of the closure policy leads to deprivations of collective Palestinian society, culture, economy and politics.

296. Palestinian residents of Gaza are part of the Palestinian nation, which includes those Palestinians who reside in the West Bank, including Jerusalem, in Israel within the Green Line, and abroad in the diaspora. While certain segments of the Palestinian nation may have identity cards issued by the Palestinian Authority or be identified as “Arab” by Israel, and persons in the diaspora who descend from Palestinians who have been forced out or left the territory comprising mandate Palestine, all form part of the Palestinian nation. Palestinians residing in Gaza can be distinguished as a sub-population of the broader Palestinian civilian population by their being bound to the territory of the Gaza Strip, and/or by their differentiated national ID cards specifying their administratively assigned residence in Gaza, as dictated by the Israeli-controlled population registry.

297. The Palestinians of Gaza are also discriminated against on ethnic and cultural grounds, as Palestinians have distinct customs, traditions, linguistic dialect, and social institutions.

c) The Nexus Requirement to Other Enumerated Acts or Crimes within the Jurisdiction of the Court

298. Unlike the crime of persecution under customary international law, Article 7 of the ICC Statute has a nexus requirement; the alleged persecution must be carried out “in connection with any act referred to in this paragraph [(enumerating crimes against humanity)] or any crime within the jurisdiction of the Court.”⁴²³ This nexus requirement renders the crime of persecution at the ICC “less liberal than customary international law,” where “no such link is required.”⁴²⁴ It was adopted to assuage certain delegations to the Rome Conference who worried that the term “persecution” was “too vague and elastic and in need of additional limitation.”⁴²⁵

⁴²³ Rome Statute of the International Criminal Court, Entered into Force 1 July 2002, Article 7(1)(h) (‘ICC Statute’). See also, Element 4 in the Elements of Persecution in the Elements of Crimes.

⁴²⁴ A. Cassese, *International Criminal Law*, p. 107.

⁴²⁵ Evolution of Persecution, *supra* n. 328 at 544.

299. The nexus requirement “is satisfied by a linkage to even one other recognised act (a killing or other inhumane act), which one would expect to find in a situation warranting international prosecution.”⁴²⁶ Two delegates heavily involved in the negotiations on crimes against humanity also point out that the underlying act(s) connected to persecution need not have been committed as part of a widespread or systematic attack. They conclude that “the possibility of connection to any inhumane act ensures that persecution will not be a mere auxiliary offence or aggravating factor.”⁴²⁷

300. In the case of the closure policy imposed on Gaza, the Organizations emphasize that persecution is the primary crime alleged, and the nexus requirement is easily met as the underlying acts of persecution are committed in connection with other inhumane acts as crimes against humanity (Article 7(1)(k) of the Statute, as well as war crimes committed in the course of the ongoing prolonged belligerent occupation (i.e., an international armed conflict),⁴²⁸ including but not limited to willfully causing great suffering, or serious injury to body or health (Art. 8(2)(a)(iii)) or intentionally launching an attack in the knowledge that it will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread and severe damage to the natural environment excess to any concrete military advantage (Art. 8(2)(b)(iv)). In this regard, the Organizations recall the numerous violations under Article 7 and Article 8 of the Statute already detailed in the Palestinian Human Rights Organizations November 2015 submission in relation to the crimes alleged to have been committed during “Operation Protective Edge.”

2. The Mens Rea Elements of Persecution

a. Proving Discriminatory Intent

301. Finally, the perpetrator must have known that the conduct in question “was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.” Discriminatory intent can be inferred from the generally discriminatory nature of

⁴²⁶ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge University Press, Cambridge, 2010, p. 260.

⁴²⁷ Herman von Hebel and Darryl Robinson, “Crimes within the Jurisdiction of the Court”, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, pp. 101–2.

⁴²⁸ See, e.g., *Georgia Authorization to Investigate Decision*, para. 27; November 2015 Submission, *supra* n.5, paras. 236-245.

the attack “as long as, in the view of the facts of the case, circumstances surrounding commission of the alleged acts substantiate the existence of such intent.”⁴²⁹

302. The Palestinian Human Rights Organizations submit that the individual architects of the current closure at the highest political and military levels in Israel are fully aware and indeed intend for the closure to result in the denial of fundamental rights to Palestinian civilians in Gaza *qua* Palestinians. The Israeli officials who oversee and continue to enforce the closure policy in the face of well-documented reports regarding the destruction, dispossession and disenfranchisement caused by the closure policy’s implementation by high-level international officials and bodies over the course of the closure willfully ignore such warnings because they are fully aware of the consequences of their policies on the civilian population, and intend those consequences to punish Palestinian civilians, including for their perceived political views. Statements of high-level Israeli officials further indicate that they are not only aware, but intend to punish Gaza’s civilians for the actions purportedly taken by Hamas as form of collective punishment and alleged deterrence. The fact that the closure policies are directed against Palestinians in Gaza as a whole, and result in the denial of fundamental rights to the entire Palestinian population of Gaza demonstrates that the policies are intended to discriminate against Palestinians on national, ethnic, cultural, political and religious grounds.

C. The Crime against Humanity of Other Inhumane Acts

303. To determine whether conduct is an “other inhumane act” under article 7(1)(k) of the Statute, the Court considers the factual circumstances in which it occurs, which the ICC has determined includes: “the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.”⁴³⁰

⁴²⁹ *Krnjelac* Appeal Judgment, para. 184; *Prosecutor v. Blaškić, Judgement*, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 164.

⁴³⁰ *Katanga*, Decision on the Confirmation of Charges, para 449. The ICTY examined the same set of circumstances for determining whether an act constitutes “other inhumane acts” for the purposes of international criminal law: “consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.” Appeals Chamber, *Prosecutor v. Mitan Vasiljević*, IT-98-32-A, 25 Feb. 2004, para. 165.

304. Among the acts which have been found to constitute “other inhumane acts” at the ICC are causing severe physical injuries,⁴³¹ the killing and maiming civilians in front of their family members,⁴³² and injuring persons by shelling a densely populated area,⁴³³ or by wounding protestors.⁴³⁴ For example, Pre-Trial Chamber III found a reasonable basis to believe that other inhumane acts were committed when pro-Gbagbo forces “allegedly beat foreign residents with bricks, clubs and sticks.”⁴³⁵ The Court has also suggested that property damage would qualify as an “other inhumane act”, if there were evidence the damage led to great suffering or injury to mental health.⁴³⁶ Notably, the Court has recognized that other inhumane acts occur can be violations of basic or fundamental rights “drawn from the norms of international human rights law.”⁴³⁷

305. Although the Rome Statute contains certain limitations on “other inhumane acts” in relation to the ad-hoc tribunals,⁴³⁸ the jurisprudence of the ICTY and ICTR remains instructive.⁴³⁹ The ICTY and ICTR have recognized several examples of “other inhumane acts,” including the infliction of physical or mental suffering less severe than torture,⁴⁴⁰ requiring prisoners to perform tasks on the front line that endangered them,⁴⁴¹ conduct causing persons to experience serious mental harm by witnessing acts committed against others, particularly friends or family,⁴⁴² forced nudity,⁴⁴³ and humiliation and harassment.⁴⁴⁴

⁴³¹ *Kenyatta*, Decision on the Confirmation of Charges, paras. 272-73 (finding other inhumane acts in light of civilians suffering gunshot wounds, cuts and blunt force trauma);

⁴³² *Id.* at 277.

⁴³³ *Prosecutor v. Laurent Koudou Gbagbo* ICC-02/11-01/11, Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, 30 Nov. 2011, para. 60-61.

⁴³⁴ *Id.*

⁴³⁵ *Côte d’Ivoire* Authorisation to Investigate Decision, paras. 85-86.

⁴³⁶ *Kenyatta*, Decision on the Confirmation of Charges para. 279.

⁴³⁷ *Id.* at 448.

⁴³⁸ *Id.* at paras. 450-55 (determining that the great suffering or serious injury occur by means of the inhumane act).

⁴³⁹ See, e.g., *id.* at paras. 449, 456-57 (finding conduct to be an “other inhumane act” under the Rome Statute, pursuant to the ICTY case Trial Chamber, *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgment 3 Mar. 2000, para. 239 and analyzing the events in question under *Blaskic*).

⁴⁴⁰ See, e.g., *Prosecutor v. Naletilic and Martinovic*, Trial Judgment, IT-98-34-T, 31 March 2003, para. 246 (noting cruel and inhumane treatment comprise the same conduct, both of which may be less than torture)

⁴⁴¹ *Naletilic* Trial Judgment, paras. 279, 334 (finding the defendant was guilty of “other inhumane acts” for using prisoners to perform acts on the front line such as clearing bodies).

⁴⁴² See Trial Chamber, *Clement Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 153 (“The Chambers is in no doubt that” such conduct would be another inhumane act “when the perpetrator knew the act was likely to cause serious mental suffering and was reckless as to whether such suffering would result.”)

⁴⁴³ *Akayesu* Trial Judgment, para. 697 (finding defendant guilty of “other inhumane acts” for forcing a woman to sit naked in the mud, or to publically exercise or march nude).

⁴⁴⁴ *Kvočka* Trial Judgment, para. 209.

306. Furthermore, the international tribunals have suggested that depriving a civilian population of the means for their survival is inhumane, and constitutes an “other inhumane act” against them. In *Kupreškić*, for example, the ICTY found that the “destruction of the livelihood of a certain population . . . may have the same inhumane consequences as a forced transfer or deportation.” As *Kupreškić* suggests, destroying the means of a people’s livelihood is inhumane in a sense similar to other provisions in the Statute, and fitting as an “other inhumane act”. Indictments under the ICTY have been issued for similar acts, characterizing the denial of necessities to those under the defendant’s control as “other inhumane acts.”⁴⁴⁵ It is recalled that the Rome Statute states, under the section for war crimes, that “serious violations of the laws and customs” of international humanitarian law includes, in the context of starvation, “depriving persons of objects indispensable for their survival [and] willfully impeding relief supplies.”⁴⁴⁶

307. In this situation, there is a reasonable basis to believe that other inhumane acts have been and are being committed in the course of the Israeli closure policy on Gaza. For example, through the denial of movement for people and goods, Israel deprived Palestinian civilians of their means of subsistence, and of necessary services. The information gathered by the Palestinian Human Rights Organizations set forth above support opening an investigation into such deprivations, including through hindering or actively destroying the means of sustaining a livelihood. As the UN Commission of Inquiry on the 2014 military found, the continued “blockade of Gaza by Israel . . . was strangling the economy in Gaza and imposed severe restrictions on the rights of the Palestinians.”⁴⁴⁷ The current UN Special Rapporteur on the Occupied Palestinian Territory recently expressed serious concern about the denial of the right to development for Palestinians due to the occupation, and focused extensively on the serious situation in Gaza due to the closure.⁴⁴⁸ More directly, facets of the

⁴⁴⁵ See, e.g., *Prosecutor v. Dragan Nikolic*, IT-94-2-I, *Indictment*, 4 November 1994, para 24.1 (indictment for, *inter alia*, “participating in inhumane acts against more than 500 civilians . . . by endangering the health and welfare of detainees by providing inadequate food, . . . by providing living conditions failing to meet minimal basic standards, and by creating an atmosphere where detainees feared for their personal safety . . . as part of a widespread or systematic attack directed against a civilian population, an offense recognized [as an ‘other inhumane act’].”). That detaining a population and depriving them of their means of subsistence could constitute an inhumane act, expressed by the ICTY is hardly novel, and reaches back about as far as international criminal law itself. See, e.g., *The Charter and Judgement of the Nuremberg Tribunal: History and Analysis*, Memorandum submitted by the Secretary-General, UN Sales No. 1949.V.7, 1949, p. 67 (“The phrase ‘and other inhumane acts’ indicates that the list of explicitly named activities is not exhaustive. It could be asked, for instance, whether deprivation of means of sustenance might not be considered an ‘inhumane act.’”).

⁴⁴⁶ Article 8(2)(b)(xxv).

⁴⁴⁷ 2015 UN Commission of Inquiry Report, *supra* n. 7 at ¶ 54.

⁴⁴⁸ See A/71/554, *supra* . n. 25 at paras. 38-59, and particularly paras. 45-48.

closure like the access restricted “buffer zone” maintained by the Israeli military within the territory and coastal waters of the Gaza Strip directly deprives agricultural workers, fishermen and families residing in the area of their means of livelihood and subsistence.

308. The Commission of Inquiry also found that Palestinians’ right to an adequate standard of living, and to food, work, health, water and sanitation (all of which the Palestinian Human Right Organizations have documented) had been challenged by the current closure (and offensive), noting that almost the entire population of Gaza was also dependent on food aid during the conflict;⁴⁴⁹ that remains the case for many to this day. In this context the UN Commission of Inquiry found that international human rights law requires that Israel cease the closure.⁴⁵⁰

309. The Palestinian Human Rights Organizations further assert that the inhumane acts being committed against the Palestinian civilians in Gaza are being carried out to discriminate against the Palestinian population, as Palestinians- on national, political, ethnic, racial and/or religious grounds, as set forth below, and thus constitute an underlying act of persecution.

VII. Criminal Responsibility of Israeli Civilian and Military Senior Officials

310. The timely attribution of individual criminal responsibility to those implicated at various levels in the commission of international crimes can be an effective reaction to the massive violations of human rights. The need to bring these individuals to justice is particularly important with regard to those in positions of authority. Indeed, it is generally recognized that one of the most effective means for ensuring the promotion of the rule of law and compliance with international law is to succeed in bringing to justice those military and political leaders who are behind the commission of genocides, crimes against humanity and war crimes.⁴⁵¹

311. The ICC Statute regulates in detail the modalities of individual criminal responsibility and distinguishes several modes of criminal participation. According to Article 25(3) of the ICC Statute, when the requirements for a form of participation are fulfilled, the legal consequence is that the perpetrator shall be “criminally responsible and liable for punishment.” Although no gradations in the degree of criminal liability are expressly provided

⁴⁴⁹ 2015 UN Commission of Inquiry Report, *supra* n. 7. at ¶¶ 587-88.

⁴⁵⁰ *Id.* at ¶ 599.

⁴⁵¹ *Prosecutor v. Martić*, IT-95-11-T, Trial Chamber Decision, 8 March 1996, para. 21.

for in Article 25, the system lying at the heart of the provision implies a model that also distinguishes between the degrees of responsibility attached to each mode of participation.

312. Individual criminal responsibility can arise from “commission as a perpetrator;” “encouragement or ordering”, which may take different forms; “assistance”; and “contribution to a group crime.” An important distinction is between commission as principal liability and secondary forms of participation.⁴⁵² Here, the ICC has ruled that the definitional criterion common to all forms of commission is “control over the commission of the offence”, an approach known to most civil law systems.⁴⁵³ Beside Article 25(3), Article 28 of the ICC Statute provides for “command responsibility”. This mode of liability can attach both to military commanders and to civilian leaders who failed to control their subordinates and to take the necessary measures to prevent or punish the commission of crimes by them.

313. The Palestinian Human Rights Organizations submit that there is a reasonable basis to investigating the individual criminal responsibility of senior Israeli civilian and military officials for crimes arising out of the closure of Gaza. The Organizations respectfully urge the Prosecutor to investigate whether legal liability attaches pursuant to Article 25(3)(a) of the Statute (commission, joint commission or commission through another person); Article 25(3)(b) of the Statute (ordering and encouragement); Article 25(3)(c) and (d) of the Statute (assistance to a group crime); as well as command responsibility for both civilian superiors and military commanders under Article 28 of the Statute.

314. At the appropriate time, the Palestinian Human Rights Organizations will provide a comprehensive list of high-level Israeli military and civilian leaders with corresponding recommendations for relevant modes of liability for all cases submitted to the OTP, including the case of the closure of Gaza.

VIII. Jurisdiction

315. As demonstrated by the factual background set out above, and the underlying materials upon which it relies, a reasonable basis to proceed with an investigation exists, and the Prosecutor is urged to submit a request to the pre-trial chamber to proceed with an investigation into crimes committed in the context of Israel’s closure of the Gaza Strip,

⁴⁵² See Pre-trial Chamber 1, *Lubanga* confirmation of charges decision.

⁴⁵³ *Id.*

initially imposed in June 2007, but particularly the closure in place from June 2014 and continuing to today.

316. The facts presented above demonstrate that crimes falling within the jurisdiction of this Court have been – and indeed, are being – committed, in that the acts described herein fulfill the temporal requirements set forth in article 11 of the Statute; constitute crimes against humanity under Article 7 of the Statute and meet both the *ratione loci* and *ratione personae* jurisdictional requirements set forth in Article 12 of the Statute in so far as the crimes have been committed on the territory of a State Party to the Statute.⁴⁵⁴

317. The acts set forth herein satisfy the requirements for establishing temporal jurisdiction over the crimes alleged in that the acts continued to be committed after the date specified in the declaration lodged by the State of Palestine pursuant to Article 12(3) of the Statute, i.e., after 13 June 2014. To the extent that acts committed prior to 13 June 2014 are included in the factual background, they are included to provide context for the crimes⁴⁵⁵ that are alleged to have occurred after 13 June 2014.

318. The acts set forth herein satisfy the requirements for establishing territorial jurisdiction over the crimes alleged in that the acts were committed on territory recognized as falling within the boundaries and being an integral and constituent part of the State of Palestine.⁴⁵⁶

319. As set forth above, there is a reasonable basis for believing that crimes under Article 7, namely persecution and other inhumane acts as crimes against humanity, were committed in the course of Israel's closure of the Gaza Strip, from the first day of ICC jurisdiction over Palestine, 13 June 2014, through the present, in the context of a prolonged belligerent occupation.

IX. Admissibility

320. There are currently no national proceedings in either Israel or Palestine against those who bear the greatest responsibility for the crimes alleged herein in relation to Israel's imposition of the closure on the Gaza Strip. In combination with the suggested gravity of the

⁴⁵⁴ See, e.g., *Kenya Authorization to Investigate Decision*, para. 39; Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, para. 36.

⁴⁵⁵ See, e.g., *Nahimana Appeal Judgement*, para. 315; *Taylor Trial Judgement*, paras. 98, 102; *Akayesu Trial Judgment*, paras. 78-129.

⁴⁵⁶ See, e.g., UNSC Res. 242, 338, and 1860.

alleged acts, the Palestinian Human Rights Organizations submit that the potential cases arising from an investigation into the conduct described herein would be admissible to the Court.

321. Particularly in light of the continuation of the atrocities described herein resulting from Israel's closure, the Palestinian Human Rights Organizations and the victims they represent are convinced that the OTP's opening of an investigation and subsequent prosecutions will serve the interests of justice. By breaking the cycle impunity, such a move by the OTP would deter future crimes as well as provide immediate relief to Palestinian civilians currently suffering under and as a result of Israel's absolute closure of Gaza. Speaking at the ICC in The Hague in 2015, Palestinian Foreign Minister Riad al-Malki declared that "Palestine remains one of the most important tests of the will and ability of the international community, and international institutions, to uphold universal values."⁴⁵⁷ For the civilian population of Gaza, who will face an uninhabitable Gaza Strip in a mere four years' time, Malki's words ring particularly true: "It is a test the world cannot afford to fail."⁴⁵⁸

A. Gravity (Article 17(1)(d) of the ICC Statute)

322. Four factors are considered in assessing the question of gravity: (1) scale of the crimes; (2) nature of the crimes; (3) the manner of their commission; and (4) the impact on victims and families.⁴⁵⁹ In relation to the fourth factor, it is recalled that "the victims' representations will be of significant guidance for the Chamber's assessment."⁴⁶⁰

323. Various chambers have cautioned against setting an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court.⁴⁶¹

324. The *scale of the crimes* may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).

⁴⁵⁷ Daa Hadid and Marlise Simons, "Palestinians Join International Criminal Court, but Tread Cautiously at First," N.Y. TIMES, (1 Apr. 2015) *available at* http://www.nytimes.com/2015/04/02/world/middleeast/palestinians-join-international-criminal-court-but-tread-cautiously-at-first.html?_r=0.

⁴⁵⁸ *Id.*

⁴⁵⁹ See OTP Policy Paper on Preliminary Examinations, 2015, pp. 15-16.

⁴⁶⁰ Kenya Authorization to Investigate Decision, para. 62.

⁴⁶¹ See, e.g. Pre-Trial Chamber I, Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic And the Kingdom of Cambodia, ICC-01/13, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015.

325. The *nature of commission of the crimes* may be assessed in light of, *inter alia*, whether they were committed on a discriminatory basis, the level and manner of suffering, and who was targeted or harmed, including women, children or disabled persons.

326. The *manner of commission of the crimes* may be assessed in light of, *inter alia*, the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.

327. The *impact of crimes* may be assessed in light of, *inter alia*, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.

328. The crimes committed in the context of Israeli's ongoing absolute closure of the Gaza Strip are of sufficient gravity to warrant the Prosecution expending its limited resources to investigate and prosecute those individually criminally responsible for the commission of crimes falling within the jurisdiction of the Court.

329. In terms of the scale, the number of victims, geographical spread, temporal scope, extent of the damage, and impact of the crimes from Israel's nine-year closure of the Gaza Strip warrants the ICC's involvement. The number of victims includes nearly all of Gaza's 2 million civilian residents, who continue to bear the brunt of the closure's impact, as well as many more Palestinians residing in other parts of occupied Palestine who are also impacted by the social, economic, cultural, and political fragmentation wrought by the closure.⁴⁶² The extent of the damage caused or severely exacerbated by the closure to civilian infrastructure, economy, property, and the environment is such that in a mere four years' time, UN experts predict the Gaza Strip will be uninhabitable. Similarly, the degree of de-development and degradation of the environment, mobility, livelihoods, social structures, food security, education, and physical and mental health resulting from the closure has been profound. On top of this, the closure has been punctuated by three massive Israeli military assaults on the small, closed and densely-populated territory of the Gaza Strip, causing immense destruction

⁴⁶² *C.f.*, Georgia Authorization to Investigate Decision, paras. 54, 56 (finding that *inter alia* the killing of between 51-113 persons, the destruction of 5,000 dwellings and the forced displacement of 13,400-18,500 ethnic Georgians are of sufficient gravity to justify further action by the Court).

and a disproportionate number of civilian deaths, including women, children and disabled persons.

330. In terms of the nature and manner of the crimes, the violations set forth herein involve the violation of fundamental rights on a widespread and systematic basis, with a discriminatory element, causing severe physical and mental suffering and societal development. This situation arose out of policies, acts and omissions involving the highest levels of the Israeli civilian and military structure. The crimes committed involve undue restrictions on civilians' freedom of movement and access to the basic building blocks of a dignified life.

331. From every perspective possible, the gravity of the crimes related to Israel's closure merits the ICC's involvement.

B. Complementarity (Article 17(2) and (3) of the ICC Statute)

332. Article 17 ("Issues of admissibility") of the Rome Statute provides:

1. (...) the Court shall determine that a case is **inadmissible** where:

(a) The case **is being investigated or prosecuted** by a State which has jurisdiction over it, **unless the State is unwilling or unable genuinely** to carry out the investigation or prosecution;

(b) The case **has been investigated** by a State which has jurisdiction over it and the State has **decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability** of the State genuinely to prosecute;

[...].

2. In order to determine **unwillingness** in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of **shielding the person** concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an **unjustified delay** in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are **not being conducted independently or impartially**, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

[...].

333. The principle of complementarity governs the relationship between the ICC and domestic jurisdictions. Under this principle domestic jurisdictions have primacy, meaning that cases will only be admissible before the ICC where domestic jurisdictions have been absent or failed.

334. The principle of complementarity is considered at both the preliminary examination and case stages. At the preliminary examination stage, admissibility is based on consideration of *potential cases* that would likely arise from an investigation into the situation.⁴⁶³ Criteria defining a “potential case” include (i) the **groups of persons involved** that are likely to be the focus of an investigation for the purposes of shaping future case(s) and (ii) the **crimes** within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation.⁴⁶⁴ These criteria are equivalent in substance to the “same person/same conduct” test employed in assessing admissibility in the context of a case.⁴⁶⁵

1. The Existence – or Absence – of Action at the Domestic Level

335. The first step in determining the question of complementarity is to ascertain whether any domestic action involving the groups of persons or crimes likely to be the focus of the investigation has been undertaken or is ongoing. Complementarity assessments are concerned with current, concrete facts as they exist at the time, and not hypothetical future cases that might arise.⁴⁶⁶

336. The ICC has made it clear that an absence of current or past domestic action is sufficient to render a situation or case admissible:

In considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. *It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.* It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction

⁴⁶³ See Office of the Prosecutor Policy Paper on Preliminary Examinations, November 2013, *available at* https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf (hereinafter, “OTP Policy Paper on Preliminary Examinations (2013)”) pp. 10-12 (citations omitted).

⁴⁶⁴ *Kenya Authorization to Investigate Decision*, paras. 50, 182 and 188; *Cote d'Ivoire Authorization to Investigate Decision*, paras. 190-91 and 202-04.

⁴⁶⁵ See *Kenya Authorization to Investigate Decision*, para. 44-45, 48-40, 52. See also, OTP Policy Paper on Preliminary Examinations 2013, p. 12, para. 48 (citations omitted).

⁴⁶⁶ OTP Policy Paper on Preliminary Examinations (2013), p. 12.

on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1) (d) of the Statute.⁴⁶⁷ (emphasis added)

337. As one leading commentator explained, Article 17 “expressly and unambiguously provides not a one-step test, but a two-step test.”⁴⁶⁸ The first step is clear: Article 17 expressly requires national proceedings. If the first test is not passed then there is no need to conduct the second test: “the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (...) renders a case [directly] admissible before the Court.”⁴⁶⁹

338. Domestic action will only be capable of satisfying the complementarity test, and thereby rendering a situation or case inadmissible, if it covers the **same person** and substantially the **same conduct** as the ICC investigation.⁴⁷⁰ That question is to be decided on a case by case basis, turning on the particular facts at hand.⁴⁷¹ There is no requirement that crimes under *international* law be investigated or charged. It is sufficient to investigate a person for, or charge a person with, a domestic offence that covers substantially the same conduct – and reflecting the same underlying incidents – as the relevant offence under the Rome Statute.⁴⁷²

339. As noted, the Palestinian Human Rights Organizations submit that there are no investigation ongoing in relation to the crimes arising out of the Israeli closure of Gaza. The crimes that should be investigated include, *inter alia*, persecution and other inhumane acts as crimes against humanity. The persons alleged to be involved in the commission of these crimes occupy positions within the highest levels of Israeli civilian and military leadership.

⁴⁶⁷ *Id.*

⁴⁶⁸ Daryl Robinson, *The ‘Inaction’ Controversy: Neglected Words and New Opportunities*, in Carsten Stahn and Mohamed El Zeidy, eds. *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 462 (Cambridge University Press, 2011).

⁴⁶⁹ G. Boas et al., *INTERNATIONAL CRIMINAL PROCEDURE*, Vol. III 77 (Cambridge University Press, 2011).

⁴⁷⁰ OTP Policy Paper on Preliminary Examinations, p. 12; See also, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,” 30 Aug. 2011, paras. 1, 47.

⁴⁷¹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, 11 Oct. 2013, para. 66

⁴⁷² See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11 OA4, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 21 May 2014, paras. 72-75.

C. Interests of Justice

340. According to Article 53(1)(c) of the Rome Statute, if “there are substantial reasons to believe that an investigation would not serve the interests of justice”, even after taking into account the gravity of the crime and the interests of victims, the Prosecutor can exercise discretion to not proceed with investigation. This discretion is “highly exceptional”,⁴⁷³ and there is a presumption in favor of investigation and prosecution.⁴⁷⁴

341. If the positive criteria of jurisdiction and admissibility are met, the Prosecutor is not required to establish that an investigation serves the interests of justice, but shall proceed with investigation unless there are specific circumstances that demonstrate that it is not in the interest of justice to do so. This requires an assessment of the context, guided by the object and purpose of the Statute, namely the prevention of serious crimes of concern to the international community through ending impunity.

342. The basis for not proceeding with investigation should take into account all the circumstances, and Article 53(2)(c) of the Statute provides a non-exhaustive list, including “the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”. In the present case submitted before the ICC, there are no “substantial reasons to believe that an investigation would not serve the interests of justice”. On the contrary, there is a strong need for international criminal justice to be exercised since there is an absence of possibilities to access justice domestically, of which the lack of criminal and civil accountability has contributed to impunity.

343. Taking into account all the circumstances, including the consideration of gravity and the interest of victims, and the fulfilment of the positive requirements of jurisdiction and admissibility, there is no basis for “interest of justice” to be invoked as a countervailing consideration to not proceed with investigation. In fact, proceeding with investigation is consistent with the object and purpose of the Statute to end impunity and prevent serious crimes of concern to the international community, and discourage future breaches of international law by Israel. Moreover, the ongoing commission of the criminal conduct in question and the advancing environmental collapse of the Gaza Strip in a mere four years’ time compounds the urgency for addressing Israeli impunity immediately.

⁴⁷³ OTP Policy Paper on Preliminary Examinations, November 2013, p. 17.

⁴⁷⁴ International Criminal Court, Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, available at http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf.

X. Conclusion

344. The Palestinian Human Rights Organizations respectfully submit that on the basis of the information and analysis set forth herein, there exists a reasonable basis to believe that crimes falling within the jurisdiction of the Court were – and continue to be – committed in Gaza by high-level Israeli civilian and military officials in the course of Israel’s imposition of closure on the Gaza Strip, which continues through today. Accordingly, the Palestinian Human Rights Organizations request that the Prosecutor use her power of *proprio motu* to open a full investigation forthwith.

345. The Palestinian Human Rights Organizations contend that the information and allegations submitted in this communication are admissible in accordance with the provisions outlined in Article 17 of the Statute. There are currently no ongoing investigations or prosecutions addressing the conduct that forms the basis of crimes committed as part of a widespread or systematic attack against a civilian population, as covered by Article 7 of the ICC Statute, or as part of a plan or policy.

346. The International Criminal Court was established to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished. The ICC embodies the international community’s determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”⁴⁷⁵ For far too long, the grave violations of international law inflicted upon Palestinians have been met with impunity and inaction. With this communication, the Palestinian Human Rights Organizations urge the Prosecutor to break this outrageous cycle of impunity and take the necessary step towards halting the ongoing atrocities in the Gaza Strip by opening an investigation. As the ICRC already asserted six years ago: “The hardship faced by Gaza’s [1.9] million people cannot be addressed by providing humanitarian aid. The only sustainable solution is to lift the closure.”⁴⁷⁶

347. As previously offered, the Palestinian Human Rights Organizations reiterate our invitation to the Prosecutor and her staff to visit the Gaza Strip, in order to meet with victims and observe first-hand the devastating effects of the continued closure on Gaza’s infrastructure and economy, as well as the daily lives and fundamental rights of Palestinians. The Palestinian Organizations will continue to cooperate with the OTP, including with respect

⁴⁷⁵ ICC Statute, Preamble.

⁴⁷⁶ ICRC, “Gaza Closure: Not another year!, *supra* n. 8.

to the preparation of a mission to Palestine, and stand ready to discuss prepared legal files and further connect the OTP with victims and witnesses.