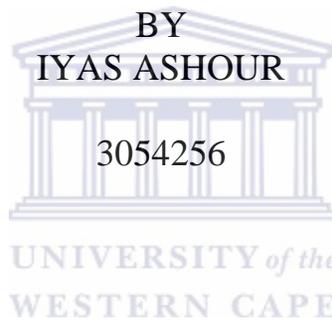


# **DOES THE BLOCKADE OF GAZA CONSTITUTE GENOCIDE?**

A MINI-THESIS SUBMITTED TO THE FACULTY OF LAW OF THE  
UNIVERSITY OF THE WESTERN CAPE, IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE MPhil DEGREE



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**List of Abbreviations:**

AP: Additional Protocols to the Geneva Conventions.

AMA: The Agreement on movement and access.

GA: General Assembly of the United Nations.

GC: The Geneva Conventions.

EU: The European Union.

ICC: The International Criminal Court.

ICJ: The International Court of Justice.

ICRC: International Committee of the Red Cross.

ICTR: The International Criminal Tribunal for Rwanda.

ICTY: The International Criminal Tribunal of the former Yugoslavia.

NATO: North Atlantic Treaty Organization.

PLO: The Palestinian Liberation Organization.

PNA: The Palestinian National Authority.

UNSC: The United Nations Security Council.

SCAF: The Supreme Council of the Armed Forces in Egypt.

UN: The United Nations.

UNDP: United Nations Development Programme.

UNICEF: United Nations International Children's Emergency Fund.

UNRWA: The United Nations Relief and Works Agency for Palestine Refugees.

**Keywords:**

- 1- Blockade.
- 2- Gaza.
- 3- Genocide.
- 4- Siege.
- 5- Universal Criminal Jurisdiction
- 6- International Criminal Court.
- 7- Occupation.
- 8- International law.
- 9- Collective Punishment.
- 10- Geneva Conventions.



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# Chapter one

## Introduction

### 1.1. Background of the study

The blockade of the Gaza strip is one of the most controversial issues discussed at the international level in the last few years. The escalating debate on this issue is not only because of the disparate views between who supports and who opposes the blockade, but also due to the effect of this blockade on the civilian population in the Gaza strip.

The Gaza strip is 360 square kilometers in size, and consists of a string of towns and villages<sup>1</sup>. The biggest city in the strip is Gaza. The population of the Gaza strip is more than 1.5 million<sup>2</sup>, and more than 853, 000 of the population are registered as refugees by the United Nations Relief and Works Agency for Palestine Refugees (hereinafter UNRWA 2001)<sup>3</sup>. Both the strip and the city have been under a harsh Israeli blockade since 2007. This negatively affects and stifles the inhabitants of Gaza<sup>4</sup>. What distinguishes this blockade from other blockades is the fact that it is comprehensive, since Israel controls the Gazan coastal water, air space and most of the land crossings to the Gaza strip<sup>5</sup>. The blockade does not differentiate between men and women, the

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<sup>1</sup> The CIA World Fact book (2009: 256).

<sup>2</sup> ICRC report, Gaza 1.5 million people trapped in despair (2009), <http://www.icrc.org/eng/resources/documents/report/palestine-report-260609.htm>, accessed on 5/4/2011.

<sup>3</sup> Shultz, Hammer (2003: 68).

<sup>4</sup> ICRC report, Israel and the occupied territories: violence claims more lives as blockade continues to stifle Gaza (2010), <http://www.icrc.org/eng/resources/documents/update/israel-update-290410.htm>, accessed on 5/4/2011.

<sup>5</sup> The CIA World Fact book, 2010 (2009: 256).

elderly and the young, and the most troublesome issue is that this blockade has been imposed on not only the government officials in Gaza, but also on the civilian population.<sup>6</sup>

Before the Six Days war in 1967, the West Bank and east Jerusalem were part of the Hashemite Kingdom of Jordan, while the Gaza strip was under the Egyptian military administration<sup>7</sup>. Egypt, however, did not claim any title over Gaza<sup>8</sup>. The Six Days war ended with a victory by Israel over Egypt. As a consequence Israel occupied the West Bank, Gaza, the Sinai Peninsula (Egyptian territories) and the Golan Heights (Syrian territories)<sup>9</sup>.

Following the Six Days war, the Security Council unanimously adopted the Resolution No 242 on 22 November, 1967. This resolution represented an international effort to resolve the conflict in the Middle East and is based on many principles. The most notable principle is the one calling for an end to the Israeli occupation. The interpretation of the Resolution No 242 raised an argument between both Israel and Arabs due to the formulation of the resolution and the difference between the English text and the French text. Whereas the English text states that Israel should withdraw from *territories* occupied in the recent conflict, the French text states that Israel should withdraw from *the territories* (des territoires) occupied following the Six Days war.

Israel adhered to the English text and interpreted it to justify its occupation and to give it legitimacy. The Israeli interpretation of this resolution is to the effect that Israel is not obliged to withdraw from all the territories occupied in the recent conflict, and that withdrawal from *any*

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<sup>6</sup> Koettl, (2010), the Amnesty USA web log <http://blog.amnestyusa.org/middle-east/daily-life-in-gaza-loss-despair-and-hopelessness/>, accessed on 5/4/2011.

<sup>7</sup> Ortiz (2004: 400).

<sup>8</sup> Benvenisti (1993: 108).

<sup>9</sup> Sorenson (2008: 26-28).

territories - even from a small area - will implement the Resolution 242<sup>10</sup>. The Arabic countries on the other hand pressed for Israel's complete withdrawal from territories it occupied<sup>11</sup>.

On 22 October 1973, the Security Council adopted Resolution 338 (14 votes to none), calling for a cease-fire following the 1973 war between Israel on the one hand, and Egypt and Syria on the other hand. The same Resolution called for the implementation of Security Council Resolution 242 and stated that the *parties concerned* must start negotiations in order to establish a just and durable peace in the Middle East.

## 1.2. Statement of the problem

One of the problematic legal issues is the divergent approach to this matter. The ineffectiveness of the international community in the implementation of international law as it pertains to Israel has made the situation on the ground very complex. Some Security Council Resolutions have been deactivated since 1948, such as General Assembly Resolution No 194 on the return of the Palestinian refugees to their land<sup>12</sup>. The accumulation of the unenforced international resolutions makes it difficult to address this issue. Therefore some questions can be raised about the legal status of the Gaza strip under international law.

Another problematic issue is that the approach that has been taken to justify or to refute the blockade is generally of a non-legal character, but rather political or ideological. The implementation of international law is subject to political pressures, interests and overtones.

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<sup>10</sup> The American-Israeli Cooperative Enterprise website (2011), [http://www.jewishvirtuallibrary.org/jsource/UN/meaning\\_of\\_242.html](http://www.jewishvirtuallibrary.org/jsource/UN/meaning_of_242.html), accessed on 25/4/2011.

<sup>11</sup> The American-Israeli Cooperative Enterprise website (2011), [http://www.jewishvirtuallibrary.org/jsource/UN/meaning\\_of\\_242.html](http://www.jewishvirtuallibrary.org/jsource/UN/meaning_of_242.html), accessed on 25/4/2011.

<sup>12</sup> Amnesty international report, Lebanon: Exiled and Suffering: Palestinian Refugees in Lebanon (2007: p 2+3).

Therefore, an evaluation of the human and the legal status of this blockade will remain distorted as long as addressing this matter stems from a subjective analysis.

The danger of politicizing international law was witnessed when the UN sanctions and economic blockade against Iraq were decided upon between 1991 and 2003. More than half a million civilians in Iraq died due to the lack of essential food and treatment as a result of these sanctions (UNICEF)<sup>13</sup>. For example, the international community regarded the threat of Saddam Hussein's regime as a justifiable reason to apply sanctions against Iraq, and in so doing caused the deaths of more than half-a-million civilians. On 12 May 1996, the US Ambassador to the UN, Madeleine Albright, in response to claims of half a million child deaths in sanctioned Iraq, replied: "I think this is a very hard choice, but the price - we think the price is worth it"<sup>14</sup>.

To avoid the same consequences in Gaza and in any other place in the future, an objective human and legal approach must be followed to understand and to assess the international conflicts.

Israel acceded to the Convention on Genocide in 1950<sup>15</sup>, but it refused to ratify the Rome Statute of the International Criminal Court after signing it<sup>16</sup>. In fact, some of illegal acts can be seen on the ground in Gaza. As mentioned above, this blockade not only prevents essential food and treatment, but it also prevents people from exercising their right of freedom of movement. The crossings from and to Gaza have been almost continuously closed since 2007 and reports from governmental and

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<sup>13</sup> Global Policy Forum report, Iraq Sanctions: Humanitarian Implications and Options for the future (2002), <http://www.globalpolicy.org/component/content/article/170/41947.html>, accessed on 6/4/2011.

<sup>14</sup> Global Policy Forum report, Iraq Sanctions: Humanitarian Implications and Options for the future (2002), <http://www.globalpolicy.org/component/content/article/170/41947.html>, accessed on 6/4/2011.

<sup>15</sup> Prevent Genocide International website, <http://www.preventgenocide.org/law/gencon/nonparties-byICCstatus.htm>, accessed on 24/2/2011.

<sup>16</sup> The International Criminal Court website, <http://www.icc-cpi.int/Menu/ASP/states+parties/>, accessed on 24/2/2011.

non-governmental organizations indicate that many victims have died in either in Gaza or in the crossings due to the blockade<sup>17</sup>.

To decide whether or not the blockade on Gaza constitutes genocide against the civilian population, we must look at what constitutes genocide under international criminal law. The mini-thesis therefore addresses the key elements of the question whether or not the Gaza blockade amount to genocide.

In order to evaluate this question effectively, we need to clarify the legal status of the Gaza strip, the blockade as understood within the context of international law, and the elements of the crime of genocide.



### **1.3. The importance of the problem**

The importance of this topic lies in the fact that it sheds light on the legal aspect of the human suffering in Gaza. The legal dimension of this human crisis is apparently concealed in some analyses or lost in other analyses. Another point is the nature of the blockade itself, it is seldom in modern times to find a blockade from the air, sea and land on an area as small as Gaza. This in itself gives an importance to the problem in terms of the legality of the blockade and its consequences to the civilian population in Gaza.

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<sup>17</sup> Amnesty International report, Suffocating Gaza- The Israeli blockade effect's on the Palestinians (2010), <http://www.amnesty.org/en/news-and-updates/suffocating-gaza-israeli-blockades-effects-palestinians-2010-06-01>, accessed on 22/2/2011.

The blockade under international law could be legal or illegal, but it is significant to clarify whether the illegal blockade, which constitutes a collective punishment of group of people, can be regarded as genocide or not.

#### **1.4. The research questions**

This mini- thesis will endeavor to answer the following questions:

What is the legal status of the Gaza strip? Is it an occupied territory? Is there a state of war in Gaza?

Under what circumstances can a blockade be considered to be legal? Is the Gaza blockade in accordance with international law?

What are the consequences of this blockade for the civilian population? Does this blockade constitute the crime of genocide?

To answer these questions, the mini-thesis will try to address facts that are directly related to the question (topic) and to establish the extent to which law and international legal texts have impacted on the situation on the ground.

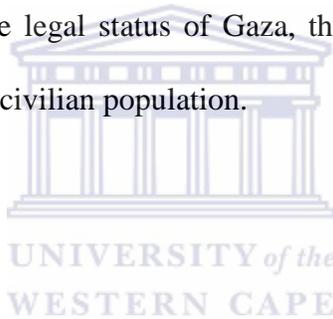
#### **1.5. Research methodology**

In order to answer these questions, it is necessary to analyze the relevant international legal texts as well as to show how the courts in various cases have dealt with the elements of the crime of

genocide. This will be a desk-top research project, while be based also on the study of other primary sources, as well as secondary sources such as books, journal articles, media reports and electronic sources.

## **1.6. Limitation of study**

As the topic is wide-ranging by its nature, this study will confine itself to dealing with the nature of the blockade and its concrete effects on the civilian population. One cannot answer the main question, which is does the blockade of Gaza constitute genocide, without analyzing the three elements of the question, that is, the legal status of Gaza, the legality of the blockade, and the consequences of the blockade on the civilian population.



## **1.7. Proposed structure**

### **1.7.1. Chapter 2: The legal status of the Gaza Strip:**

The legal status of Gaza is controversial and obscure. The first dilemma relates to the political representation of the inhabitants of the Gaza strip. The Palestinian Liberation Organization (PLO) is internationally recognized as the representative of the Palestinian people, and based on this recognition, the PLO became internationally acknowledged as *the* authority to negotiate with Israel on behalf of the Palestinian people<sup>18</sup>. The PLO concluded the Oslo accords in 1993 which paved

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<sup>18</sup> Llewellyn, Israel and the PLO (1998), [http://news.bbc.co.uk/2/hi/events/israel\\_at\\_50/history/78655.stm](http://news.bbc.co.uk/2/hi/events/israel_at_50/history/78655.stm), accessed on 7/5/2011.

the way for the establishment of the Palestinian National Authority in the West Bank and Gaza strip<sup>19</sup>.

The paradox is that both Security Council Resolutions 242 and 338 do not indicate in any way that the PLO is the representative of the Palestinian people or that it is an entitled to negotiate with Israel. Therefore, a big question is raised about the legality of the role of the PLO in the peace process. The other point which makes the vision obscure is the abandonment of the territories of Gaza, Jerusalem and the west bank by Egypt and Jordan in their peace treaties with Israel<sup>20</sup>.

Israel withdrew from Gaza and removed the settlements from the Gaza strip by September 2005 and declared that it was not legally responsible for the strip after this date<sup>21</sup>. The question is: Under which legal framework can we categorize this withdrawal? Is it an implementation of SC Resolutions 242 and 338? Israel withdrew from the land, but still controls Gaza's airspace and territorial waters, the border crossings, tax policy and tax revenues, and it decides on when to launch a military incursion into Gaza.<sup>22</sup>

This chapter will try to clarify whether Gaza is occupied or not.

### **1.7.2. Chapter 3: The blockade and the crime of genocide**

This chapter will address the theoretical frame of the blockade under international law in order to understand the difference between a lawful and an unlawful blockade. The issue when we handle

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<sup>19</sup> Llewellyn, The Road to Oslo (1998), [http://news.bbc.co.uk/2/hi/events/israel\\_at\\_50/history/78730.stm](http://news.bbc.co.uk/2/hi/events/israel_at_50/history/78730.stm), accessed on 7/5/2011.

<sup>20</sup> Hauswaldt (2003:10)

<sup>21</sup> Gisha executive report (2007: 2).

<sup>22</sup> Gisha executive report (2007: 3).

the blockade of Gaza that it has been imposed on not only the government officials in Gaza, but also on the civilian population<sup>23</sup>. This situation led to the status of "collective punishment" according to John Holmes, the United Nations Emergency Relief Coordinator<sup>24</sup>.

The legal status of the blockade and its consequences on the inhabitants of the Gaza strip cannot be dealt with without having regard to its political and human dimensions. The fact of the matter is that the roots of the problem are political. The military occupation is the basic problem. Violence and counter-violence are natural results of this occupation. The occupation is causing human suffering in the Gaza strip, a suffering which began with the Israeli occupation of the 1967 war and which reached its summit when the decision to impose the blockade was made after the Palestinian elections in 2006<sup>25</sup>. The blockade came into effect in 2007 after Israel declared Gaza to be a hostile territory<sup>26</sup>.

The elements of the crime of genocide will be addressed in this chapter as well.

### **1.7.3. Chapter 4: The legal consequences of the blockade of Gaza**

This chapter will discuss the conditions under which Gazans live as well as the legality of the Israeli blockade of the Gaza Strip. This chapter will endeavor to answer the question of this mini-thesis, by linking the elements of the crime of genocide with the act of blockade and its consequences on the Gazans. Proving genocidal intent is the crucial element, which will determine

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<sup>23</sup> The United Nations Information System on the Question of Palestine, Executive Summary (2010), <http://unispal.un.org/UNISPAL.NSF/0/276B3267FDF0A0948525772D0051B669>, accessed on 3/3/2011.

<sup>24</sup> The United Nations Information System on the Question of Palestine, Executive Summary (2010), <http://unispal.un.org/UNISPAL.NSF/0/276B3267FDF0A0948525772D0051B669>, accessed on 3/3/2011.

<sup>25</sup> Applied research institute – Jerusalem (ARIJ), The blockade in Gaza-de-development and humanitarian dimensions (2009), [http://www.poica.org/editor/case\\_studies/view.php?recordID=2144](http://www.poica.org/editor/case_studies/view.php?recordID=2144), accessed on 28/4/2011.

<sup>26</sup> Elden (2009: 88).

whether this blockade constitutes genocide or not. After proving the crime of genocide, this thesis will explore the available legal avenues for prosecuting alleged Israeli criminals.

#### **1.7.4. Chapter 5: Conclusion**

This concluding chapter answers the questions of the mini-thesis in summary form based on the conclusions in each of the preceding chapters. Furthermore, it comes up with a set of recommendations as regards the concrete steps that need to be taken under international criminal law.



## Chapter 2

### The legal status of the Gaza strip

#### 2.1 Introduction

The city of Gaza was built 5000 years ago by the Arabs ancestors, the Canaanites<sup>27</sup>. It has a very important geopolitical location between Asia and Africa. Therefore it was besieged many times in different historical eras. The most notable siege was the one which was the two-month seige imposed by Alexander the Great in 332 B.C<sup>28</sup>.

Gaza is a coastal city in Palestine which used to constitute a part of the Ottoman Empire<sup>29</sup>, but the fall of the latter following the First World War led to the occupation of the Arabic territories including Palestine<sup>30</sup>. The 1916 Sykes-Picot secret agreement between Britain and France put Palestine in the British sphere and ended 400 years of Turkish rule<sup>31</sup>. On 2 November 1917 the Belfour Declaration came into effect in order to affirm the British commitment to make Palestine a national home for the Jewish people<sup>32</sup>. On 15 May 1948, Israel was officially declared and its existence was brought about by the withdrawal of the British army from the former colony (Palestine) and the ending of 1948 war between Zionist militias and Arabs as well<sup>33</sup>.

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<sup>27</sup> Dumper and Stanley (2007: 155).

<sup>28</sup> Greswell (1862: 111).

<sup>29</sup> Miller (2010: 2).

<sup>30</sup> Miller (2010: 2).

<sup>31</sup> White (2012: 273).

<sup>32</sup> Miller (2010: 2).

<sup>33</sup> Sorenson (2008: 22-25).

Many United Nations Resolutions dealt with the conflict in the Palestinian territories in general and the Gaza strip in particular. The chronology of these resolutions was concurrent with the fast moving events on the ground. The most notable resolutions in this regard are UN General Assembly Resolutions 181 and 194, Security Council Resolutions 242 and 338. The legal status of the Gaza strip and the abovementioned UN Resolutions will be discussed below.

## **2.2 The status before the Six Days War**

As mentioned above, Palestine was under the British Mandate before the establishment of Israel. The British Mandate over Palestine lasted more than 30 years between, 1917 and 1948<sup>34</sup>. This period witnessed many events which led to the withdrawal of the British army and resulted in the foundation of the state of Israel. The lands which are located west of the Jordan River, including the Gaza Strip, became the Palestine Mandate<sup>35</sup>. The British era encouraged the Jewish migration to Palestine,<sup>36</sup> which contributed towards the escalation of the violence between Arabs and the Jewish immigrants<sup>37,38</sup>. The population of the Jews increased twelve-fold compared to the figures before the British colony era and this was due to the immigration<sup>39</sup>. The unrest in Palestine urged the United Nations to intervene in the conflict, and this resulted in the UN adopting General Assembly Resolution 181 in 1947.

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<sup>34</sup> Forman (2003:491).

<sup>35</sup> Middle East research and information project website, [http://www.merip.org/palestine-israel\\_primer/brit-mandate-pal-isr-prime.html](http://www.merip.org/palestine-israel_primer/brit-mandate-pal-isr-prime.html), website accessed on 4/8/2011.

<sup>36</sup> Khalidi (2006:63).

<sup>37</sup> Ullian (2011:25).

<sup>38</sup> Mayamey (2010:23).

<sup>39</sup> Tyler (2001:6).

This Resolution is known as the Partition Plan for Palestine. It divided the Palestinian territories of the mandate of Palestine into two different states: Arabic and Jewish<sup>40</sup>. The Resolution provides in Part 3/A that Jerusalem shall be established as a separate body, *Corpus Separatum*, under a special international regime, and shall be administrated by the UN. Part 2/A and B of the Resolution set the boundaries of both the Arabic and the Jewish states. The area which is known today as the Gaza strip was supposed to be under the sovereignty of the alleged Arabic state. The Resolution provides as follows:

"The area of the Arab State in Western Galilee is bounded on the west by the Mediterranean and on the north by the frontier of the Lebanon from Ras en Naqura to a point north of Saliha... thence westwards in a straight line to the north-eastern corner of Umm Kalkha, thence following the northern boundaries of Umm Kalkha, Qazaza and the northern and western boundaries of Mukhezin to the Gaza District boundary... It then runs across the tribal lands of 'Arab El-Jubarat to a point on the boundary between the Sub-Districts of Beersheba and Hebron north of Kh. Khuweilifa, whence it proceeds in a south-westerly direction to a point on the Beersheba-Gaza main road two kilometers to the north-west of the town...".

A total of 33 countries voted in favour of the Resolution; 13 countries voted against it and 10 countries abstained, including the mandatory state, the United Kingdom<sup>41</sup>.

The two parties differed in their position on the partition plan. The Jewish population in Palestine supported the Resolution, while the Arabic population in Palestine and the Arabic states disapproved of it<sup>42</sup>.

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<sup>40</sup> Samson (2010:9).

<sup>41</sup> Available at Yale University website, Avalon Project at Yale Law School, <http://www.yale.edu/lawweb/avalon/un/res181.htm>, website accessed on 1/8/2011.

<sup>42</sup> Quigley (2005:37-39).

The Declaration of the Establishment of the State of Israel in 1948 indicates that the General Assembly (hereafter GA) Resolution 181 gave legitimacy to the Jewish state. It provides:

"On the 29th November, 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable"<sup>43</sup>.

However, we can raise a question about the alleged irrevocability of the GA Resolution 181. The powers of the GA of the United Nations and the extent of its mandate are limited in terms of the responsibility for the maintenance of international peace and security, according to Articles 10, 11, 12 and 14 of the United Nations Charter. Articles 23 (1) and 24 (1) of the Charter state that the SC is the organ having primary responsibility in this regard and the GA can only make recommendations, but not binding decisions upon states<sup>44</sup>. Therefore, it is suggested that the GA of the UN exceeded its power when it made its decision on the partition plan because the consequences of this Resolution has damaged international peace and security since 1947, and there is no provision in the UN Charter giving the GA the power to create a new state.

The War broke out in 1948 as a result of the differences on the partition plan of 1948, which led to the establishment of the Israeli state on 24 February 1949. Both Israel and Egypt signed the armistice agreement which put the Gaza strip under Egyptian military administration, according to Article 6 of the agreement. The Gaza Strip remained under Egyptian military administration until the Six Days War.

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<sup>43</sup> Israel Ministry of Foreign Affairs website, The Declaration of the Establishment of the State of Israel, <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Establishment%20of%20State%20of%20Israel>, accessed on 4/8/2011.

<sup>44</sup> Hossain (2008:77).

### 2.3 The General Assembly Resolution no 194

As a consequence of the 1948 war was the deportation of about 750 000 Palestinians from their homeland<sup>45</sup>. Some of the deportees sought refuge in the rest of the Palestinian territories namely, East Jerusalem, the Gaza strip and the West Bank, all of which have been occupied since the end of the Six Days War. Others were expatriated to Jordan, Syria, Lebanon and other countries<sup>46</sup>.

The GA of the United Nations issued Resolution 194 on 11 December 1948 to address the outcome of the war and its effect on the warring parties. The Resolution comprises of 15 Articles. Important for the discussion here are Articles 7, 8 and 9. These Articles deal with the situation in Jerusalem and the holy places in Palestine. They reaffirm the protection and freedom of access to the holy places. They also deal with the demilitarization of Jerusalem. Also, one of the most important Articles in this Resolution is Article 11, which established what later became known as the Palestinian right of return. The Article provides as follows:

"The General Assembly,

Having considered further the situation in Palestine,

Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible; Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations".

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<sup>45</sup> United Nations Relief and Works Agency for Palestine Refugees (UNRWA) website, <http://www.unrwa.org/etemplate.php?id=86>, website accessed on 11/8/2011.

<sup>46</sup> United Nations Relief and Works Agency for Palestine Refugees (UNRWA) website, <http://www.unrwa.org/etemplate.php?id=86>, website accessed on 11/8/2011.

Before addressing the legal content of Article 11 of the Resolution, it is necessary to refer to the UN Convention Relating to the Status of Refugees of 1951 and its Protocol of 1967 which defined what a refugee is. Article 1 of the Convention defines a refugee as follows:

"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

On 8 December 1948, the United Nations established the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) pursuant to UN General Assembly Resolution 302/4<sup>47</sup>. UNRWA is responsible mainly for the provision of education and health services to the Palestinian refugees in Jordan, Syria, Lebanon, the West Bank, including East Jerusalem and the Gaza Strip.<sup>48</sup> The paradox is that the 1951 Refugee Convention has implicitly excluded the Palestinian refugees from the protection or the assistance under the Convention. Article (1/D) of the Convention provides as follows:

'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance'.

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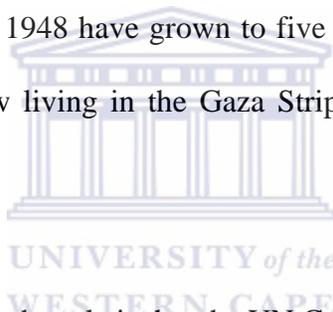
<sup>47</sup> United Nations Relief and Works Agency for Palestine Refugees (UNRWA) website, <http://www.unrwa.org/etemplate.php?id=85>, accessed on 11/8/2011.

<sup>48</sup> United Nations Relief and Works Agency for Palestine Refugees (UNRWA) website, <http://www.unrwa.org/etemplate.php?id=85>, accessed on 11/8/2011.

In other words, the Palestinian refugees will not benefit from the protection under this Convention, because UNRWA is a UN agency and the Convention excluded the refugees who receive assistance from a UN agency.

In order to be able to operate on the ground, UNRWA has defined the Palestinian refugees according to an operational and not legal definition. It states that ‘Palestine refugees are people whose normal place of residence was Palestine between June 1946 and May 1948, who lost both their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict’<sup>49</sup>.

The 750 000 Palestinian refugees in 1948 have grown to five million in 2012, and more than 1,1 million Palestinian refugees are now living in the Gaza Strip, constituting three-quarters of the entire population of Gaza<sup>50</sup>.



According to the GA Resolution 194, the rule is that the UN General Assembly Resolutions are not binding and they do not acquire a mandatory status, but rather, the GA may only makes recommendations.<sup>51</sup> Israel relies on this rule to justify its refusal of the repatriation of the Palestinian refugees to their lands.<sup>52</sup> However, this rule is not absolute, but is subject to restrictions which give Resolution 194, to some extent, a binding nature. It is suggested that this mandatory legal status stems from the following facts:

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<sup>49</sup> United Nations Relief and Works Agency for Palestine Refugees (UNRWA) website, <http://www.unrwa.org/etemplate.php?id=86>, accessed on 11/8/2011..

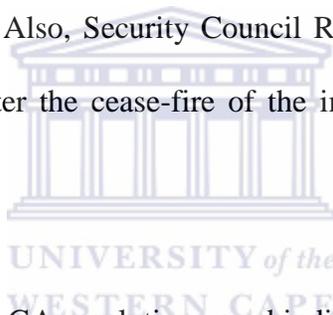
<sup>50</sup> United Nations Relief and Works Agency for Palestine Refugees (UNRWA) website, <http://www.unrwa.org/etemplate.php?id=64>, accessed on 11/8/2011.

<sup>51</sup> Tunkin (1974: 169).

<sup>52</sup> Grief (2008:499).

1. The Palestinians' right of return, which is included in GA Resolution 194/11 “reflects international law”<sup>53</sup> due to the fact that this right is included in Article 13 of the Universal Declaration of Human Rights, Article 5(d) (ii) of the International Convention on the Elimination of all Forms of Racial Discrimination and Article 12 (4) of the International Convention on Civil and Political Rights. All these international conventions affirm the right of every person to return to their own country.<sup>54</sup>

2. GA Resolution 194/11 has been implicitly included in Security Council Resolution 242, which already has a binding effect. The resolution “[a]ffirms the necessity...[f]or achieving a just settlement of the refugee problem.” Also, Security Council Resolution 338 indirectly asserts the same right “to start immediately after the cease-fire of the implementation of Security Council Resolution 242”.



3. The fact of the matter is that the GA resolutions are binding in precise cases.<sup>55</sup> One of these cases is where the GA decides to admit new member states.<sup>56</sup> Israel has been admitted as a member according to the GA Resolution number 273 of 1949. The same Resolution stipulated that GA Resolution number 194 must be obeyed by Israel. The GA Resolution 273 provides:

"Recalling [Resolutions 181 and 194] and taking note of the declarations and explanations made by [Israel]...in respect of the implementation of the said resolutions, the General Assembly...decides to admit Israel into membership in the United Nations."

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<sup>53</sup> Keenan (2006), the canpalnet Ottawa website, [http://www.canpalnet-ottawa.org/Keenan\\_ROR.html](http://www.canpalnet-ottawa.org/Keenan_ROR.html), accessed on 5/4/2011.

<sup>54</sup> The Palestine right to return coalition website, <http://www.al-awda.org/facts.html>, accessed on 17/8/2011.

<sup>55</sup> Oberg (2005: 883).

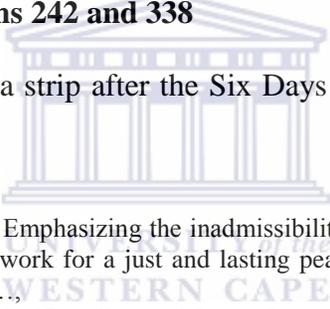
<sup>56</sup> Oberg (2005: 883).

It is thus clear that the admission of Israel as a member state at the UN was conditional<sup>57</sup>. Israel is obliged by the binding GA Resolution number 273 to implement GA Resolution No 194. It is suggested that the latter Resolution has acquired a mandatory status from the binding GA Resolution 273.

4. GA Resolution 194 has been reaffirmed more than 110 times by the General Assembly.<sup>58</sup> These reaffirmations are important “because of their role in the codification and progressive development of international law”<sup>59</sup>. GA Resolution 194 has become binding through the “declared law”<sup>60</sup>.

#### **2.4 The Security Council Resolutions 242 and 338**

Following the occupation of the Gaza strip after the Six Days War in 1967, the Security Council passed Resolution 242 which states:


  
 "The Security Council...Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security...,
   
 1. Affirms (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict".

The Gaza strip is included in SC Resolution 242 as it was a territory occupied in the Six Days War<sup>61</sup>. Therefore, under this resolution Gaza became an occupied territory according to international law.

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<sup>57</sup> Keenan (2006), the Canpalnet website, [http://www.canpalnet-ottawa.org/Keenan\\_ROR.html](http://www.canpalnet-ottawa.org/Keenan_ROR.html), accessed on 5/4/2011.

<sup>58</sup> Chiller-Glaus (2007:125).

<sup>59</sup> Chiller-Glaus (2007:125).

<sup>60</sup> Chiller-Glaus (2007:125).

<sup>61</sup> Quigley (2005:171).

The Gaza Strip remained under the Israeli occupation after the 1973 war. The Security Council passed Resolution 338 in the aftermath of this war. It provides as follows:

" The Security Council, Calls upon all parties to present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions after the moment of the adoption of this decision, in the positions they now occupy; Calls upon all parties concerned to start immediately after the cease-fire the implementation of Security Council Resolution 242 (1967) in all of its parts; ".

In 1974 the Arab League adopted a Resolution providing for the Palestinian Liberation Organization (PLO) to be the sole and legitimate representative of the Palestinian people<sup>62</sup>. The international community gradually acknowledged this representation, and based on this recognition the PLO became internationally acknowledged as the authority to negotiate with Israel on behalf of the Palestinian people<sup>63</sup>. The PLO concluded the Oslo accords in 1993, which paved the way for the establishment of the Palestinian National Authority in the West Bank and Gaza strip<sup>64</sup>.

It should be noted that both Security Council Resolutions 242 and 338 do not indicate, in any way, that the PLO is the representative of the Palestinian people or that it is entitled to negotiate in the peace process between Arabs and Israel. Therefore, a big question is raised about the legality of the role of the PLO in the peace process. It is submitted that political factors have led to this stalemate situation, and that the failure of the peace process can be attributed partly to the absence

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<sup>62</sup> Resolution on Palestine, Seventh Arab League Summit Conference (1974).

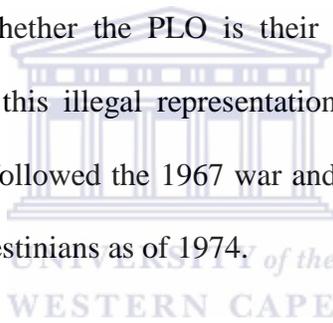
<sup>63</sup> Llewellyn, Israel and the PLO, BBC website, [http://news.bbc.co.uk/2/hi/events/israel\\_at\\_50/history/78655.stm](http://news.bbc.co.uk/2/hi/events/israel_at_50/history/78655.stm), accessed on 7/5/2011.

<sup>64</sup> Llewellyn, The Road to Oslo (1998), BBC website, [http://news.bbc.co.uk/2/hi/events/israel\\_at\\_50/history/78730.stm](http://news.bbc.co.uk/2/hi/events/israel_at_50/history/78730.stm), accessed on 7/5/2011.

of the proper application of the UN Security Council Resolutions 242 and 338 in particular, and international law in general.

Legally, it is submitted that Jordan and Egypt are the concerned parties since their territories were occupied in the 1967 war. Jerusalem and the West Bank were Jordanian territories when the war broke out. The same legal position should apply to the Gaza Strip, for Gaza was under the Egyptian military administration and Egypt was in charge at the time of the 1967 war.

It is submitted that no one held a referendum to ask the Palestinians in the occupied territories or the Palestinians of the Diaspora whether the PLO is their sole and legitimate representative. Initially the Arab League imposed this illegal representation on the Palestinians to justify the political and military failure which followed the 1967 war and to send a message that the PLO is responsible for Palestine and the Palestinians as of 1974.



## **2.5 Oslo Accords**

The Oslo Accords of 13 September 1993, which were concluded between Israel and the PLO have paved the way for the formation of the Palestinian National Authority in the Gaza Strip and Jericho. The preamble of the Accords provides as follows:

"REAFFIRMING their understanding that the interim self-government arrangements, including the arrangements to apply in the Gaza Strip and the Jericho Area contained in this Agreement, are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338".

The legal and political entity of the Palestinian body derives from Article 4 of the Oslo Accords. This article gave the PLO the right to establish and to build executive, legislative and judicial bodies in both Gaza and Jericho, in addition to building the institutions of civil society. All of these bodies have formed the structure of the Palestinian National Authority (hereafter PNA).

One of the most important aspects of the Oslo Accords is the one which gave the Israeli side security guarantees reflected in the retention of effectiveness of the Israeli military laws in the West Bank and Gaza, according to Article 7(9) of the Oslo agreement, in addition to the commitments of the PNA to fighting 'terror'<sup>65</sup>.

Fighting terror is a broad term, which can easily be used by Israel to justify its occupation or even by the PNA against its political adversaries. One can state that the Oslo accords have bred a Palestinian body whose its main responsibility is to stop the resistance against the Israeli occupation and to punish those who opposed the Oslo process according to the occupying Israeli laws. Hence, the Oslo accords have not created a state, in the legal meaning, for the Palestinians, but rather a political entity that takes the burden off the shoulders of the occupying power. The PNA was the ideal excuse which was given to Israel to evade its legal responsibility under the Geneva Conventions and the law of belligerent occupation as an occupying power, especially in the area of education, health, security, human rights and other areas, but the PNA has taken it upon itself to implement these responsibilities. The PNA is a political body without adequate resources and depends on donor funds to survive<sup>66</sup>, whereas before the Oslo era, Israel was actually

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<sup>65</sup> Von Benda-Beckmann (2009:89).

<sup>66</sup> Lasensky and Grace (2006:5).

responsible for the Gaza Strip as an occupying power under the provisions of the Geneva Conventions and the law of belligerent occupation.

## 2.6 Israel's disengagement plan

What was addressed in Paragraph 2.5 does not necessarily mean that Israel has no legal responsibility for the Gaza Strip. Indeed, Israel, as mentioned in Paragraph 1.7.1, has been trying to disclaim responsibilities for the Strip since it declared its disengagement plan from the Gaza Strip on 12 September 2005. Israel endeavors to recast the legal status of the Gaza Strip by depriving it of the occupied territory status and giving it a *sui generis* status<sup>67</sup>. The motive behind this redefining of the Gaza Strip is to give the Israeli status legitimacy for fighting the (terrorism) which emanates from Gaza.<sup>68</sup> This opinion claims that Israel has no actual control over Gaza and tries to unburden Israel from its obligations as an occupier under international law<sup>69</sup>. In fact, this attempt to change the legal status of Gaza does not derive from a legal setting, but rather from a political background because this opinion says in a frank phrase that the reason for redefining the status of Gaza is to legitimize the Israeli acts in the Strip in the name of fighting terrorism and putting pressure on the Hamas government in Gaza<sup>70</sup>. This politicization of a legal matter will undermine the objectivity of this approach as long as legality is interpreted to realize ideological aims.

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<sup>67</sup> Samson, (2010:1).

<sup>68</sup> Samson, (2010:2).

<sup>69</sup> Samson, (2010:39).

<sup>70</sup> Solomon (2011:81 and 82).

Before addressing the occupation status of Gaza, it should be mentioned that the UN still calls Gaza an (occupied) territory<sup>71</sup>. The actual occupation status in Gaza and the consequences of that occupation can be discussed as follows:

1. Article 42 of Hague Regulations of 1907 concerning the laws and customs of war on land provides that:

"Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised".

The rule is that provisions of the law of occupation under international law may be applicable when a foreign country exercises "actual control" over a certain territory<sup>72</sup>. The International Committee of the Red Cross (hereafter ICRC) affirms the same doctrine by saying that the effective control of foreign armed forces over a territory makes IHL rules related to occupied territories applicable<sup>73</sup>. The ICRC asserts that "a transfer of authority to a local government re-establishing the full and free exercise of sovereignty will normally end the state of occupation"<sup>74</sup>.

Regarding the current situation in Gaza, the facts on the ground in the Strip indicate that Israel is still exercising actual control over the territory.<sup>75</sup> The aspects of this actual control lie in the crossings of the border for passengers and cargo, air space and territorial waters, population

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<sup>71</sup> Levs, Josh, CNN website, [http://articles.cnn.com/2009-01-06/world/israel.gaza.occupation.question\\_1\\_gaza-israeli-troops-arab-israeli-war?\\_s=PM:WORLD](http://articles.cnn.com/2009-01-06/world/israel.gaza.occupation.question_1_gaza-israeli-troops-arab-israeli-war?_s=PM:WORLD), accessed on 19/11/2011.

<sup>72</sup> Ruys (2008:163).

<sup>73</sup> The ICRC website, Occupation and international humanitarian law: questions and answers, <http://www.icrc.org/eng/resources/documents/misc/634kfc.htm>, accessed on 20/11/2011.

<sup>74</sup> The ICRC website, Occupation and international humanitarian law: questions and answers, <http://www.icrc.org/eng/resources/documents/misc/634kfc.htm>, accessed on 20/11/2011.

<sup>75</sup> B'Tselem, The scope of Israeli control in the Gaza Strip, [http://www.btselem.org/english/gaza\\_strip/rafah\\_crossing.asp](http://www.btselem.org/english/gaza_strip/rafah_crossing.asp), accessed on 8/3/2011.

registry and in controlling the tax system of the Gaza Strip<sup>76</sup>. In its 104-page study, *Disengaged occupiers: The legal status of Gaza*, the Legal Center for Freedom of Movement of Palestinians (Gisha) highlights in detail the way Israel exercises actual control over Gaza. The study indicates that not only the previously mentioned controlling aspects are being exercised, but also the continuous Israeli military incursions into Gaza and the deployment of the Israeli forces along the borders of Gaza since June 2006 have been controlling the movement in Gaza<sup>77</sup>. Furthermore, the lives of the inhabitants of Gaza are threatened if they move in a “no-go zone” which was declared in the northern part of the Strip by Israel in December 2005<sup>78</sup>. Israel's actual control over the Gaza Strip also lies in its exercising control over the PNA and its capability to provide services to Gaza inhabitants, for Israel controls the transfer of tax revenues which constitute 50% of the operational income of the PNA<sup>79</sup>. Israel also controls the West Bank, which is regarded as an indirect control of Gaza due to the fact that both of them form a single territorial unit under the PNA umbrella<sup>80</sup>. Electricity in Gaza is also controlled by Israel, as Gaza purchases 57% of the electricity from Israel<sup>81</sup>. The only power plant in Gaza which produces 43% of the electricity in Gaza was destroyed by Israeli jets in June 2006<sup>82</sup>. The study summarizes the situation in Gaza in the following phrase: “Gaza residents know that their ability to use electric lights, to buy milk, or to have the garbage collected depends on decisions made by Israel”<sup>83</sup>.

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<sup>76</sup> B'Tselem, The scope of Israeli control in the Gaza Strip, [http://www.btselem.org/english/gaza\\_strip/rafah\\_crossing.asp](http://www.btselem.org/english/gaza_strip/rafah_crossing.asp), accessed on 8/3/2011.

<sup>77</sup> Gisha, *Disengaged occupiers: The legal status of Gaza* (2007:12-13).

<sup>78</sup> Gisha, *Disengaged occupiers: The legal status of Gaza* (2007:12-13).

<sup>79</sup> Gisha, *Disengaged occupiers: The legal status of Gaza* (2007:14).

<sup>80</sup> Gisha, *Disengaged occupiers: The legal status of Gaza* (2007:14).

<sup>81</sup> Gisha, *Disengaged occupiers: The legal status of Gaza* (2007:44).

<sup>82</sup> Gisha, *Disengaged occupiers: The legal status of Gaza* (2007:44).

<sup>83</sup> Gisha, *Disengaged occupiers: The legal status of Gaza* (2007:9).

2. The status of occupation leads us to the applicability of the Geneva Conventions on the occupied territories which have been occupied following the Six Days War. General Article 2 of the Geneva Conventions provides: “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.

As mentioned above, the Gaza Strip was occupied following an international armed hostility between Israel and Egypt. This means that Gaza is an occupied territory and that the Geneva Conventions are applicable in Gaza’s case because both Israel and Egypt had acceded to the Conventions when the hostility broke out<sup>84</sup>.

The Geneva Conventions (GC) remain applicable to the situation in Gaza even if Egypt relinquished any claims over Gaza and even after the establishment of the PNA (the latter is not a contracting party) inasmuch as general article 2 GC states:

“Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof”.

It should be noted that the PLO decided to adhere to Geneva Conventions and the first and the second Additional Protocols in 1989 and before the establishment of the PNA, but the Swiss Federal Council stated that it was not in a position to accept this adherence “due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine”<sup>85</sup>.

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<sup>84</sup> The ICRC website, State parties webpage, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>, accessed on 20/11/2011.

<sup>85</sup> The ICRC website, State parties webpage, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>, accessed on 20/11/2011.

3. Based on the applicability of the Geneva Conventions on the Gaza Strip, Israel, as an occupying power, has to comply with the rules of the law of occupation under international law. The major rules which the belligerent occupation power must adhere to in the occupied territories are: Art 4 of the Fourth Geneva Convention, which states that civilians in occupied territories are “protected persons” and that their rights cannot be renounced (Art 8 of the Fourth Geneva Convention); The occupying power must ensure the provision of medical care and food supplies to the population and must maintain the public health standards (Art 55 and Art 56 of the Fourth Geneva Convention); The occupying power must Permit, facilitate and protect foreign relief consignments (food, clothing, medical supplies) which are dispatched by impartial humanitarian organizations (Art 59 of the Fourth Geneva Convention); The occupying power must allow protected persons to receive individual relief consignments (Art 62 of the Fourth Geneva Convention); Private property cannot be confiscated (Art 46 of the Hague Regulations of 1907 concerning the Laws and Customs of War on Land Regulations); The occupying power has the obligation to protect children (Art 50 of the Fourth Geneva Convention); The occupying power has the obligation to prohibit deportation and transfer (Art 49 of the Fourth Geneva Convention); The occupying power must restore and ensure public safety (Art 43 of Hague Regulations of 1907 concerning the Laws and Customs of War on Land); The occupying power has the obligation to prohibit destroying private property unless such destruction is necessary for military operations (Art 53 of the Fourth Geneva Convention).

It is worth mentioning that Israel tried to deprive Gaza from the afforded legal protection under GC4 on the ground that Gaza was not a state in the legal sense of the word when the war broke out in 1967, and this war deprived the civilian population of Gaza from the mentioned legal

protection.<sup>86</sup> This interpretation has been rejected by the United Nation, the International Court of Justice and even the Israeli Supreme Court<sup>87</sup>.

4. The occupation status in Gaza leads to the applicability of customary international law. This legal fact facilitates the understanding of the complicated situation in Gaza, as the PNA is not a state in the legal sense of the word and Israel, as a state, acceded to the Geneva Conventions of 1949, but is not bound by the Additional Protocols of 1977<sup>88</sup>. This unequal legal status adds some difficulty in this regard, particularly when we endeavor to determine the applicable rules and the liability of the infringements of these rules. The applicability of the customary rules goes beyond the framing of the hostility, whether it is an international or non-international armed conflict, or whether it is between two contracting parties to a convention under an international treaty law or not. Many examples of customary rules can be mentioned here, but the clearest one is Common Article 3 of the Geneva Conventions, which represents the minimum protection to persons taking no active part during an armed conflict. Common Article 3 states:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

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<sup>86</sup> Erakat (2011:4).

<sup>87</sup> Erakat (2011:5).

<sup>88</sup> The ICRC website, State parties webpage, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>, accessed on 20/11/2011.

- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

## 2.7 Conclusion:

At a first glance, the legal situation of the Gaza Strip seems controversial. This controversy derives from the fact that Gaza has been occupied by Israel following an international armed conflict with Egypt, as Gaza was previously under Egyptian military administration. The Oslo accords of 1993, which paved the way for the establishment of the PNA in the Gaza Strip and the West Bank, have created a new political body in Gaza. The determination of the identity of the PNA is crucial in order to understand the status of the Strip and to determine the applicable laws and conventions. What is the status of the conflict in Gaza? We have many probabilities: If the conflict is between Israel and the Palestinians, then we will have two answers, the first being that the conflict is not international because the Palestinian National Authority is not a state in the legal meaning of the word, according to the predominant legal opinion in international law and according to the political practice<sup>89</sup>. The second answer is that this conflict is international because Palestine is a state in the legal meaning of the word according to an uncommon point of view<sup>90</sup>.

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<sup>89</sup> Cerone (2011:4), American Society of International Law website, <http://www.asil.org/pdfs/insights/insight110913.pdf>, accessed on 26/5/2012; Khalil (2005:24); Rozenbeg, ICC's credibility hangs on Palestinian state decision, 21 May 2009, Law society Gazette website, <http://www.lawgazette.co.uk/opinion/joshua-rozenberg/icc039s-credibility-hangs-on-palestinian-statehood-decision>, accessed on 15/8/2011.

<sup>90</sup> Rozenbeg, ICC's credibility hangs on Palestinian state decision, 21 May 2009, Law society Gazette website, <http://www.lawgazette.co.uk/opinion/joshua-rozenberg/icc039s-credibility-hangs-on-palestinian-statehood-decision>, accessed on 15/8/2011.

The other probability is that the conflict in Gaza is international being one between Egypt and Israel, because as mentioned previously, Egypt is the concerned party in Security Council Resolutions 242 and 338.

Politically, there has been no conflict between Egypt and Israel since the 1977 peace agreement. On the contrary, the relationship and the political normalization between the two countries grew strongly. Egypt does not want to be involved in Gaza and tries to put the burden on the shoulders of the people of Gaza. The main obstacle is that both Israel and Egypt have omitted Gaza from their peace agreement and political factors made the PNA a recent player in Gaza instead of Egypt. Legally, it is suggested that Egypt, not the PNA, is the concerned party in terms of the situation in Gaza, as the latter was under the Egyptian administration when the Six Days War broke out.

But regardless of whether the PNA is a *de facto* or a *de jure* body according to international law, the most important question is: Is the Gaza strip an occupied territory? Despite Israel declaring its disengagement plan in Gaza in 2005, it is submitted that the Gaza strip is still under the Israeli occupation, considering that international law and specifically Article 42 of Hague Regulations concerning the Laws and Customs of War on Land and Article 6 of the Fourth Geneva Convention of 1949, indicate that the status of occupation exists when there is actual control of a territory by a foreign military force. A legal opinion made by Amnesty International Organization reaffirmed this fact about the existence of occupation after the invasion of Iraq in 2003. It states:

"The sole criterion for deciding the applicability of the law on belligerent occupation is drawn from facts: the *de facto* effective control of territory by foreign armed forces coupled with the possibility to enforce their decisions, and the *de facto* absence of a national governmental authority in effective control"<sup>91</sup>.

In the next chapter, the following subjects will be outlined: The blockade under international law, the features of the blockade of Gaza and the elements of the crime of genocide.



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<sup>91</sup> Amnesty International report, Iraq: Responsibilities of the occupying powers (2003:5).

## Chapter 3

### The blockade and the crime of genocide

#### 3.1 Introduction

The blockade under contemporary international law has been addressed narrowly and in a limited way. The reason may be the rarity of the occurrence of the blockade realistically, especially nowadays. The consequences of the blockade on the blockaded civilian population in general seem to be rather vague due to the overlapping of what is legal with what is political. This chapter looks at the blockade under international law; it studies the features of the blockade of the Gaza Strip. The elements of the crime of genocide under international law will be addressed as well.

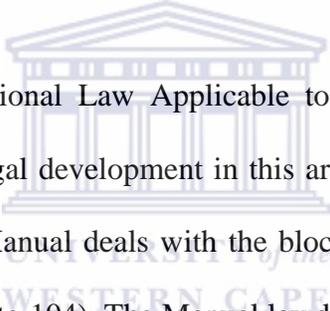
#### 3.2 The blockade under international law

Due to the absence of a legal definition for the term 'blockade' under the international law of treaties, a definition will be borrowed from the *Encyclopedia Britannica*, which states that a blockade is "an act of war by which a belligerent prevents access to or departure from a defined part of the enemy's coasts"<sup>92</sup>. In fact, the content of the rules which handled the blockade in the international treaties and instruments are aligned to the aforementioned definition.

In 1856, the warring parties in the Crimean war signed the Declaration of Paris Respecting Maritime Law. Article 4 of the declaration indicated that the blockade must be effective in order to be binding. This article legitimized the blockade as an act of war in an international treaty. The Declaration of London of 1909 Concerning the Laws of Naval War specified and regulated the use of a blockade in Chapter 1 (articles 1 to 21). Article 2 reaffirmed the effectiveness of the blockade

<sup>92</sup> Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/69580/blockade>, accessed on 10/4/2012.

as a mandatory requirement. From an understanding of article 3, we can see that the blockade comes into effect according to actual facts on the ground and not only according to a declaration from the blockading state. Article 5 clarifies that the blockade must be implemented neutrally. Articles 8 and 9 state that the start of the blockade, its geographic limits, and the specified time given to the neutral vessels to get out of the blockaded area must be declared. Articles (14 to 21) determine the conditions of capturing and condemnation of neutral vessels which breach the blockade and their cargo. It is clear from the reading of these articles that the blockade, as an act of war in international law, must not only be effective but also comprehensive in respect of the neutral vessels.



The San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 1994 constitutes the culmination of the legal development in this area because it includes international customary rules<sup>93</sup>. The San Remo Manual deals with the blockade in Section 2 Part 5 under the title Methods of Warfare (articles 93 to 104). The Manual lay down the precepts of the blockade as an act of war and reaffirms the same legal rules which are mentioned in The Declaration of London of 1909 Concerning the Laws of Naval War. Articles 93 and 94 state that the blockade must be declared to the warring parties and the neutral states, in addition to its duration and the geographic extent. The new important rules in the San Remo Manual are those which determine the criteria that distinguish between a lawful and a prohibited blockade. Article 102 prohibits a blockade if the sole purpose of the blockade is to starve the civilian population or to deprive it of essential goods for its survival. Also, the blockade is unlawful if the direct anticipated military advantage does not match the damage to the blockaded civilian population; in other words where

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<sup>93</sup> Doswald-Beck , Background- Development of the San Remo Manual and its intended purpose' the ICRC website, <http://www.icrc.org/eng/resources/documents/misc/57jmst.htm>, accessed on 27/4/2011.

the damage is disproportionately bigger than the military advantage. Furthermore, Articles 103 and 104 state that the blockading military forces must permit the passage of food, essential items for survival and medical supplies to the blockaded civilian population, according to certain requirements and conditions.

Chapter Seven of the United Nations' Action with respect to Threats to the Peace, Breaches to the Peace and Acts of Aggression addresses the blockade under Article 42. It states that the Security Council has the right to impose a naval, air and land blockade in order to maintain or restore international peace and security. The UN put this article into effect when it imposed naval blockades to enforce sanctions against Iraq, Haiti, Sierra Leone and the former Yugoslavia.<sup>94</sup>

It should be noted that none of the above-mentioned international treaties or instruments determined the geographic extent of the blockade. It is submitted that this situation makes the blockade capable of being imposed in international waters and airspace as well as in the territorial zones. However, establishing the extent of the geographic blockade must be restricted to coasts controlled or occupied by the enemy but not outside the zone of naval warfare<sup>95</sup>.

To maintain the effectiveness of the blockade, the blockading belligerent power may use military means such as warships, submarines, aircraft and mines<sup>96</sup>. The effectiveness of the blockade becomes factual when the blockading power deploys adequate armed forces to hinder the incoming

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<sup>94</sup> Repertoire of the practice of the Security Council, the United Nations website, <http://www.un.org/en/sc/repertoire/faq.shtml>, accessed on 14/4/2012.

<sup>95</sup> Von Heinegg (2006:18).

<sup>96</sup> Von Heinegg (2006:18)).

vessels to the blockaded coast<sup>97</sup>. There is also a distinction between a blockade as an act of war and a pacific blockade. It is true that both of them have to be effective and accompanied by a declaration<sup>98</sup>. However, contrary to the belligerent blockade, the pacific blockade, which is a “method of non-hostile redress”<sup>99</sup>, is not applicable to neutral vessels, but only to vessels of the blockaded state<sup>100</sup>. In other words, the effectiveness of the pacific blockade is not comprehensive, and the neutral vessels and their cargo may not be confiscated in this case. Another matter that should be illustrated is the alleged slight difference between the blockade and the siege. Some maintain that the blockade is naval and that its purpose is to cut off the mercantile activities of the blockaded state, while a siege can only be from land, with its purpose being the occupation of the besieged area.<sup>101</sup> This opinion does not differ from the common belief among the scholars of international law in the 19<sup>th</sup> century<sup>102</sup>. However, the naval nature of the blockade has become questionable nowadays because the UN Charter addresses the blockade from three angles: naval, air and land. The same Charter did not use the term ‘siege’ *per se* when it dealt with the ‘land’ aspect; it used the term ‘blockade’ instead, which suggests that the difference between a blockade and a siege is more literal than legal, according to the contemporary law relating to a blockade.

Obviously, the purpose of the blockade must be restricted to cut down the commercial exports from or imports into the blockaded coasts without intentionally starving the civilian population of the blockaded area. Article 49 of Additional Protocol I, which addresses the protection of the civilian population against effects of hostilities in Paragraph 3, states that the scope of this

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<sup>97</sup> Keslen (2003: 289).

<sup>98</sup> Farrall (2007:51).

<sup>99</sup> Wilson (1935:226).

<sup>100</sup> Wilson (1935:229).

<sup>101</sup> Rauch (1984:82).

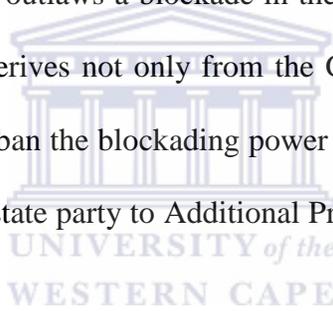
<sup>102</sup> Halleck (1866:246).

protection '[applies] to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land'. Article 54 of the same Convention provides as follows:

"Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive".

It is thus clear that international law outlaws a blockade in the abovementioned cases, taking into consideration that this prohibition derives not only from the Geneva Conventions, but also from customary international rules which ban the blockading power from starving a civilian population, even if the blockading state is not a state party to Additional Protocol I to the Geneva Conventions of 1949<sup>103</sup>.



### **3.3 The features of the Israeli blockade of Gaza**

As mentioned in paragraph 1.7.2 above, the blockade was imposed on Gaza as a result of the Palestinian elections in 2006<sup>104</sup>. Hamas won the democratic legislative elections pursuant to the international standards, according to the EU monitors. Javier Solana, the European Union's foreign policy chief, declared that the Palestinian people had "voted democratically and peacefully"<sup>105</sup>, but in practice Israel decided to impose sanctions on the Gaza Strip. In September 2007, Israel started its blockade of the Gaza Strip after declaring Gaza to be a hostile territory and stating that this

<sup>103</sup> Von Heinegg (2006:20).

<sup>104</sup> Applied research institute – Jerusalem (ARIJ), The blockade in Gaza-de-development and humanitarian dimensions (2009), [http://www.poica.org/editor/case\\_studies/view.php?recordID=2144](http://www.poica.org/editor/case_studies/view.php?recordID=2144), website accessed on 28/4/2011.

<sup>105</sup> Wilson, Scott, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/26/AR2006012600372.html>, accessed on 6/5/2012.

blockade constitutes an act of self-defence.<sup>106</sup> By using the term ‘self defence’, Israel seeks to use article 51 of the UN Charter, which entitles its members to use this right if an armed attack occurs against them, but the Israeli reliance on this article is unlawful under international law.

The International Court of Justice (hereinafter ICJ) has stated that the right of self defence in Article 51 of the UN Charter applies only “in the case of an armed attack by one state against another state”<sup>107</sup>. The ICJ came with this advisory opinion and considered building a wall by Israel in the occupied territory of the West Bank unlawful. The ICJ decision was based on the findings of the Nicaragua decision in 1986, which based its opinion on the fact that the ‘self defence’ status requires a high form of force by another state to constitute an armed attack<sup>108</sup>. Hence, it is submitted that the same approach is applicable to the situation in Gaza, as both the West Bank and Gaza are occupied territories and they together constitute the PNA but not a state in the legal meaning under international law. Therefore, it is also submitted that the legal ground of the Israeli justification for the blockade is fragile as long as the alleged armed attack from Gaza is not serious enough to make the ‘self-defence’ status applicable. Moreover, Gaza is still occupied by Israel itself and the latter has two unique positions; that of an occupying power and a blockading power at the same time.

The Gaza strip has four commercial crossings with Israel besides the Rafah crossing with Egypt<sup>109</sup>.

The crossings Karni, Nahal and Sofa are completely closed and there is no export or import via

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<sup>106</sup> Erakat (2011: 6).

<sup>107</sup> The ICJ Advisory Opinion ‘legal consequences of the construction of a wall in the Palestinian Territories’, Summary 2004/2 (2004: 12).

<sup>108</sup> Tams (2005:963-966).

<sup>109</sup> Gisha, Gisha response to closing of Karni crossing: Gaza’s crossings squeezed shut (2011), <http://www.gisha.org/classPrintItem.php?intLanguage=2&intItemId=1975&intSiteSN=113>, website accessed on 5/3/2011.

these crossings<sup>110</sup>. The fourth crossing with Israel, Kerem Shalom, remained only partially operational and currently Israel permits 40% of the needs of the Gaza Strip and 1% of its outgoing needs to be met<sup>111</sup>. The Rafah crossing is only for passengers, not for cargo<sup>112</sup>. This crossing with Egypt was generally closed between 2007 and June 2011 and the Egyptian authorities opened the crossing intermittently and in specific cases during that period<sup>113</sup>, especially when the international community mounted pressure against the blockade. The air and the sea of Gaza are in the hands of the Israeli army and the freedom of movement is completely forbidden except from the Rafah crossing under exceptional cases<sup>114</sup>.

It is thus clear that the blockade is only from the Israeli side, but the ban on freedom of movement was from both Egypt and Israel. Egypt was supposed to be legally and humanely responsible for the Gaza Strip but instead Egypt participated in the ban of freedom of movement. The Agreement on Movement and Access (hereinafter AMA) on 15 November, 2005 between Israel and the Palestinian Authority organized the workings of the crossings. The agreement gave the European Union the power of monitoring the Rafah crossing and gave Israel the power of monitoring it remotely. Israel suspended the agreement after Hamas took control of the Gaza Strip in June 2007<sup>115</sup>. The EU monitors vacated their sites at the crossing, following the EU decision to not deal

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> The Institute for Middle East Understanding (2011), <http://imeu.net/news/printer0021114.shtml>, website accessed on 9/5/2102.

<sup>113</sup> B'tselem, The Israeli information center for human rights in the occupied territories, Rafah Crossing report, [http://www.btselem.org/gaza\\_strip/rafah\\_crossing](http://www.btselem.org/gaza_strip/rafah_crossing), website accessed on 8/3/2011.

<sup>114</sup> Gisha executive report, (2007: 3).

<sup>115</sup> The United Nations report no 99 on implementation of the agreement on movement and access and update on Gaza crossings (2009: 1).

with Hamas<sup>116</sup>. Egypt in turn, closed the crossing under the pretext that the application of the AMA is not possible in the absence of the Israeli and EU monitoring. It is noteworthy that both Egypt and the EU condemn the blockade strongly.

On 23 January 2008, the hungry people of Gaza stormed the Rafah crossing and destroyed the walls and the fences between the Palestinian and the Egyptian sides of Rafah<sup>117</sup>. Hundreds of thousands of Palestinians entered Egyptian territory to buy food and basic supplies<sup>118</sup>. The Egyptian army intervened quickly and closed the crossing again after it had fortified the fences and hundreds of thousands of people from the Gaza Strip had to return again to Gaza<sup>119</sup>.

Israel attacked Gaza on 27 of December 2008 and after three weeks “Operation Cast Lead” led to more than 1380 deaths among the Palestinian civilians<sup>120</sup>. The purpose of this action, according to Israel, was to stop rockets being launched from Gaza, but the last documents from *Wikileaks* indicated that the purpose was to bring down the government of Hamas in Gaza after coordination with Egypt and the National Palestinian Authority<sup>121</sup>. The UN decided to conduct a factual

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<sup>116</sup> The United Nations Information System on the Question of Palestine, OPT Frustration of Gazans for Rafah Crossing into Egypt (2011), <http://unispal.un.org/UNISPAL.NSF/0/DD3C8059CB0C3E54852578140059CE0F>, website accessed on 3/3/2011.

<sup>117</sup> Human Rights Watch report, Israel/Gaza: Israeli Blockade Unlawful Despite Gaza Border Breach, Indiscriminate Palestinian Rocket Attacks Violate International Law (2008), <http://www.hrw.org/en/news/2008/01/25/israelgaza-israeli-blockade-unlawful-despite-gaza-border-breach>, website accessed on 7/4/2011.

<sup>118</sup> Human Rights Watch report, Israel/Gaza: Israeli Blockade Unlawful Despite Gaza Border Breach, Indiscriminate Palestinian Rocket Attacks Violate International Law (2008), <http://www.hrw.org/en/news/2008/01/25/israelgaza-israeli-blockade-unlawful-despite-gaza-border-breach>, website accessed on 7/4/2011.

<sup>119</sup> Global Security, Egypt-OPT: Hamas, Egyptian cooperate on Gaza Border (2008), <http://www.globalsecurity.org/military/library/news/2008/01/mil-080129-irin01.htm>, website accessed on 2/5/2011.

<sup>120</sup> Amnesty International report, Suffocating Gaza- The Israeli blockade effect's on the Palestinians (2010), <http://www.amnesty.org/en/news-and-updates/suffocating-gaza-israeli-blockades-effects-palestinians-2010-06-01>, website accessed on 22/2/2011.

<sup>121</sup> Williams (2010), [http://www.msnbc.msn.com/id/40432535/ns/world\\_news/](http://www.msnbc.msn.com/id/40432535/ns/world_news/), website accessed on 25/2/2011.

investigation to find the reasons of this war. The final *Goldstone report* states that both Israel and Hamas committed war crimes and possibly crimes against humanity as well<sup>122</sup>.

It should be noted that the blockade of Gaza not only applies to food and medication, but also to electricity and energy<sup>123</sup> because Israel supplies the Gaza strip with all their liquid fuel and half of their electricity<sup>124</sup>. The Israeli government cuts the electricity and stops the supply of gas to Gaza at intervals<sup>125</sup>.

This situation has prompted some humanitarian organizations to send aid convoys from all around the world to break this siege. Israel decided to attack one of these convoys which carried with it human aid<sup>126</sup>. The Gaza Freedom Flotilla was attacked by the Israeli Navy in international water on 31 May 2010 and nine of the participants in this convoy were killed and several were wounded by the Israeli army<sup>127</sup>. The United Nations Human Rights Council sent an independent fact-finding committee to investigate infringements of international law, and the final report of this committee shows clear evidence of the need to prosecute the Israeli deeds for war crimes of willful killing under article 147 of the Fourth Geneva Convention<sup>128</sup>.

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<sup>122</sup> UN news center, UN mission finds evidence of war crimes by both sides in Gaza conflict (2009), <http://www.un.org/apps/news/story.asp?NewsID=32057>, website accessed on 3/3/2011.

<sup>123</sup> The ICRC report, Gaza: A never ending effort to relieve suffering, The ICRC website, <http://www.icrc.org/eng/resources/documents/update/2011/palestine-update-2011-07-28.htm>, website accessed on 10/5/2012.

<sup>124</sup> BBC report, Israel's Gaza fuel cuts alarm UN (2009), <http://news.bbc.co.uk/2/hi/7068239.stm>, website accessed on 31/1/2011.

<sup>125</sup> Ibid.

<sup>126</sup> Booth (2010), <http://www.guardian.co.uk/world/2010/jun/04/gaza-flotilla-activists-autopsy-results>, website accessed on 2/5/2011.

<sup>127</sup> Ibid.

<sup>128</sup> 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, (2010: 53).

The people of Gaza have to dig underground tunnels in order to smuggle food to the strip and to help them in their daily life<sup>129</sup>. Egypt, with the help of American army engineers, has started to destroy these tunnels and to build an iron wall along the Gaza border<sup>130</sup>. This kind of iron is manufactured in the United States and has a bomb-proof feature<sup>131</sup>.

The Israeli government is trying to justify this blockade by claiming that the purpose of it is to stop arms from being smuggled into Gaza<sup>132</sup>. This pretext does not align with the facts on the ground because Israel prevents the arrival of food, medication and electricity to Gaza<sup>133</sup>. Israel declared its intention to ease the closure of Gaza in June 2010<sup>134</sup> but this easing has not reflected any notable improvement in the life of the Gazans<sup>135</sup>. The weekly report of the United Nations Office for the Coordination of Humanitarian Affairs in the occupied Palestinian territories cited that a weekly average of 838 truckloads of goods entered Gaza between 5 and 18 June 2011, and this average only constitutes 30% of the weekly truckloads which used to enter Gaza before the blockade in 2007<sup>136</sup>. This percentage affirms that the easing of the closure has a very limited effect on the inhabitants of Gaza.

After the Egyptian revolution and the fall of Mubarak's regime in Egypt in February 2011, the Supreme Council of the Armed Forces in Egypt (hereinafter SCAF) decided to reopen the Rafah

<sup>129</sup> Fraser (2009), [http://news.bbc.co.uk/2/hi/middle\\_east/8405020.stm](http://news.bbc.co.uk/2/hi/middle_east/8405020.stm), accessed on 5/12/2009.

<sup>130</sup> Fraser (2009), [http://news.bbc.co.uk/2/hi/middle\\_east/8405020.stm](http://news.bbc.co.uk/2/hi/middle_east/8405020.stm), accessed on 5/12/2009.

<sup>131</sup> Fraser (2009), [http://news.bbc.co.uk/2/hi/middle\\_east/8405020.stm](http://news.bbc.co.uk/2/hi/middle_east/8405020.stm), accessed on 5/12/2009.

<sup>132</sup> Ephron (2010), <http://www.newsweek.com/2010/06/07/gaza-is-about-butter-not-guns.html> accessed on 2/5/2011.

<sup>133</sup> Ephron (2010), <http://www.newsweek.com/2010/06/07/gaza-is-about-butter-not-guns.html> accessed on 2/5/2011.

<sup>134</sup> The ICRC 'Gaza: Continuous hardship for Gazans after four years of closure' (2011), <http://www.icrc.org/eng/resources/documents/photo-gallery/palestine-israel-gaza-2011-06-23.htm>, website accessed on 9/5/2012.

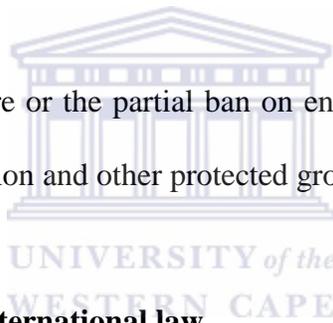
<sup>135</sup> The ICRC 'Gaza: Continuous hardship for Gazans after four years of closure' (2011), <http://www.icrc.org/eng/resources/documents/photo-gallery/palestine-israel-gaza-2011-06-23.htm>, website accessed on 9/5/2012.

<sup>136</sup> United Nations Office for the Coordination of Humanitarian Affairs (2011:4).

Crossing in 28/5/2011 with the retention of a blacklist which includes the names of 5000 Gazans who are not allowed to enter Egypt<sup>137</sup>. However, the month of June 2011 witnessed the temporary closure of the crossing due to a dispute between SCAF and the government of Hamas in Gaza<sup>138</sup>. The crossing is currently open for travelers, but not cargo, for six days a week<sup>139</sup>.

The features of the blockade of the Gaza Strip can be summarized as follows:

- 1- The Israeli blockade of Gaza is comprehensive from sea, land and air;
- 2- The unique status of the blockade of Gaza derives from the fact that Gaza is not a state in the legal sense and it is an occupied territory. The occupying power and the blockading power is the same in Gaza's case; and
- 3- The blockade is general. The entire or the partial ban on entering food, medication and energy does not exclude the civilian population and other protected groups in the Strip.



### **3.4 The crime of genocide under international law**

The responsibility or the irresponsibility for crimes under international law stems from two fundamental opposite norms: offences which constitute a crime under international law and defences depriving the perpetrator of any criminal liability.<sup>140</sup> In this section, we will try to address the crime of genocide under international law only to the extent that it serves the purpose of this mini-thesis, but the elements of criminal responsibility will be outlined first.

<sup>137</sup> The Institute for Middle East Understanding (2011), <http://imeu.net/news/printer0021114.shtml>, website accessed on 9/5/2102.

<sup>138</sup> The Institute for Middle East Understanding (2011), <http://imeu.net/news/printer0021114.shtml>, website accessed on 9/5/2102.

<sup>139</sup> Egypt Independent newspaper report (2012), <http://www.egyptindependent.com/news/egypt-shut-rafah-crossing-wednesday>, website accessed on 9/5/2012.

<sup>140</sup> Werle (2009:139).

### 3.4.1 The elements of the criminal responsibility under international law

In order for someone to incur liability, crimes under international law, like all other crimes, require that the elements of the crime must be met. The international criminal responsibility has many forms; individual responsibility as opposed to collective responsibility, natural persons' responsibility as opposed to governments' responsibility, international criminal responsibility under international criminal law as opposed to international criminal responsibility stemming from domestic legislation, like the case of the universal criminal jurisdiction<sup>141</sup>. International criminal responsibility refers to certain serious crimes which comprise serious breaches of international customary law<sup>142</sup> as well as crimes under the Rome Statute of the ICC.

It is suggested that evolution of the concept of 'protection' under international humanitarian law led to the emergence and the proliferation of the *Ad hoc* criminal tribunals in the 20<sup>th</sup> century. This in turn led to conceptualizing the term 'criminal responsibility', for the latter now encompasses the individual responsibility pursuant to the contemporary international criminal law and this broad implication of the criminal responsibility is included in the statutes of the *Ad hoc* or the permanent international judicial entities<sup>143</sup>. The elements of the criminal responsibility consist of:

1. The material element: The material element consists of a conduct, consequences of the conduct and specific circumstances required by international law for certain crimes<sup>144</sup>, like the existence of an armed conflict as a requirement for the existence of grave breaches of Geneva Conventions. This element is also said to be the objective element of the crime.

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<sup>141</sup> Damgraad (2008:12-13).

<sup>142</sup> Bonafe (2009:11).

<sup>143</sup> Aksar (2004:71-76).

<sup>144</sup> Werle (2009:142).

2. Mental Element: It requires the availability of the perpetrator's intention and knowledge when he perpetrates the material element<sup>145</sup>. This is called the subjective element of the crime.
3. Grounds of excluding criminal responsibility: The Rome Statute of the ICC lists these under 'issues of defence'<sup>146</sup>. Article 31(1) of the Rome statute states that mental disease, intoxication, self defence, duress and necessity are clear reasons for excluding criminal responsibility. The same article provides that any other ground of excluding responsibility can be considered by the court where such a ground stems from applicable law as set forth in article 21 of the ICC statute.<sup>147</sup> Other grounds for excluding criminal responsibility are the mistake of fact or the mistake of law if they negate the mental element required by the crime (Art 32). By virtue of the general rule contained in Article 33 of the ICC statute, superior orders constitute a ground for excluding responsibility only in three exceptional cases. The wording of this article avoided the absolute adoption of the obedience to order defence, which necessarily leads to keep serious crimes without punishment<sup>148</sup>. These three exceptions are: The perpetrator's obedience of the orders stems from legal obligations; the perpetrator's ignorance of the illegality of the superior order; and where such an order is not manifestly unlawful. The same article affirms that orders to commit genocide or crimes against humanity are manifestly unlawful. In other words, the perpetrator cannot rely on the absence of explicit orders which prevent both genocide and crimes against humanity to justify his commission of these crimes.

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<sup>145</sup> Werle (2009:142).

<sup>146</sup> Damgraad (2008:121).

<sup>147</sup> Article 21 of the Rome Statute enumerates these applicable laws sorted by priority as follows: The Rome Statute, treaties and principles of international law, general principles of law derived by the courts of national laws of legal systems of the world and principles and rules of law as interpreted in its previous decisions.

<sup>148</sup> Insko (2003:417).

### 3.4.2 The elements of the crime of genocide under international law

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide states that genocide is an intention to destroy, in whole or in part, a national, ethnical, racial or religious group. Article (2) of the convention provides that the acts of genocide are: killing members of the groups, causing serious bodily or mental harm. Imposing conditions on the group calculated to destroy it, preventing births, forcibly transferring children from the group to another group. The crime of genocide is a crime under international law pursuant to Article (1) of the Convention. The convention is an international human rights law instrument and the crime of genocide is illegal under the customary international law. More than 140 states have ratified the Convention on the Prevention and Punishment of the Crime of Genocide<sup>149</sup>.

The elements of the crime are a wrongful act, a wrongful purpose, a hateful motive and the nature of both the perpetrator and the victim<sup>150</sup>. Some scholars disregard the motive and disqualify it from being part of the crime of genocide<sup>151</sup>. Genocide can be perpetrated during peacetime or wartime<sup>152</sup>. Article (5) of the Rome Statute of the ICC indicates that the crime of genocide is within the jurisdiction of the ICC. Article (6) of the Rome Statute cites the same five former acts which constitute genocide<sup>153</sup>. The Rome Statute is an international criminal law instrument but it has not obtained the status of the customary international law as yet.

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<sup>149</sup> Amnesty international report, Universal jurisdiction: The scope of civil universal jurisdiction (2007), <http://asiapacific.amnesty.org/library/Index/ENGIOR530082007?open&of=ENG-385>, accessed on 20/8/2010.

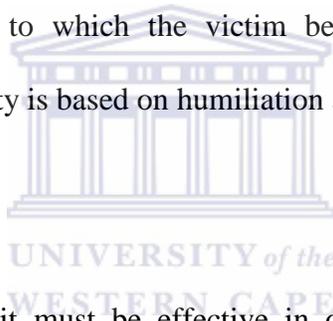
<sup>150</sup> Simon (2007:33).

<sup>151</sup> May (2010:138).

<sup>152</sup> Kalin (2009:61).

<sup>153</sup> King (2007:378).

The five above-mentioned acts do not necessarily mean that the crime of genocide is committed. Genocide requires a specific intention and purpose behind the wrongful act, which lies in the destroying of the group to which the victims belong<sup>154</sup>. The intention to destroy part or a whole group can be concluded from the verbal and or the physical acts of the perpetrator<sup>155</sup> and the absence of this specific intention changes the type of the crime. The objective element for the crime of genocide, the *Actus reus*, which means the act or the omission can be the same objective element for the crimes against humanity, but what makes the five foregoing acts constitute genocide is the mental element, the *mens rea* or the specific intention<sup>156</sup>. The *mens rea* in the crime of genocide requires the intention of the perpetrator to destroy, in whole or in part, a national, ethnical, racial or religious group to which the victim belongs, while the intention of the perpetrator of crimes against humanity is based on humiliation and discrimination<sup>157</sup>.



### 3.5 Conclusion

A blockade is an act of war and it must be effective in order to be binding. According to international law, a blockade is prohibited if the sole purpose of it is to starve the civilian population or deprive them of essential goods for their survival. Also, a blockade is unlawful if the direct anticipated military advantage does not match the damage to the blockaded civilian population. The blockading military forces must permit a passage of food, essential objects for survival and medical supplies to the civilian blockaded population according to certain requirements and conditions. International law outlaws the blockade based on the rules of customary international law which ban the blockading power from starving a civilian population.

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<sup>154</sup> Sassoli (2006:310).

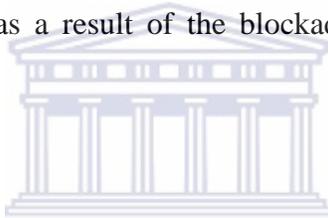
<sup>155</sup> Sassoli (2006:310).

<sup>156</sup> Sassoli (2006:310).

<sup>157</sup> Aydin (2004:7).

The Gaza strip has been under a harsh blockade since 2007. Three of four commercial crossings between Gaza and Israel are completely closed and there is no export or import of goods through these crossings. The fourth crossing with Israel, Kerem Shalom, remains only partially operational. The Rafah crossing between Gaza and Egypt is only for passengers, not for cargo.

The characteristics of the Israeli blockade of Gaza are: It is a comprehensive blockade. The blockading power is the same occupying power. The ban or the partial ban on bringing in of food, medication and energy does not exclude the civilian population of the Strip, which means that the civilian population suffers directly as a result of the blockade, which has also led to death of people living in the Gaza Strip.



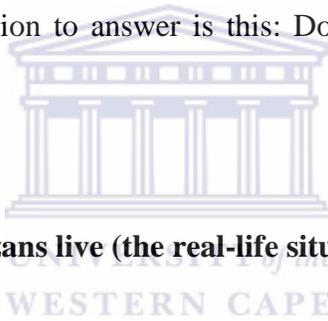
In the next Chapter, the consequences of the blockade of Gaza and its impact on the civilian population in the Strip will be addressed from a humanitarian and legal perspective. The next chapter will also try to answer the question the mini-thesis topic question.

## Chapter 4

### The legal consequences of the blockade of Gaza

#### 4.1 Introduction

The siege of Gaza has entered its sixth year and the consequences of this blockade can be clearly distinguished. The UN and its agencies, as well as other humanitarian organizations, are eyewitnesses of events in Gaza. Their eyewitness testimonies have high credibility insofar as they concern the effect of this siege. This chapter will rely on some of these testimonies to outline the current situation in Gaza. The question to answer is this: Does the blockade of Gaza constitute genocide?



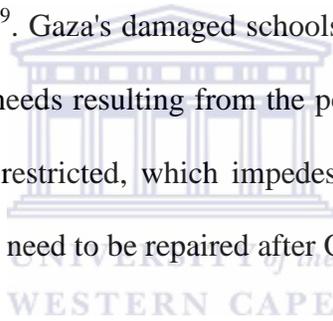
#### 4.2 The condition under which Gazans live (the real-life situation on the ground)

Undoubtedly, the Israeli blockade of Gaza has a negative effect on the inhabitants of the Strip. Its impact has affected the daily life of almost everybody in Gaza without any differentiation between civilians or government officials. All the Gazans are being targeted via this blockade, irrespective of their age or gender. The following statistics give one a clearer understanding of the situation: A total of 51.8% of the people in Gaza live in poverty as a consequence of the blockade of 2007<sup>158</sup>. The unemployment rate in the Strip is at 40%<sup>159</sup>. A total of 70% of the families survive on less

<sup>158</sup> Assadi (2008), reuters website, <http://uk.reuters.com/article/2008/06/26/uk-palestinians-poverty-idUKL261820720080626>, accessed on 10/6/2012.

<sup>159</sup> The ICRC 'Gaza: Continuous hardship for Gazans after four years of closure' (2011), <http://www.icrc.org/eng/resources/documents/photo-gallery/palestine-israel-gaza-2011-06-23.htm>, website accessed on 9/5/2012.

than one US Dollar a day per person<sup>160</sup>. A total of 75% of the population is dependent on aid dispensed by UNRWA<sup>161</sup>, and 44% of Gazans are food insecure<sup>162</sup>. Some 35% of the farmland and 85% of the fishing water in Gaza is entirely or partly accessible<sup>163</sup>. The shortage of fuel and electricity results in power cuts of up to 12 hours a day<sup>164</sup>. More than 90% of the untreated water of the aquifer is unsafe for human consumption<sup>165</sup>. On the educational front, 280 of the 640 schools in Gaza were damaged or severely damaged after Operation Cast Lead in 2008/2009, while 6 university buildings were destroyed and 16 were damaged<sup>166</sup>. Around 20% of school children are iodine deficient<sup>167</sup>. The spread of anemia among 9-to12- month-old babies is 61.6% and among pregnant women 29%<sup>168</sup>. A total of 22% percent of children between 12 -and 59-month- old are vitamin A deficient<sup>169</sup>. Gaza's damaged schools need to be repaired and Gaza also needs 105 new schools to meet the needs resulting from the population increase<sup>170</sup>, but importing construction materials into Gaza is restricted, which impedes the Gazans from building<sup>171</sup>. The same applies to 71 000 houses which need to be repaired after Operation of Cast Lead<sup>172</sup>.



<sup>160</sup> World Health Organization report: Gaza health fact sheet. (2010:3).

<sup>161</sup> Human Rights Council: Report of the special rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967, Richard Falk (2012:15).

<sup>162</sup> United Nations office for the coordination of humanitarian Affairs: Five years of blockade (2012:1).

<sup>163</sup> United Nations office for the coordination of humanitarian Affairs: Five years of blockade (2012:1).

<sup>164</sup> United Nations office for the coordination of humanitarian Affairs: Five years of blockade (2012:1).

<sup>165</sup> United Nations office for the coordination of humanitarian Affairs: Five years of blockade (2012:1).

<sup>166</sup> The Institute for Middle East Understanding, The Gaza blockade: Children and education fact sheet (2011) <http://imeu.net/news/article0017067.shtml>, Website accessed on 10/6/2012.

<sup>167</sup> The Institute for Middle East Understanding, The Gaza blockade: Children and education fact sheet (2011) <http://imeu.net/news/article0017067.shtml>, Website accessed on 10/6/2012.

<sup>168</sup> The Institute for Middle East Understanding, The Gaza blockade: Children and education fact sheet (2011) <http://imeu.net/news/article0017067.shtml>, Website accessed on 10/6/2012.

<sup>169</sup> The Institute for Middle East Understanding, The Gaza blockade: Children and education fact sheet (2011) <http://imeu.net/news/article0017067.shtml>, Website accessed on 10/6/2012.

<sup>170</sup> The Institute for Middle East Understanding, The Gaza blockade: Children and education fact sheet (2011) <http://imeu.net/news/article0017067.shtml>, Website accessed on 10/6/2012.

<sup>171</sup> Human Rights Council: Report of the special rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967, Richard Falk (2012:15).

<sup>172</sup> United Nations office for the coordination of humanitarian Affairs: Five years of blockade (2012:1).

The humanitarian crisis in the Strip is still the same, even after the easing of the closure which was declared by Israel in June 2010. A report by Oxfam of April 2012 shows that Gaza received only 40% of the basic food supplies compared to the pre-blockade weekly average<sup>173</sup>. It also shows that Gaza was allowed to import only 50% of its fuel needs, including benzene and cooking gas during that period<sup>174</sup>. Importing petrol and diesel to the public sector has been authorized in exceptional circumstances six times since October 2008 and all the goods presently enter Gaza through one crossing, which is Kerem Shalom<sup>175</sup>.

During the period of the blockade, nearly 2300 Palestinians were killed and 7700 injured by the Israeli army, whether during the Operation Cast Lead or during the almost daily Israeli military operations in the Strip<sup>176</sup>. The total deaths from the lack of food and treatment in the Strip is not really obvious, but it suffices to mention that 115 Gazans died while they were waiting for permission to cross the Eriz crossing in order to obtain medical treatment in Israel between 2007 and January 2010<sup>177</sup>. The deaths resulted from the fact that the treatment is not available in Gaza, and that only Israel has the facilities to provide treatment. But their applications were denied or delayed by the Israeli authorities<sup>178</sup>. This example shows how difficult the situation is when Israel combines the blockade with the ban of freedom of movement on the ground.

Between 15% and 30 % of the essential drugs and between 10% and 20% of the disposables were out of stock in 2009 due to the shortfalls in deliveries<sup>179</sup>. The health services infrastructure is also

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<sup>173</sup> Oxfam (2012:4).

<sup>174</sup> Oxfam (2012:5).

<sup>175</sup> Oxfam (4-5).

<sup>176</sup> United Nations office for the coordination of humanitarian Affairs: Five years of blockade (2012:1).

<sup>177</sup> World Health Organization report: Gaza health fact sheet (2010:1-2).

<sup>178</sup> World Health Organization report: Gaza health fact sheet (2010:1).

<sup>179</sup> World Health Organization report: Gaza health fact sheet (2010:2).

operating under bad conditions. The figures show that 15 of 27 hospitals, 43 of 110 health care services and 29 of 148 ambulances in Gaza are damaged and they have not been repaired because importing construction materials and spare parts is outlawed in Gaza.<sup>180</sup>

The blockade made the Gazans more and more dependent on the underground tunnels between Gaza and Egypt<sup>181</sup>. Digging the tunnels was the last resort for the Gazans in order to obtain the necessities to manage their life, but the tunnels also resulted in many casualties for the people in Gaza. For example, 172 people were killed and 318 injured during the five years of the blockade<sup>182</sup>.

The Israeli blockade led to disastrous results for Gaza and its civilian population who are suffering from an entire collapse at all levels. From the above-mentioned figures, it is obvious that the infrastructure of the health, education and economic sectors is damaged or severely damaged. The most notable thing in this humanitarian crisis is the deliberate starvation of the Gaza strip. The very recent UN report shows that "Gaza will not be a livable place by 2020 because the growing population will not have sufficient water, food health and education services by then"<sup>183</sup>.

The main question in this regard is: Why does Israel prevent food and fuel from reaching Gaza? If the answer is because Israel fights terrorism, then the other question is: What is the relationship between fighting terrorism and starving a whole civilian population in the Strip? Why does Israel

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<sup>180</sup> World Health Organization report: Gaza health fact sheet (2010:4).

<sup>181</sup> Human Rights Council: Report of the special rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967 (2012:15).

<sup>182</sup> United Nations office for the coordination of humanitarian Affairs: Five years of blockade (2012:1).

<sup>183</sup> BBC news report, Gaza 'will not be livable' by 2020- UN report (2012) <http://www.bbc.co.uk/news/world-middle-east-19391809>, accessed on 17/9/2012.

resort to this cruel punishment? The current critical humanitarian situation in Gaza leads us to speculate that Israel's intention is to maintain the blockade in order to cause as much humanitarian harm as possible to the occupied population of Gaza.

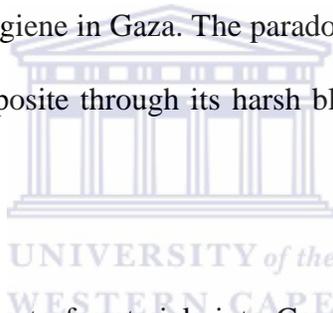
#### **4.3 The legal situation of the blockade of Gaza:**

To address the current legal status of the Gaza Strip, both the legal rules and the hard facts on the ground should be analysed in order to understand the situation better. As mentioned in paragraph 2.3 above, three-quarters of Gaza's population are refugees who have the right to return to their homes and lands, according to the 'Palestinian right of return', which reflects binding international law. The Gaza Strip is an occupied territory according to international law, and it was included in the SC Resolutions 242 and 338 (see paragraph 2.4). Israel's disengagement plan in 2005 did not change the legal status of Gaza even though Israel exercises actual control over the Strip (see paragraph 2.6). The logical result of the status of the occupation is that the Geneva Conventions and the other IHL conventions and instruments apply to the situation in Gaza. This includes the rules affording comprehensive protection to the civilians in time of war (see paragraph 2.6 above).

The Israeli blockade of Gaza is a belligerent blockade and it is an act of war according to international law. The declaration of the blockade and its geographic limits was in accordance with Articles 8 and 9 of the Declaration of London of 1909 Concerning the Laws of Naval blockade and Articles 93 and 94 of San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 1994, but this declaration is not adequate for the Israeli blockade to acquire the legitimacy. The Israeli blockade is clearly contrary to international law, as it violates articles 102, 103 and 104

of San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 1994, and articles 49 and 54 of API whereas the latter constitutes international customary rule<sup>184</sup>.

Starving the civilians of Gaza and not giving them adequate humanitarian relief constitute a form of collective punishment, violating Article 33 of GC4, which is part of international customary law. The Israeli blockade also violates Articles 55 and 56 of GC4 relating to the responsibilities of the occupying power towards the civilian population in an occupied territory. Both articles affirm that Israel, as an occupying power over Gaza, must secure the food and the medical supplies for the people in the Strip and import these items if they are short, and it must also ensure and maintain the medical services and hygiene in Gaza. The paradox is that Israel is not fulfilling these obligations, but is doing just the opposite through its harsh blockade, as mentioned in paragraph 4.2 above.



The policy of preventing the import of materials into Gaza makes Israel an occupying power and a blockading power at the same time. It is suggested that having the status of 'blockading power' completely contradicts having simultaneously the status of 'occupying power', as the latter incurs special duties owed by the occupying power to the protected civilian population who live in the occupied territory. Therefore, having a 'blockading' status will automatically affect Israel's responsibility to fulfil its legal duties as an 'occupying power'. The comprehensive Israeli military control for the sea, land and air of Gaza also deprives the Gazans of their own means of subsistence, which is their right according to Article 1(2) of the International Covenant on Economic, Social and Cultural Rights of 1966 and Israel is a state party to it.

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<sup>184</sup> The ICRC report, Customary International Humanitarian Law (2005), <http://www.icrc.org/ihl.nsf/FULL/612?OpenDocument>, accessed on 12/6/2012.

It is thus clear that the Israeli blockade of the Gaza Strip can be called illegal and illegitimate. This conclusion is based on law and also on the fact that it is regarded as illegitimate by credible international organizations and NGO's<sup>185</sup>.

#### 4.4 Does the blockade of Gaza constitute genocide?

From reading the Rome Statute of the of the ICC, it is manifest that deprivation of access to food and medicine and causing a civilian population to starve, can be both a crime against humanity Art7(2)(b) if this act resulted in a destruction of part of a population or a war crime Art8 (2)(b)(xxv). The hypothetical question of this mini-thesis is: Does the starvation of the Gazan population which is caused by the Israeli blockade, constitute genocide?

To answer this presumptive question, the first step should start from the illegitimacy of the blockade and from Israel's violation of international law, as mentioned in paragraph 4.2 above. Having shown that this blockade is illegal, the following step then is to examine whether the criminalized act of preventing food and essential supplies from reaching the Gazan population also constitutes an objective element of the crime of genocide, besides being an element of a crime against humanity and of a war crime. It is suggested that only two of the five acts of genocide can

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<sup>185</sup> Reuters report, Gaza blockade illegal, must be lifted: UN High Commissioner for Human Rights (2010), <http://www.reuters.com/article/2010/06/05/us-israel-flotilla-un-idUSTRE6541JD20100605>, accessed on 12/9/2012; Chris McGreal (2010), <http://www.guardian.co.uk/world/2010/sep/23/un-panel-israel-war-crimes>, accessed on 12/9/2012; Voice of America report, Red Cross: Israel's Gaza blockade breaks international law (2010), <http://www.voanews.com/content/red-cross-israels-gaza-blockade-breaks-international-law-96280463/119529.html>, accessed on 12/9/2012; Human Rights Watch, Israel: Full, impartial investigation of flotilla killings essential (2010), <http://www.hrw.org/en/news/2010/05/31/israel-full-impartial-investigation-flotilla-killings-essential>, accessed on 12/9/2012; Amnesty International report, Suffocating Gaza- The Israeli blockade effect's on the Palestinians (2010), <http://www.amnesty.org/en/news-and-updates/suffocating-gaza-israeli-blockades-effects-palestinians-2010-06-01>, accessed on 22/2/2011; Human Rights Council: Report of the special rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967, Richard Falk (2012:14).

be applicable to the situation of Gaza's blockade, and these are: Causing serious bodily or mental harm to members of the group; and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. The other three acts will be excluded as they do not correspond with the nature of the military blockade.

#### **4.4.1 The blockade's effect on the health and mental state of the Gazan civilian population:**

From the human situation in Gaza, it can be said that the blockade is causing bodily or mental harm to the inhabitants of Gaza. This is shown by the statistics mentioned in paragraph 4.1 above. In addition, the World Health Organization's Specialized Health Mission to Gaza found that the blockade and Operation Cast Lead resulted in psychological distress and pathologies which have a negative impact on the whole population of Gaza<sup>186</sup>. The same Mission found that the deterioration of the entire health sector was due to the Israeli blockade, as it has prevented the recovery and the development of the health sector since Operation Cast Lead<sup>187</sup>. The mission describes the current health situation in Gaza as a 'complex, chronic disaster of catastrophic proportions'<sup>188</sup>. One of the consequences of Operation Cast Lead which has not been remedied due to the blockade is that 98.7% of Gaza's children suffer from mild to severe grief and Post Traumatic Stress Disorder<sup>189</sup>. It should be noted that children constitute more than 50% of the population in Gaza and they are suffering severely from the blockade<sup>190</sup>.

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<sup>186</sup> UNDP, One year after report (2010:32).

<sup>187</sup> WHO Specialized Health Mission to the Gaza Strip extended report (2009), <http://unispal.un.org/UNISPAL.NSF/0/5A56915628F97B5F852575CB00664CFB>, accessed on 15/6/2012.

<sup>188</sup> WHO Specialized Health Mission to the Gaza Strip extended report (2009), <http://unispal.un.org/UNISPAL.NSF/0/5A56915628F97B5F852575CB00664CFB>, accessed on 15/6/2012.

<sup>189</sup> UNDP (2010:32).

<sup>190</sup> UN website, News Center, Worsening conflict in Gaza leaves children at particular risk, UNICEF (2008), <http://www.un.org/apps/news/story.asp?NewsID=25814&Cr=Palestin&Cr1#.UF3ZNIYk0lw>, accessed on 15/6/2012.

Seriousness is a fundamental element to decide whether the harm can be considered genocide or not. Causing a serious bodily and mental harm to the persons of the group can constitute genocide even if the harm is temporary and remediable, according to the International Criminal Tribunal for Rwanda (hereinafter ICTR) decision in *Akayesu* case<sup>191</sup>. The most notable evolution in terms of the implication of the serious mental and bodily harm as a genocidal act is the jurisprudence of the *ad hoc* international criminal tribunals. The International Criminal Tribunal of the former Yugoslavia (hereinafter ICTY) has broadened the "serious bodily and mental harm" and has held that this may be brought about by acts encompassing torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of deaths and harms that damages health or causes disfigurement or injury<sup>192193</sup>. The judgment has affirmed that the harm inflicted does not need to be permanent and irremediable, but it must be serious<sup>194</sup>.

Nevertheless, the ICTR has gone further than the ICTY, holding that the mental and bodily harm which results from sexual violence, including rape, constitutes a genocidal act. In the *Akayesu* case, the Court found that rape resulted in physical and psychological destruction of the victims, the Tutsi women<sup>195</sup>. The court came to this conclusion, based on the systematic rape which was perpetrated against Tutsi women and committed with the intention to murder those women<sup>196</sup>. The same was found in other ICTR cases like *Musema*, *Rutaganda*, *Muhimana* and *Gacumbitsi*<sup>197</sup>.

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<sup>191</sup> Sassoli (2006:2175)

<sup>192</sup> ICTY, *Stakic* Trial Chamber Judgment (2003: 146).

<sup>193</sup> *Prosecutor v Brdanin*, Judgment of the ICTY of Trial Chamber (IT-99-36-T) of 1 September 2004 at para 690 page 246.

<sup>194</sup> *Prosecutor v Brdanin*, Judgment of the ICTY of Trial Chamber (IT-99-36-T) of 1 September 2004 at para 690 page 246.

<sup>195</sup> *Prosecutor v Akayesu*, Judgment of the ICTR of Trial Chamber (96-4-T) of 2 September 1998 Akayesu Trial Chamber Judgment at para 731 page 163.

<sup>196</sup> *Prosecutor v Akayesu*, Judgment of the ICTR of Trial Chamber (96-4-T) of 2 September 1998 Akayesu Trial Chamber Judgment at para 732 and 733 page 163 and 164.

<sup>197</sup> Henry (2011:141).

In light of the above, and relying on the merits of the ICTY and ICTR judgments, one may conclude that the Israeli blockade of the Gaza Strip causes serious mental and bodily harm to the Gazan civilian population as long as this blockade entails conduct resulting in inhumane or degrading treatment which harms the health of the population. The blockade is systematic because it is a result of an on-going Israeli policy since 2007 which does not differentiate between combatants and civilians. It is worth mentioning that the ICC Elements of Crimes, which assist the Court in the interpretation and application of articles 6,7 and 8 consistent with the ICC Statute, state that causing serious mental and bodily harm may constitute genocide even if the victim is one person<sup>198</sup>. The elements state that the serious harm includes, but is not necessarily restricted to acts of torture, rape, sexual violence or inhumane degrading treatment<sup>199</sup>.

#### **4.4.2 Does the clause of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, apply to the blockade of Gaza?**

Undoubtedly, Gaza's conditions of life are deteriorating and the humanitarian crisis is getting worse as a result of the illegal Israeli blockade. The Gazan children are fed from "illegal" underground tunnels between Egypt and the Strip. The paradox is that even the United Nations Humanitarian Chief warned of a humanitarian disaster if Egypt blocks those tunnels<sup>200</sup>. He also warned of a humanitarian disaster if the blockade continues<sup>201</sup>.

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<sup>198</sup> ICC Elements of Crimes, Art 6(b) (1).

<sup>199</sup> ICC Elements of Crimes, Art 6(b) (1).

<sup>200</sup> Haaretz report, UN Humanitarian Chief warns of disaster if Gaza siege continues, <http://www.haaretz.com/news/un-humanitarian-chief-warns-of-disaster-if-gaza-siege-continues-1.266453>, accessed on 17/6/2012.

<sup>201</sup> Haaretz report, UN Humanitarian Chief warns of disaster if Gaza siege continues, <http://www.haaretz.com/news/un-humanitarian-chief-warns-of-disaster-if-gaza-siege-continues-1.266453>, 17/6/2012.

As mentioned previously, and according to the last UN report, Gaza is in the process of being made into an unlivable place within few years if Israel does not lift its illegal blockade. These remarks necessarily mean that the lack of water, food, medicine and other basic supplies will lead to the physical destruction of the whole or part of the Gazans if the siege and the ban of freedom of movement continue. In *Brdanin* case, the ICTY stated that subjecting the group to a subsistence diet, denial of the right to medical services and the creation of circumstances that would lead to a slow death, such as lack of proper housing or clothing or hygiene, are one of the methods of destruction which can be included within this act<sup>202</sup>. The same was held in the ICTY judgment in the *Stakic* case<sup>203</sup>. The ICTR also affirmed the same principle in the *Akayesu* case<sup>204</sup>.

The ICC Elements of Crimes state that the term “conditions of life” may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes<sup>205</sup>.

In view of the above, the blockade of Gaza can be clearly seen as deliberately inflicting on the Gazans conditions of life calculated to bring about their physical destruction in whole or in part.

#### 4.4.3 The specific intent

The act of genocide consists in the perpetrator committing a prohibited act against a protected group, and most importantly, the perpetrator with the specific intent to destroy, in whole or in part

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<sup>202</sup> *Prosecutor v Brdanin*, Judgment of the ICTY of Trial Chamber (IT-99-36-T) of 1 September 2004 at para 691 page 246.

<sup>203</sup> *Prosecutor v Stakic*, Judgment of the ICTY of Trial Chamber (IT-97-24-T) of 31 July 2003 at para 517 page 146.

<sup>204</sup> Sassoli (2006:2175).

<sup>205</sup> ICC Elements of Crimes, Art 6(c).

this protected group. This study concluded that the blockade of Gaza is causing both serious mental and bodily harm to the civilians in Gaza and is having the effect of destroying them physically in whole or in part. But this is not adequate to qualify this blockade as genocide, as the latter needs a specific intent. What makes the crime of genocide different from the crimes against humanity and other international crimes is that it requires specific intent<sup>206</sup>. So, to accuse the Israeli military and governmental officials of genocide, one has to prove that the Israeli decision makers have the intention to destroy, in whole or in part the civilian population in Gaza.

It should be noted that that objective element of crimes against humanity overlap, in many forms, with those of the crime of genocide, and the two acts mentioned in paragraphs 4.1 and 4.2 above are a clear example in this regard. Article 7(1) of the Rome Statute of the ICC states that the commission of a crime against humanity must be part of a widespread or systematic attack directed against any civilian population. Specific intent remains the crucial element, which differentiates between genocide and crimes against humanity.

Special intent *dolus specialis* is the term which implies that the intention of the perpetrator of genocide is to destroy<sup>207</sup> and the meaning of this term lies in the existence of a clear, willful act to destroy a group or part of a group<sup>208</sup>. The destruction of the group in the crime of genocide must be physical and biological<sup>209</sup>, hence the commission of acts which constitute the objective element of genocide without having the intention to physically destroy the group of the victim is not genocide.

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<sup>206</sup> Ambos (2009:836).

<sup>207</sup> Ambos (2009:837).

<sup>208</sup> Ambos (2009:838).

<sup>209</sup> Schabas (2000:229).

The proof of the specific intent or the intent to destroy is not easy, for the proof must be established on a case by case basis. The intent to destroy can be inferred from the circumstances and the facts of the case<sup>210</sup>. In the case of Gaza, it is submitted that the blockade was designed to destroy the people of Gaza. This inference is based upon the following circumstances and facts:

1. The generality of the blockade: As mentioned in paragraphs 4.2 and 4.3 above, the people of Gaza as a whole are starving and suffering from the inadequacy of the humanitarian aid which resulted from this blockade. This fact is evidence that the intent behind this blockade was designed to destroy the civilian population in Gaza as a protected group. This conclusion must be linked with the UN reports and other NGO reports about the human conditions in Gaza. This is also submitted by the ICC prosecutor who maintains that hindering humanitarian aid in Darfur is a calculated attempt to bring about the physical destruction of the people there<sup>211</sup>.
2. The blockade is systematically directed against the civilian population of Gaza: The Jurisprudence of the ICTR indicates that the specific genocidal intent is inferred from 'the context of the perpetration of other culpable acts systematically carried out against the same group'<sup>212</sup>. If we apply the same approach to Gaza, we find that the Israeli blockade manifested in the context of the perpetration of constant military operations and incursions. The most notable military operation is Cast Lead Operation which resulted in the destruction of 14000 homes, 219 factory, 240 schools<sup>213</sup> and 80% of the crops in Gaza<sup>214</sup>.

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<sup>210</sup> *Prosecutor v Gacumbitsi*, Judgment of the ICTR of Appeal Chamber (ICTR-2001-64-A) of 7 July 2006 at para 40 page 15.

<sup>211</sup> ICC, 11<sup>th</sup> report of the prosecutor of the ICC to the UNSC (2010:2).

<sup>212</sup> Sassoli (2006:2177).

<sup>213</sup> BBC report, Gaza home destruction 'wanton', [http://news.bbc.co.uk/2/hi/middle\\_east/7926413.stm](http://news.bbc.co.uk/2/hi/middle_east/7926413.stm), accessed on 1/7/2012.

3. Blockading Gaza has been a plan and policy of successive Israeli government since 2007: The existence of such a plan or policy is an important element to prove the genocidal intent of the perpetrator and it constitutes evidence which proves of the crime of genocide pursuant to the jurisprudence of ICTY<sup>215</sup>.
4. The civilian population in Gaza is a protected group under the provisions of Genocide Convention: The civilians of Gaza are part of the Palestinian people who live in the West Bank as well as the Palestinians in the Diaspora. The Palestinian people cannot be classified as a National group as they still do not have a state in the legal meaning of the word. They also do not follow one religion, for Palestinians follow many beliefs. Furthermore, they do not constitute one racial group. Therefore, it is suggested that the jurisprudential definition of Ethnic Group applies to the Palestinians. The legal meaning of an Ethnic Group is 'a group whose members share a common language or culture'<sup>216</sup>. The Palestinians are part of the Arab people<sup>217</sup> and they are different from the Israelis who presently speak mainly Hebrew and represent a Jewish Nation<sup>218</sup>. The understanding of the distinction between the Gazans and the Israelis as two different groups must stem from an objective criterion which takes into consideration the actual difference within a social and historic context<sup>219</sup>. A thorough understanding of this distinction requires taking into

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<sup>214</sup> CNN report, Palestinians: 1,300 killed, 22000 buildings destroyed in Gaza, [http://articles.cnn.com/2009-01-19/world/gaza.war\\_1\\_hamas-militants-john-ging-rockets-into-southern-israel?\\_s=PM:WORLD](http://articles.cnn.com/2009-01-19/world/gaza.war_1_hamas-militants-john-ging-rockets-into-southern-israel?_s=PM:WORLD), accessed on 1/7/2012.

<sup>215</sup> *Prosecutor v Jelasic*, Judgment of the ICTY of Appeal Chamber (IT-95-10-A) of 5 July 2001 at para 48 page 18.

<sup>216</sup> Sassoli (2006:2176).

<sup>217</sup> The Palestinian National Charter of 1964, the Introduction.

<sup>218</sup> Encyclopedia Britannica, <http://www.britannica.com/EBchecked/topic/296740/Israel>, accessed on 10/7/2012.

<sup>219</sup> *Prosecutor v Semanza*, Judgment of the ICTR of Trial Chamber (ICTR-97-20-T) of 15 May 2003 at para 317 page 94.

account the subjective perception of the perpetrator<sup>220</sup> and his conviction that the victim belongs to a specific different group.

Based on this understanding, the genocidal intent can be seen from this distinction between the two groups and the fact that the Israeli blockade against a protected group will result in Gaza becoming an unlivable habitat within a few years, according to the previously-mentioned UN report. The victims in Gaza's case constitute all the inhabitants of Gaza, and they belong to a specific group while the blockading power belongs to a different group. The term 'as such' is a crucial element to prove the genocidal intent. The jurisprudence of the ICTR has defined and affirmed this term through mentioning that the court must prove the genocidal intent by means of targeting the victim because he belongs to a certain group and not targeting him as a person<sup>221</sup>. Consequently, the mission in Gaza's case is much easier than in the case of Rwanda as the victims in Gaza are not individuals belonging to a different group, but an entire group, and this is another indication that the purpose of the blockade is to destroy an entire group of people in Gaza.

Proving the genocidal intent should also be established in the context of the long period of political and military conflict. As mentioned in Chapter Two, Gaza has been an arena of several conflicts since 1948, and it has always been a troublesome place for Israel. Yitzhaq Rabin, the former Prime Minister of Israel, summarized this Israeli concern in 1992 when

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<sup>220</sup> *Prosecutor v Semanza*, Judgment of the ICTR of Trial Chamber (ICTR-97-20-T) of 15 May 2003 at para 317 page 94.

<sup>221</sup> *Prosecutor v Muvunyi*, Judgment of the ICTR of Trial Chamber (ICTR-2000-55A-T) of 12 September 2006 at para 485 page 122.

he said that he would like Gaza to sink into the sea<sup>222</sup>. Clearly, the siege of Gaza constitutes a collective punishment against an entire civilian protected group and this is clear evidence that the intention behind this blockade is to destroy this group. Operation Cast Lead, which occurred during the time of the blockade and resulted in the death of 1380 civilians in Gaza is further evidence of the genocidal intent.

Last but not least, targeting the Palestinian people in Gaza through this blockade, without targeting the Palestinians of the West Bank and Jerusalem, is not evidence of the absence of the genocidal intent. The jurisprudence of the ICTY affirms that the intent to destroy is existent even if the perpetrator intended to destroy part of the group which lives in a particular location<sup>223</sup>.

#### 4.5 Conclusion

While the siege of Gaza has entered its sixth year, the human suffering in the Strip remains the most important dimension of this siege. The Israeli easing of the closure did not cause any fundamental change in the daily life of the Gazans. The absence of essential supplies such as food, clean water, medical supplies, gas and electricity is threatening the life of the Gazans, especially women, children and the elderly.

Legally, the blockade of the Gaza Strip is unlawful. It violates The San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 1994, the Geneva Conventions and its Additional Protocols and other International Conventions and Instruments.

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<sup>222</sup> Androni (2010), Aljazeera news website, <http://www.aljazeera.com/focus/2010/07/2010728133548536702.html>, accessed on 15/7/2012.

<sup>223</sup> *Prosecutor v Krstic*, Judgment of the ICTY of Trial Chamber (IT-98-33-T) of 2 August 2001 at para 590 page 208.

The illegitimacy of the Israeli blockade of Gaza leads us to the conclusion that this blockade constitutes two genocidal acts. It causes serious bodily or mental harm to the civilian persons in Gaza and also affects the living conditions which are calculated to bring about the physical destruction in whole or in part for the people in Gaza. The availability of the genocidal intent can be deduced from the acts and the policies of the Israeli government and its army. It also can be inferred from the circumstances of the blockade and the nature of the conflict in Gaza.



## Chapter 5

### Conclusion

Does the blockade of Gaza constitute genocide? In fact, answering the question of this mini-thesis required the division of its elements into three parts, which are, the legal status of Gaza, the legality of the Israeli blockade under international law and an examination of whether the conditions under which Gazans live due to the blockade constitute genocide.

The difficulty with this question stems from the fact that it includes different elements, and these elements belong to different areas under international law. The link between the status of the occupation, the blockade and the crime of genocide was possible in a place like Gaza.

Initially, this study found that Gaza is an occupied territory and Israel is the occupying power which can exercise its authority over the Strip. International law determines the existence of occupation based on the availability of "actual control" over a certain territory. The aspects of the Israeli actual control over Gaza can clearly be witnessed. The Israeli forces withdrew from Gaza following the disintegration plan in 2005, but they still control Gaza's airspace and territorial waters, the crossings, tax policy and tax revenues and constant military incursions.

Consequently, the status of the occupation makes the Geneva Convention and other international humanitarian law conventions and instruments apply to Gaza as an occupied territory. The major rules which Israel, as an occupying power, must adhere to in Gaza are set out in Article 4 of the

Fourth Geneva Conventions which affirm that the civilian population in the occupied territory of Gaza constitutes "protected persons". Israel must also ensure the provision of medical care and food supplies to the Gazans and must maintain the public health standards according to Articles 55 and 56 of the Fourth Geneva Convention.

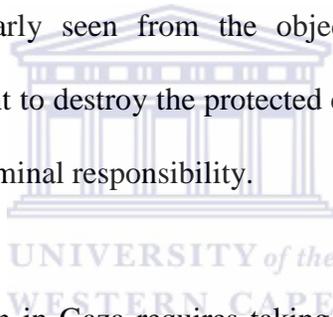
Israel did not fulfil the foregoing legal obligations, but on the contrary, it imposed a blockade on the civilian population in Gaza, which completely contradicts its obligation as an occupying power. The Israeli blockade is comprehensive, from the sea, land and air and is also general in terms of its effect. The illegality of this siege lies in its contradiction of the provisions of the Fourth Geneva Convention Relative to the Protection of the Civilian Persons in Time of War, especially and as mentioned in paragraph 2.6, Articles 4, 8, 49, 50, 53, 55, 56, 59 and 62.

The blockade also violates, as mentioned in paragraph 4.2, the provisions of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 1994, the Declaration of London of 1909 Concerning the Laws of Naval War and Hague Regulations of 1907 Concerning the Laws and Customs of War on Land.

Consequently, the illegitimacy of the siege of Gaza and the Israeli failure to "protect" the civilian persons in the Strip leads us to the conclusion that this illegal blockade constitutes a crime under international law. Gaza is the place where there is not enough food, water, medical treatment, and electricity. It is a place where there is no freedom of movement. It is a place where thousands of people are still living in tents after Operation Cast Lead due to the absence of construction materials. Three quarters of the inhabitants of Gaza are refugees and they have been living in bad

conditions in refugee camps, waiting to return to their homes since 1948. Israel is not only denying their binding legal right of return, but is also destroying their sanctuaries, starving them and killing part of them through the almost daily military incursions and operations, including Operation Cast Lead. Obviously, this is tantamount to make Gaza is the biggest concentration camp in the world in every sense of the word.

It has been suggested in this mini-thesis that targeting a whole civilian population which is living in an occupied territory and starving it through a comprehensive blockade, besides killing part of it through military operations at the same time, constitutes genocide. The elements of the Israeli criminal responsibility can be clearly seen from the objective element (the blockade), the subjective element (the specific intent to destroy the protected civilian population in Gaza) and the absence of grounds for excluding criminal responsibility.



An objective reading of the situation in Gaza requires taking into account the creation of a link between the blockade and its surrounding circumstances. This will facilitate dealing with this blockade as a crime of genocide. The most notable circumstances are the human crisis in Gaza which is caused by the siege, the Israeli military operations in Gaza which are causing deaths among the civilians and damage to the infrastructure in the Strip, and the fact that Israel is occupying Gaza and blockading it at the same time.

The Israeli blockade of Gaza constitutes two genocidal acts. The fact of the matters is that this blockade causes serious bodily or mental harm to the civilian persons in Gaza and it also affects living conditions which are calculated to bring about the physical destruction in whole or in part of

the people in Gaza. The Israeli specific genocidal intent can be inferred from the generality of the blockade, the blockade's systematic targeting of the civilian population of Gaza, the successive Israeli government's plan and policy concerning the blockade - in effect since 2007 - , and the fact that the civilian population in Gaza is a protected group under the provisions of Genocide Convention.

In fact, this siege is not more than a slow willful killing of the civilians in the Strip. This issue started in 1948 when the Palestinians began to be deported from their land, and Israel began targeting Gaza, most of whose inhabitants are refugees. Israel is targeting the descendants of the refugees of 1948. The current refugees are the third or the fourth generation of the Palestinians after their diasporic and this is a fundamental fact which may help us to infer the genocidal intent behind the Israeli blockade. In other words, the first generation of these refugees were deported to Gaza following the 1948 War, and Israel is now targeting Gaza, including these refugees by starving them and killing part of them through the siege and several military operations.

The decision makers in the Israeli government and its army incur the responsibility for the commission of the crime of genocide and they need to be tried before a criminal court for justice to be seen to have been done. It is submitted that there are three legal avenues which enable the criminal prosecution of the alleged Israeli criminals:

1- The ICC: Practically, this option is difficult to be attained due to legal and political reasons.

According to Article 13 of the Rome Statute, the ICC can only exercise its jurisdiction in 3 cases, Article 13 provides:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

The PNA accepted the Jurisdiction of the ICC in 2009 and asked the Prosecutor of the ICC to conduct an investigation about the alleged war crimes committed by Israel beginning in December 2008 pursuant to Article 13(a) of the Statute<sup>224</sup>. Initially, the ICC refused the Palestinian request on the basis that Palestine is not a state and that the ICC will only open investigation if asked to do so by the UN Security Council according to Article 13(b)<sup>225</sup>. But the recent UN Resolution no 11317 of 29 November 2012, which upgraded the Palestinian representation at the UN to that of a non-member observer state, will give this legal avenue more momentum on the grounds that the ICC may exercise its jurisdiction at the request of a State Party of the ICC pursuant to Articles 13(a) and 14(1) of the Rome Statute of the ICC.

A referral from the UN Security Council seems unlikely due to well-known political reasons. Certainly, the ICC will refuse any request from the PNA to investigate alleged crimes of genocide.

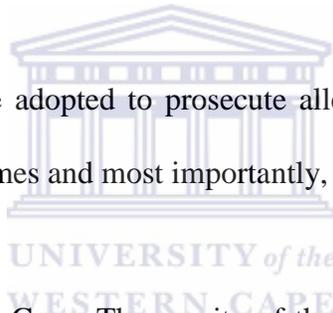
- 2- The principle of universal criminal jurisdiction: It is a legal principle in international criminal law defined as a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of where the crime was committed and

<sup>224</sup> Aljazeera news report, ICC rejects bid for Gaza war crimes tribunal, <http://www.aljazeera.com/news/middleeast/2012/04/20124318028457229.html>, accessed on 10/10/2012.

<sup>225</sup> Aljazeera news report, ICC rejects bid for Gaza war crimes tribunal, <http://www.aljazeera.com/news/middleeast/2012/04/20124318028457229.html>, accessed on 10/10/2012.

the nationality of the perpetrator or the victim"<sup>226</sup>. This precept is a remedy against any barrier preventing the (ICC) from achieving its objectives. The Genocide Convention is part of customary international law and it is part of the domestic laws of the states which have ratified this Convention. Implementing the principle of universal jurisdiction helps international criminal law to advance<sup>227</sup> and to overcome some political obstacles which impede the attainment of justice. An important example in this regard is the warrant of arrest issued under this principle in the United Kingdom against Doron Almong, the former military commander in the Israeli army, accusing him of the alleged commission of war crimes in Gaza.<sup>228</sup>

In fact, this approach can be adopted to prosecute alleged criminals who are accused of perpetrating other serious crimes and most importantly, the crime of genocide.



- 3- An *ad hoc* criminal court for Gaza: The gravity of the Israeli crimes in Gaza necessitates establishing an *ad hoc* criminal court to prosecute the persons responsible for perpetrating serious crimes in Gaza including genocide, like the UN *ad hoc* Criminal Tribunal in Rwanda, Sierra Leone and the former Yugoslavia. However, this option is difficult to implement as such a court needs a resolution from the UN Security Council, and issuing such a resolution is practically improbable.

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<sup>226</sup> Philippe (2006: 377).

<sup>227</sup> Meloni (2012:47).

<sup>228</sup> Meloni (2012:45).

The criminal responsibility of genocide is personal in nature, but one can seek a governmental Israeli responsibility according to the ICJ. In *Bosnia and Herzegovina v Serbia and Montenegro* case, the court found that a state can be held responsible for genocide<sup>229</sup>.

Last but not least, the conclusion that the status of genocide applies to Gaza is not based on the fact that Israel is the blockading power and Gaza is the blockaded city, but it is based on the actual existence of the elements of the crime of genocide in Gaza's case. Therefore, it is deduced that genocide would be existent in any similar blockade which has the same circumstances and the same findings, and even if the blockading power were Gaza and the people of Israel were the blockaded nation.

It is strongly recommended that all the governmental organizations and NGOs should force Israel to lift the blockade of Gaza promptly and without any conditions. The international community should take the responsibility and should try the Israeli perpetrators for genocide in order to achieve justice and to prevent and deter any other state from targeting any "protected persons" by way of imposing a similar blockade. The possibility of compensating the victims of the conflict in Gaza is also a potential legal solution<sup>230</sup>. The warring parties in Gaza have to seek a political not a military solution, and this solution must be based on the rules of international law. The Israeli blockade of Gaza must be lifted immediately because it is illegal, and it does constitute genocide.

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<sup>229</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ Advisory Opinions and Orders, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide of 26 February 2007 at para 431 page182.

<sup>230</sup> Docherty (2008:108).

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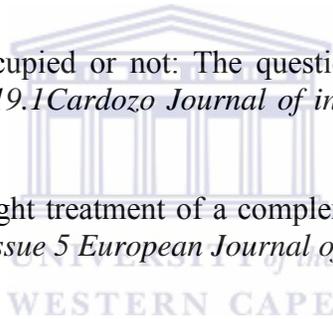
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