

A Progressive Programme of Starvation: The Gaza Strip Blockade as the Crime against Humanity of Extermination

Abstract

The inadequacies in the law of blockade allow for its misuse. A successful blockade by itself involves devastating effects on the blockaded civilian population; however, the inadequacies in the international law on blockades can aggravate their effects. This article examines the blockade around the Gaza Strip, because it is one of the longest in existence and one of the deadliest. It analyses the operation of the blockade from an international criminal law perspective to arrive at the conclusion that the Gaza blockade is capable of constituting extermination as a crime against humanity under the Rome Statute.

Keywords: blockade, belligerence, international armed conflict, crimes against humanity, apartheid

I Introduction

The law of blockade has long been around; however, it is not a particularly codified area of international law. Commentators either rely on customary international law or the military manuals of states. It allows the blockading state to impose a blockade over a belligerent in an international armed conflict to cut off its arms supply. Indeed, the imposition of a blockade itself is not unlawful; however, a blockade that intentionally deprives the blockaded civilian population of basic necessities is contrary to international humanitarian law.

The problem therefore is with what blockade law calls the ‘sole purpose’ principle: a blockading state must not create a siege for the sole purpose of starving out the blockaded civilian population. However, the threshold for this principle is extremely low. It merely

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states that the blockade must not have been created for the sole purpose of starvation, so if a blockade has a legitimate military aim, such as cutting off supplies from the belligerent state or group, it will not necessarily be illegitimate in accordance with the law of armed conflict. In the event a blockade begins to devastate the civilian population and outweigh its legitimate military strategy, a siege might not be subject to the traditional law of blockade.

Academic literature tends to focus on the law of armed conflict and international humanitarian law, which is understandable given the fact that blockading is a form of warfare; however, literature is scarce on blockades that could be deemed unlawful. Scholars have hinted at the possibility of challenging an unlawful blockade on human rights grounds; however, the possibility that an unlawful blockade may be an international crime has been argued even more rarely.¹ Just a few blog posts argue for the Yemeni and Cuban blockades as potential crimes against humanity, although, with reference to Yemen, only in the context that it could not be characterised as a war crime, as the blockade was created in a non-international armed conflict.² This shows that while commentators are thinking about these issues, the literature is not yet fully developed.

In the case of the Gaza blockade, it is not at issue that it was lawfully created; Israel's security was threatened by Hamas, a terrorist organisation, which assumed *de facto* governance upon Israeli disengagement, in the context of an international armed conflict.³ What is at issue are the problems that surfaced during the operation of the blockade, one of which is the obvious gradual starvation of the Gazan civilian population. Thus, for fourteen years, Israel has allowed the blockade to rampage its way through Gaza.

Because of the level of illegality and harm in this case, it is posited that the Gaza blockade can be characterised as the crime against humanity of extermination, thereby potentially serving as an example that unlawful blockades are not tolerated by the international judicial community. If such a deterrent mechanism can be established, such as that a blockade may be prosecuted under international criminal law, it could potentially improve how blockades are used. As such, this essay argues that the Gaza blockade is capable of constituting extermination as a crime against humanity and it being an unlawful blockade. Additionally, in this specific context, the crime against humanity of extermination is also capable of constituting part of the crime against humanity of apartheid, which is unique to the Israeli-Palestinian conflict.

¹ Philip Drew, *The Law of Maritime Blockade: Past, Present, and Future* (OUP 2017). <https://doi.org/10.1093/oso/9780198808435.001.0001>

² Junteng Zheng, 'Unlawful Blockades as Crimes Against Humanity' *American Society of International Law*' (20 April 2018) <<https://www.asil.org/insights/volume/22/issue/5/unlawful-blockades-crimes-against-humanity>> accessed 30 November 2022, Fernando Buen Abad Domínguez, 'The Cuba Blockade is a Crime Against Humanity' (10 May 2021) *Progressive International* <<https://progressive.international/wire/2021-05-10-the-cuba-blockade-is-a-crime-against-humanity/en>> accessed 30 November 2022.

³ Israel Ministry of Foreign Affairs, 'Israel's Disengagement from Gaza and North Samaria' (2005) <<https://mfa.gov.il/mfa/aboutisrael/maps/pages/israels%20disengagement%20plan-%202005.aspx>> accessed 28 January 2022.

II The Development of Blockade Law and Contentious Issues

With the first formal blockade in 1584, the Dutch blockade of Flanders, which cut off all trade to the ports, the modern law of blockade was created.⁴ A blockade is a military tactic to prevent vessels, aircraft and vehicles from sailing, flying or driving into specified ports, airports and land checkpoints, which belong to or are under the control of the blockading state. A blockade is essentially a war of attrition, designed to deny the blockaded state from accessing goods or the use of enemy vessels/vehicles, which in the past was used as a form of economic warfare.⁵ In contemporary practices, the creation of a blockade is most often part of military operations targeted against the blockaded state's armed forces in order to cut off their supplies. As a result, the blockading state must have due regard for the protection of civilians in time of war under international humanitarian law.

An effective blockade must be maintained by a force substantial enough to prevent access to the blockaded waters and territory.⁶ If a blockade is temporarily withdrawn due to weather concerns, it cannot be regarded as effective and binding.⁷ The blockade must apply to every vessel/vehicle/aircraft of all nations impartially.⁸ Vehicles and aircraft may enter at the discretion of the blockading force; so may vessels in distress provided that no cargo was shipped nor discharged from it for the benefit of the belligerent.⁹ It must be declared and the international community must be notified in due course of the date when the blockade began, its geographical limits, and a cooling period within which neutral vehicles may exit.¹⁰ It is required that the blockading state allow aid to the civilian population, although it retains the right to control the channels through which the aid arrives. An important aspect is that the blockading state must allow 'items essential for survival' to reach the civilian population, such as food, water and medicine.

While these rules and principles are somewhat reflective of customary international law, the fact that, *inter alia*, with respect to naval blockades, the London Declaration never formally became law and the uncertainties in its customary legal status cannot be ignored. For example, the United States insisted that belligerent states abide by the Declaration, but both the United Kingdom and Germany ignored it.¹¹ More generally, it is also unclear what types of vessels can enter a blockade, under what circumstances and according to what procedures. Similarly, there was no general agreement that the enforcement of a blockade against a belligerent

⁴ James McNulty, 'Blockade: Evolution and Expectation' (1980) 62 US Naval War College of International Law, 174.

⁵ Talia Einhorn, 'Transit of Goods over Foreign Territory' (Summer edn, 2014) Max Planck Encyclopedia of International Law <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1552>> accessed 23 February 2022. <https://doi.org/10.1093/law:epil/9780199231690/e1552>

⁶ Declaration concerning the Laws of Naval War, London, 208 Consol. T.S. 338 (1909), Article 2.

⁷ Ibid, Article 4.

⁸ Ibid, Article 5.

⁹ Ibid, Article 7.

¹⁰ Ibid, Articles 9, 11.

¹¹ Paul Reinsch, 'The Declaration of London' (1909) 190 (647) North American Review 479–487.

was truly accepted in international law.¹² Additionally, the principle that a blockade must uphold international humanitarian legal principles and must not starve the blockaded civilian population is not included in the Declaration. This opens a crucial debate about when blockade law applies, how and for how long, and the attempts to codify the law on blockades are laudable.

At the same time, most states' military manuals recognise the customary character of the London Declaration.¹³ According to these manuals, which thus may be evidence of customary law, blockades must be restricted to the coastal areas belonging to, occupied by or controlled by the blockaded state, but must not bar access to neutral ports. In the case of the creation of a naval blockade, it must be maintained by an armed force, which is capable of rendering ingress or egress of the area dangerous.¹⁴ Neutral vessels in distress should not be prevented from entering a blockaded area, though this is not absolute, and vessels have no right to enter.¹⁵ Neutral vessels that try to breach a blockade may be captured.¹⁶ If they resist and refuse a visit and search, they may be attacked, which happened with the Mavi Marmara in the Gaza Flotilla Incident.¹⁷

According to the US and the German manuals, a further exception applies to neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded.¹⁸ Those vessels should be authorised safe passage and should be able to expect safe conduct.¹⁹ The German and British manuals outline that starvation of the civilian population as a method of warfare is prohibited.²⁰ This is now enshrined in the San Remo Manual,²¹ and in the significant majority of military manuals around the world. Similarly, these are the contemporary rules when it comes to the aerial and land counterparts of a blockade. Therefore, it can be presumed that the rules have attained the level of customary international law and thus bind states.

¹² Ibid.

¹³ Commander's Handbook on the Law of Naval Operations (US Manual), Humanitarian Law in Armed Conflict Manual (German Manual), The Manual of the Law of Armed Conflict (UK Manual).

¹⁴ San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994.

¹⁵ Wolff Heintschel von Heinegg, 'Blockade' (Autumn edn, 2015) Max Planck Encyclopedia of International Law <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252>> accessed 22 February 2022. <https://doi.org/10.1093/law:epil/9780199231690/e252>

¹⁶ Ibid.

¹⁷ Douglas Guilfoyle, 'Israeli Raid Raises Questions over Legality of Gaza Blockade' (01 June 2010) The Times <<https://www.thetimes.co.uk/article/israeli-raid-raises-questions-over-legality-of-gaza-blockade-nldrm6d3gwk>> accessed 28 December 2021.

¹⁸ Natalino Ronzitti, 'Civilian Population in Armed Conflict' (Summer edn, 2010) Max Planck Encyclopedia of International Law <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e268>> accessed 22 February 2022. <https://doi.org/10.1093/law:epil/9780199231690/e268>

¹⁹ James Kraska, 'Safe Conduct and Safe Passage' (Winter edn, 2009) Max Planck Encyclopedia of International Law <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e396>> accessed 23 February 2022. <https://doi.org/10.1093/law:epil/9780199231690/e396>

²⁰ The Federal Ministry of Defence of the Federal Republic of Germany, 'Humanitarian Law in Armed Conflict, (1992), chapter V. Ministry of Defence, 'The Joint Service Manual of the Law of Armed Conflict' (2004), chapter IX.

²¹ San Remo Manual (n 14) paras 102, 103.

Post Second World War, the limitations of blockade law were better observed by states, though the area of law has also seen considerable modifications. A blockade could now be enforced aerially against aircraft by aircraft,²² as well as on land, and warships could no longer enter a blockaded zone.²³ Clearly indicated humanitarian and neutral vessels/vehicles/aircraft could obtain permission to cross a siege. Types of blockades could now be combined, for instance, when Israel created a full air, land and naval blockade on Lebanon to prevent Hezbollah from obtaining arms,²⁴ or the Gaza Strip blockade, which is also a complete siege.

The development of blockade law can be clearly seen; a series of principles and state practice emerged to regulate this area of warfare, although one may ask as to what extent the blockaded civilian population is adequately protected according to international humanitarian legal principles, as it is equally presumable that this method of warfare would easily have a devastating effect on them. Consideration of the civilian population was not significantly contemplated until the 60s and 70s, when Article 54(1) of the Additional Protocol I to the Geneva Conventions formally entered into force.²⁵

Under both customary and conventional international law, a blockade is unlawful if established for the sole purpose of starving the civilian population or denying essentials for survival, or if the damage to the civilian population is excessive as compared to the direct and concrete military advantage expected from the blockade.²⁶ Because this element of 'humanity' is a recent addition to the law of blockade, it is highly underdeveloped and needs special attention. As mentioned above, it is inevitable that an effective blockade has a series of cataclysmic effects on the blockaded civilian population, and additional measures to protect them are therefore required.

If the blockaded civilian population is inadequately provided with essentials, the blockading state must ensure the free and safe passage of such essentials.²⁷ At the same

²² Wolff Heintschel von Heinegg, 'Aerial Blockades and Zones' (2013) 43 *Israel Yearbook on Human Rights*, 263. https://doi.org/10.1163/9789004242081_012

²³ Dana Constantin, 'Korean Wars (1950-53)' (Fall edn, 2015) *Max Planck Encyclopedia of International Law* <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e57>> accessed 23 February 2022. <https://doi.org/10.1093/law:epil/9780199231690/e57>

²⁴ Hassan Fattah and Steven Erlanger, 'Israel Blockades Lebanon; Wide Strikes by Hezbollah' (14 July 2006) *NY Times* <<https://www.nytimes.com/2006/07/14/world/middleeast/14mideast.html>> accessed 23 February 2022.

²⁵ Prime Minister Churchill stated that 'there have been many proposals founded in the highest motives that food should be allowed to pass the blockade for the relief of these populations. I regret that we must refuse these requests. [...]. Many of these valuable foods are essential to the manufacture of vital war materials. Fats are used to make explosives. Potatoes make the alcohol for motor spirit. The plastic materials now so largely used in the construction of aircraft are made of milk. If the Germans use these commodities to help them to bomb our women and children rather than to feed the populations who produce them, we may be sure imported foods would go the same way, directly or indirectly, or be employed to relieve the enemy of the responsibilities he has so wantonly assumed.' (Hansard HC Deb vol 364 cols 1159, 1161-62 [20 August 1940]).

²⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims in International Armed Conflicts (Protocol I), 8 June 1977, Article 54. (hereinafter Additional Protocol I.)

²⁷ San Remo Manual (n 14) para [103].

time, this is not an absolute rule, because these cargos could be abused for harmful purposes or advancing military objectives by the hostiles against which the blockade is targeted.²⁸ As a result, this requirement is subject to the blockading state's right to search the vessel/vehicle/aircraft that carries the cargo and it may even be subject to capture.²⁹ This shows the significant imbalance between humanitarian considerations and the law of armed conflict, and it can be concluded that the area of blockade law is far from developed when it comes to protecting the civilian population trapped in a siege.

This can result in so-called capricious blockades, which are created with ulterior motives, or while they serve legitimate military objectives are accompanied by ulterior motives, which may surface over time. It is posited that the Gaza blockade is an example of a capricious blockade, where the Israeli authorities had the legitimate aim of security when having created the blockade, being consistent with its inherent right to self-defence. However, over time, capricious elements that may give rise to an international crime have begun manifesting themselves.

III A Remark on Apartheid as a Crime Against Humanity in Israel/Palestine

The Elements of Crimes to the Rome Statute of the International Criminal Court defines apartheid as a crime against humanity as '...inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups'.³⁰ Apartheid is a complex international crime and difficult to establish given its status as a *jus cogens*, an absolute norm:³¹ in order to show apartheid, another crime against humanity of comparable gravity has to be proved coupled with the intent to maintain the system of oppression. This other crime therefore may be the crime against humanity of extermination.³² While this paper exclusively focuses on the Gaza Strip blockade, it is necessary to give a wider context on Israel's apartheid policies across the Palestinian territories in order to be able to analyse the blockade comprehensively as extermination, which is a contributing factor to apartheid as a crime against humanity.

Perhaps the most important starting point with respect to apartheid is the notion of *hafrada*, Hebrew for 'separation'. This notion was explicitly endorsed by former Prime Minister Ehud Barak,³³ which gave way to a series of policies in Israel/Palestine; these

²⁸ von Heinegg, 'Blockades' (n 15).

²⁹ San Remo Manual (n 14) para [104].

³⁰ International Criminal Court, 'Elements of Crimes' (2011), elements to Article 7(1)(j).

³¹ International Convention on the Suppression and Punishment of the Crime of Apartheid (1974), 1015 UNTS 243, entered into force 18 July 1976, Article I.

³² Elements of Crimes, elements to Article 7(1)(b).

³³ Seraj Assi, 'Just Ask Israel' (10 January 2019) Jacobin <<https://jacobin.com/2019/01/trump-israel-separation-wall-apartheid>> accessed 13 April 2022.

marked the separation visually via checkpoints and the Separation Wall built in 2003, amongst others. The separation was formally affirmed in the Oslo Accords, with the Palestinian Authorities and Palestinian Liberation Organisation acquiescing to a series of quasi-autonomous Palestinian territories, with Israel retaining complete control over the borders, security, airspace, land and currency.³⁴ However, perhaps the most explicit *hafrada* is the Gaza blockade, which hermetically sealed the Strip off from the outside world under Israeli security concerns.

Measures that intentionally segregate Palestinians from Israelis include the so-called 'Jews-only roads', on which, if a Palestinian is caught driving, the driver's vehicle is confiscated and the Palestinian sent away,³⁵ house demolitions, which were recently confirmed by the Israeli High Court to be lawful,³⁶ and segregation of residents in Gaza and the West Bank.³⁷ As opposed to this, Israelis enjoy the right to self-determination and freedom from persecution to the fullest extent, and a homeland after centuries of living in diasporas. The Palestinian economy, compared to the Israeli, reeks of stark differences in advancement and ability of production, just like the way apartheid held back the non-white population in South Africa.³⁸ As such, it can be seen that Israel is a first-world state, while the Occupied Palestinian Territories suffer the consequences of apartheid in the forms of Jewish settlements in the West Bank, Palestinian enclaves, land expropriation, checkpoints, segregated roads, and the work-permit system to source cheap Palestinian labour in Israel.

In Gaza, Israel has been blockading over two million Palestinians via air, land and sea. This ensured that these Palestinians are effectively living without any rights, in a continuous state of subjugation, and without any prospects for realising self-determination, a right which has been granted to the Israelis to the fullest extent.³⁹ With respect to the conflict, Former Prime Minister Netanyahu stated that 'no Palestinian state will ever emerge'.⁴⁰

In 2005, Israel announced its formal disengagement from Gaza and, as a consequence, Israel argues it has no obligations towards the citizens of Gaza, other than those humanitarian

³⁴ David Makovsky, 'Barak's Separate Peace' (16 July 2000) The Washington Institute <<https://www.washingtoninstitute.org/policy-analysis/baraks-separate-peace>> accessed 13 April 2022.

³⁵ Breaking the Silence, 'Highway to Annexation – Israeli Road and Transportation Infrastructure Development in the West Bank' (2020) <<https://www.breakingthesilence.org.il/inside/wp-content/uploads/2020/12/Highway-to-Annexation-Final.pdf>> accessed 13 April 2022.

³⁶ Tovah Lazaroff, 'HJC Ruling Paves Way for IDF Eviction of Palestinians from Firing Zone 918' (5 May 2022) The Jerusalem Post <<https://www.jpost.com/israel-news/article-705977>> accessed 13 April 2022.

³⁷ HCJ 2088/10 *HaMoked: Center for the Defence of the Individual et 12 al, v Military Commander of the West Bank* [24 May 2012].

³⁸ Julie Peteet, 'The Work of Comparison: Israel/Palestine and Apartheid' (2016) 89 (1) *Anthropological Quarterly* 261. <https://doi.org/10.1353/anq.2016.0015>

³⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136.

⁴⁰ Ben Sales, 'Netanyahu Says He Supports a Palestinian 'state-minus' Controlled by Israeli Security' (24 October 2018) Jewish Telegraphic Agency <<https://www.jta.org/2018/10/24/israel/netanyahu-suggests-support-state-minus-palestinians>> accessed 13 April 2022.

obligations that flow from blockade law, since formal occupation ceased.⁴¹ Indeed, another High Court judgment affirmed the State of Israel's stance that Gazan residents are foreign nationals and have no right to enter Israel.⁴² This was taken further, when it was held that Gazans were unique foreign citizens, who come under special law with minimal humanitarian protection.⁴³

While it is true that Israel is not directly responsible for peacekeeping in Gaza or overseeing the welfare of the civilian population under occupation law *per se*, Israel continues to control critical aspects of life in Gaza, such as land crossings and the sea and airspace via which items essential for survival are brought into Gaza. Therefore, Israel has complete control over the movement of people and goods in and out of the Strip, so Israel ought to bear obligations under international law, especially international humanitarian law.

This is a further example of the intentional maintenance of a system of oppression without due regard to the basic rights of Palestinians in Gaza. The only point not under Israeli control is the Rafah Crossing, under Egyptian authority, but it is open maybe once or twice a year and tends to close without advance notice. This results in the Palestinian need to turn to Israel to obtain permits to travel to the West Bank or East Jerusalem, a process that is often unduly delayed, and often deliberately conducted in Hebrew.⁴⁴ As a result, Gazans rarely get to travel outside the Strip, which is a further denial of their right to free movement.

Dov Weisglass, a senior advisor to former Prime Minister Ariel Sharon, explained that the disengagement would 'freeze...the political process ... and when you freeze that process you prevent the establishment of a Palestinian state'.⁴⁵ While the Israeli High Court did intervene on a few occasions to uphold basic human rights and humanitarian principles in the Strip,⁴⁶ the State of Israel enacted a series of oppressive policies on the grounds of security, such as the blockade. As a result, the significance of the Gaza blockade as a potential crime against humanity is that it would contribute to the overall 'picture' in Israel/Palestine of apartheid as a crime against humanity. Thus, perhaps the most important issue in need of address first is why crimes against humanity, when the blockade could potentially be a war crime.

The Rome Statute explicitly lists starvation and the limiting of humanitarian relief as prosecutable war crimes when committed in an international armed conflict, the description most often used for the Israeli-Palestinian conflict is.⁴⁷ However, my choice, of crimes against

⁴¹ HCJ 9132/07 *Gaber Al-Bassiouni v The Prime Minister of Israel* [27 January 2008], para [12].

⁴² HCJ 5268/08 *Anbar et al v GOC Southern Command et al* [09 December 2009].

⁴³ HCJ 9329/10 *Anonymous v Minister of Defence et al.* [08 March 2011].

⁴⁴ Gisha, 'Separating Land, Separating People: Legal Analysis of Access Restrictions between Gaza and the West Bank' (2015) <<https://gisha.org/UserFiles/File/publications/separating-land-separating-people/separating-land-separating-people-web-en.pdf>> accessed 13 April 2022.

⁴⁵ Sara Roy, *Failing Peace: Gaza and the Palestinian-Israeli Conflict* (Pluto Press 2007) 327–328. <https://doi.org/10.2307/j.ctt18dzscm>

⁴⁶ HCJ 1169/09 *The Legal Forum for the Land of Israel v The Prime Minister et al.* [15 June 2009], para [18].

⁴⁷ Rome Statute of the International Criminal Court July 17 1998, 2187 UNTS 90, Articles 8(2)(b)(xxv), 8(2)(c), and 8(2)(e) (hereinafter Rome Statute).

humanity, lays precisely in the high degree of harmfulness the blockade has had on the Gazan civilian population, as well as apartheid as an international crime in a wider context: if crimes against humanity can be established, a much greater level of criminal responsibility can be determined, which would reflect the level of Israeli human rights abuses much better than if they were prosecuted as 'only' war crimes. In addition, cumulative convictions of crimes against humanity with other international crimes are permissible, as each crime has materially distinct elements.⁴⁸

As mentioned, in order for apartheid to be shown in this context, as an international crime, another crime against humanity of comparable gravity needs to be proved. Crimes against humanity, as an umbrella term, refer to acts that are part of a widespread or systematic attack directed against a civilian population with knowledge of the attack.⁴⁹ The specifically punishable acts are listed in the same article, among which extermination is the most applicable to the circumstances in Gaza, which in turn may contribute to establishing apartheid as a crime against humanity with respect to the Israeli-Palestinian conflict as a whole.

IV Extermination as a Crime against Humanity and the Gaza Blockade

This chapter now turns to analysing the blockade as extermination as a crime against humanity. Extermination is murder on a mass scale and thus requires an element of mass destruction.⁵⁰ There is the possibility that an act, such as a blockade, which is lawful under the law of armed conflict could equally be unlawful as a crime against humanity.⁵¹ In other words, if a legitimate military tactic is permitted under the law of armed conflict but breaches international humanitarian legal principles to the extent it could constitute an international crime, it can no longer be considered lawful under armed conflict law. It therefore follows that a lawfully created blockade could be characterised as a crime against humanity, if it can be shown that the civilian population is intentionally deprived of items essential for survival.

⁴⁸ *Prosecutor v Nahimana et al* (Appeal Judgment) (International Criminal Tribunal for Rwanda, Case No. ICTR-99-52-A, 28 November 2007), para [1029].

⁴⁹ Rome Statute, Article 7(1).

⁵⁰ *Prosecutor v Ntakirutimana* (Appeals Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-96-10-A, 13 December 2004), para [516]. *Prosecutor v Kamuhanda*, (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No. ICTR-99-54A-T, 22 January 2004), para [692]. *Prosecutor v Stakić* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-97-24-A), paras [260]-[261].

⁵¹ Payam Akhavan, 'Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence' (2008) 6 (1) *Journal of International Criminal Justice* 21. <https://doi.org/10.1093/jicj/mqn001>

In the case of Gaza, the civilian population is facing a continuous humanitarian crisis, with some commentators describing Gaza as the world's largest 'open-air prison'.⁵² Most factories and businesses have shut down, which led to about 44% of the inhabitants being unemployed in 2017; among women this statistic is 71.5%, and among those in their 20s the figure was 62%. Eighty percent of the entire population depends on aid, and 60% suffers from extreme food insecurity.⁵³ The lack of essential imports and systematic destruction of the Gazan economy have devastated livelihoods, and local agriculture has been significantly compromised. Food insecurity has led to a gradual shift in diet to low-cost and high carb foods, such as cereal and oil. This can further lead to micro-nutrient deficiencies, particularly among children and pregnant women.⁵⁴

Electricity is supplied only a few hours a day, and frequent blackouts prevent Gazans from leading reasonable lives. This power shortage significantly impacts the maintenance of the wastewater infrastructure and sewage facilities, which should have power all the time, but instead they became non-operational as a result of such an intermittent power supply. Only about 3% of water in Gaza meets the WHO's safety standards; the rest is contaminated, which increases the risk of infectious diseases.⁵⁵ This results in the civilian population being required to cut back on water consumption and buy desalinated water from private suppliers, which further aggravates the dire economic conditions.

On top of that, this also results in the lack of opportunity to use vital medical equipment, as there is virtually no electricity that would power it. Israel also prevents doctors from travelling to conferences to stay up to date with medical innovations. Bringing medical equipment into Gaza requires Israel's consent, an application that is either in Hebrew only, often delayed, or not provided at all, on the pretext that the parts can be converted into weapons and then used against Israel.⁵⁶

The struggle for life in Gaza has shown that a prolonged blockade without due consideration for the directly affected civilian population leads to a humanitarian catastrophe, especially in those states that are not self-sufficient in food production. However, the indifference to the fate of Palestinians in Gaza further aggravates the uncertain and highly criticised status of the blockade under international law.

⁵² Thomas W. Smith, 'The Gaza Wars, 2008–2014: Human Rights Agency and Advocacy' in Thomas W. Smith (ed), *Human Rights and War Through Civilian Eyes* (University of Pennsylvania Press, 2016) 108. <https://doi.org/10.9783/9780812293616-005>

⁵³ BTSELEM, 'Gaza Strip' (2017) <https://www.btselem.org/gaza_strip> accessed 14 April 2022.

⁵⁴ UNOCHA, 'Locked in: The Humanitarian Impact of Two Years of Blockade on the Gaza Strip' (2009) 39 (1) *Journal of Palestine Studies* 154–161. <https://doi.org/10.1525/jps.2010.XXXIX.1.154>

⁵⁵ UNOCHA, 'Gaza Strip; The Humanitarian Impact of the Blockade' (2017) <<https://www.ochaopt.org/content/gaza-strip-humanitarian-impact-blockade>> accessed 14 April 2022.

⁵⁶ Peteet (n 38).

1 Material Element 1. — Widespread or Systematic Attack against a Civilian Population

The requirement of widespread refers to the large-scale nature of the attacks,⁵⁷ and systematic to their organised nature and the improbability of their random occurrence, which is most typically reflected by the pattern or the methodical planning of acts.⁵⁸ Such a disjunctive requirement allows that if only one of the elements is met, crimes against humanity may not necessarily fail; indeed, there are crimes that could be either widespread or systematic but if there were no disjunctive requirement, a great deal of potential international crimes would fall outside the scope of crimes against humanity. While if we specifically look at the Gaza blockade, it is likely that both elements are met, it would be a miscarriage of justice on substantive grounds, if one of the requirements could not be established should there be a conjunctive definition.

The elephant in the room is to address the issue of ‘attack’ with regard to the blockade. The Rome Statute defines attack as a ‘course of conduct involving the multiple commission of acts referred to in paragraph 1⁵⁹, which one may associate with kinetic attacks. However, the attack element to extermination can include the ‘infliction of conditions calculated to bring about the destruction of part of a population, such as the deprivation of access to food and medicine’.⁶⁰ Separate killing accidents may be aggregated to meet the requirement of large scale if the killings can be attributed to the same series of operations.⁶¹ Again, if there would be no such requirement, there would be a potential miscarriage of justice.⁶² Therefore, an attack can be perpetrated as either a series of violent acts, or as a result of legislation and/or government policy, which would inflict insufferable life conditions.

There is no distinction between intentional and unintentional killing, and there is also no distinction between whether the killings were remotely done or via (in)direct

⁵⁷ *Prosecutor v Akayesu* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-96-4-T, 2 September 1998), para [580].

⁵⁸ *Prosecutor v Kunarac et al* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case Nos. IT-96-23-T & IT-96-23/1-T, 12 June 2004), paras [94]-[96]. *Prosecutor v Tadić* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No. IT-94-1-T, 7 May 1997), para [648].

⁵⁹ Rome Statute, Article 7(2)(a).

⁶⁰ Elements of Crimes, Article 7(1)(b), element 1. *Prosecutor v Kayishema and Ruzindana* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No. ICTR-95-1-A, 21 May 1999), para [146]. *Prosecutor v Brdanin* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-99-36-A, 3 April 2007), para [389]. *Prosecutor v Krstić* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No. IT-98-33-T, 2 August 2001), para [499]. *Prosecutor v Rutaganda* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-96-3-A, 26 May 2003), paras [83]-[84].

⁶¹ *Prosecutor v Stanišić & Župljanin* (International Criminal Tribunal for the former Yugoslavia, Appeals Judgment, Case No. IT-08-91, 30 June 2016), para [1022].

⁶² Kendall and Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’ 2013/24 Legal Studies Research Paper Series, 8. <https://doi.org/10.2139/ssrn.2313094>

participation.⁶³ Moreover, there is no numerical minimum that the ‘attack’ should have reached in order to be considered extermination, and it is decided on a case-by-case basis.⁶⁴ In addition, the Elements of Crimes pronounce that even a single death is sufficient to give rise to extermination,⁶⁵ although in reality a substantial number of deaths would be more likely to give rise to extermination, and instead a single casualty would be classified as murder as a crime against humanity, especially as murder and extermination are not materially different.⁶⁶ Therefore, an ‘attack’ can be determined by its nature and impact upon civilians besides its violent appearance.

Thus, the fact that the restrictions are not directly violent acts does not mean they could not be characterised as extermination. With the deprivation of resources vital to survival possibly constituting an attack, the Gaza blockade imposed conditions likely to bring about deaths among the Gazan civilian population.⁶⁷ While the blockade may not have instantly involved deaths, it did impose an excessive burden on civilians, which in turn later began causing a significant loss of life. As the duration of time between the imposition of conditions and deaths is irrelevant to establish extermination, this element is likely met. The blockade is operated in a widespread and/or systematic manner affecting the civilian population. Because the creation and maintenance of a complete and effective blockade requires careful planning, and methodical organisation, it follows that the suffering resulting from these restrictions is not randomly occurring.

Another problem may be with the requirement ‘directed against a civilian population’⁶⁸. As mentioned, a blockade is a war tactic against the hostile armed forces, and it can be argued that the blockade is targeted against Hamas militants, not against the civilian population, and they are collateral in an armed conflict. However, over the course of the siege, it can be observed that the blockade is a tactic against the entirety of Gaza. According to documents exposed following a Freedom of Information petition, it came to light that Israel employed a deliberate reductive policy based on calculations of the minimal caloric intake required for Gaza residents to survive.⁶⁹ Further, the blanket ban on Gazan fishing vessels is contrary to the Hague Conventions of 1907, which binds Israel as a matter of customary international

⁶³ *Rutaganda*, para [81].

⁶⁴ *Prosecutor v Ntahimimana* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-01-68-A, 9 April 2013), [231]. *Prosecutor v Tolimir* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-05-88/2-A, 12 December 2012), [146].

⁶⁵ Elements of Crimes to the Rome Statute, Article 7(1)(b)(1). (hereinafter Elements of Crimes)

⁶⁶ *Prosecutor v Ntakirutimana* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-96-17-A, 13 December 2004), para [542].

⁶⁷ *Prosecutor v Al Bashir* (International Criminal Court, Pre-Trial Chamber I, Case No. ICC-02/05-01/09-94, 12 July 2010), para [33].

⁶⁸ Additional Protocol I, Article 50.

⁶⁹ AP 2744/09 *Gisha v Ministry of Defence* [2011].

law.⁷⁰ The changing fishing restrictions are contrary to international humanitarian law as well as Israel's own military manual, given they are slowly starving out the population.⁷¹

Initially, fishermen were prohibited from fishing beyond three nautical miles, a restriction which was loosened or tightened depending on Israel's evaluation of Hamas' threat to Israeli security, but never went beyond twelve nautical miles in the past.⁷² In September 2021, the fishing zone was expanded to fifteen nautical miles, though this still does not come close to the agreed twenty nautical miles enunciated in the Oslo Accords.⁷³ While this may be seen positive, Gazans however remain sceptical. Some have opined that, because of the extreme restrictions, most people have small boats that are unable to sail beyond five-six nautical miles, or that while some have their own trawler, they have engine problems since they have not been used for years and the mechanical parts for repair cannot be sourced in Gaza.⁷⁴

Finally, as recently as April 2022, it was reported that a Palestinian baby died as a result of the blockade, as she was not given permission from Israeli authorities to seek urgent medical assistance outside of Gaza.⁷⁵ This is not an isolated incident; instances of such mistreatment that culminate in death are regular occurrences in Gaza. With respect to the COVID-19 pandemic, the already restricted access for medical patients to leave Gaza for lifesaving care was further reduced, which is another contributor to the crime of extermination.⁷⁶ While this was justified by Israel on healthcare grounds, in order not to spread the viral pathogen, Israel should have facilitated and allowed 'rapid and unimpeded passage' of humanitarian assistance, '...even if such assistance is destined for the civilian

⁷⁰ Hague Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War. The Hague, 18 October 1907, Article 3.

⁷¹ Israel, *Laws of War in the Battlefield* (Manual, Military Advocate General Headquarters, Military School 1998) 35.

⁷² BTSELEM, 'Lift the restrictions on the Gaza fishing range' (24 March 2013) <https://www.btselem.org/gaza-strip/20130324_restrictions_on_fishing_should_be_lifted> accessed 14 April 2022.

⁷³ Fernanda Seavon, 'Israeli blockade on Gaza eases, but residents are not hopeful' (12 September 2021) Al Jazeera <<https://www.aljazeera.com/news/2021/9/12/israeli-blockade-on-gaza-eases-but-residents-are-not-hopeful>> accessed 14 April 2022.

⁷⁴ Ibid.

⁷⁵ Kamil Ahmed, 'Palestinian Baby Dies After Treatment Delayed by Israeli Blockade of Gaza' (1 April 2022) The Guardian <<https://www.theguardian.com/world/2022/apr/01/palestinian-baby-dies-after-treatment-delayed-by-israeli-blockade-of-gaza>> accessed 14 April 2022. BTSELEM, 'Israel Continues to Impede Medical Care for Gazan Patients Needing Treatment in the West Bank or in Israel' (2022) <https://www.btselem.org/video/20220210_israel_continues_to_impede_medical_care_for_gazan_patients_needing_treatment_in_the_west_bank_or_in_israel#full> accessed 14 April 2022. Jack Khoury, 'Gaza Infant Dies After Heart Surgery Postponed Due to Cessation of Coordination With Israel' (23 June 2020) Haaretz <<https://www.haaretz.com/middle-east-news/palestinians/premium-gaza-infant-dies-after-surgery-delayed-due-to-cessation-of-coordination-with-israel-1.8942800>> accessed 14 April 2022.

⁷⁶ Save the Children, 'Denial of Healthcare outside Gaza is a Death Sentence for Children' (2020) <<https://www.savethechildren.net/news/denial-healthcare-outside-gaza-death-sentence-children-save-children#>> accessed 14 April 2022.

population of the adverse Party'.⁷⁷ Thus, it can be concluded that this blockade is capable of constituting extermination as a crime against humanity.

2 Material Element 2. — State or Organisational Policy

The requirement to carry out widespread or systematic attacks 'in furtherance of a state or organisational policy' is unique to the Rome Statute; before, this was not a requirement to establish crimes against humanity. This element requires that a state or organisation has a plan/policy to commit the crime so as to distinguish attacks from isolated and sporadic attacks by random individuals. It is satisfied in both instances when an individual actively promotes the state policy and when someone commits criminal acts envisaged by that policy.⁷⁸ It is not required that the policy be communicated in any specific way; there is no requirement that the policy be implemented by either action or inaction, and it can even emerge from the circumstances.⁷⁹

A blockade can only be implemented when there are planned policy actions and guidelines set out by the Israeli government and military commanders-in-chief. Such a rigorous, systematic and consistent pattern of restrictions and effective maintenance over years cannot be achieved through isolated and makeshift acts. The cases of the Gaza Freedom Flotilla and the *Estelle*⁸⁰ are clear evidence of a rigorous state policy to maintain an effective naval blockade, as well as effective air and land blockades.

The airspace above Gaza is completely closed to both commercial and non-commercial aircraft, and the land siege has a complete buffer zone and 24/7 military patrol in addition to heavily armed checkpoints. Additionally, considering the scale and length of the Gaza blockade, this element is very likely met with evidence of a state policy, as a blockade cannot be maintained throughout the years if there are no rigorous policies in place. The blockade covers the entirety of Gaza, and it has been in place for fourteen years now, as opposed to most modern era blockades, which generally last up to five years.⁸¹ Therefore, this element is also likely met.

3 Mental Element — Intent and Knowledge of the Attack

Another contentious issue is whether the intent required to establish crimes against humanity is met, as there have been numerous commanders and prime ministers

⁷⁷ Additional Protocol I, Article 70(2).

⁷⁸ *Prosecutor v Bemba* (International Criminal Court, Trial Chamber, Case No. ICC-01/05-01/08, 21 June 2016), para [161].

⁷⁹ *Prosecutor v Katanga* (International Criminal Court, Trial Chamber II, Case No. ICC-01/04-01/07, 18 December 2012), paras [1108]–[1109], [1113].

⁸⁰ CA7307/14 *The State of Israel v The Ship Estelle* (2016).

⁸¹ The customary law on the duration of a blockade is not yet established. The highlighting of the length of other blockades is only for the purposes of comparison.

throughout the existence of the blockade, and intent – and thus responsibility – may be difficult to establish. For the conduct part, the perpetrator must engage in the conduct and, for the consequence – devastation – it is required that those accused mean to cause the consequence or that the consequence occurs in the ordinary course of events.⁸² The crime can involve acts of omission, where the perpetrators intentionally refrain from interfering with the extermination, thereby furthering it.⁸³ With respect to this, the ICC developed a virtual certainty test to assess the foreseeability or the consequence that would normally follow in the circumstances where the acts were committed.⁸⁴ It is not required that the perpetrators fully understand the precise nature or scale of the attack.⁸⁵

The perpetrators have to be aware that the role they played in the courses of conduct led to the destruction of civilian sites, infrastructure, or the disruption of food production, which would inevitably result in a large number of deaths among the Gazan civilian population coupled with an awareness or knowledge of a widespread or systematic attack against the population.⁸⁶ With the extensive reporting on the Gaza crisis, it is hardly disputable that Israeli military officials on any level in charge of the blockade did not have knowledge of the attacks and their deadly consequences.

In addition, these relevant actors also know that the blockade is part of an armed conflict, where crimes in violation of international humanitarian law have already been occurring. As a result, authorities restricting the entry of humanitarian aid not only knew of the overarching policy of the blockade, but also of other attacks against the civilian population and its overall impact, and it is also strongly presumable that relevant actors deliberately restrict aid, movement, and fishing.

In support of this, the fishing restrictions and the length of the blockade are the starkest examples of such intent, which is consistent with an intent to deprive the civilian population of the essentials for survival, as Gazans sustain themselves predominantly through fishing. These restrictions also change at very short notice depending on Israel's threat assessment. In terms of the length of the blockade, it was established in 2007 and is still in place. It is regrettable that the law of blockade does not offer a limitation on the length of a blockade as, in this case, it is lasting abnormally long with deadly consequences. This may be an indication of the intent to exterminate the population in Gaza, as opposed to restricting Hamas' access to resources. However, since the assessment depends on how the ICC would construe the 'intent' and 'virtual certainty' test with reference to the blockade, there may be

⁸² Rome Statute, Article 30.

⁸³ Stakić (n 50) para [522].

⁸⁴ *Prosecutor v Bemba* (International Criminal Court, Pre-Trial Chamber II, Case No. ICC-01/05-01/08, 15 June 2009), para [362].

⁸⁵ Elements of Crimes, p 6, point 4 to Article 7(1)(b).

⁸⁶ *Prosecutor v Seromba* (International Criminal Court for Rwanda, Appeals Chamber, Case No. ICTR-2001-66-A, 12 March 2008), para [190].

a compelling case for intent and knowledge.⁸⁷ Consequently, the Gaza blockade is strongly presumed to constitute extermination as a crime against humanity.

V Conclusion

The law of blockade is a largely uncodified area of law with inadequate rules on civilian protection. The sole purpose principle's pronouncement, that a blockade must not be created for the sole purpose of starving the blockaded civilian population out, does not have adequate safeguards given its low threshold. This allows for a blockading state to make use of a siege by providing nominal humanitarian assistance to the blockaded civilian population but reserving the right to search and disallow every single humanitarian vehicle, aircraft, or vessel should it be determined that the belligerent armed forces may make use of the aid. This right is at the discretion of the blockading state, therefore the already difficult living conditions created by the blockade for the civilian population may be further aggravated by the fact that the blockading state makes use of the loopholes afforded by the sole purpose principle.

This has been happening in the Gaza Strip, where Gazans have been hermetically sealed off from the outside world since 2007, on the grounds that Hamas, the *de facto* elected non-state actor, poses a threat to Israeli security, as it fires rockets and mortar shells onto Israel. While this is a legitimate military reason to enact a blockade and cut off any arms supply to Hamas, the cost of civilian destruction cannot be greater than the military advantages afforded by the siege. Indeed, Hamas still fires rockets onto Israel and therefore, even on military grounds, the extent to which the blockade has been advantageous to Israel is questionable.

On the other hand, there are a series of policies targeted at the Gazan civilian population collectively, such as the calorie intake assessment. These policies give rise to the presumption that Israel has been making use of the sole purpose principle, and uses the blockade to slowly starve out and exterminate the entirety of Gaza. As a result, the blockade could be characterised as the crime against humanity of extermination under the Rome Statute. If the crime against humanity can be established, it would mean a new deterrent mechanism to encourage abstinence from the illicit usage of blockade law and a significant development of humanitarian protection in this specific area of the law of armed conflict; moreover, it would contribute to establishing apartheid as a crime against humanity currently unique to Israel-Palestine.

⁸⁷ Rome Statute, Article 30.