

## معیار نوین کنترل مؤثر در حقوق بین‌الملل؛ مطالعه موردی: جنگ غزه ۲۰۲۳-۲۰۲۴

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### چکیده

در جریان نبرد سال ۲۰۲۳ میان غزه و اسرائیل (عملیات طوفان الاقصی علیه عملیات شمشیرهای آهنین) ادعاهای مختلفی از سوی طرفین این جنگ به منظور دفاع از اقداماتشان مطرح شد. از سوی حماس، جنبش جهاد اسلامی و جبهه مردمی آزادی‌بخش فلسطین به‌عنوان گروه‌های مسلح فلسطینی بر حق تعیین سرنوشت و حق مقاومت تأکید دارند و از سوی دیگر، اسرائیل بر حق دفاع مشروع خود پای می‌فشارد. از همان روزهای ابتدایی این مخاصمه مسلحانه، اسرائیل به‌عنوان یکی از طرفین درگیر، ادعا کرد از آنجا که از سال ۲۰۰۶ کنترل مؤثری بر غزه نداشته است و ندارد، بنابراین، هیچ مانعی برای ممانعت از توسل این رژیم به حق ذاتی دفاع مشروع وجود ندارد. با بالا گرفتن مناقشات بر سر مفاهیم کنترل مؤثر و امکان توسل به دفاع مشروع، پرسش‌های مختلفی مطرح می‌شود، آیا قدرت اشغالگر از حق دفاع مشروع برخوردار است؟ چه معیارهایی برای کنترل مؤثر در حقوق بین‌الملل وجود دارد و آیا اسرائیل بر غزه کنترل مؤثر دارد؟ نویسنده کوشیده است با تکیه بر روش تحلیلی-توصیفی و استناد به منابع کتابخانه‌ای به این پرسش‌ها پاسخ دهد. نتایج نشان می‌دهد که در مورد معیار نوین کنترل مؤثر، دکترین و حقوق نرمی وجود دارد که به‌جای تمرکز بر عنصر مادی اشغال، بر آثار آن متمرکز است.

### واژگان کلیدی

اشغال، دفاع مشروع، کنترل مؤثر، محاصره، حقوق نرم.

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## **New Criterion of Effective Control in International Law; Case Study of Gaza Conflict 2023-2024**

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### **Abstract**

During the Gaza-Israel conflict of 2023 (Al Aqsa storm Vs. Swords of Iron) several allegations and claims have been raised from both sides in order to defend their actions. Hamas, Palestinian Islamic Jihad, and Popular Front for the Liberation of Palestine as Palestinian armed groups insist on their right to self-determination and right to resist on the one hand and Israel on its right to self-defence on the other hand. From the very first day of this armed conflict, Israel as one party claimed that while it has not had any effective control over Gaza since 2006, there is no ground to avoid this regime from its natural right to self-defence. With the emergence of disputes over the concepts of effective control and the possibility of resorting to self-defence, several questions are raised as follows: does an occupying power have the right to self-defence? What are the main criteria for effective control in international law? And does Israel have effective control over the Gaza Strip? The author tries to answer these questions based on the Analytical-descriptive method by using library documents. The results show that there is a doctrine and also a soft law about the new criterion of effective control which focuses on consequences of control rather than its material element, namely Occupation.

### **Keywords**

Occupation, Self-defence, Effective Control, Blockade, Soft Law.

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**Introduction**

On 7 October 2023, Palestinian armed groups consisting of Hamas, Palestinian Islamic Jihad, and Popular Front for the Liberation of Palestine launched an unpredictable attack on Israel, took hostages, barraged rockets, and took back some lands in response to several years of rights' violation, occupation, and brutality by the Zionist regime. Since then, the Israeli regime has started an inhumane operation namely Swords of Iron against all residents of the Gaza Strip. After more than two months of mass violation of human and humanitarian rights including the commitment of Genocide, war crimes, and crimes against humanity some international experts and several nations condemned Israel's attack and methods of warfare against the Palestinian people. To defend itself, Israel claimed that its attacks on civilians in Gaza are part of its strategy to eradicate Hamas and other armed militias in the Gaza Strip who violated the rule those civilians may not be used to shield. It also emphatically insisted that has the right to self-defence. To strengthen this recent claim, Israel analyzed the advisory opinion of ICJ in the Wall Case (2004) which stated in paragraph 139 that: "under the terms of article 51 of the charter of the UN ... the court also notes that Israel exercises control in the occupied Palestine territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside that territory. The situation is thus different from that contemplated by Security Council Resolutions 1368 (2001) and 1371 (2001), and therefore Israel could not, in any event, invoke those resolutions in support of its claim to be exercising a right to self-defence". (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, p. 62) Israel, relying on the opposite meaning of this phrase, argues that since it has withdrawn its military forces from Gaza since 2005 and this land has not been actually occupied, consequently it does not have effective control over it, and because the attack started from outside its occupied territory, Therefore, it has the right to self-defence. Some legal experts have rejected this claim and stated that the blockade of the Gaza Strip since 2006 is an actual criterion that shows Israel has effective control over this territory. these controversies raise some questions: does an occupying power has the right to self-defence? What are the main criteria for effective control in international law? And does Israel have effective control over the Gaza Strip? The author tries to answer these questions based on the Analytical-descriptive method by using the library and available documents.

Many studies are done around subjects of "self-defence", "effective control", and "analysis of Wall opinion" in Persian and English. But, the author has not found any research entitled "New Criterion of Effective Control in International Law". Among those papers which are related to the subject, the "Evolution of the concept of self-defence in international law

with an emphasis on developments after September 11, 2001” by Mohsen Sharifi (2003), “International Court of Justice Advisory Opinion: Judicial Condemnation of Israel” by Seyyed Hossein Sadat Meidani (2004), and “Legal analysis of Palmer Report” (2011) in Persian can be mentioned.

There is also some English research such as “Having It Both Ways: The Question of Legal Regimes in Gaza and the West Bank” by Hilly Moodrick-Even Khen (2011) and “Is Gaza Occupied?: Redefining the Legal Status of Gaza” by Elizabeth Samson (2010) which both emphasized on the absence of effective control over Gaza by Israel. George Bisharat in his paper “Israel's Invasion of Gaza in International Law” (2009) While referring to Israel's crimes in the 2008 war against Gaza, does not evaluate the issue of effective control.

According to the questions, at first, this paper investigates the right to self-defence for occupying power within the concept of ‘use of force’, then it goes to the right of occupied people to armed resistance, as the third step, it investigates relevant cases and analyzes the traditional criteria of effective control, and finally discuss new criterion of effective control which is raised in doctrine.

### **1- The Right to self-defence for Occupying power**

The Right to self-defence is recognized by Article 51 of the UN Charter and it has been repeated in several resolutions and documents. it is an inherent right of every legitimate member state of the UN. Article 51 states that: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security”. According to this article occurrence of any armed attack against the members of the UN would activate the mechanism of self-defence.

When this situation comes to an occupying power, there would be some questions as follows: does an occupying power have the right to self-defence? Under what conditions this power could exercise its legitimate right to self-defence?

Exercising the right to self-defence for occupying power, at first needs to clarify the status of using armed force. The ICRC has tried to draw a special framework for this subject matter. For instance, it attempted to attract attention to the issue of the use of armed force in occupied territories in its report at the 31<sup>st</sup> International Conference 2011, affirming that: “another challenge raised by recent examples of occupation is the identification of the legal framework governing the use of force by an occupying power ... there is a need to clarify how the rules governing law enforcement and those regulating the conduct of hostilities interact in practice in the context of an

occupation”. (ICRC, 2011, pp. 28-29). Using armed force is an inevitable act by both the occupant and occupied; to fight against actual residents opposing the occupation and take control of them for the first and to evict the invader for the second party, respectively. This force utilization under the right to self-determination for a people under occupation has received recognition concerning the occupation of the Palestinian territory and in the practice of the ICJ (Carcano, 2015, pp. 103-104).

Some scholars believe that the occupation of Palestine is linked to the use of armed force. Dr. Marco Longobardo (2018) mentions that: “From a *jus ad bellum* perspective, the fact that a situation of occupation is normally created after an exercise of armed force by one or more states in the process of invading and taking control over another territory renders obvious the link between the use of armed force and occupation. For instance, the Israeli occupation of the OPT commenced with the Israeli invasion of those territories during the international armed conflict with Egypt, Jordan, and Syria- commonly referred to as the ‘Six-Day War’” (Longobardo, 2018, p. 2). Even though the occupation of Palestine began many years before the Six-Day War and goes back to the approval of the Balfour Declaration, the point that confirms the connection between the occupation and the use of force is completely acceptable. Longobardo also adds: “While the occupying power tries to justify and legitimize its use of force, the General Assembly’s definition of ‘Aggression’, ICC Statute’s definition of the ‘crime of aggression’, and International case law with state practice, demonstrate that the occupation of a territory is constantly considered to be a violation of the prohibition of the use of force embodied in article 2(4) UN Charter” (Longobardo, 2018, p. 3).

Although the existing rules and regulations prohibit the use of force as a means of aggression and occupation, it is not clear that this prohibition would extend to the situation where occupation is accomplished. To understand and analyze the prohibition or allowance of the use of armed force during the occupation, it is essential to study the law of occupation. The law of occupation was born in the Westphalian conception of international law which itself was designed based on state sovereignty. According to the history of European countries and their national interest in the nineteenth century, the notion of occupation was considered a threat to their national sovereignty. (Benvenisti, 2012, p. 75) The aforementioned countries had a reasonable fear of lose their control over one or more portions of their territory due to an armed conflict, that’s why they considered occupation of their lands as one of the main sources of violation against the right to sovereignty. Consequently, one pillar of the law of occupation even today is that the occupying power does not acquire

sovereignty over the occupied territory, nor is it considered the owner of the public property located therein (Longobardo, 2018, p. 23).

Later, this principle was reflected in Article 55 of the 1907 Hague Regulations annexed to Hague Convention IV which entitled the occupying power just as 'administrator' and 'usufructuary'. Article 43 also regulates: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

Based on these regulations, many scholars including Greenwood (1992) and Cassese (2008) expressed four main principles for the administration of an occupied territory. Greenwood states: " 1. The Occupant acquires temporary authority, not sovereignty over the occupied territory; 2. The Occupying power required to administer the occupied territory; 3. The Occupant should respect the existing law, unless absolutely prevented, 4. The power of the Occupant is limited under international law" (Greenwood, 1992, pp. 241-266).

Cassese declares four principles as follows: "Belligerent occupation, as is well known, is based on four fundamental principles. First, the occupant does not acquire any sovereignty over the territory; it merely exercises *de facto* authority. Second, occupation is by definition a provisional situation. The rights of the occupant over the territory are merely transitory and are accompanied by an overriding obligation to respect the existing laws and rules of administration. Third, in exercising its powers, the occupant must comply with two basic requirements or parameters: fulfillment of its military needs, and respect for the interests of the inhabitants. International rules strike a careful balance between these two (often conflicting) requirements: while military necessities in some instances may gain the upper hand, they should never result in total disregard for the interests and needs of the population. Fourth, the occupying Power must not exercise its authority in order to further its own interests or to meet the needs of its own population. In no case can it exploit the inhabitants, the resources, or other assets of the territory under its control for the benefit of its own territory or population. Linked with this is the principle that the occupying Power cannot force the occupied territory-both its inhabitants and its resources to contribute to, or in any way assist, the occupant's war effort against the displaced government and its allies" (Cassese, 2008, p. 251).

According to these two statements, there is no doubt that: "The occupant does not acquire sovereignty over the territory". Then what can this occupant do as a temporary administrator? Some experts believe that the nature of the occupant administration is civil, some believe in the military nature, and

others in a mixed version. But as Greenwood correctly mentions: “this kind of authority always has a military character”. (Greenwood, 1992, p. 253) As this situation is imposed by force, its duration also depends on the force. Therefore, the source of authority for the administration has a military sense.

This military nature of occupant administration within the occupied territory is convenient with the use of force, but this utilization has restrictions. The occupant’s responsibility to protect the lives and properties and its obligation to restore and ensure civil life regarding the whole social, commercial, and economic life of the community, as mentioned in Art. 43 of HR restricts force utilization to the human and humanitarian rights of inhabitants, and as the HR prohibits any population transfer in the favor of occupant (Art. 49 of Geneva Convention IV), there is no doubt that these inhabitants contain just the occupied people.

Now, while accepting the restricted use of force by occupying power it is the time to investigate the role of self-defence as an exception to the use of force. This analysis needs to be done through the states’ practices.

Except for the situation of Palestine territory in other occupational situations like south Ossetia and Abkhazia (2008), Iraq (2003), and Afganistan (2001) the occupying powers, namely Russia and the USA accordingly, there were not any claims about self-defence. Neither Russia nor the United States of America ever invoked self-defence against the insurgents’ incidents, and other states did not address this situation in the framework of jus ad bellum. But, unlike the other states’ practices, Israel is the only occupying power that invoked self-defence to justify its use of force in occupied territory (Longobardo, 2018, pp. 90-91).

Constructing the Wall which created a legal framework to condemn Israel’s violation of humanitarian rights is the most important allegation of Israel about the right to self-defence. Though the Wall opinion will be discussed in the next section, it should be noted that in the report entitled “The situation in the Middle East, including the Palestinian question” by the Security Council, this assertion provoked the reaction of different countries. China, Syria, Algeria, Libya, Qatar, Djibouti, Jordan, Iraq, Iran, and some other states considered the construction of the Wall as an act of aggression. On the other hand, France, Mauritius, Mexico, Norway, Pakistan, Spain, Chile, and Brazil took the neutral position and did not respond to this situation. Finally, the USA supported Israel’s claim of self-defence (Security Council, 2002, pp. 1-36).

Thereafter, in the Wall opinion (2004) this theoretic and practical contradiction showed itself in the governments’ statements. some states including Netherlands and USA criticized the ICJ’s approach for not having taken into account Israel’s right to self-defence on one hand, and some

others like Djibouti asserted that Israel has no right to self-defence on the other hand (General Assembly, 2004, pp. 1-14).

During other armed incidents that Israel has had with Armed resistant groups in the Gaza Strip especially Hamas, there has been always the allegation of the right to self-defence by Israel and the different positioning of states. The analysis of the state practice and *opinio juris* regarding the occupying power's right to self-defence shows that recognizing this right for Israel is less favorite among most of the states which means that the majority of the states do not admit the right to self-defence for Israel. Therefore, the occupying power's recourse to self-defence in the occupied territory does not have any uniform practice, nor it has any accepted legal ground (Longobardo, 2018, pp. 98-99).

Thus, to answer the first question regarding if the occupying power has any right to self-defence, it should be noted that there is no legal basis to defend its right to self-defence and it is a contradictory subject under the state practices.

Even though the occupying power's right to self-defence has remained ambiguous through state practice, the advisory opinion of the ICJ in Wall has its own lessons.

The Advisory Opinion of the ICJ about the allegation of self-defence by Israel is summarized in two paragraphs as follows:

“Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the [OPT] and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case”. (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004, p. Para. 139).

This vague type of wording which does not clarify the exact nature of occupying power's rights including the right to self-defence in ICJ's opinion, leads to numerous interpretations from these paragraphs. Longobardo believes that this ambiguous wording has rooted in two different reasons that the court used to deny the applicability of self-defence: “On the one hand, the ICJ affirmed that only states can launch armed attacks and trigger a response in self-defence; on the other, the Court said that the fact that the



occupied territory is placed under occupation per se excludes the application of self-defence ... so, this opinion can be interpreted in at least two ways: the ICJ may have addressed the inapplicability of self-defence against attacks from non-state actors, or, rather, may have considered this rule to be inapplicable in the specific situation of an occupation” (Longobardo, 2018, p. 100).

So, two main points should be resolved in this field; first the possibility of the use of force and self-defence against non-state actors ( Hamas in this case), and second the occupancy statement in territories under the control of occupying power.

### **1-1- Self-defence against non-state actors**

O'Connell et.al (2019) based on the separate statement of the ICJ Judges like Kooijmans argues: “The judge Kooijmans in the Wall opinion begins by noting that the statement by the majority that the Art. 51 applies ‘in the case of an armed attack by one state against another state... is undoubtedly correct. However, he continues, Security Council Resolutions 1368 and 1373 have added ‘completely new elements’ that would permit the use of force in response to acts of terrorists without ascribing these acts of terrorism to a particular state. This new element, Judge Kooijmans observes, ‘marks undeniably a new approach to the concept of self-defence’” (O'Connell, Tams, & Tlad, 2019, pp. 66-67).

It is clear that the court's opinion to restrict the provisions of Art. 51 to state actors, has been rejected by at least a minority of Judges. The opponents believe that the restriction of using self-defence to the threats and acts of force by state actors is incompatible with the explicit wording of Art. 51 UN Charter and also it is kind of ignoring the reality that massive terrorist violence perpetrated by non-state actors (Canor, 2006, p. 131).

There is no doubt that some non-state actors use armed forces to achieve their goals, but attributing all force utilization as ‘terrorist actions’ is not rational. People under the occupation have the right to self-determination which is a UN principle and an international *erga omnes*. Though the right of ‘people’ to utilize force to achieve their self-determination is controversial in international law, it is obvious that their right to self-determination is not limited to peaceful resistance. Chawich (2022) in her paper mentions that: “the indeterminacy in the Charter regarding ‘which’ peoples are entitled to self-determination, ‘how’, precisely, they are to achieve it, and what rights entitlements are included, has not helped to strengthen anticipated UN goals, such as international peace and security. UN provisions prohibiting the inter-state use of force except in self-defence, reserving sovereign internal control to governments, and imposing legal duties on states to prevent non-state

violent actors have instead fostered the view that liberation movements are unlawful ‘terrorism’, leaving many struggles for self-determination at the mercy of governmental uses of over-whelming, excessive, ‘peacetime’ force” (Chadwick, 2022, pp. 886-901). While this argument may apply to the situation in which a legitimate state confronts non-state actors’ violence, it does not extend to the occupation situation in which the occupying power has no sovereignty in occupied territory. Accordingly, when US President Roosevelt and UK Prime Minister Churchill gathered together to sign the Atlantic Charter in 1941, it was clear to them that the key component of ‘people’ seeking the right to self-determination was to liberate themselves from outsider rule and occupation, and to oust invaders: “respect the right of all peoples to choose the form of government under which they will live, and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them” (Atlantic Charter, 1941).

It should not be neglected that Uprising, Revolts, and Insurrections against occupying forces were commonplace occurrences throughout the occupied territory in the 19<sup>th</sup> and 20<sup>th</sup> centuries (Nabulsi, 2005, p. 52). and it is a regular behavior in today’s life. from this point of view, the armed resistance of occupied people falls under the notions of ‘uprising’, ‘Revolt’, and ‘Insurrection’ rather than ‘Terrorism’.

Specifically focusing on the Palestine situation, it is necessary to investigate the Additional Protocol I 1977 to Geneva Conventions which states: “The present Protocol brings mainly the following innovations: Article 1(4) provides that armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes are to be considered international conflicts.” Based on the very clear phrases of this Article, there is no doubt that the people under occupation have the right to *fight* and *resist* forcefully (as the term ‘fight’ means violent struggle) against the occupying power. This right is affirmed in the context of the right of self-determination of all peoples under foreign and colonial rule (Schrijver, 2015, p. 474).

the United Nations General Assembly (UNGA) has explicitly affirmed the right of Palestinians to resist Israel’s military occupation, including through armed struggle which has been reflected in some resolutions:

- UNGA Resolution 3314 (1974) entitled as “Definition of Aggression” determines: “Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or *any military occupation, however temporary, resulting from such invasion or attack*, or any annexation by the use of force of the territory of another State or part thereof, ... ”. it

adds in Article 7 as follows: “Nothing in this declaration, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: *nor the right of these peoples to struggle to that end and to seek and receive support*, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration” (United Nations General Assembly, 1974).

- UNGA Resolution 37/43 (1982) entitled as “Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights” states: “Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and foreign occupation *by all available means, including armed struggle* ... Reaffirms the inalienable right of the Palestinian people and all peoples under foreign and colonial domination to self-determination, national independence, territorial integrity, national unity and sovereignty without outside interference ... Considering that the denial of the inalienable rights of the Palestinian people to self-determination, sovereignty, independence and return to Palestine and the repeated acts of aggression by Israel against the peoples of the region constitute a serious threat to international peace and security” (United Nations General Assembly, 1982).

Although UNGA resolutions are not legally binding, they accurately reflect the customary international legal opinion among the majority of the world’s sovereign states (Schwebel, 1979, p. 302). Therefore, by accepting the right of occupied people to utilize armed resistance, especially for Palestinian People, it seems that the ICJ’s argument to restrict the attack from a state actor rather than non-state actors in Wall opinion is based on this fact that it recognizes the Palestinians right to self-determination according to UNGA Resolutions.

Now, it is clear that the occupant could not allege the right to self-defence in front of armed resistant inhabitants of occupied territory, especially on the ground of ‘defending itself against Terrorist actions’. That’s why Israel consistently tries to prove that these attacks are generated from outside the occupied territory. To analyze this second allegation it is vital to investigate the ‘Effective Control’ criteria within relevant cases

including Wall's Opinion.

## **2- The traditional Criteria of Effective Control; reviewing relevant cases**

The matter of effective control is the subject of different aspects of International law such as the state's effective control over the acts and mission of non-state actors, or organizations' effective control over some territories like the UN peacekeeping operations in conflict zones, and ... . Here, the effective control over occupied territory and by occupant is the main issue. It is commonly held that 'actual authority' under Article 42 of the Hague Regulations is synonymous with 'effective control' and that accordingly, the occupation itself means effective control of foreign territory (Dinstein, 2009, p. 42). the main subject is how to determine an authority as an effective control or how an authority be considered effective.

Although the notion of 'effective control' is not found in treaty law, it has developed over time in the occupation literature to determine the existence and status of occupation. Therefore, it is true that the effective control is different from overall and full control. So, if the occupant shows some sort of authority in the occupied territory, it is assumed as its effective control over that territory. As Ferraro (2012) mentions: "International jurisprudence, some army manuals, and legal scholarship tend to propose a consistent approach to this notion based on the ability of the foreign forces to exert authority, in lieu of the territorial sovereign, through their unconsented-to and continued presence in the territory in question. With regard to international jurisprudence, the US Military Tribunal in Nuremberg stated the following, in connection with the *Von List* case: the term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of an established government. ... to the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied...the Germans could at any time they desired to assume physical control of any part of the country" (Ferraro, 2012, pp. 139-141). According to the US Military Tribunal in Nuremberg, effective control is the same as physical control, which means the physical presence in the territory.

In addition to the US Military Tribunal opinion, the United Kingdom's Manual of the Law of Armed Conflict states: "To determine whether occupation exists, it is necessary to look at the area concerned and determine whether two conditions are satisfied: first, that the former government has been rendered incapable of publicly exercising its authority in that area, and second, that the occupying power is in a position to substitute its own authority for that of the former government" (UK Ministry of Defence, 2005, p. 275).

There are two main international judicial approaches that provide some guidelines to understand the criteria of effective control, namely the ICJ approach and the ICTY approach in the *Prosecutor v. Naletilic & Martinovic* case.

### **2-1- The ICJ approach**

There are two cases in which the ICJ has determined some criteria for 'effective control': a) the Wall advisory opinion (2004) and b) the *DRC v. Uganda* case (2005).

- a) **Wall advisory opinion (2004):** The term 'effective control' is mentioned once in this advisory opinion of the court. The court, in Paragraph 112 while recalling the initial report of Israel to the Committee of Economic, Social, and Cultural Rights (4 December 1998) in defence of its position for not complying with the provisions of the covenant in the territories, emphasizes the approach of the CESC which stated: "the state party's obligation under the Covenant apply to all territories and populations under its effective control".

Then it goes further in Paragraph 139 and issues the second part of its argument about the 'control' criterion, stating: "The Court also notes that Israel exercises control in the [OPT] and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory".

As far as these sentences are concerned, the linkage between 'exercising control' and 'within territory' shows that control is combined with actual presence in the occupied territory.

- b) **the DRC v. Uganda case (2005):** in this case, the court considers in Paragraph 173 that: "In order to reach conclusion as to whether a state, the military forces of which are present on the territory of another state as the result of an intervention, is an 'occupying power' in the meaning of the term as understood in the *Jus in Bello*. The court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening state in the areas in question. In the present case, the court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied" (*Armed Activities on the Territory of the DRC v. Uganda*, 2005, p. 173).

In this case, the court has added a new criterion to the aforementioned

one, meaning ‘physical presence’ in the occupied territory. This new criterion is about the administration of the occupied territory and dismantling the previously established authority.

### **2-2- The ICTY approach in the Prosecutor v. Naletilic & Martinovic case**

The International Criminal Tribunal for the Former Yugoslavia (ICTY) in paragraph 217 of the Prosecutor v. Naletilic & Martinovic case states: “The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly; – the enemy’s forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation; – the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; – a temporary administration has been established over the territory; – the occupying power has issued and enforced directions to the civilian population” (Prosecutor v. Naletilic and Martinovic, 2003).

The ICTY approach contains some guidelines as follows:

- a) Substitution of occupant authority for the occupied previous incapable authorities;
- b) the territory must be occupied (physical presence) even though some local resistance is in progress;
- c) sufficient force presence for occupant or the capacity to send troops; and
- d) issuing and enforcing directions to the civilian population.

These four guidelines show three pillars for effective control Which all together, constitute an ‘effective control test’:

- 1- seizing power and land;
- 2- presenting physical or capability to military presence; and
- 3- taking administrative control of territories.

Seizing power and land is the first essential element in the occupation and effective control which is intertwined with physical and military presence. According to Art. 42 of Hauge regulations there is an inseparable connection between the establishment of authority and deployment of force within occupied territory. Thus, in principle, the ability to exert authority over occupied territory is combined with physical and military presence (Ferraro, 2012, p. 144).

Based on these propositions, the Israeli court following the unilateral military withdrawal from the Gaza Strip in 2005 issued that the occupational situation has ended in this area and Israel no longer exercises any effective

control over Gaza (Anonymous v The State of Israel, 2008, p. 11).

Once again, during the recent Gaza-Israel conflict, the real status of Gaza was brought up whether as an occupied territory or as an independent one which is opposing against Israel. While Israel is trying to justify its violations and attacks against Gaza on the grounds of outsider attacks, some international humanitarian rights institutions including ICRC are affirming that the factual situation of Gaza shows a new criterion in effective control and although it is no longer under the military occupation, it is under the Israel's effective control following the comprehensive blockade. So, in the next section, this new criterion will be discussed.

### **3- Towards New Criterion of Effective Control**

In light of changes in technology including means and methods of force utilization, new interpretations have been created around the meaning of physical and military presence. (Bashi & Mann, 2007, p. 69) the ICTY special committee in its final report on the NATO Bombing case (2000) noted in Para. 44 The change in the understanding of humanitarian law is due to the development of new technologies, such as precision-guided munitions (PGM) (ICTY special committee, 2000). This new interpretational approach may apply to other traditional criteria, especially the effective control elements.

It has been notably contended that the development of modern technologies has made it possible for contemporary occupying powers to assert effective control over foreign territory and significant aspects of the civilian life of its inhabitants without having a continuous military presence therein. This definition of effective control implies that an occupation could exist solely on the basis of the foreign power's ability to project military power from a position beyond the boundaries of the 'occupied territory' (Ferraro, 2012, p. 143).

But this is not the only new interpretation of effective control based on technological changes, sometimes, this control shows itself through comprehensive sanctions, meaning blockade.

As mentioned before, one of the main elements of effective control is to dismantle the existing authority and substitute it with the occupant's authority. Dismantling the existing authority could happen in several forms such as disintegration. Applying coercive sanctions and blockade also could disable the existing authority as well. Thus, investigating the relationship between blockade/sanctions and effective control could help to understand the real situation in the Gaza Strip.

#### **3-1- Blockade and Effective Control; Background and Legal Aspects**

Historically, From 1967 until 2005, the Gaza Strip was under Physical and

military occupation of Israel. In 2003, the Disengagement Plan was proposed by Prime Minister, Ariel Sharon, which after a short time was adopted by his Government in June 2004, and approved by Keneset in February 2005 as Disengagement Plan Implementation law. There are several reasons for this plan, among which are demographic causes. As Shimon Peres the former Vice Prime Minister stated in an interview, Israelis were disengaging from Gaza because of Demography. Sharon as the proposer on the day of disengagement, publicly stated: "It is no secret that, like many others, I had believed and hoped we could forever hold onto Netzarim and Kfar Darom. But the changing reality in the country, in the region, and the world, required me a reassessment and change of positions. We cannot hold on to Gaza forever. More than a million Palestinians live there and double their number with each generation" (Cook, 2006, p. 104).

Increasing the number of Palestinians on the one hand and Israel's failure to establish the two-state plan on the other hand, led the Israeli authorities to leave Gaza behind hoping that due to the inability to form a government, the Palestinians could forcefully be displaced. Prime Minister Ariel Sharon's senior adviser, Dov Weissglass, explained the meaning of this statement: "The significance of the disengagement plan is the freezing of the peace process, and when you freeze that process, you prevent the establishment of a Palestinian state, and you prevent a discussion on the refugees, the borders and Jerusalem. Effectively, this whole package called the Palestinian state, with all that it entails, has been removed indefinitely from our agenda. And all this with authority and permission. All with a presidential blessing and the ratification of both houses of Congress. That is exactly what happened. You know, the term 'peace process' is a bundle of concepts and commitments. The peace process is the establishment of a Palestinian state with all the security risks that entails. The peace process is the evacuation of settlements, it's the return of refugees, it's the partition of Jerusalem. And all that has now been frozen.... what I effectively agreed to with the Americans was that part of the settlements would not be dealt with at all, and the rest will not be dealt with until the Palestinians turn into Finns. That is the significance of what we did" (Shavit, 2004).

Although Israel withdrew from Gaza according to the disengagement plan considering that Palestinians were unable to create their own government, but Hamas Movement took office and established an authority that was no longer tolerated by Israel and tried to destroy it soon after its establishment.

Following Israel's withdrawal from Gaza in 2005, the Fatah movement held legislative elections and Hamas ran for office as it won 45% of votes among Palestinians in Gaza, West Bank, and East Jerusalem. This election and its result caused international challenges, while the US and Israel froze



funding they had provided to the former Palestinian Authority which was led by Fatah movement, they refused to recognize any Palestinian government including Hamas, rather they consider this movement as a terrorist organization. Even after the Hamas and the Fatah reconciliation and efforts to form a united government, Israel responded by imposing a land, air, and sea blockade on Gaza which remains to this day. Eventually, the US provoked the Fatah movement to create division and enmity and consequently made a split in Palestinian leadership in 2007. The Fatah regained control of the Palestinian Authority in the West Bank and Hamas took control over Gaza (Kane, Cohen, Shamir, & Scher, 2023).

One of the main issues in the Gaza situation, in order to determine the existence of effective control, is to understand what is the meaning and effects of 'Blockade'.

The etymology of the 'blockade' notion dates back to the 1670s which stated: "prevent ingress and egress from by warlike means", also in the 1690s was "shutting up of a place by hostile ships or troops". (Online Etymology Dictionary, 2024) Terminologically, 'blockade' was supposed to be used as a feature of naval warfare and is rooted in the traditional concept of sea war (Weller, 2015, p. 273). Every powerful state specifically around the First and Second World War date, has its own approach to blockade but all of them consider it as a diplomatic-military institution (Osborne, 2004, pp. 1-3).

In general meaning, a blockade is an act of sealing off a place to prevent goods and people from entering or leaving. This actual meaning is happening for Gaza to the extent that this area is called the "world's largest open-air prison". While blockade is generally accepted as a legal means of war, it has some limitations in humanitarian law. Art. 23 of the GC IV (1949) states: "Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing, and tonics intended for children under fifteen, expectant mothers, and maternity cases. The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services, or facilities as would

otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers. such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.”

Since the blockade imposition over Gaza, a devastating impact has occurred which is defined as a humanitarian crisis. This crisis has affected all aspects of life in Gaza, including food, agriculture, health, Job, fuel, etc. Israel has sealed the five crossings around the Gaza Strip and also blocked the sea borders. According to these actions, the poverty level has reached over 80%. After the recent armed conflict in Gaza, all of Gaza’s inhabitants depend on food and medical assistance for survival (Erakat, 2012, p. 5).

While it is clearly mentioned that the blockade could not forbid the transition of essential goods like food, medics, clothes, etc. it also attracts attention to the phrase “that the control may not be effective” in subparagraph (b). according to this part of the Article, the high contracting party who allows the passage of consignments should be satisfied that there is no serious reason to fear that the control may not be effective. So, it means that the state that blocks actually has effective control over that territory. Actually, paragraph two brings a number of conditions offering guarantees to the belligerents. The second guarantee is about ‘supervision’. Consignments must be subject to strict and constant supervision from the moment they arrive until they have been distributed. This requirement shows how the blocking power, occupant in this regard, has effective control over the blocking territory.

Based on this idea, the ICRC and some other international experts and scholars claim that although Israel does not occupy Gaza physically and militarily right now, it has effective control over that territory, which makes it responsible for the violation of humanitarian rules and regulations and also creates an obstacle on the way of resorting to the right to self-defence.

#### **4- The Effective Control Over Gaza; From Opinio Juris to International Norm**

By all means Israel’s effective control over Gaza is a controversial subject that is rejected by this occupying power and its alliances. Specifically, the UN Security Council has treated the blockade on Gaza as a political matter with little to no mention of the law (Erakat, 2012, p. 12). But among those who condemn Israel’s violation of Palestinian rights in occupied territory,

there are some experts whose Ideas have an undeniable effect on international norms and shape *opinio juris*.

Dr. Dinestein (2009) believes that Israel has effective control over Gaza even after the disengagement based on three reasons:

- a) First of all, Gaza and West Bank are not two separate territories, but according to both the Israeli High Court of Justice (HCJ) and the Interim agreement, Gaza and West Bank are only one occupied territory, which part of it is still under occupation (West Bank) and the other part is disengaged in 2005;
- b) Imposing mass restrictions against Gaza and monitoring the airspace, maritime activities, and land borders through extensive blockade shows that Israel can not wash its hands of the situation in Gaza. Israel is the main supplier of fuel and most electricity to Gaza,... it should be palpable that the occupation cannot viewed as over;
- c) Israel still holds that, on a unilateral basis, it is free to send its armed forces into the area whenever such a move is deemed vital to its security and, indeed, Israeli military incursions into Gaza after the disengagement in response to missile fire and other attacks have been a recurrent event. Israel's insistence on its liberty to retake any section of the Gaza Strip militarily and to bring in individuals for detention or prosecution is the most telling aspect of the non-termination of the occupation (Dinestein, 2009, pp. 277-278).

Dr. Nicholas Stephanopoulos (2006) also believes that Israel still has control over Gaza although it has left the territory in appearance. He mentions: "While Israel is no longer responsible for the day-to-day administration of Gaza, it retains a good deal of control over the territory. The flow of people and goods into and out of Gaza is supervised by Israel, even along the Gaza-Egypt border. Israel also controls the airspace above the territory, patrols Gaza's coastline, bans the building of an airport or seaport, collects customs for the territory, and maintains a population registry for all of Gaza's residents. Most intrusively, the Israel military creates sonic booms in the skies above Gaza, fires artillery at targets in northern Gaza, and carries out targeted assassinations throughout the territory" (Stephanopoulos, 2006, p. 524). the criterion which Dr. Stephanopoulos emphasizes is similar to the provision that enshrined in the ICTY approach about effective control, meaning: "capability to send troops". In fact, when an occupying power is able to occupy and control a territory whenever it wants, this means that it has effective control over that territory. So, when Israel blocks Gaza comprehensively and controls everything in that region, there is no doubt that this territory is under Israel's effective control.

In addition to what was mentioned above, there is another fact that

shows Gaza is still an occupied territory. According to several agreements between Israel and the Palestinian Authority, any unilateral changes to the legal status of Gaza and the West Bank are prohibited. As an example 'Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip' (1995) in Art. 31 states: "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations". Therefore, when Gaza undoubtedly was occupied before Israel's withdrawal, there was no legal ground for changing its status unilaterally. (Stephanopoulos, 2006, p. 256) Thus, the whole disengagement plan was an illegal action that constituted a violation of Israel's commitments on the one hand, and a violation of International rules especially GC IV *erga omnes* regulations on the other hand.

Dr. Mari (2005) and Dr. James (2009) are two other scholars who discuss the real situation of Gaza under the effective control of Israel. Mustafa Mari considers the actual control of Israel over Gaza and emphasizes: "It is true that Israeli ground troops may have, at least initially following the implementation of the Israeli disengagement plan, left most of the territory of the Gaza Strip, however, Israeli boats have remained in Palestinian territorial waters. Furthermore, Israel's air force remained active and controlled airspace over the entirety of the Gaza Strip. Israel also prevented the operation of the Arafat International Airport in Gaza and Gaza's only seaport. These are only a few examples of control Israel still exercises in the OPT, especially in Gaza" (Mari, 2005, p. 366).

Carey James (2009) states: "Israel's continued status as an occupying power arises from *inter alia*, the fact that Israel continues to control Gaza's airspace, coast, electricity, population registry, telecommunications networks, and water sewage. It also continues to exercise complete control over the movement of goods into the Gaza Strip and exercise exclusive control over all but one export crossing" (James, 2009, p. 644).

These legal views have also influenced the opinions of some international and regional institutions as follows:

#### **4-1- The Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel**

The Report of Independent International Commission of Inquiry to GA in 2023 expressly provides on Paragraph 49: "These incursions and attacks are directly linked to the larger context of the Israeli occupation and the blockade of Gaza. Israel's occupation policies, described in depth in the Commission's previous report to the General Assembly, such as systematic discrimination, coercive environment, settlement expansion

and impunity for settler violence, evictions and displacement of Palestinians from their homes, as well as the 16-year blockade of Gaza, have all served as a backdrop and catalyst for attacks on Gaza.<sup>105</sup> The blockade, which constitutes a collective punishment of the residents in Gaza, has significantly weakened the capacity of the population and public sector to respond to the devastation caused by repeated attacks”. It continues in Para. 77: “The Commission concludes that the repeated military incursions and aerial attacks on Gaza, which are now an annual occurrence, must be seen within the broader context of the Israeli occupation, which Israel has no intention of ending. Such operations underpin the separation and isolation policies of Israel relating to Gaza and are a continuation of its de facto annexation policies in the West Bank. The political rift between Hamas and the Palestinian Authority has been used by Israeli authorities to further promote their policies of separation, isolation, and fragmentation, with the objective of deflecting attention from the permanent occupation and the killing of civilians, who bear the brunt of this conflict” (Independent International Commission of Inquiry, 2023).

#### **4-2- The ICC**

The office of the prosecutor of the ICC in its report of 6<sup>th</sup> November 2014 in Art. 53 (1) of “Situation of Registered Vessels of Comoros, Greece and Cambodia”, considered that Gaza was occupied in its decision not to proceed with the investigation of the flotilla incident. In its decision, the ICC pointed, *inter alia*, to the continuing Israeli control of border crossings – territorial, sea, and airspace – the recurrent military incursions into Gaza, and the regulation of the local monetary market. On this basis, the Office of the Prosecutor concluded that Israel’s retention of such competencies regarding the territory of Gaza after the disengagement supports the view that the authority retained by Israel amounts to “effective control” (Gross, 2017, p. 209).

#### **4-3- The ICRC**

ICRC is another international institution that has affirmed that Gaza is still under Israel’s control: “The ICRC considers Gaza to remain occupied Palestinian territory on the basis that Israel still exercises key elements of authority over the strip, including over its borders (airspace, sea, and land - at the exception of the border with Egypt). Even though Israel no longer maintains a permanent presence inside the Gaza Strip, it continues to be bound by certain obligations under the law of occupation that are commensurate with the degree to which it exercises control over it” (ICRC, 2023).

#### **4-4- The African Union**

the Executive Council of the African Union in its 'REPORT OF THE COMMISSION ON THE SITUATION IN PALESTINE AND THE MIDDLE EAST' (2019) expressed: "Express our deep concern about the deterioration of the economic and humanitarian conditions in the Gaza Strip as a result of the Israeli blockade and hold the Israeli occupation fully responsible for the situation in the Gaza Strip. We believe that the crisis in the Gaza Strip is an occupation crisis and that this crisis should be dealt with by ending the occupation and enabling the geographical and political unity of the Palestinian territories between the West Bank and the Gaza Strip. And not dealing with it as just a humanitarian crisis that requires relief. We call on the international community to work to end this unjust Israeli blockade" (African Union, 2019, p. 4). Considering the humanitarian crisis of Gaza as an Occupation crisis based on the blockade by the African Union shows that they believe in effective control of Gaza by Israel and consider this territory as occupied.

These *opinio juris* and legal approaches within International and regional organizations truly show the new interpretation of the concept of 'occupation' and 'effective control'. Although because of some different and opposed states' practices in this regard, we could not consider this new criterion of effective control as an international custom or rule, it is absolutely qualified as international soft law.

#### **Conclusion**

The recent Gaza-Israel war has led to many legal disputes over the nature of the actions of the two parties involved. On the one hand, Israel and its allies talk about the inherent right of self-defence of this regime, and on the other hand, the defenders of the rights of the Palestinian people interpret the actions of Hamas in the framework of the right to self-determination and resistance. In the meantime, the issue of an attack from inside or outside the occupied territories becomes relevant. According to the ICJ advisory opinion on the Wall case 2004, because the armed attacks against Israel were launched from inside the occupied territories, Israel did not have the right to self-defence based on Article 51 of the UN Charter. Based on this argument, determining the status of Gaza as a part of the occupied territories or an independent one has become an issue.

After the withdrawal of Israeli military forces from the Gaza Strip in 2005, this regime claimed that Gaza was an independent and non-occupied territory, so it could respond to any attack from Gaza with self-defence. On the opposite corner, some jurists, experts, and international institutions including ICRC, ICC, and African Union insist on this

important issue that although Gaza has been out of military occupation since 2005, due to the extensive blockade and comprehensive border control, the passage and monitoring of Various essentials aspects of life in Gaza, such as food, medicine, water, electricity, fuel, etc., in fact, this land remains under the effective control of Israel. Although this interpretation is a matter of dispute in the states' practice, it is qualified as international soft law.

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