

SEPARATE OPINION OF JUDGE BRANT

[Translation]

Law of occupation — Obligations of the occupying Power — Test of effective control and obligations unaffected by ongoing hostilities — Right of the Palestinian people to self-determination — Territorial integrity — Forcible transfer of population — Rights of children.

1. While I voted in favour of all the points in the operative part of the Opinion, I nevertheless consider that the Court’s excessive caution in some of its analysis partly undermines its reasoning, and that the Opinion does not sufficiently reflect the centrality of the right to self-determination of the Palestinian people in these proceedings, of which it is nonetheless the cornerstone.

2. In my view, the Court has a certain tendency to be overly cautious in its approach; although understandable given the highly sensitive nature of the case, at times this weakens the rigour of some of its legal reasoning and even diminishes the scope of the applicable legal framework. This tendency manifests itself in various ways, and I think it is useful to provide a few examples.

3. One such example can be found in paragraphs 58 and 59 of the Opinion, which deal with the factual background to these proceedings. While the former paragraph states that “[o]n 7 October 2023, Hamas and other armed groups present in the Gaza Strip carried out attacks in Israel, killing more than 1,200 people, injuring thousands and abducting 251, some of whom continued to be held hostage for more than two years”, the latter paragraph reads as follows:

“Following these attacks, Israel launched a large-scale military operation in the Gaza Strip, by land, air and sea, which has caused massive casualties, including the death of tens of thousands of civilians, a large number of whom were women and children, extensive destruction of civilian infrastructure and the repeated displacement of the overwhelming majority of the civilian population in the Gaza Strip.”

I find it is extremely problematic to provide a precise figure on the one hand, and, on the other, merely to use wording that certainly conveys a sense of gravity but that is as vague as the reference to “massive casualties” (“d’innombrables victimes” in the French version, meaning literally too many to count). The use of this phrase, which comes only with the clarification that this includes “the death of tens of thousands of civilians, a large number of whom were women and children”, is most regrettable in my view. The victims, whoever they may be, are unfortunately all too *countable*. Indeed, the number of casualties caused by the attacks led by Israel in the Gaza Strip is quantifiable, and precise estimates exist in this regard¹.

4. Another example of this excessive caution can be seen in paragraph 87 of the Opinion, in which it is stated that

“[t]he Court observes that the fact that hostilities are ongoing does not *necessarily* preclude the simultaneous application of the law of occupation. When hostilities take place in an occupied territory, the law of occupation applies alongside other rules of

¹ For example, according to the United Nations, as of 29 September 2025, more than 65,000 deaths had been recorded, including over 18,400 children (<https://unric.org/en/the-un-and-the-crisis-in-the-middle-east-gaza/>, accessed 10 Oct. 2025). On 8 October 2025, UN Women reported that more than 33,000 women and girls had been killed since the start of the war in Gaza (https://x.com/UN_Women/status/1975936732848607461, accessed 10 Oct. 2025). The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) also regularly publishes figures on the humanitarian situation in the Gaza Strip.

international humanitarian law relating to the conduct of hostilities, and the occupying Power must comply with both sets of rules. *However, the intensity of the hostilities could affect the implementation of certain obligations under the law of occupation, and therefore the particular conduct required of the occupying Power.*” (Emphasis added.)

5. By introducing the possibility of flexibility in the effective implementation of the obligations of the occupying Power, this paragraph wrongly reduces the scope of the legal obligations incumbent on the latter throughout the entire period of occupation. The application of the law of occupation does not depend on a subjective perception of the situation but rather on a set of objective criteria deriving from the same starting point: the effective control exercised over the occupied territory. From the beginning to the end of the occupation, this body of law applies continuously, and therein lies its rationale, namely “the necessity to organize the allocation of responsibilities between the belligerents with the view to avoiding, as far as possible, vacuum of authority and protection in occupied territory”². Therefore, as is widely recognized in international humanitarian law, the fact that hostilities are ongoing does not lead to the suspension of the law of occupation or to the weakening of its requirements.

6. Consequently, and contrary to what is stated in the above-mentioned paragraph, the obligations of the occupying Power do not vary depending on the intensity of the hostilities. These obligations exist for the occupying Power as such, in accordance with the law in force — which provides, where necessary, for certain adjustments in light of the factual situation³ — and only cease to have effect when the situation of occupation ends. To state that “the intensity of the hostilities could affect the implementation of certain obligations under the law of occupation, and therefore the particular conduct required of the occupying Power”, in my opinion, opens a regrettable loophole which would authorize the occupying Power to consider at its discretion that, depending on the intensity of the said hostilities, the scope of its obligations may be reduced.

7. In my view, the Court has not been sufficiently firm on this point: where hostilities are ongoing in an occupied territory, the occupying Power must comply with two distinct legal régimes. With regard to combatants or civilians who take a direct part in the hostilities (at such time as they do so), the applicable rules are those governing the conduct of hostilities. On the other hand, with regard to the civilian population as a whole, as long as it remains under the effective control of the occupying Power, the latter must continue to comply with the law of occupation⁴.

8. Turning now to the right of the Palestinian people to self-determination, as rightly noted by a participant in the proceedings, the resolution by which the United Nations General Assembly transmitted to the Court its request for an advisory opinion “takes, as its point of departure and point of arrival, the inalienable right of all peoples to self-determination”⁵. Although I do not think that the Court should develop a general theory on every point examined in the decisions it adopts, I regret

² T. Ferraro, “Determining the beginning and end of an occupation under international humanitarian law”, *International Review of the Red Cross*, Vol. 94, 2012/1, p. 158, fn. 76.

³ See, e.g., Article 43 of the 1907 Hague Regulations, according to which “[t]he 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” (emphasis added). See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 231, para. 178.

⁴ Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, 2nd ed., 2019, p. 111.

⁵ CR 2025/5, pp. 57-58, para. 11 (Colombia, Jaramillo Jassir).

that the right of the Palestinian people to self-determination is only briefly addressed at the end of the present Opinion and that it does not feature in the operative provisions.

9. There is no doubt that the right to self-determination of peoples exists in international law⁶. The fact that the Palestinian people enjoys such a right is also beyond doubt, as was recognized by the United Nations General Assembly back in 1974⁷ and has been reaffirmed several times since then. Again, very recently, by way of its resolution 79/81 of 3 December 2024, the General Assembly called for “[t]he realization of the inalienable rights of the Palestinian people”, including the right to self-determination⁸. This right of the Palestinian people has also been explicitly recognized by the Court on two occasions: in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁹ and in that of 19 July 2024 on the *Legal Consequences of Israel’s Policies and Practices in the Occupied Palestinian Territory, including East Jerusalem*¹⁰. Moreover, the Court recognized in the latter Opinion that “in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law”¹¹.

10. The Palestinian people’s fundamental right to self-determination is intrinsically linked to the majority of Israel’s obligations as both the occupying Power of the Occupied Palestinian Territory and a Member of the United Nations, obligations which are set out by the Court in the present Opinion. I would like to list some of those obligations to highlight where the Opinion fails to take account of the critical role of the right to self-determination in this case.

11. First, as the Court recalls in paragraph 176 of the Opinion, “Israel, as an occupying Power, is not entitled to sovereignty over or to exercise sovereign powers in any part of the Occupied Palestinian Territory, including East Jerusalem”. Consequently, Israel “is not entitled to sovereignty over” that territory by virtue of its occupation. The Court rightly recognizes that “[b]y enacting and enforcing the two laws adopted by the Knesset . . . that unilaterally terminated Israel’s co-operation with UNRWA, including its operation in East Jerusalem . . . , Israel continues to exercise sovereign power in East Jerusalem”. However, Israel’s obligation not to obstruct the functions of the United Nations in and in relation to the Occupied Palestinian Territory also contributes more broadly to refraining from further impeding the realization of the right to self-determination of the Palestinian

⁶ This right is enshrined in several international legal instruments, foremost among which is the Charter of the United Nations, which includes it among its purposes (Charter of the United Nations, Art. 1, para. 2), and the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which enshrine it in common Article 1. According to paragraph 1 of that Article, “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This right is also enshrined in certain regional human rights conventions, such as Article 20 of the African Charter on Human and Peoples’ Rights, which states that “[a]ll peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”

⁷ United Nations General Assembly resolution 3236 (XXIX), 2296th plenary meeting, 22 Nov. 1974, A/RES/3236, para. 1.

⁸ United Nations General Assembly resolution 79/81, 46th plenary meeting, 3 Dec. 2024, A/RES/79/81, para. 15 (b).

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 183, para. 118.

¹⁰ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 19 July 2024*, para. 102.

¹¹ *Ibid.*, para. 233.

people. Indeed, as is clear from the Court’s consistent jurisprudence, the right to territorial integrity is a “corollary of the right to self-determination”¹².

12. This situation of occupation — which is necessarily “temporary”¹³ — gives rise to a set of legal obligations incumbent on Israel as the occupying Power; these obligations are set out in paragraphs 82 to 162 of this Advisory Opinion. Once again, it appears that compliance with the majority of these obligations contributes directly to the effective realization of the right of the Palestinian people to self-determination. This is particularly true of Israel’s obligation to provide the local population with “the supplies essential for their *survival*” (emphasis added) (Opinion, para. 128) and, when Israel does not itself fulfil that obligation, of the obligation to support and not obstruct the activities carried out by UNRWA, as well as by other international organizations and third States. Thus, the decision adopted by Israel to suspend the activities of UNRWA in the Occupied Palestinian Territory — UNRWA being a key humanitarian actor, particularly in the vital sectors of education and health — directly compromises the viability of civilian life in that territory. In this respect and in the current circumstances, is the assistance provided by UNRWA not one of the conditions *sine qua non* for the Palestinian people to be able to exercise their right to self-determination? Although the Court recognizes this link between the obligations of the occupying Power and the right to self-determination of the Palestinian people (Opinion, paras. 219 to 221), in my view it should have developed its analysis further.

13. Citing its own jurisprudence¹⁴ (and in keeping with that of other international courts and tribunals¹⁵), the Court notes elsewhere that Article 49 of the Fourth Geneva Convention prohibits the *forcible* transfer of persons living in the Occupied Palestinian Territory. In paragraph 139 of the Opinion, it recalls that the use of physical force is not necessarily required for a transfer to be characterized as *forcible*: this characterization also applies where the conditions imposed on the civilian population are such that it is left with no choice but “to leave”. In other words, the effective realization of the right to self-determination necessarily depends on the capacity of a people “freely to determine its political status and to pursue its economic, social and cultural development”¹⁶. Thus, in forcing the Palestinian population to leave — without guaranteeing it any right of return¹⁷ — the realization of the right of the Palestinian people to self-determination is *de facto* seriously compromised, or even made impossible.

14. In the same vein, the Court recognizes that Israel has a duty to respect and fulfil the various rights enjoyed by children, as enshrined in several international instruments, including the Convention on the Rights of the Child. In this respect, as an occupying Power, Israel is obliged to ensure children’s “enjoyment of the highest attainable standard of health and [access] to facilities for the treatment of illness and rehabilitation of health”, and “to ensure that no child is deprived of his

¹² *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 134, para. 160.

¹³ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 105.

¹⁴ *Ibid.*, para. 145.

¹⁵ International Criminal Tribunal for the former Yugoslavia (2006), *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 Mar. 2006, para. 279.

¹⁶ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 241.

¹⁷ In this regard, the Court has recognized that the right of return of displaced Palestinians constitutes one of the forms of the obligation of restitution incumbent upon Israel on account of the unlawful nature of its continued presence in the Occupied Palestinian Territory (*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 19 July 2024*, para. 270).

or her right of access to such health care services”¹⁸. Yet again, the performance of such an obligation forms part of the realization of the right of the Palestinian people to self-determination, and failure to comply with it amounts to jeopardizing that people’s future. Deprivation of access to education cannot be regarded as solely an individual violation: it constitutes a structural obstacle to the development of an autonomous society that is capable of independently determining its status and future — politically, economically, socially and culturally.

15. In conclusion, I believe that the Court has given only a partial response to the request for an advisory opinion that was transmitted to it by the United Nations General Assembly. In the present Opinion, the Court certainly answers the question of

“[w]hat are the obligations of Israel, as an occupying Power and as a member of the United Nations, in relation to the presence and activities of the United Nations, including its agencies and bodies, other international organizations and third States, in and in relation to the Occupied Palestinian Territory”¹⁹.

That is why I have voted with the majority in favour of the operative part of this Opinion. However, while I recognize that the Court must not go beyond the questions put to it, it can nevertheless not reduce their scope. In these advisory proceedings, the General Assembly’s request also referred to the “right of the Palestinian people to self-determination”²⁰. In this instance, it was certainly not for the Court to reiterate what it had already established in its previous Opinions — namely, the existence of this right, its content and its peremptory character — but rather to give the right of the Palestinian people to self-determination its due place, inasmuch as that right, in fact, forms the backdrop to the present proceedings.

(Signed) Leonardo BRANT.

¹⁸ Convention on the Rights of the Child, Art. 24, para. 1.

¹⁹ United Nations General Assembly resolution 79/232, 54th plenary meeting, 19 Dec. 2024, A/RES/79/232, para. 10. See also the present Advisory Opinion, para. 21.

²⁰ *Ibid.*