PARTIALLY DISSENTING OPINION OF JUDGE GÓMEZ ROBLEDO

[Original English text]

Disagreement with the reasoning of the Court concerning the status of the Gaza Strip as occupied territory — The Court should have developed conclusive reasoning in this regard — Disagreement with the Court's timid approach concerning the obligation to co-operate with the United Nations — The Court should have conducted a more detailed examination of the question of the obligations incumbent on Israel under the provisional measures ordered by the Court.

1. I agree with the Opinion rendered by the Court in this case. However, I cannot support the Court's reasoning on certain substantive points that warranted further elaboration.

2. In terms of substance, I regret that the Court did not go further in its reasoning on two matters that I consider to be crucial: first, the status of the Gaza Strip as occupied territory and, second, the obligation to co-operate with the United Nations. Lastly, the Court should have conducted a more detailed analysis of Israel's obligations, including those incumbent on it by virtue of the provisional measures ordered by the Court in 2024.

3. First, as regards the reasoning adopted by the Court in the present Opinion, in paragraphs 85 to 87, about the status of the Gaza Strip as occupied territory, the Court's pronouncement appears to convey a desire to avoid expressly concluding that the Gaza Strip is now under full-scale occupation. In its Advisory Opinion of 19 July 2024 on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (para. 94), the Court adopted a so-called functional approach, determining that Israel's obligations remained commensurate with the degree of its effective control over the Gaza Strip, refraining from reaching a determination as to the exact status of that territory at the time of the events of 7 October 2023 and confining the temporal scope of its Opinion to exclude the events that took place thereafter. That is not the case in these proceedings, however, which have specifically arisen out of the present situation, which has continued to deteriorate since that date and in the months following it, including after the conclusion of the oral proceedings in May 2025. The current situation on the ground fully justifies the characterization of the Gaza Strip as occupied territory.

4. The Court observed in 2005 that "under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 229, para. 172). It reaffirmed this reasoning in its 2024 Advisory Opinion, observing that "[a] State therefore cannot be considered an occupying Power unless and until it has placed territory that is not its own under its effective control" (*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. 90). Hence, "for the purpose of determining whether a territory remains occupied under international law, the decisive criterion is . . . whether [the] authority [of the State in question] 'has been established and can be exercised'", pursuant to the aforementioned Article 42 (*ibid*., para. 92). The concept of occupation is thus based on an objective criterion. Territory is occupied as soon as it is subject *de facto* to the authority of hostile foreign armed forces or when such authority can rapidly

be deployed there, resulting in an effective control that manifests itself through the unauthorized presence of those forces on the territory, their ability to exercise authority in place of the local government and the ensuing impossibility for the latter to exercise its own authority over the area in question.

5. The continuation of hostilities in Gaza, in so far as they are still taking place, does not preclude the existence of an occupation. The Gaza Strip is occupied territory, and continues to be occupied territory, since the outbreak of the full-scale war in the wake of the 7 October 2023 attacks. The Court could have shown less deference in its reasoning (paras. 85 to 87) and stated explicitly that Israel is currently occupying the Gaza Strip and, moreover, maintaining an occupation there that is in breach of international law (*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. 261).

6. It is my view, therefore, that there is no justification for the ambiguity in the Court's reasoning and that a more explicit assertion was warranted, since it would have reinforced the Court's findings on Israel's obligations in Gaza.

7. As for *the obligation to co-operate* with the United Nations in accordance with Article 2, paragraph 5, and Articles 55 and 56 of the Charter, I consider this obligation to be one of the cornerstones of the architecture of the United Nations system and a raison d'être of the Organization. I regret that, in interpreting the Charter, the Court has adopted a timid and excessively formalistic approach that has no basis in reality, by failing to specify that this duty of co-operation *also* entails, *under certain circumstances*, the obligation to lend assistance to the General Assembly in any action undertaken by it (Opinion, paras. 172 and 173). Indeed, the obligation to co-operate clearly extends beyond the strict institutional division of functions among the principal organs of the United Nations: it assumes that States agree to co-operate *in good faith* with the Organization as such, in the pursuit of its purposes under the provisions of the Charter. The Court itself has interpreted the scope and importance of the obligation set forth in Article 2, paragraph 5, in a broad manner, emphasizing the need for it to "stress the importance of the duty to render to the Organization 'every assistance' which is accepted by the Members in Article 2, paragraph 5, of the Charter", and to recall "that the effective working of the Organization — the accomplishment of its task, and the independence and effectiveness of the work of its agents — require that these undertakings should be strictly observed" (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 183).

8. In my view, there is a major internal discrepancy in the Court's reasoning in this case, in that it posits the existence of an apparently extensive duty of co-operation, to then render that duty meaningless by asserting that it applies only within the narrow framework of strictly binding obligations imposed by certain bodies, first and foremost the Security Council (Opinion, paras. 172 and 173). The Court should have made clear the importance of the obligation to co-operate with the General Assembly, the most representative organ of the United Nations and the best expression of the universal conscience. This obligation plays a central role in the institutional functioning of the Organization; I would even venture to say that the fulfilment of the latter's mandate is conditional upon it. In this sense, the General Assembly embodies the will of the international community as a whole, through the actions it decides to take to fulfil the purposes enshrined in the Charter. Despite all its limitations, and I refer in particular to the brazen abuse of the right of veto by the majority of the permanent members of the Security Council, the United Nations synthesizes the *civitas maxima* ideal, the ultimate source of international law.

9. It should be noted in this regard that the role of the General Assembly, particularly in the maintenance of international peace and security, has been growing since the United Nations began its activities. Although the General Assembly and the Security Council initially interpreted and applied Article 12 of the Charter to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the Security Council remained seised of the matter, this interpretation has progressively evolved. Subsequent practice has in fact revealed an increasing tendency for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 149-150, para. 27). The question is not, however, limited to noting the evolution towards a more flexible division of the competencies of each organ.

10. Indeed, depending on the specific circumstances of each case, General Assembly resolutions may "provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development" (International Law Commission, Draft conclusions on identification of customary international law, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, Conclusion 12 (2); see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70).

11. In my view, the Court should also have emphasized the "permanent responsibility" of the United Nations towards the question of Palestine "until th[at] question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (see General Assembly resolution 57/107 of 3 December 2002, UN doc. A/RES/57/107, p. 1), rather than discarding it pitifully by placing the entire responsibility for this assertion on the General Assembly (Opinion, paras. 166 to 168). I would add that Israel voted in favour of General Assembly resolution 302 (IV), by which UNRWA was established, and that in 1967 it concluded with the latter an agreement reaffirming that UNRWA would continue to provide assistance to the Palestine refugees with the full co-operation of the Israeli authorities (United Nations, *Treaty Series*, Vol. 620, No. 8955). In this regard, the Court should have made clear that the Member States of the United Nations, including Israel, have an obligation to give every assistance to the Organization in any action undertaken by it in accordance with the Charter to discharge this permanent responsibility towards the question of Palestine.

12. I regret that the Court has failed to give full effect to its acknowledgment of the importance of UNRWA, which plays a unique and irreplaceable role in the provision and co-ordination of both humanitarian and development assistance in the Occupied Palestinian Territory, including East Jerusalem. The Court should have taken a firmer position in this regard, emphasizing that there is a limit to what actions Israel can take, *including on its own territory*, since certain activities relating to humanitarian assistance in the occupied territory are reliant on access routes located in Israeli territory. On the contrary, by making paragraphs 177 and 179 subject to paragraph 184, the Court ultimately sided with Israel, as it acknowledged that the activities of the United Nations on its territory are subject to its consent. I am of the opinion that the Court should have made plain that Israel's conduct is impeding the activities of the United Nations, and notably those of UNRWA, in and in relation to the occupied territory, in particular in the Gaza Strip, in breach of the obligations incumbent upon it. Due account should thus have been taken in the Advisory Opinion of the obligation to co-operate.

13. It should be noted that an international organization such as the United Nations is not merely the sum of the wills of its Member States. As a subject of international law in its own right that enjoys legal personality and broad autonomy, the Organization operates independently of the will of its Members. If it had always to seek their authorization to act, it would be unable to perform its functions effectively. The Organization has its own distinct role. Hence, since it is the General Assembly that has entrusted UNRWA with its present mandate — and has done so for such a prolonged period — it is clear that the General Assembly, together with the Secretary-General, may adopt an evolutive interpretation of the obligations arising from its constituent act, in this instance the Charter, and be a source of obligations for its Member States, with a view to achieving that mandate. Specifically, the Organization has the authority to interpret its own constituent act and the practice of its principal organs may be taken into consideration when interpreting the provisions of that instrument and the very function of the international organization in question, taking account of the developments in its institutional evolution (International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, Conclusion 12). With this in mind, agents with institutional competence or born of a given legal order fulfil the function entrusted to them by that same order, with a view to ensuring the achievement of common goals, when that order does not yet have the necessary organs to do so or has them only to a limited extent. One cannot but recall the relevance of Georges Scelle's well-known duality of functions theory (G. Scelle, "Le phénomène juridique du dédoublement fonctionnel", in *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (W. Schätzel and H.-J. Schlochauer, eds.), 1956, p. 331; G. Scelle, *Précis de droit des gens : principes et systématique 1932-1934*, Part I, pp. 43, 54, 56 and 217; Part II, pp. 10 and 319; see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 74-75, para. 19).

14. States' duty of co-operation is not confined to binding obligations in the strict sense. When the action required goes beyond this, that is, it requires States to take measures that do not necessarily derive from a specific obligation, then it is founded on a broader framework, specifically that which derives from the general duty to co-operate with the Organization. Even though States enjoy a certain latitude in interpreting this obligation, the obligation to co-operate remains an extensive one, since it is an integral part of the very object and purpose of the United Nations.

15. Lastly, I regret the Court's complete failure to address the question of the legal consequences for Israel of disregarding its obligations. I accept that the question submitted to the Court in the request for an advisory opinion is more limited in scope than that in the 2024 Opinion. Nevertheless, it is my view that the Court should not have remained silent on this matter and that it should at least have examined whether Israel is fulfilling the obligations previously identified by the Court as incumbent upon it.

16. In this regard, it is lamentable that the Court has ignored in its reasoning and in the operative part of its Opinion the question of the provisional measures in force — indicated on three occasions in 2024 — and Israel's obligation to comply with them. The Court has confined itself to addressing them only in the context of whether, in giving the opinion requested, the Court would prejudge certain elements in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)* (Opinion, paras. 26 to 31). Yet the provisional measures that Israel has been ordered to take by the Court, which constitute binding obligations for that State, are, in my opinion, part of the applicable law in this instance, for at least two principal reasons. The first reason is substantive and relates to the normative autonomy of provisional measures in relation to the merits of a case. In view of this, the Court would

in no way have prejudged the merits of the case pending between South Africa and Israel had it reaffirmed the applicability of its provisional measures as a source of binding obligations for Israel. The second reason is procedural. Provisional measures are autonomous not only in terms of the obligations they create, but also in terms of their basis of jurisdiction. Indeed, I share the view expressed by my eminent colleague Judge Abraham, who rightly stated, in 2019, that the Court's power to indicate provisional measures derives from Article 41 of its Statute, which constitutes an autonomous basis of jurisdiction to this end (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019 (I)*, separate opinion of Judge Abraham, p. 379, para. 9). The Court, therefore, does not derive its power to indicate provisional measures from the principal basis of jurisdiction invoked by the Applicant in the *South Africa* v. *Israel* case, namely Article IX of the Genocide Convention, but from Article 41 of the Statute. Not only does this underscore the normative autonomy of provisional measures, but it also serves to fill a significant procedural void that would exist if the Court were to indicate provisional measures before later concluding that it lacked jurisdiction to entertain the merits of the case. When a State consents to be bound by the Statute of the Court, which is assuredly the case for Israel as a State party to the Charter of the United Nations and the Statute of the International Court of Justice, it thereby accepts that the Court may indicate provisional measures that create autonomous and binding obligations for it, provided that the conditions put in place for that purpose have been met.

17. Consequently, had the Court recalled in this Advisory Opinion the provisional measures it has indicated in the *South Africa* v. *Israel* case, it would in no way have prejudged the merits of that case, because these two questions are, and remain, distinct. It would nevertheless have noted that, because of Israel's actions, the population of the Gaza Strip continues to endure unspeakable suffering that is "unimaginable" and that "deeply shock[s] the conscience of humanity" (preamble of the Rome Statute of the International Criminal Court).

(Signed) Juan Manuel GÓMEZ ROBLEDO.