

DECLARATION OF JUDGE TLADI

1. I am, for the most part, in agreement with the Court's Opinion. I wish, however, to make some observations on three issues that may need further clarification. The first of these issues concerns the right of self-determination and its impact on the obligations of Israel under Article 59 of the Fourth Geneva Convention. The second of these concerns the immunities and privileges of the United Nations, including the inviolability of UN premises, and the circumstances under which they may be said to be no longer applicable. Third, I wish to highlight that the current catastrophe in Palestine results from Israel's ongoing unlawful occupation of the Occupied Palestinian Territory and that, in the final analysis, the Court has only a limited role in resolving that situation.

SELF-DETERMINATION AND THE DISCRETION OF ISRAEL UNDER ARTICLE 59 OF THE FOURTH GENEVA CONVENTION

2. Article 59 of the Fourth Geneva Convention imposes a duty on an Occupying Power to "agree to relief schemes on behalf of the [occupied] population" and to "facilitate [such relief schemes] by all the means at its disposal" if the whole or part of the population of an occupied territory is inadequately supplied. I concur with much of the analysis of the Court regarding the nature of Israel's obligation under Article 59, including the assessment that the duty under Article 59 is additional to the general duties under Articles 55 and 56 requiring Occupying Powers to ensure that the population is adequately provided for¹, and that the duty under Article 59 is unconditional. I agree also with the Court's description of the scope of the duty².

3. I find it necessary to note, however, that the duties of Israel as an Occupying Power should not be seen in isolation. Over and above the particular duties and constraints on Israel under international humanitarian law, and in particular the law of occupation, the determination by the Court in its Advisory Opinion of 19 July 2024 that Israel's presence in the Occupied Palestinian Territory is unlawful and must be brought to an end as rapidly as possible³ also has implications for Israel's obligations.

4. In the present Opinion, the Court recalls its conclusions in the Advisory Opinion of 19 July 2024 and states that Israel should not exert any power "in any manner inconsistent with its obligation not to impede the Palestinian people from exercising its right to self-determination, including its inalienable right to territorial integrity over the entirety of the Occupied Palestinian Territory"⁴. While the Court does not expressly link its statement concerning the right of self-determination to obligations flowing from Article 59, I believe that the former undoubtedly has particular implications for the latter. It is for this reason that, when addressing the discretion of an Occupying Power to choose the humanitarian organization through which it fulfils its Article 59 obligation, the Court characterized an Occupying Power's "free[dom] to choose" as a "general rule", whose application to a particular context was to be considered by the Court in specific situations⁵. The "free[dom] to choose" the humanitarian organizations through which it fulfils its obligation to agree to and facilitate humanitarian relief is not available to Israel due to the unlawfulness of its occupation. Indeed, the Court is careful in paragraph 120 of the Opinion, when outlining this "freed[om] to choose", to state

¹ Advisory Opinion, para. 92.

² *Ibid.*, para. 96.

³ *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. 285 (3)-(4).

⁴ Advisory Opinion, para. 219.

⁵ *Ibid.*, para. 120.

that this freedom is available “in principle” to “an occupying Power”, without at all suggesting that Israel, as an Occupying Power, has this freedom. Thus, while an Occupying Power will, as a general matter of the law of occupation, have *some* freedom to determine which humanitarian organization will fulfil its responsibility under Article 59, the unlawfulness of Israel’s occupation results in it not having such a discretion as a matter of law.

5. The Court does not address this point directly. Instead, the Court addresses the question of Israel’s discretion under Article 59 on the basis of a factual assessment whether the capacity of the United Nations, acting through UNRWA, can be replicated to ensure that the population of the Gaza Strip is adequately provided for⁶. It concludes that, under the present circumstances, “the United Nations, acting through UNRWA, [is] an indispensable provider of humanitarian relief in the Gaza Strip” and that Israel is under an obligation to agree to and facilitate relief schemes provided by the United Nations, including UNRWA⁷.

6. While the Court opted to determine that Israel cannot deny UNRWA its role in the provision of humanitarian assistance on account of UNRWA’s indispensability in the Occupied Palestinian Territory, that choice should not detract from the equally relevant legal effects flowing from the conclusions of the Court in its Advisory Opinion of 19 July 2024. The law of occupation cannot be applied in complete isolation from the general rules of international law. The Court has determined that Israel’s occupation of the Palestinian territory is unlawful and that there is a duty on other actors not to recognize as lawful the situation arising from Israel’s unlawful occupation⁸. While, as a *factual matter*, Israel is in control of the Occupied Palestinian Territory and determines who to allow in and who not to allow (a situation made painfully evident by the refusal to allow humanitarian personnel and aid into Gaza), any suggestion that, as a *matter of law*, Israel has the right to make such determinations would have the effect of providing normative legitimacy to an unlawful factual situation — and thus a recognition as lawful of a situation that the Court has deemed unlawful⁹.

THE PROPER PROCEDURE FOR ADDRESSING CONCERNS REGARDING PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

7. The Court correctly determines that Israel is under an obligation to ensure full respect for the privileges and immunities of the United Nations and its personnel, to ensure full respect for the inviolability of its premises and to ensure full respect for the immunity of the property and assets of the Organization from any form of interference. In respect of these privileges and immunities, the Court makes several comments that might be misconstrued as suggesting that Israel has the right to make determinations about the applicability of those immunities and privileges in given circumstances. First, at paragraph 193, having correctly determined that Israel has an obligation to respect the inviolability of the premises of the United Nations and not to interfere “with the performance of their functions”, the Court adds “that the question whether a particular facility qualifies as ‘[t]he premises of the United Nations’ must be assessed by taking into account the specific circumstances pertaining to each facility concerned”. Second, at paragraph 196, the Court, having correctly acknowledged that it is for the United Nations to decide whether a particular facility

⁶ *Ibid.*, para. 121.

⁷ *Ibid.*, para. 124.

⁸ *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. 285 (7).

⁹ The Court alludes to this rule of international law at paragraph 184 of the Opinion when discussing Israel’s obligation to respect the privileges and immunities of the United Nations (“in the occupied territory, over which Israel, as an occupying Power, enjoys no sovereignty, it is not entitled to decide unilaterally, with respect to the presence and activities of the United Nations in and in relation to the Occupied Palestinian Territory, in the same way as in its own territory”).

remains the premises of the Organization, adds that “such a determination by the United Nations creates a presumption that may only be set aside for the most compelling reasons and is to be given the greatest weight by States”. Third, at paragraph 204, the Court introduces a similar qualification in respect of the assessment of the Secretary-General whether an official or expert on mission acted within the scope of their functions¹⁰.

8. While I am prepared to accept the correctness of these qualifiers, taken out of context they are liable to create a misunderstanding as to the scope of States’ obligations concerning the privileges and immunities of the United Nations. It is important, therefore, to ensure that these comments are not seen as providing a right of auto-determination by States to escape from obligations owed to the Organization. In other words, in respect of the first statement, it is not for Israel, or any other State, to unilaterally assess whether a facility qualifies as premises of the United Nations. Similarly, the statement — that a determination of immunity and/or inviolability by the United Nations creates a presumption which may only be set aside for the most compelling reasons — does not provide sanction for Israel, or any other State, to unilaterally set aside that determination.

9. These comments by the Court should be read in the context of what the Court says in paragraphs 211-216 of the Opinion concerning the obligation to address disagreements regarding the applicability or scope of the United Nations’ privileges and immunities within the existing legal framework for the settlement of differences. Thus, where a State believes that there are compelling reasons to set aside a determination of the Secretary-General concerning the privileges and immunities enjoyed by the United Nations or its personnel, or where a State believes that a facility does not qualify as premises of the United Nations, notwithstanding an authoritative determination by the Organization, such matters are to be addressed through the framework established under the General Convention. For instance, its Article V, Section 21, imposes a duty upon the Organization to “co-operate at all times with the appropriate authorities . . . to . . . prevent the occurrence of any abuse in connection with the privileges, immunities and facilities” that have been accorded¹¹. States must therefore raise any compelling reasons to set aside determinations of the Secretary-General, or seek to address differences of views, directly with the United Nations through good-faith negotiations. Moreover, Article VIII, Section 30, of the General Convention provides that “[i]f a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved”. Any difference or dispute between a Member State and the United Nations concerning the determination of the Secretary-General may thus be brought before the Court in accordance with the terms of Section 30. Therefore, as the Court has noted as well (see paragraph 212 of the Opinion), it is not for a State to, on its own, make unilateral determinations concerning abuse or inapplicability of the privileges and immunities of the United Nations or its personnel.

10. It is the case that the Court in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* — the authority that is relied upon in the Opinion for the proposition that a determination of the Secretary-General can be set aside for compelling reasons — addressed the consideration by a national court (a State organ) of the

¹⁰ Advisory Opinion, para. 204 (“It is for the Secretary-General to determine whether a particular official or expert on mission is entitled to the privileges and immunities provided, and to assess whether that person acted within the scope of the person’s functions . . . In the view of the Court, the Secretary-General’s determination of the scope of the official functions of the officials or experts in question creates a presumption that can only be set aside for the most compelling reasons and is to be given the greatest weight by States”).

¹¹ While Article V, Section 21, of the General Convention relates only to “the privileges, immunities and facilities mentioned in [that] Article” (emphasis added), meaning that it relates only to the privileges and immunities afforded to officials under Article V, the practice of the United Nations has been to apply this provision to the privileges and immunities contained in Article II as well: see *United Nations Juridical Yearbook* 2003, pp. 521-523; *United Nations Juridical Yearbook* 2006, pp. 455-456.

immunity of an agent of the United Nations. But even in that case, the final determination concerning the immunities and privileges of the agent in question, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, was made by this Court seised under Article VIII, Section 30, of the General Convention¹².

THE LIMITED ROLE FOR THE COURT IN RESOLVING THE CONFLICT IN THE MIDDLE EAST

11. In May 2024, I said:

“There are no more words to describe the horrors in Gaza. The words ‘apocalyptic’, ‘exceptionally grave’, ‘disastrous’ and ‘catastrophic’ have all been used to describe the current situation, and all seem to pale in comparison to what is unfolding before our very eyes. Almost daily we are confronted with gut-wrenching accounts of victims and survivors and images of unimaginable suffering.”¹³

12. That was 17 months ago. The situation has deteriorated further still. It is presumably because of this that the General Assembly has once again approached the Court. The current request, as the Court notes (Opinion, paras. 32-35), is narrower than its predecessors¹⁴. It arises out of a specific sequence of events and actions that impede assistance to the Palestinian people, including through measures that curtail the presence and operations of the United Nations and UNRWA in and in relation to the Occupied Palestinian Territory. At the same time, however, it can hardly be denied that these more recent events are all part and parcel of the broader problem in the Occupied Palestinian Territory: the denial of the right of self-determination of the Palestinian people.

13. While recourse to the Court is understandable, especially given the paralysis of the Security Council in addressing the crises in the Middle East, it should not be forgotten that the role of the Court in the resolution of the problem in Palestine is a limited one. In this context, I recall that in May 2024 when the Court ordered Israel to, *inter alia*, “[i]mmediately halt its military offensive” and allow “unhindered provision at scale . . . of urgently needed basic services and humanitarian assistance”, I cautioned that the “Court is only a court!”. The events that followed laid bare the limitations of judicial pronouncements when other responsible organs fail to discharge their responsibilities. It is for the political organs of the United Nations, not the Court, to take appropriate action to resolve this problem. In its Advisory Opinion of 19 July 2024, the Court (and some judges in their individual opinions) made a series of findings and provided legal pathways to addressing the problem. This is the Court’s second Opinion in 17 months on this issue. The ball is now squarely in the court of the political organs of the United Nations to decide what action, if any, to take by utilizing the findings of the Court to bring about a just, lasting and comprehensive settlement of the question of Palestine.

14. And what if no heed is paid to this Advisory Opinion and to other recommendations and resolutions of the United Nations? Then I end this declaration by recalling Judge Lauterpacht’s

¹² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999 (I), p. 87, para. 61.

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Request for the Modification of the Order of 28 March 2024, Order of 24 May 2024, I.C.J. Reports 2024 (II), declaration of Judge Tladi, p. 700, para. 18.

¹⁴ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), p. 136; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024.

words, that there comes a point “when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter”¹⁵.

(Signed)

Dire TLADI.

¹⁵ *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, separate opinion of Judge Lauterpacht, p. 120.