DECLARATION OF JUDGE BRANT

[Translation]

Agreement with the reasoning and conclusions of the Court — Violation by Israel of Article 3 of CERD — Racial segregation and apartheid — Evolutive interpretation — Constituent elements of apartheid — Fulfilment of the right of a people to self-determination impossible under racial segregation or apartheid — Cessation of international law violations needed to ensure peace and security of Israel and Palestine.

1. I would like to state at the outset that I fully subscribe to the reasoning and conclusions of the Court. However, I considered it necessary to elaborate on the aspect of the Advisory Opinion relating to the policies and practices of Israel in the Occupied Palestinian Territory that are alleged to constitute racial segregation or apartheid.

2. In paragraph 229 of the Advisory Opinion, the Court observes that "Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities". It concludes that, "[f]or this reason", Israel has violated Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

3. Israel ratified CERD on 3 January 1979. Article 3 of that Convention provides that "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction".

4. I agree with the Court's conclusion that, by creating a physical and juridical separation within the Occupied Palestinian Territory, Israel has breached Article 3 of CERD prohibiting apartheid and racial segregation. However, since neither of these two concepts is defined in the Convention, I consider it necessary to make some observations in this regard.

5. The concept of "racial segregation", interpreted in accordance with the ordinary meaning of its terms in their context and in the light of the object and purpose of CERD, means separating people, *de jure* or *de facto*, according to criteria based on race, colour, descent, or national or ethnic origin.

6. As for "apartheid", clarifying its constituent parts is indisputably important in my view, given the seriousness of practices of apartheid, whose prohibition is established in both treaty law and customary international law, and the fact that the crime of apartheid is recognized as a crime against humanity whose prohibition is a *jus cogens* norm that creates rights and obligations *erga omnes*.

7. In my opinion, the Court could have used evolutive treaty interpretation to clarify the constituent elements of this crime. The Court has previously adopted such an approach in interpreting a treaty instrument. In its *Namibia* Advisory Opinion, it stated that, "[m]indful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account" the evolutionary nature of the definitions of certain concepts and "cannot remain unaffected by the subsequent development of law" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*,

p. 31, para. 53). In a recent case, moreover, the Court acknowledged that the subsequent practice and interpretation of certain States parties to a convention is "relevant when interpreting its provisions" (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment of 31 January 2024*, para. 93).

8. Following the entry into force of CERD on 4 January 1969, two international instruments defined and established apartheid as a crime against humanity: the International Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter the "Apartheid Convention") and the Rome Statute of the International Criminal Court (hereinafter the "Rome Statute"). Israel is not party to either of these instruments.

9. Nevertheless, the treaty practice of the 124 States parties to the Rome Statute and the 110 States parties to the Apartheid Convention cannot be overlooked. In my view, it clearly constitutes practice that is relevant for defining the elements of apartheid as set out in CERD. I would add that the States parties to the Apartheid Convention — which entered into force on 18 July 1976, seven years after CERD — were mindful of the pre-existing obligation prohibiting practices of racial segregation and apartheid set forth in CERD, this being expressly recalled in the preamble of the Apartheid Convention. Moreover, as regards the definition contained in the Rome Statute, although this was developed in the context of individual criminal responsibility, I see no reason to conclude that apartheid should be defined differently in relation to the international responsibility of States.

10. The Apartheid Convention stipulates that the crime of apartheid applies to "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them". The Rome Statute, for its part, defines the crime of apartheid in its Article 7 (2) *(h)* as follows: "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime". Three elements are thus present in both definitions, namely:

(i) the material element constituted by the commission of inhuman acts;

(ii) the contextual element of an institutionalized régime of systematic oppression and domination by one racial group over another; and

(iii) the intentional element constituted by the intent to maintain the aforementioned régime.

The Court could have interpreted Article 3 of CERD based on the three elements common to both of these instruments. The relevance of such a definition has been confirmed by the International Law Commission which, in its Draft Articles on Prevention and Punishment of Crimes Against Humanity, reproduces verbatim the definition set out in the Rome Statute comprising the three above-mentioned elements. It should be noted that the State of Israel did not object to this definition[1].

11. I would further observe that Article II of the Apartheid Convention states that this crime "shall include similar policies and practices of racial segregation and discrimination". The question that arises, therefore, is whether apartheid, within the meaning of Article 3 of CERD, must be interpreted as having a broader scope than racial segregation or whether it is to be considered as

[1] Comments and observations received from Governments, international organizations and others, 21 Jan. 2019, doc. A/CN.4/726, *ILC Draft Articles on Crimes Against Humanity — Israel's initial comments and observations*, 30 Nov. 2018, para. 5.

limited to practices of segregation. In this case, the Court found that the discriminatory practices put in place by Israel in the Occupied Palestinian Territory have resulted in the physical separation of the populations (para. 227 of the Opinion). Moreover, Israel's settlement policy seeks to fragment the Palestinian people and territory by isolating towns and villages from each other (paras. 164 and 238 of the Opinion), which some participants characterized as "strategic fragmentation". This clearly constitutes racial segregation. The Court further observed in Part V of the Opinion that there is also juridical separation, as well as myriad breaches of the rights of Palestinians for the benefit of the Israeli settlements established in the occupied territory and the State of Israel itself. In short, the Court found that Israel has violated Article 3 of CERD, but did not consider it necessary in this instance to define the concepts of racial segregation and apartheid.

12. In any event, a régime of racial segregation or apartheid makes the fulfilment of the Palestinian people's right to self-determination impossible. As duly noted by some participants, the discriminatory nature of these policies and practices suppresses the equality, identity and dignity at the heart of self-determination.

13. Moreover, although I consider Israel's security needs to be legitimate, this does not justify either policies and measures of segregation or apartheid. On the contrary, requiring respect for international law, and its peremptory norms in particular, as well as for human rights and international humanitarian law is in the ultimate interest of Israel. The prolonged occupation, creeping settlement and annexation of occupied lands, and the discriminatory legislation and measures that accompany them, undermine Palestine's — equally legitimate — right to security. Only respect for international law can bring peace to the two peoples and lasting security for Israel and Palestine. Justice, peace and security cannot wait any longer.

(Signed) Leonardo BRANT.

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