SEPARATE OPINION OF JUDGE IWASAWA

The Advisory Opinion does not address conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023 — The Court adopts the "functional approach" regarding the application of the law of occupation to Gaza after 2005.

The Court should have paid more attention to the discriminatory aspect of the dual legal system introduced by Israel in the West Bank — The Court concludes that the "separation" implemented by Israel in the West Bank between the Palestinian population and settlers constitutes a breach of Article 3 of CERD, without qualifying it as apartheid.

The Court concludes that Israel's continued presence in the Occupied Palestinian Territory is illegal because its policies and practices violate the prohibition of the acquisition of territory by force and impede the right to self-determination — The illegality of Israel's continued presence relates to the entirety of the Occupied Palestinian Territory, including Gaza — Israel has an obligation to bring to an end its continued presence in the Occupied Palestinian Territory "as rapidly as possible" — Israel is not under an obligation to withdraw all its armed forces from the Occupied Palestinian Territory immediately and unconditionally.

1. To answer the questions posed by the General Assembly, the Court first examines their scope and meaning (Advisory Opinion, paras. 72-83). With regard to their temporal scope, the Court notes that

> "the request for an advisory opinion was adopted by the General Assembly on 30 December 2022, and asked the Court to address Israel's 'ongoing' or 'continuing' policies and practices . . . [T]he policies and practices contemplated by the request of the General Assembly do not include conduct by Israel in the Gaza Strip in response to the attack carried out against it by Hamas and other armed groups on 7 October 2023." (*Ibid*., para. 81.)

This is an important temporal limitation of the Opinion.

2. Regarding their territorial scope, the questions posed by the General Assembly refer to Israel's policies and practices in "the Palestinian territory occupied since 1967". It is reasonable to consider that this phrase refers to "the Occupied Palestinian Territory" as used by United Nations organs since 1967 and by the Court in the *Wall* Advisory Opinion. There is no question

that "the Palestinian territory occupied since 1967" or "the Occupied Palestinian Territory" includes not only the West Bank and East Jerusalem, but also the Gaza Strip. The Security Council has confirmed that "the Gaza Strip constitutes an integral part of the territory occupied in 1967" (resolution 1860 (2009), preamble). In the present Opinion, the Court affirms that "'the Palestinian territory occupied since 1967' . . . encompasses the West Bank, East Jerusalem and the Gaza Strip" (Advisory Opinion, para. 78).

3. Nevertheless, the situation of Gaza is distinct. In 2004, Israel decided to "disengage" from Gaza with the intention of no longer occupying the territory[1], while continuing to "guard and monitor the external land perimeter of the Gaza Strip, . . . maintain exclusive authority in Gaza air space, and . . . exercise security activity in the sea off the coast of the Gaza Strip"[2]. Although Israel withdrew all its land forces and evacuated its settlements in Gaza in 2005, it continued to exercise key elements of authority with respect to Gaza (Advisory Opinion, paras. 89 and 93). In these circumstances, views are divided as to whether, after 2005, Gaza remained "occupied" within the meaning of the law of occupation and whether the law of occupation continued to apply to Gaza.

4. Article 42 of the Hague Regulations defines occupation as follows: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Based on this provision, as well as on Article 6 of the Fourth Geneva Convention, effective control has generally been accepted as the test for determining the existence of an occupation.

5. One view is that Gaza remained occupied and that the law of occupation continued to apply to Gaza after 2005. This view is shared by the United Nations Fact-Finding Mission on the Gaza Conflict[3], the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967[4], the European Union[5], and several NGOs. The General Assembly has repeatedly affirmed that the Fourth Geneva Convention is

[1] "Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces or Israeli civilians in the areas of Gaza Strip territory which have been evacuated. As a result, there will be no basis for claiming that the Gaza Strip is occupied territory." Israel Ministry of Foreign Affairs, "The Disengagement Plan — General Outline", 18 April 2004, Sec. 2, i.

[2] *Ibid.*, Sec. 3, i.

[3] "Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict", UN doc. A/HRC/12/48 (2009), para. 276.

[4] "Human Rights Situation in Palestine and Other Occupied Arab Territories: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard", UN doc. A/HRC/7/17 (2008), paras. 9-11.

[5] European Coordination of Committees and Associations for Palestine, "EU Heads of Missions' Report on Gaza", 2013.

applicable to "the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967", which includes Gaza (e.g. resolution 73/97 (2018), para. 1).

6. An alternative view is that, after 2005, Gaza was no longer occupied within the meaning of the law of occupation. This view relies on, *inter alia*, the Court's decision in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*. In that case, the Court explained the criteria for determining the existence of an occupation as follows:

> "under customary international law, . . . territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised . . .
>
> In order to reach a conclusion as to whether a State . . . 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." (*Judgment, I.C.J. Reports 2005*, pp. 229-230, paras. 172-173.)

Applying these criteria, the Court concluded that Uganda had established and exercised authority in Ituri as an occupying Power, but not in any other areas (*ibid*., pp. 230-231, paras. 176-177).

7. The International Committee of the Red Cross ("ICRC") has put forward another approach regarding the application of the law of occupation. According to the ICRC,

> "Israel still exercises key elements of authority over the [Gaza] strip, including over its borders (airspace, sea and land — [with] 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*."[6]

This approach, referred to as the "functional approach", is not concerned with the status of the territory as such. Its focus is rather on whether a State continues to be bound by certain obligations under the law of occupation.

[6] ICRC, "What does the law say about the responsibilities of the Occupying Power in the occupied Palestinian territory?", 28 March 2023, p. 4 (emphasis added). See also ICRC, "International humanitarian law and the challenges of contemporary armed conflicts: Report", document prepared by the ICRC, Geneva, October 2015, p. 12; ICRC, "Article 2", in *Commentary on the First Geneva Convention*, 2016, pp. 110-112, paras. 307-313; T. Ferraro (Legal Adviser, ICRC), "Determining the beginning and end of an occupation under international humanitarian law", *International Review of the Red Cross*, Vol. 94, No. 885, Spring 2012, p. 157.

This approach also finds support in the decision of the Eritrea-Ethiopia Claims Commission[7].

8. In the present Advisory Opinion, the Court subscribes to this approach. The Court declares that,

> "[w]here an occupying Power, having previously established its authority in the occupied territory, later withdraws its physical presence in part or in whole, it may still bear obligations under the law of occupation to the extent that it remains capable of exercising, and continues to exercise, elements of its authority in place of the local government" (Advisory Opinion, para. 92).

Applying this approach to Gaza, the Court concludes:

> "Israel remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip . . . despite the withdrawal of its military presence in 2005 . . .
>
> In light of the above, the Court is of the view that Israel's withdrawal from the Gaza Strip has not entirely released it of its obligations under the law of occupation. Israel's obligations have remained commensurate with the degree of its effective control over the Gaza Strip." (*Ibid*., paras. 93-94.)

Thus, while the Court makes clear that Israel continues to be bound by certain obligations under the law of occupation, it does not take a position as to whether Gaza remained "occupied" within the meaning of the law of occupation after 2005.

The situation in Gaza has drastically changed since 7 October 2023. However, events taking place after that date are beyond the temporal scope of the Court's inquiry (see paragraph 1 above).

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9. I agree with the Court's analysis on Israel's adoption of "discriminatory legislation and measures" for the most part, but, in my view, the discriminatory aspect of the dual legal system introduced by Israel in the West Bank deserved more attention. The Court addresses the dual legal system in the section on Israel's "settlement policy", concluding that Israel has exercised its regulatory authority as an occupying Power in a manner inconsistent with the rule reflected in Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention (Advisory Opinion, paras. 134-141). It does not give full attention to the discriminatory aspect of the dual system. In the section on Israel's "discriminatory legislation and measures", the Court only cursorily touches on this issue, merely stating in the context of Art-

[7] Eritrea-Ethiopia Claims Commission, *Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 and 26*, Decision of 19 December 2005, United Nations, *Reports of International Arbitral Awards*, Vol. XXVI, Part VIII, pp. 307-308, para. 27.

icle 3 of CERD that settlers and Palestinians are subject to distinct legal systems (*ibid*., para. 228).

10. The extraterritorial application of Israeli domestic law to the West Bank has created two different legal systems. While settlers are subject to Israeli criminal law, Palestinians living in the West Bank are governed by military law[8] and prosecuted in military courts[9]. Differential treatment between Palestinians and settlers is also found in the national health insurance law, taxation law, election law, and in the enforcement of traffic laws. There exists an institutional and legislative separation in the planning and building régime as well[10]. The dual legal system is supported by the 2018 Basic Law, which stipulates that "[t]he State views the development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and consolidation" (para. 7).

11. The dual legal system introduced by Israel in the West Bank treats Palestinians and settlers differently based on, *inter alia*, race, religion, or ethnic origin, and amounts to discrimination. The United Nations High Commissioner for Human Rights has affirmed that "[t]he extraterritorial application of Israeli domestic law to settlers creates two different legal systems in the same territory, on the sole basis of nationality or origin. Such differentiated application is discriminatory"[11]. Similarly, the Independent International Commission of Inquiry on the Occupied Palestinian Territory concluded that "[t]his dual legal system provides greater enjoyment of human rights for Israelis than for Palestinians and is therefore discriminatory"[12].

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12. Applying the concept of apartheid to Israeli policies and practices in the Occupied Palestinian Territory is no easy task, particularly because there is no universally accepted definition of apartheid. Apartheid is both

[8] "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", UN doc. A/77/328 (2022), p. 15, para. 46.

[9] "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/43/67 (2020), para. 29.

[10] "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", UN doc. A/77/328 (2022), p. 15, para. 46.

[11] E.g. "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/34/39 (2017), para. 9.

[12] "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", UN doc. A/77/328 (2022), p. 15, para. 47.

a violation of international human rights law and an international crime, and thus may entail State responsibility and individual criminal responsibility. With respect to apartheid as a violation of international human rights law, Article 3 of CERD stipulates 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". CERD, however, does not define apartheid. On the other hand, apartheid as an international crime is regulated by the 1998 Rome Statute of the International Criminal Court and the 1977 Additional Protocol I to the Geneva Conventions. Like genocide, the international crime of apartheid requires the presence of *dolus specialis* towards a particular group. The 1973 Apartheid Convention has a dual character. While it declares that apartheid is an international crime, it also contains certain inter-State obligations for the suppression of apartheid. There are significant differences in the definition of apartheid in Article 7 (2) *(h)* of the Rome Statute and Article 2 of the Apartheid Convention. For example, under the Rome Statute, there must be an institutionalized régime of systematic oppression and domination by one racial group over another to meet the elements of the crime of apartheid.

13. The questions of the General Assembly concern Israel's "discriminatory legislation and measures" under international human rights law and not apartheid as an international crime. The Court explains that Article 3 of CERD refers to "two particularly severe forms of racial discrimination: racial segregation and apartheid" (Advisory Opinion, para. 225) and concludes that "Israel's legislation and measures constitute a breach of Article 3 of CERD" (*ibid*., para. 229). In its reasoning, the Court emphasizes the "separation" implemented by Israel in the West Bank between the Palestinian population and settlers (*ibid*., paras. 226-229), without qualifying it as apartheid.

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14. The first part of question *(b)*, which calls on the Court to ascertain how Israel's policies and practices affect the legal status of the occupation, seeks an assessment by the Court of the effect of Israel's policies and practices on the legality of its continued presence in the Occupied Palestinian Territory. The Court analyses this question in light of two fundamental rules of international law, namely the prohibition of the acquisition of territory by force and the right to self-determination. These rules are found in the Charter of the United Nations and customary international law. On the other hand, the law of occupation does not regulate the legality of a State's military presence in a foreign territory, but sets out the occupying Power's rights and duties, which continue to apply even if its presence in the territory is illegal (see Advisory Opinion, para. 251).

15. The prohibition of forcible acquisition of territory is a principle of customary international law. The Friendly Relations Declaration adopted by the General Assembly in 1970 provides that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal" (resolution 2625 (XXV), Annex, first principle). The Security Council also has repeatedly emphasized "the inadmissibility of the acquisition of territory by [force]" (e.g. resolution 242 (1967)) (see Advisory Opinion, paras. 175-176). The prohibition of the acquisition of territory by force precludes any forcible acquisition of territory, regardless of whether that force is unlawful or otherwise permitted under international law. Israel's policies and practices amount to the annexation of large parts of the Occupied Palestinian Territory and thus violate the prohibition of the acquisition of territory by force (*ibid*., para. 179).

16. The determination of whether the obligation to respect the right to self-determination has been violated is complex in situations of occupation. Occupation in all its forms, by its very nature, affects the exercise of the right to self-determination of the people living in the occupied territory. Thus, occupation itself cannot constitute a violation of the obligation to respect the right to self-determination. In the present Opinion, the Court analyses whether Israel's policies and practices impede the right of the Palestinian people to self-determination in light of four elements that compose this right (Advisory Opinion, paras. 236-242) and concludes that Israel's policies and practices are in breach of Israel's obligation to respect the right of the Palestinian people to self-determination (*ibid*., para. 243).

17. Based on the finding that Israel's policies and practices violate the prohibition of the acquisition of territory by force and impede the right to self-determination, the Court concludes that Israel's continued presence in the Occupied Palestinian Territory is illegal (Advisory Opinion, paras. 261-262 and point 3 of the operative clause). In some parts of its reasoning, the Court curiously states that it is the effects of Israel's policies and practices which constitute a breach of international law (*ibid*., paras. 256-257). The Court should have avoided such construction and stated straightforwardly that it is Israel's policies and practices which violate the two aforementioned fundamental rules of international law, and that consequently Israel's continued presence in the Occupied Palestinian Territory is illegal. In any case, the conclusion that Israel's continued presence in the Occupied Palestinian Territory is illegal is not predicated on a finding that Israel violated its obligations under the law of occupation.

18. Although Israel has sought to exercise sovereignty over East Jerusalem and large parts of the West Bank, and not over the entire Occupied Palestinian Territory, I agree with the Court that the illegality of Israel's continued presence relates to the entirety of the Occupied Palestinian Territory, including Gaza, subject to the temporal limitation of the Opinion (paragraph 1 above). The Occupied Palestinian Territory constitutes a single territorial unit, the unity, contiguity and integrity of which must be respected. The

Palestinian people must be able to exercise its right to self-determination over the entirety of the Occupied Palestinian Territory (Advisory Opinion, paras. 78 and 262).

19. Since Israel's continued presence in the Occupied Palestinian Territory is an internationally wrongful act of a continuing character, Israel is under an obligation to cease that act. This conclusion is consistent with the resolutions of the Security Council and the General Assembly. For example, the Security Council has emphasized the need for the "[w]ithdrawal of Israel armed forces from territories occupied" (resolution 242 (1967), para. 1 *(i)*) and the "necessity for ending the prolonged occupation" (resolution 476 (1980), para. 1). The General Assembly has repeatedly called for "[t]he withdrawal of Israel from the Palestinian territory occupied since 1967, including East Jerusalem" (e.g. resolution 77/25 (2022), para. 12 *(a)*).

20. Israel has an obligation to bring to an end its continued presence in the Occupied Palestinian Territory "as rapidly as possible" (Advisory Opinion, para. 267 and point 4 of the operative clause). Given its legitimate security concerns, Israel is not under an obligation to withdraw all its armed forces from the Occupied Palestinian Territory immediately and unconditionally, particularly from the Gaza Strip in view of the ongoing hostilities since 7 October 2023. The Security Council and the General Assembly have reiterated the importance of the principle of land for peace and the two-State solution. For example, Security Council resolution 242 (1967) linked the end of Israel's illegal presence in the Occupied Palestinian Territory and the full realization of the Palestinian people's right to self-determination with Israel's right to live in peace within secure and recognized borders free from threats or acts of force (*ibid.*, para. 283). The precise modalities for ending Israel's illegal presence should follow from arrangements arrived at based on these principles under the supervision of the General Assembly and the Security Council (see *ibid.*, para. 281 and point 9 of the operative clause).

(Signed) Iwasawa Yuji.