SEPARATE OPINION OF JUDGE NOLTE

Factual and legal scope of the Court's analysis — Differences between advisory proceedings and contentious proceedings — Definition of apartheid — Racial segregation and apartheid — Qualified subjective element as part of the prohibitions of apartheid and racial segregation — Insufficient information before the Court to observe that Article 3 of CERD has been breached.

1. I write separately to express my view on two aspects of this Advisory Opinion. First, I will elaborate on the scope of the analysis of the Court. Second, I want to express my disagreement with the additional observation of the Court that Israel's policies and practices violate Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

The Scope of the Court's Analysis

2. The Court has responded to the request submitted by the General Assembly on the basis of a limited factual and legal assessment. As the Court states in paragraph 77,

> "the Court considers that, in its request, the General Assembly has not sought from the Court a detailed factual determination of Israel's policies and practices. The object of the questions posed by the General Assembly to the Court is the legal characterization by the Court of Israel's policies and practices. Therefore, in order to give an advisory opinion in this case, it is not necessary for the Court to make findings of fact with regard to specific incidents allegedly in violation of international law. The Court need only establish the main features of Israel's policies and practices and, on that basis, assess the conformity of these policies and practices with international law."

Thus, the Advisory Opinion has undertaken neither a "detailed factual determination" nor a legal determination of Israel's responsibility for individual acts. Instead, it offers a "legal characterization" of "the main features of Israel's policies and practices".

3. The way in which the Court defines the factual and legal scope of its analysis is in line with its established approach in advisory proceedings. This approach is rooted in the differences between advisory proceedings, on the one hand, and contentious proceedings, on the other. These differences inform the standards by which the Court arrives at its factual and legal conclusions[1] and are critical for the character of those conclusions in the present case.

4. In contentious proceedings, the Court "decide[s] . . . disputes" in a binding and final manner[2]. These proceedings are retrospective: their contribution to the peaceful settlement of disputes consists in ending a dispute by making a binding determination that is endowed with legal certainty and finality, the *res judicata* effect. In contrast, advisory proceedings are consultative and prospective: the Court gives an advisory opinion on a legal question to provide guidance for the requesting organ's future conduct[3]. The conclusions of the Court in advisory opinions are not the end but the beginning of a process that seeks to establish and maintain peace through law. Indeed, "the requesting organ remains formally free to consider the consequences to be drawn from the Court's opinion"[4]. Therefore, the conclusions made in advisory proceedings complement and facilitate, but can never replace, other procedures for the peaceful settlement of

[1] See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72:

> "It is true that Article 68 of the Statute provides that the Court in the exercise of its advisory functions shall further be guided by the provisions of the Statute which apply in contentious cases. But according to the same article these provisions would be applicable only 'to the extent to which it [the Court] recognizes them to be applicable'. It is therefore clear that their application depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter."

[2] See Articles 38, 59 and 60 of the ICJ Statute.

[3] See also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27, para. 39:

> "The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory."

Also see paragraph 41; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, pp. 19 and 71.

[4] See K. Oellers-Frahm and E. Lagrange, "Article 96", in B. Simma, D. E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations: A Commentary*, Vol. II (4th ed.), Oxford University Press (OUP), 2024, p. 2601, para. 42. But see *Mara'abe* v. *The Prime Minister of Israel*, HCJ 7957/04, 15 September 2005, para. 56:

> "the opinion of the International Court of Justice is an interpretation of international law, performed by the highest judicial body in international law (S. Rosenne, *The Law and Practice of the International Court*, 1920-1996 (3rd ed.), 1997, p. 1754). The ICJ's interpretation of international law should be given its full appropriate weight."

disputes[5]. Indeed, this Court has emphasized that "the legal position of the State which has refused its consent to the present proceedings is not 'in any way compromised by the answers that the Court may give to the questions put to it'"[6].

5. The particular purpose of advisory proceedings explains why the factual assessment in this Advisory Opinion has a different focus and depth than factual determinations made in contentious proceedings. This does not mean that the standard of proof in advisory proceedings is lower. However, it is different from that in contentious proceedings, where the burden of adducing evidence lies with the parties[7]. In advisory proceedings, the Court will examine the facts only to the extent necessary for its response to the legal question posed, and it will draw legal conclusions only to the extent permitted by those facts[8]. It is this well-established approach that has guided the Court in the present proceedings, as is recalled in paragraph 46 of the Advisory Opinion, according to which

> "what is decisive in these circumstances is whether the Court has before it sufficient information 'to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character' . . . [I]t is for the Court to assess, in each case, the nature and extent of the information required for it to perform its judicial function."

In cases involving very broad requests, such as the present one, the function of advisory opinions to provide guidance to the requesting organ justifies a particularly broad and merely illustrative approach to the factual assessment. However, this broad focus, together with the principle of consent to jurisdiction, precludes such assessment from having the conclusive effect attributed to factual assessments for the purpose of determining State responsibility in contentious proceedings.

6. The particular focus of the Court's factual assessment, its "bird's-eye view" of the situation, has implications for the legal scope of the Court's

[5] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, pp. 15 and 20; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

[6] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 27, para. 42, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 72.

[7] See also J.-P. Cot and S. Wittich, "Article 68", in A. Zimmermann, C. J. Tams, K. Oellers-Frahm and C. Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd ed.), OUP, 2019, p. 1863, para. 54.

[8] See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 161, para. 56; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46.

conclusions in the present case. Since the Court has not made a fuller determination of Israel's responsibility for its conduct in the Occupied Palestinian Territory, Israel's responsibility for specific conduct or situations would need to be established in other proceedings. For this reason, paragraph 77 clarifies that this Advisory Opinion is concerned with "the legal *characterization* by the Court of Israel's policies and practices" — not with a "legal *determination*" [emphasis added]. Any conclusive legal determination of Israel's responsibility for specific conduct would require a full investigation into the facts constituting such conduct, including a careful consideration of whether Israel's security concerns may be legally relevant with respect to any specific situation.

7. It is regrettable that the Advisory Opinion and the reports on which it relies have not engaged more with security concerns which Israel has and expresses as reasons for its policies and practices. It is also regrettable that Israel did not comment on the substance of the questions put by the United Nations General Assembly, including regarding its security concerns. The Court could have better demonstrated that it has considered Israel's arguments to the extent that they are publicly available, including by drawing on decisions of the Supreme Court of Israel and the arguments put forward by the Israeli authorities in the respective proceedings[9], as well as Israel's submissions in other international fora[10]. I think that the persuasiveness of this Advisory Opinion would have benefited considerably from a visible engagement with information from official Israeli sources.

[9] Several recent decisions have been referred to in international reports, see e.g. "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", UN doc. A/77/328 (14 September 2022), para. 27 (regarding the legalization of outposts); footnote 46 (referring to Israel Supreme Court (hereinafter HCJ) decisions Nos. 1308/17 and 2055/17 (9 June 2022)); footnote 48 (HCJ No. 6364/20 (27 July 2022)); para. 63 (on forcible transfer and demolitions): HCJ No. 413/13 and case No. 1039/13 (4 May 2022). See also e.g. *Head of Council of 'Anin et al.* v. *Military Commander of the West Bank Area Judgment* (7 August 2023), HCJ 2205/23 (on the permit system in the OPT); *Khasib et al.* v. *Prime Minister of Israel* (1 May 2022), HCJ 3571/20 (on a request to dismantle a segment of the Wall); *Jahleen* v. *Head of the Civil Administration for Judea and Samaria* (24 May 2018), HCJ 2242/17 (on the exploitation of natural resources); *Hashiyeh et al.* v. *Military Commander of the West Bank*, HCJ 6745/15, ILDC 2555 (IL 2015), (11 November 2015) (on punitive demolitions). See further for a comprehensive analysis: D. Kretzmer and Y. Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd ed.), OUP, 2021.

[10] See e.g. Economic and Social Council, "Information received from Israel on follow-up to the concluding observations on its fourth periodic report", 2022, UN doc. E/C.12/ISR/FCO/4.

Apartheid and Racial Segregation

8. The Court considers that Israel's legislation and measures constitute a breach of Article 3 of CERD (Advisory Opinion, para. 229) while leaving open the question whether it considers Israel's policies and practices to be a form of racial segregation or apartheid. In the absence of any discussion of the subjective element of apartheid, which is a core element of the prohibition, the Opinion cannot be understood as finding that the prohibition of apartheid has indeed been violated by Israel. Also, I am not convinced that the Court has sufficient information before it to conclude that Israel's policies and practices amount either to apartheid or to racial segregation.

9. Article 3 of CERD does not define the term "apartheid". Definitions of the crime of apartheid are contained in Article II of the 1973 Apartheid Convention and in Article 7 (2) *(h)* of the 1998 Rome Statute, but Israel is not a State party to either treaty. Moreover, these two treaties are of a different character than CERD, as they deal with the "crime of apartheid", and thus the responsibility of individuals for apartheid, whereas Article 3 of CERD contains a prohibition of apartheid addressed to States.

10. However, the Apartheid Convention and the Rome Statute can inform the interpretation of Article 3 of CERD as a supplementary means of interpretation pursuant to Article 32 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT") and — to the extent that they reflect customary international law — as relevant rules of international law applicable between the parties under Article 31 (3) *(c)* of the VCLT. Despite their terminological differences, both definitions help to identify the meaning of apartheid under Article 3 of CERD in customary international law. They demonstrate that a high threshold must be met, as a matter of law, for identifying practices of apartheid.

11. The ordinary meaning of the term "apartheid", as informed by these two treaties, suggests that apartheid is a State-sanctioned and institutionalized régime of discrimination which has the purpose of establishing and maintaining domination and oppression by one racial group over another. This core definition of apartheid comprises three elements: first, the relevant policy and practice must concern the relationship between racial groups; second, the relevant policy and practice must display an objective element (*actus reus*) which consists in the commission of "inhumane acts" of a structural and institutionalized nature[11]; third,

[11] See Articles I and II of the Apartheid Convention: "policies [or] practices of racial segregation and discrimination"; Article 7 (2) *(h)* of the Rome Statute: "institutionalized regime of systematic oppression and domination".

the relevant policy and practice must be motivated by a subjective element (*mens rea*) which not only requires the intentional commission of inhumane acts of a certain gravity, nature and scale, but also that the purpose of these acts is the establishment and maintenance of an institutionalized régime of domination and oppression (*dolus specialis*)[12].

12. I have serious doubts that the information before the Court is sufficient to conclude that the subjective element of apartheid is present in the situation of the Occupied Palestinian Territory. Given the exceptional gravity of a violation of the prohibition of apartheid, a peremptory rule of general international law, claims against a State involving charges of apartheid "must be proved by evidence that is fully conclusive"[13]. The Court should only find that a State has the required *dolus specialis* of apartheid when the "only reasonable inference" from its conduct is an intention to maintain an institutionalized régime to systematically oppress and dominate a racial or ethnic group, in Israel's case the Palestinians relative to Israeli Jews[14]. This *dolus specialis* should only be considered as being established where other inferences are clearly implausible.

13. I doubt that the only reasonable inference which can be drawn from Israel's policies and practices in the Occupied Palestinian Territories is that of an intention to maintain an institutionalized régime to systematically oppress and dominate the Palestinians relative to Israeli Jews. Even if these policies and practices are discriminatory and disproportionate, and thus constitute large-scale violations of international human rights law and international humanitarian law — which, in my view, is undoubtedly the case — there are at least two other possible purposes which Israel may pursue by them. First, these policies and practices may be motivated by temporary, albeit long-term, security considerations (even if they are unjustified), and/or, second, they may be driven by the — misconceived and illegal — aim of asserting sovereignty over the West Bank, without the simultaneous intention of thereby permanently maintaining an institutionalized discriminatory régime for all inhabitants of the West Bank.

[12] See Article II of the Apartheid Convention: "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"; Article 7 (2) *(h)* of the Rome Statute: "the intention of maintaining that regime".

[13] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 129, para. 209.

[14] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148 ("in order

14. I have doubts that the ambition of Israel to annex the West Bank, as demonstrated by its radicalized more recent settlement policy and practice, necessarily implies that it now intends to institutionalize the — until then temporary and at least partly security-oriented — legal régime for the Palestinian inhabitants of the West Bank in relation to the settlers and the settlements, and thus to make it permanent. The intention to annex a territory and the decision to institutionalize a particular racially oppressive régime do not necessarily go together. In the present case they may well go together, but it is also possible that Israel does not intend the way in which it exercises its occupation of the West Bank, as regards the relationship between the Palestinians and the settlers, to become permanent and institutionalized. I think that there is insufficient information to draw a definite conclusion.

15. The decision as to which conclusion to draw from Israel's ambiguous approach with respect to the relationship between the Palestinian inhabitants of the West Bank and the settlers depends on a careful evaluation of the facts and related evidence. In my view, the information before the Court is not sufficient to conclude that other possible inferences are clearly implausible. In any event, the present Advisory Opinion neither defines the subjective element of apartheid nor explains how Israel's conduct in the present case fulfils this particular element. I therefore do not think that the Court's reasoning under Article 3 of CERD can be interpreted as finding that Israel's conduct amounts to apartheid.

16. Does the information before the Court suffice to find that Israel's practices and policies qualify as "racial segregation" in the sense of Article 3 of CERD? This raises the important question of how racial segregation is defined and how it is distinguished from apartheid. I am not convinced by the very narrow understanding of the term "racial segregation", according to which it is limited to practices that are equivalent to "apartheid" beyond the specific historical situation of South Africa[15]. The *travaux préparatoires* of Article 3 of CERD[16], as well as the definition in Article II of the 1973 Apartheid Convention, clarify that the concepts of apartheid and racial segregation are distinct yet closely interrelated practices. Racial segregation is the broader term, apartheid being the gravest form of racial segregation. Yet, both apart-

to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question").

[15] This early understanding of Article 3 was influential during the first decades after the adoption of CERD, see M. Banton, *International Action against Racial Discrimination*, Clarendon Press, pp. 200-201; P. Thornberry, "Article 3", *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, OUP, 2016, pp. 247-248.

[16] See P. Thornberry, "Article 3", *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, OUP, 2016, who observes that States did not want to limit Article 3 to "apartheid", pp. 243-246.

heid and racial segregation represent systemic and, as the Advisory Opinion puts it, "two particularly severe forms of racial discrimination" in the sense of Article 1 of CERD. I therefore believe that "racial segregation" also requires proof of the presence of a qualified subjective element, namely that a segregation along racial lines is intentional[17].

17. The policies and practices described by the Court in paragraphs 120 to 154 and 192 to 222 certainly constitute grave violations of human rights and they have segregative effects. However, in the absence of any engagement with the subjective element of racial segregation, i.e. proof that Israel by these policies and practices intends to establish a segregation along racial or ethnic lines, the analysis of Article 3 of CERD in paragraphs 226 to 229 of the present Advisory Opinion remains insufficient. In particular, the Court would have to show that any segregative effects are based on one of the prohibited grounds contained in Article 1 of CERD and not on citizenship. Indeed, in situations of occupation, a certain legal separation between the population of the occupying Power and the population in the occupied territories is even prescribed by the law of occupation. According to Article 43 of the 1907 Hague Regulations, the occupying Power must "respect[], unless absolutely prevented, the laws in force in the country". At the same time, Article 64 (2) of the Fourth Geneva Convention allows the occupying Power to

> "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the [Fourth Geneva] Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them".

18. Thus, the law of occupation itself envisages a difference in treatment between the nationals of the occupying Power and the protected population in the occupied territory. This is not to say that Israel's segregative practices are justified under the law of occupation. However, given the overlap between the law of occupation and CERD in the present case, a conclusion that the segregation in the present case runs along racial or ethnic lines requires a particularly thorough analysis of the facts.

[17] In this vein: S. Schmahl, "Artikel 3", in Angst and Lantschner (eds.), *ICERD: Internationales Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung. Handkommentar*, Nomos, 2020, para. 12.

19. The Court may only "arrive at a judicial conclusion upon any disputed questions of fact" if it "has before it sufficient information and evidence"[18]. Since the Court did not identify enough information substantiating the existence of the subjective element required by Article 3 of CERD, it should have refrained from observing that Israel's legislation and measures constitute a breach of Article 3 of CERD. This would not have prevented the Court from observing that Israel's practices and policies have segregative effects which constitute violations of other provisions of CERD.

(Signed) Georg NOLTE.

[18] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 161, para. 56.