## DECLARATION OF JUDGE CHARLESWORTH

*Multiple and intersectional discrimination — Discriminatory effect of Israel's measures on women and on children.*

*Legality of Israel's effective control of the Occupied Palestinian Territory — Legal bases for the use of force — Relationship between security threats and armed attack — Right to self-defence — Necessity and proportionality.*

1. I agree with the Court's replies to the questions posed by the General Assembly. In this declaration, I address two issues in the Advisory Opinion where I think that more detailed reasoning is desirable.

### I. DISCRIMINATION ON MULTIPLE GROUNDS

2. The Court observes that the essence of prohibited discrimination in international law is the unjustified differential treatment between persons belonging to different groups (Advisory Opinion, paragraphs 190-191). It notes "that differential treatment might not be experienced by all members of the Palestinian group in the same way, and that some members of the group might be subjected to differential treatment on multiple grounds" (Advisory Opinion, paragraph 190). This recognition that individual members of a group may experience discrimination in different ways and on multiple grounds is important. Palestinians as a group share an ethnicity, but they also have many different identities individually — for example, in terms of age, disability and gender.

3. United Nations bodies that monitor the implementation of treaties prohibiting discrimination on specific grounds have identified the limitations of focusing on a single ground of discrimination. For example, in its General Recommendation No. XXV on gender-related dimensions of racial discrimination, the Committee on the Elimination of Racial Discrimination has stated

> "that racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life."[1]

4. Discrimination on multiple grounds is related to the notion of intersectional discrimination. Intersectionality refers to the way that prohibited grounds of discrimination may intersect with and shape each other, entwining systems of domination and oppression. The Committee on the Elimination of Discrimination against Women has explained the idea of intersectionality as

> "a basic concept for understanding the scope of the general obligations of States parties contained in article 2 [of the Convention on the Elimination of All Forms of

[1] Committee on the Elimination of Racial Discrimination, "General Recommendation No. XXV on gender-related dimensions of racial discrimination", *General Assembly, Official records of the fifty-fifth session, Supplement No. 18*, UN doc. A/55/18 (Supp.) (20 March 2000), Annex V, para. 1; see also Committee on the Elimination of Discrimination against Women, "General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures", *General Assembly, Official records of the fifty-ninth session, Supplement No. 38*, UN doc. A/59/38 (Supp.) (18 March 2004), Annex I, para. 12.

> Discrimination against Women]. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men."[2]

5. A multiple or intersectional approach sheds light on the complexity of discrimination in this case: discrimination may be experienced differently by differently situated individuals sharing a Palestinian identity. Such a multidimensional account of discrimination acknowledges "the composite nature of the sources of discrimination and the synergy of their effects"[3]. It thus unsettles the idea that there can be a single comparator group. While discrimination on the basis of a single prohibited ground makes identification of a comparator group relatively straightforward, discrimination occurring at the intersection of two or more grounds renders comparison with another group more difficult.

6. Material before the Court indicates the existence of discrimination on multiple and potentially intersecting grounds. For example, when discussing Israel's settlement policy, the Court notes that Israel's control of water resources in the West Bank prioritizes water supply to Israeli settlements, at the expense of Palestinian communities (Advisory Opinion, paragraphs 128-129). It does not make the additional observation, however, that water shortages in some Palestinian communities have a particular effect on Palestinian women and girls, because they have additional needs of water for hygiene and privacy. Moreover, they bear responsibility for securing water for household use[4]. The Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel has further noted that the decline of the agricultural sector as a result of Israel's policies has disproportionately affected employment opportunities for Palestinian women[5]. The Commission has concluded overall that Israel's policies and practices in the Occupied Palestinian Territory have had a pervasive discriminatory effect on Palestinian women by exacerbating their economic and social vulnerability[6].

7. The Court also records the discriminatory effect of the residence permit system in East Jerusalem on Palestinians generally (Advisory Opinion, paragraph 195). The Court finds that the system differentiates between Palestinians and settlers with respect to the enjoyment of the right to family life. It further observes that Palestinian women, who often rely on male spouses for their residence status, are particularly affected by the residence permit system. But the Court leaves unstated one manifestation of this disparate effect that is well documented in the sources on which

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[2] Committee on the Elimination of Discrimination against Women, "General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women", UN doc. CEDAW/C/GC/28 (16 December 2010), para. 18. See also Committee on the Elimination of Discrimination against Women, "General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19", UN doc. CEDAW/C/GC/35 (26 July 2017), para. 12.

[3] European Court of Human Rights, *Garib* v. *The Netherlands* (App. no. 43494/09), Judgment of 6 November 2017 (Grand Chamber), dissenting opinion of Judge Pinto de Albuquerque joined by Judge Vehabović, para. 35 (emphasis removed); see also Inter-American Court of Human Rights, *I.V.* v. *Bolivia* (preliminary objections, merits, reparations and costs), Series C No. 329, Judgment of 30 November 2016, para. 247.

[4] "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. 71.

[5] *Ibid.*, paras. 72-73.

[6] *Ibid.*, para. 78.

the Court relies: Palestinian women may remain in violent or abusive marriages out of fear of deportation or separation from their children[7].

8. These situations indicate how being both Palestinian and female in the Occupied Palestinian Territory may interact to cause serious disadvantage. As in almost all societies, Palestinian women and men have different experiences of public and private life, although the boundaries between these realms are not fixed and are inevitably shaped by the occupation and its repercussions. Gender dynamics typically result in men being more in the public domain and women being assigned primary responsibilities for care for children and the elderly, and the home. Against this background, United Nations reports have documented that policies and practices of Israel in the Occupied Palestinian Territory, some of which are discussed in the Advisory Opinion, disproportionately affect women and girls[8].

9. Israel's policies and practices have a similarly marked effect in relation to children. For example, under Israel's residence permit system, residence permits are not automatically passed on to children[9], and the parents' residence permits are frequently revoked for the reasons identified in the Advisory Opinion (Advisory Opinion, paragraph 193). While the Court points out the adverse effect that this policy has on the reunification of families whose members reside in different parts of the Occupied Palestinian Territory (Advisory Opinion, paragraph 195), it does not mention that it prevents thousands of children from living with both of their parents[10]. Similarly, the effects of Israel's practice of property demolition are felt particularly by children, as the Advisory Opinion implies (Advisory Opinion, paragraph 217)[11].

10. In its Advisory Opinion, the Court has only examined legislation and measures that it considers to be "closely linked" to Israel's policies and practices of settlement and annexation (Advisory Opinion, paragraph 181). When analysing the effect of these measures on Palestinians, the Court has treated Palestinians as a group sharing a common race, religion or ethnic origin (Advisory Opinion, paragraph 223). While this is correct, this focus overshadows other types of discrimination that affect the daily lives of Palestinians.

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[7] Human Rights Committee, "Concluding observations on the fifth periodic report of Israel", UN doc. CCPR/C/ISR/CO/5 (5 May 2022), paras. 44-45; "Implementation of Human Rights Council resolutions S-9/1 and S-12/1: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/46/63 (11 February 2021), para. 45; Committee on Economic, Social and Cultural Rights, "Concluding observations on the fourth periodic report of Israel", UN doc. E/C.12/ISR/CO/4 (12 November 2019), para. 40.

[8] For example, see Committee on the Elimination of Discrimination against Women, "Concluding observations on the sixth periodic report of Israel", UN doc. CEDAW/C/ISR/CO/6 (17 November 2017), para. 32 *(a)*; "Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem: Report of the Secretary-General", UN doc. A/78/502 (2 October 2023), para. 56.

[9] "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/37/43 (6 March 2018), para. 55.

[10] Committee on the Rights of the Child, "Concluding observations on the second to fourth periodic reports of Israel, adopted by the Committee at its sixty-third session (27 May-14 June 2013)", UN doc. CRC/C/ISR/CO/2-4 (4 July 2013), para. 29 *(a)*.

[11] See "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/52/76 (15 March 2023), para. 25.

## II. THE LEGALITY OF ISRAEL'S EFFECTIVE CONTROL OF THE OCCUPIED PALESTINIAN TERRITORY

11. In question *(b)*, the General Assembly requests the Court's opinion on the effect, if any, of Israel's policies and practices on "the legal status of the occupation". This expression is confusing, because occupation itself is a status: it is a state of affairs that consists in the exercise by a State of effective control over foreign territory, and to which international law attaches a series of specific rules (Advisory Opinion, paragraph 90). So, as the Court observes, the General Assembly's enquiry about the "*legal* status" of Israel's occupation is an enquiry about the character of Israel's occupation as legal or illegal under international law. In other words, it is an enquiry as to whether Israel's effective control of — its presence in — the Occupied Palestinian Territory has a valid legal basis or not (Advisory Opinion, paragraph 82).

12. While I support the Court's overall reply to this question, I think that the Court should have explained more fully the reasoning leading to the conclusion that Israel's effective control of the Occupied Palestinian Territory lacks a legal basis.

13. The Advisory Opinion reminds us that the legality of Israel's effective control of the Occupied Palestinian Territory must be assessed with reference to the rules concerning the use of force (Advisory Opinion, paragraph 251). The Opinion does not however fully articulate the grounds for, or the implications of, this point.

14. The state of occupation triggers the applicability of a specific body of rules — the law of occupation (see Advisory Opinion, paragraphs 85 and 96). It does not follow, however, that the applicability of other rules is suspended. As the Court observes in a different context, international human rights law remains applicable in situations of occupation (Advisory Opinion, paragraph 99). The same is true for the right to self-determination (Advisory Opinion, paragraph 95).

15. More importantly, the establishment of the occupation does not suspend the applicability of the rules concerning the use of force. Therefore, the occupying Power is not absolved of the obligation to uphold the prohibition on the use of force at all times (Advisory Opinion, paragraph 109). Indeed, the rules concerning the use of force are particularly relevant in situations of occupation, in view of the nature of an occupation. Occupation consists in the exercise by a State of effective control over foreign territory in the place of the local government (Advisory Opinion, paragraph 90). The establishment and maintenance of such effective control is made possible because the occupying Power deploys, and remains capable of deploying, its military presence in the occupied territory: it is authority backed by armed force — whether actual or threatened force. In other words, an occupation involves, by its very nature, a continued threat or use of force in foreign territory. For this reason, the occupation must at all times be based on a ground for the use of force that is accepted under the *jus ad bellum*.

16. The other side of this coin is that no other legal bases may be invoked for an occupation except for those that are available for the use of force under the *jus ad bellum*. The establishment of the occupation is a question of fact and, for this reason, it does not furnish the occupying Power with an additional legal basis for its maintenance beyond the established exceptions to the prohibition of the use of force. So, the existence of "security concerns" is not a legal ground for the maintenance of

an occupation, nor indeed for its establishment, unless it can be translated into the currency of the accepted grounds for the use of force — for example, self-defence[12].

17. Moreover, because the rules concerning the use of force remain applicable throughout the occupation, it is neither necessary nor sufficient to determine whether the use of force that brought about the occupation was lawful. What matters is whether the legal basis for the use of force — in the present context, the legal basis for the occupation — is valid today. Therefore, I support the decision not to determine whether Israel's use of force in 1967 had a legal basis at the time, because it is unnecessary. With this in mind, I will examine the possible legal bases for Israel's continued threat or use of force, in the form of the occupation of the Occupied Palestinian Territory, taking account of Israel's policies and practices.

18. Israel's effective control of the Occupied Palestinian Territory is not based on enforcement action authorized by the Security Council under Chapter VII of the Charter of the United Nations. Starting from Security Council resolution 242 of 22 November 1967, several resolutions of the Security Council depart from the factual premise that Israel occupies the Occupied Palestinian Territory[13]. However, there is nothing in these resolutions to suggest that they were adopted under Chapter VII and thus as sanctioning enforcement measures by Israel to maintain or restore international peace and security.

19. Nor is Israel's effective control of the Occupied Palestinian Territory sanctioned by the Oslo Accords concluded between Israel and Palestine. The Oslo Accords were directed at the allocation of power between Israel and the institutions established and recognized in the Accords; they were intended to complement the applicable *jus in bello* régime (see, to that effect, Advisory Opinion, paragraph 102). However, the Oslo Accords are silent as to the grounds on which the occupation came about, or indeed the grounds on which it would cease. Instead, they record that the contracting parties' rights, claims and positions on these issues are preserved[14].

20. This leaves a single possibility: that Israel's occupation constitutes use of force in exercise of the right to self-defence under Article 51 of the Charter of the United Nations and under customary international law. Use of force in self-defence presupposes that "an armed attack occurs" against Israel, and that Israel's continued effective control of the Occupied Palestinian Territory is a necessary and proportionate response to such an armed attack.

21. The application of the right to self-defence in the present situation may raise a series of additional legal questions, including whether the right is applicable in the face of attacks that are not attributable to a foreign State or of attacks that originate within the territory under occupation[15]. But I do not think that it is necessary to grapple with these issues here. I will thus assume that there is no legal rule barring Israel outright from occupying the Occupied Palestinian Territory in response to attacks against it.

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[12] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 223-224, para. 148.

[13] See, for example, Security Council resolution 338 (1973) of 22 October 1973; and Security Council resolution 2334 (2016) of 23 December 2016.

[14] Oslo II Accord, Art. XXXI, para. 6.

[15] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 194, para. 139.

22. The submissions of some participants, including Israel, as well as some documents submitted under Practice Direction XII, allude to the security threats faced by Israel. It is regrettable that the Court was not furnished with adequate information about such threats. In any event, the concept of a security threat is broader than the concept of an armed attack[16]. So, while security threats to Israel may well be real, they alone do not suffice to justify the use of force, unless they amount to an armed attack (see paragraph 16 above).

23. In this connection, it is worth recalling that, under customary international law, the population in the occupied territory does not owe allegiance to the occupying Power[17], and that it is not precluded from using force in accordance with international law to resist the occupation[18]. Therefore, the fact that the population in the Occupied Palestinian Territory resorts to force to resist the occupation does not *in itself* justify the maintenance by Israel of its occupation. Further, the continuation of Israel's effective control in the Occupied Palestinian Territory cannot be justified with reference to policies and practices that the Advisory Opinion considers to be in breach of international law — for instance, the maintenance of settlements.

24. On the assumption that Israel is the victim of an armed attack triggering the right to self-defence, does Israel's use of force — in the form of its continued occupation of the Occupied Palestinian Territory — fit within the "strict confines"[19] of the right to self-defence? In this regard, it is important to bear in mind the purpose of self-defence: namely, to halt or repel an armed attack until the Security Council takes action. The use of force in self-defence, then, is directed at restoring the situation as it was prior to the armed attack. This purpose distinguishes lawful self-defence from measures that aim to punish the aggressor for the harm inflicted. The latter measures constitute armed reprisals, which are prohibited under international law[20].

25. The legal standards of necessity and proportionality are well established in customary international law and are recognized in the Court's jurisprudence as the tools ensuring that forcible measures stay within the scope of the right to self-defence[21]. Necessity and proportionality are concepts sufficiently malleable to account for an infinite variety of situations, including situations that are said to involve the accumulation of a series of events which, taken together, might constitute an armed attack. These legal standards can be assessed objectively and independently of the subjective appreciation of the State purporting to act in self-defence[22]. For this reason, the standards of necessity and proportionality are well suited to assess whether the use of force employed by the victim of an armed attack serves the purpose of self-defence. In my view, three dimensions of Israel's

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[16] Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 117, para. 224.

[17] See Art. 45 of the Hague Regulations; see also the third paragraph of Art. 68 of the Fourth Geneva Convention.

[18] See, for example, General Assembly resolution 37/43 of 3 December 1982, para. 2.

[19] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 223, para. 148.

[20] See General Assembly resolution 2625 (XXV) of 24 October 1970, Annex, first principle, sixth paragraph: "States have a duty to refrain from acts of reprisal involving the use of force." See also Institut de droit international, "Régime des représailles en temps de paix" (Rapporteur N. Politis), *Annuaire de l'Institut de droit international*, 1934, Vol. 38, p. 709, Art. 4.

[21] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 103, para. 194; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 245, para. 41.

[22] See *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 196, para. 73.

policies and practices illustrate that the maintenance by Israel of its occupation does not qualify as an act of self-defence: their intensity, their territorial scope and their temporal scope.

26. The intensity, or the character, of Israel's effective control features in the Advisory Opinion. The Advisory Opinion observes that Israel has used the fact that it exercises effective control over the Occupied Palestinian Territory as an opportunity to assert permanent control over it (Advisory Opinion, paragraph 261). As the Advisory Opinion discusses in detail, Israel has engaged in the annexation of large parts of the Occupied Palestinian Territory, and it has taken steps to annex the entire West Bank (Advisory Opinion, paragraphs 162-173). This conduct violates the prohibition of forcible acquisition of territory (Advisory Opinion, paragraph 179). In addition to this, however, such conduct belies the proposition that Israel's effective control of the Occupied Palestinian Territory is a permissible use of force in self-defence. The assertion of permanent control over foreign territory is incompatible with the aim of preserving a State's territorial integrity, which is one of the key justifications for the right to self-defence. Rather than preserving the integrity of its territory, a State using force to annex foreign territory seeks to expand it at the expense of the local government. Moreover, the requirements of necessity and proportionality point to temporary forcible measures that are tailored to the specific threat posed by the armed attack. Where the armed attack is ongoing, the requirements of necessity and proportionality call for the imposition of forcible measures that may be adapted to the evolving nature of the attack and that remain under constant review in light of the circumstances. By contrast, the annexation of territory is, by its nature, intended to be permanent. When using force to annex foreign territory, then, the occupying Power anticipates that the armed attack to which its force responds will itself be permanent — that it will continue to occur in perpetuity.

27. The territorial and temporal scope of Israel's occupation also undermines the proposition that this occupation is justified on grounds of self-defence. As the Advisory Opinion points out, Israel has extended its effective control over the whole Occupied Palestinian Territory — the entirety of the territory in which the right of the Palestinian people to self-determination is exercised (Advisory Opinion, paragraph 262). Further, Israel has kept the Occupied Palestinian Territory under its control for over 57 years. Of course, international law does not, and could not, set categorical territorial and temporal limits to the use of force in self-defence, including in the form of occupation. Such limits are determined on a case-by-case basis by the requirements of necessity and proportionality. Under those requirements, targeted operations, including occupation, may be expected in the territory from which the armed attack originates, and for as long as the armed attack occurs. Yet, the longer time passes, the less plausible it is that an armed attack is, or indeed continues to be, occurring; and the less plausible it is that the continued occupation of an entire foreign territory is a necessary and proportionate measure in response under the right to self-defence. This is especially the case where this occupation extends to the entire territory over which a population exercises its right to self-determination.

28. For these reasons, I consider that Israel's continued effective control of the Occupied Palestinian Territory lacks a valid legal basis. Of course, Israel, as all States, has the inherent right to self-defence against armed attacks that occur against it. However, today and in the future, Israel's acts in self-defence must be exercised within the confines of international law, and especially in accordance with the requirements of necessity and proportionality — as is the case for all States.

*(Signed)* Hilary CHARLESWORTH.

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