Observations on the OLA Memorandum relating to the State of Palestine's complaint under Art. 11 CERD

A. Introduction

1. The present observations are supplied further to the Note, dated 23 August 2019, of the Secretariat of the United Nations (Office of the High Commissioner for Human Rights), as well as the Note submitted by Israel of 20 August 2019 addressed to the Secretariat relating to the interstate communication brought by the State of Palestine against Israel under Art. 11 CERD.

B. Preliminary remarks on Israel's behavior

2. The State of Palestine acknowledges and welcomes the fair and balanced approach chosen by the Committee in light of the attempt, by the State of Israel, to undermine the ongoing interstate complaint procedure under Arts. 11-13 CERD, which attempt in and of itself is telling.

3. The State of Palestine therefore appreciates having received the above-mentioned OLA memorandum, which it has carefully studied.

4. The State of Palestine further notes that Israel, as being a contracting party of CERD, is obliged to cooperate with the Committee in good faith in the consideration of the interstate complaint brought by the State of Palestine. The fact that Israel has illegally been able to have access to the confidential communication between the Committee and OLA by itself therefore constitutes a violation of CERD by Israel.

5. The State of Palestine notes in that regard specifically Rule 6 para. 1 of the Committee's recently adopted Rules of Procedure concerning interstate complaints which provides that the deliberations of the Committee shall remain confidential. That obviously includes communications between the Committee and actors such as OLA.

6. This fact that Israel has had access to the OLA memorandum in violation of its procedural good faith obligations arising under CERD further entails that Israel is estopped from relying on the position taken by OLA, which in any event, as will subsequently be shown, does not prevent the

Committee neither on procedural nor on substantive grounds to consider the complaint submitted by the State of Palestine to fall within the jurisdiction of the Committee and to be admissible.

7. The State of Palestine further notes, and fully shares, the Committee's position that Israel, by its behavior, has been trying to exercise impermissible pressure upon individual members of the Committee, and on the Committee as such.

C. Status, relevance and content of the OLA memorandum

8. The State of Palestine first notes that the OLA memorandum requested by the Committee is not a legally binding document, but merely aims at advising the Committee as to the position taken by OLA itself on the matter.

9. What is more is that the Committee, as not being an organ of the United Nations or as one of its specialized agencies, but as having been created by a separate treaty, cannot be bound by such advice anyhow. As a matter of fact, considering the Committee to be bound by the advice of OLA would run counter to the very independence of the Committee, and its individual members.

10. It is also worth noting in passing that it is almost ironic in nature that Israel now relies on the position taken by the Secretary General as allegedly being authoritative, relying on the fact that the Secretary General is acting as depositary of CERD (Israeli Note p. 2). It is ironic since Israel itself has previously denied any such authoritative role of the Secretary General as far as the current proceedings are concerned (Note of Israel to the Secretariat dated 3 August 2018, p. 1-2).

11. The State of Palestine further notes that even more importantly the Committee had asked OLA a number of specific questions. Unfortunately, OLA has not replied to all of them. *Inter alia*, OLA has, in particular, not taken any position whatsoever as to the relevance of the specific position taken by Israel itself on the matter. This relates both to its position within the framework of the current proceedings, but also more generally when it comes to protests lodged by other States when Israel itself became a party to multilateral treaties that are similar in character to CERD, and namely the Genocide Convention. These issues and their relevance will therefore subsequently be addressed in more detail.

12. Finally, the OLA memorandum neither, unfortunately, discusses, and even less engages with the manifold instances of State practice referred to by the State of Palestine. Instead, to provide but one example, it selectively refers in para. 62 of its memorandum to the practice of a small number of States, and namely that of the United States, the United Kingdom and France, that have challenged the position taken by the Human Rights Committee in its General Comment 24. Yet, it is the position of General Comment 24 of the Human Rights Committee itself, which is in line with the position taken for purpose of the current proceedings by the State of Palestine.

13. As a matter of fact OLA itself agrees in its memorandum (para. 61) that the Human Rights Committee General Comment 24 (52) is based on the fact that under a treaty such as the ICCPR or indeed CERD

> "(…) one State party (…) *cannot take action the effect of which would be that another State party could not trigger in respect of it any enforcement machinery* that the treaty creates."

14. Yet, this is exactly what Israel is purporting to do, namely to take action by way of its objection the effect of it allegedly being that another State party [*i.e.* the State of Palestine (see also OLA memorandum para. 19 reconfirming the status of Palestine as a State party of CERD)] could not trigger the specific enforcement machinery CERD has created in its Arts 11-13.

As a matter of fact the memorandum itself further continues that

> "(…) [if] such a reservation is impermissible, a statement of the kind at issue here [*i.e.* a statement purporting to exclude a bilateral treaty relationship with another State party] would arguably be impermissible, also." (para. 61)

15. Yet, as the State of Palestine has shown a reservation, purporting to inhibit the mechanism laid down in Arts. 11-13 CERD is not permissible as per Art. 20 CERD. Hence, even in the view of the OLA memorandum itself a statement of the kind made by Israel is also impermissible.

16. This position is shared by the OLA memorandum when it states, that

> "(...) where a human rights treaty creates machinery for considering inter-State complaints regarding its implementation that [like in the case of CERD] is automatically applicably to States parties, reservations that would exclude the competence of that machinery, either in whole or in part, would also be impermissible. (para. 60).

17. In light of this position of the Human Rights Committee, as rightly analyzed by OLA itself, and as not challenged by the overwhelming majority of contracting parties of the ICCPR, one wonders, to say the least, how the mere statements of three (out of more than 170) contracting parties could then be considered decisive. What is more is that any such reliance by OLA on this extremely limited State practice, apart from its selectivity and obvious lack of being uniform and representative, also misunderstands the specific independent role treaty bodies such as the Human Rights Committee or the CERD Committee play in the interpretation and implementation of the respective treaty.

D. Consideration of the practice of the ILC as to the law of reservations (paras. 15-30)

18. As to the analysis by OLA of the practice of the ILC it suffices to reiterate that, as the memorandum itself acknowledges in para. 30, the ILC had considered that the kind of declarations at issue did

> "(…) fall outside the scope of its study [on reservations]."

It is thus hard to draw any conclusion as to the position taken by the ILC on that specific matter. This is confirmed by the very fact that the relevant Guideline 1.5.1. of the ILC merely refers to unilateral declarations that "*purport to*" exclude a treaty relationship (Yb. ILC 2011 vol II., pt. 2, p. 27; emphasis added). Put otherwise the Guideline does not take a position as to the question what are the legal effects, if at all, of such objections which in the ILC's own words, merely 'purport to' exclude a treaty relationship.

E. Lack of consideration of relevant treaty practice by the OLA Memorandum

19. It is further worth reminding the Committee, as it has certainly become aware itself by now, that the OLA memorandum does not discuss at all, and even less engages with, the abundant State practice referred to by the State of Palestine, including practice arising under the Apostille Convention, which confirms the lack of uniform State practice as to the alleged general right of a

State to exclude entering into a bilateral treaty relationship with another State party in particular when it comes to human rights treaties

F. Relevance of the *erga omnes* character of CERD

20. The OLA memorandum agrees that treaty obligations under CERD are of an *erga omnes* character (paras. 37 et seq.) Hence there is no need to consider whether the State of Palestine needs to be the injured State or nor. Rather, as the OLA memorandum itself acknowledges, in the case of CERD each State party owes obligations

> "(…) in *any given situation* to *every* other State party to the Convention that is, the obligations are owed *erga omnes partes*." (para. 38; first two emphasis added).

21. The memorandum then continues, and rightly so, that like in the case at hand, whenever Israel engages in an activity inconsistent with CERD it

> "(…) thereby breach[es] obligations that it owes under the Convention *towards every other State Party* (…)" (para. 40; emphasis added).

22. Yet, since the memorandum itself acknowledges that the State of Palestine is a contracting party of CERD (para. 19) and since in OLA's own words such obligations are owed "(…) towards *every other* State party (…)" (op. cit.; emphasis added), it logically follows that Israel also owes CERD-based obligations to the State of Palestine, and it hence must be possible to hold Israel accountable under the mandatory interstate complaint proceeding envisaged in Arts. 11- 13 CERD.

23. Despite its own finding that *erga omnes partes* obligations are indeed owed to all State Parties of the Convention and thereby not bilateral but collective in nature, OLA then somehow, and by a sudden, again allows the bilateralisation of *erga omnes partes* obligations by claiming that a State party to a convention of an *erga omnes* character may unilaterally exclude the effect of such obligations.

24. This finding also stands in contrast to the seminal 2012 judgment of the International Court of Justice in the Case relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) which

the OLA memorandum even fails to mention. In the said judgment, the Court unequivocally confirmed that in the case of *erga omnes* obligations

> "(…) the obligations in question are owed by *any* State party to *all* the other States parties to the Convention. (ICJ Rep 2012, p. 422, para. 68; emphasis added.]

without qualifying its holding in any manner whatsoever. As to the procedural aspect of such *erga omnes* obligations the Court then continued that

> "(…) [t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement *of each* State party to the Convention to make a claim concerning the cessation of an alleged breach *by another* State party (…)" (op. cit., para. 69; emphasis added)

without again limiting its holding in any way but simply taking it for granted that this entitlement extends to 'each State party's' [*i.e.* the State of Palestine] concerning alleged breaches 'by another State party' [*i.e.* Israel].

25. It would entirely contradict not only the Court's judgment but indeed the very nature of a common interest of all parties to a treaty of an *erga omnes* character if that common interest could be 'divided' by way of a unilateral declaration to exclude one party from being part of that common interest.

26. In light of both, its own previous findings on the issue of *erga omnes* obligations, as well as the ICJ's jurisprudence, the conclusion to be found in para. 41 of the Memorandum is, to say the least, not only surprising, but, at the very least, not supported by the previous line of argumentation and also not in line with the common understanding of *erga omnes partes* obligations and their effect in international law.

G. Lack of the necessity of a bilateral treaty relation

27. The OLA memorandum, and rightly so, takes the position that the consistent jurisprudence of various regional human rights mechanisms of a character similar to CERD leads to the conclusion

that no bilateral treaty relationship is needed in order to enable State parties thereof to be able to trigger processes akin to Arts. 11- 13 CERD (paras. 47 – 56, in particular para. 56).

28. As the memorandum acknowledges this is also the position taken by the Human Rights Committee (para. 58 – 61). It is in particular worth noting that the memorandum shares the position that there exists a uniform line of jurisprudence that

> "(…) one State party to such a treaty cannot take action the effect of which would be that another State party could not trigger in respect of it any enforcement machinery that the treaty creates." (para. 61)

29. The State of Palestine fully agrees with that position, which is also in line with the jurisprudence it itself had previously adduced.

30. This finding is also in line with the approach followed by the CERD Committee itself, to which the memorandum refers to in its para. 63, but also in line with the Committee's practice to which the State of Palestine has previously alluded to. In line of the Committee's general approach on the character of the obligations arising under CERD, it is safe to assume that a mere Preliminary Report prepared by three members of the Committee only cannot be understood as an authentic statement as to the Committee's position to the effect that a bilateral treaty relationship was indeed necessary for a State party to be able to trigger the Art. 11 procedure. Rather to the contrary, even this Preliminary Report reconfirms that the implementation of CERD is "not a matter of reciprocity" (see the reference in para. 63 of the OLA memorandum).

31. As to the reference, in the memorandum, to the Committee's practice concerning the occupied Syrian Golan (paras. 64 - 65), the memorandum itself confirms that the Chairman's then ruling was based on the fact that

> "(…) States parties to the Convention had not raised any objection to the reservation made by Syria at the time of its [i.e. Syria's)] accession". (para. 65)

32. Yet, and as the State of Palestine has already previously noted (see Submission by the State of Palestine dated 15 February 2019, para. 122.), this constitutes an almost obvious distinguishing feature as to the case at hand where the State of Palestine indeed had objected to the Israeli declaration purporting to exclude a treaty relationship with Palestine. Besides, Syria had not even invoked Art. 11 CERD, and that for that reason alone the part of the Syrian report did not constitute a communication under Art. 11 CERD. Yet, the OLA memorandum does not discuss those crucial and distinguishing features of the Committee's early practice, where the reference to the issue of a treaty relationship is nothing but a mere *obiter dictum*.

33. As a matter of fact, both the more recent practice of the Committee itself to which Palestine has already previously made reference to, as well as the practice of other similar human rights bodies both support the approach that no bilateral treaty relation is needed in order for a State party to be able to trigger an interstate complaint procedure akin to Arts. 11-13 CERD.

H. Missing references to Israel's own behavior

34. Regardless of how one perceives the various general arguments contained in the OLA memorandum it is even more striking and perplexing that it does not address three major points, which relate to Israel's own behavior. Hence, even if one were to follow, be it only *arguendo*, the line of argument of the OLA memorandum as a matter of general international law, it can still not govern the specific situation now before the Committee, which the memorandum fails to analyze despite the Committee's request.

a) Applicability of the law of reservations

35. For one, the memorandum does not address at all the fact that Israel itself perceived and accepted its objection to be governed by the law of reservations. Indeed the Committee will recall that Israel itself has unequivocally stated that

> "(…) the absence of treaty relations between Israel and the Palestinian entity is *legally indistinguishable* in its effect from a reservation to Article 11 in as much as both would exclude the applicability of the Article 11 mechanism in relations between Israel and the Palestinian entity." (Note of the Permanent Mission of Israel to the United Nations in Geneva to

Secretary-General of the United Nations, dated 3 August 2018, regarding the decision adopted by the Committee on the Elimination of Racial Discrimination of 4 May 2018, p. 6; emphasis added)

36. This position that Israel's objection is governed by the law of reservations is shared by the State of Palestine, which agreement is thus determinative of the matter. Yet, the OLA memorandum itself shares Palestine's position to the effect that a reservation purporting to exclude the Art. 11 procedure would be impermissible (para. 61), and hence without effect. If, however, both parties agree that the Israeli objection is subject to the same legal regime as a reservation, it must also by necessary implication be without legal effect.

b) Israel's previous own position as to the irrelevance of objections to the existence of a treaty relationship

37. Moreover, the Committee had specifically asked OLA to provide advice as to the legal impact of

"(…) the protest of the State of Israel against the objection by other States parties to the establishment of treaty relations between them and the State of Israel".

38. It is again telling, to say the least, that the memorandum does not address the matter at all. Accordingly, the memorandum cannot be assumed to have taken a position on that issue at all. Yet, the Committee will recall that Israel itself has taken the position that any objection of such kind it has now itself made vis-à-vis the State of Palestine

"(…) cannot in any way affect *whatever obligations* are binding upon (…)" the respective other State under the respective Convention (…)."(see United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide Paris, https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV1&chapter=4&lang=en#21; emphasis added)

39. Even specifically with regard to CERD itself Israel took the very same position. *Inter alia,* on the occasion of its accession to CERD Iraq had declared that

> "(…) [t]he Ministry for Foreign Affairs of the Republic of Iraq hereby declares that signature for and on behalf of the Republic of Iraq of the Convention on the Elimination of All Forms of Racial Discrimination (…) shall in no way signify recognition of Israel *or lead to entry (…) into such dealings with Israel as may be regulated by the said Convention*. (see https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en#17; emphasis added).

In a communication received by the Secretary-General, the Government of Israel reacted by stating that not only it had

> "(…) noted the political character of the declaration made by the Government of Iraq (…)" (op. cit.)

but that moreover

> "(…) it is the view of the Government of Israel that no legal relevance can be attached to those Iraqi statements (…)". (op. cit.)

40. Accordingly, it is Israel's own position, on which the memorandum had nothing to say despite a specific request by the Committee, that the kind of 'objections' it has now itself made are merely of a political nature with no legal relevance. In line with the principle of good faith, Israel must now also accept the very same position *vice versa*

c. Specific situation of Israel vis-à-vis the State of Palestine

41. Finally, the memorandum for whatever reason did neither address the specific situation Israel finds itself vis-à-vis the State of Palestine, which precludes it from claiming a lack of a treaty relationship. As a matter of fact Israel finds itself *mutatis mutandis* in the same situation as South Africa did find itself vis-à-vis occupied Namibia prior to the termination of the illegal presence of South Africa in Namibia, and where, notwithstanding, Namibia had become a contracting party of CERD. If Israel's line of argument were to be accepted, South Africa could have similarly precluded Namibia from triggering the Art. 11 CERD mechanism against South Africa, even if South Africa had ever decided to accede to CERD prior to the end of the apartheid regime.

42. Put otherwise, an interpretation of CERD enabling a State party to exclude a treaty relationship with another State party that it is occupying, and on the territory of which, as the Committee has already found, it has set up a system of racial segregation in violation of Art. 3 CERD, and thereby precluding it from triggering the Art. 11 procedure is certainly not in line with the overall object and purpose of the Convention.

I. Concluding remarks

43. The State of Palestine continues to have full confidence in the independence and impartiality of the CERD Committee and trusts that it will not give in to attempts to exercise pressure on the Committee at large, or on some or all of its members.

44. The Committee finds itself at a crucial crossroad for its function, and as far as the trust of the international community at large in its objectivity is concerned. It will have to decide whether it follows a more formalistic path, or whether instead, and in line with many other regional and universal human rights mechanisms, it will decide the issue at hand in accordance with the very object and purpose of the Convention, namely to "speedily eliminating racial discrimination throughout the world."

45. On the whole, therefore, the Committee finds itself in a situation very similar to the one the International Court of Justice was facing in 1962/1966 when, as the Committee is aware, Ethiopia and Liberia had brought a case against South Africa, and where the Court in 1966 rejected the case for lack of *jus standi* of the applicants. Obviously, the Committee does not have to be reminded of the ensuing well-known consequences for the Court's legitimacy in the years that followed the Court's 1966 judgment.