Note for the file

Treaty Bodies Secretariat, 23 August 2019

Transmission of the content of OLA Memorandum at the request of the Committee on the Elimination of Racial Discrimination

At its 98th Session, the Committee on the Elimination of Racial Discrimination decided to develop further research and investigation on the preliminary issues raised with regard to the interstate communication submitted by the State of Palestine, pursuant to Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD-ISC-2018/3), including with regard to its competence to consider the matter brought to its attention.

In this context, at the request of the Committee, the Secretariat consulted the United Nations Office of Legal Affairs on this matter. In particular, advice was sought on the following issues:

> 1. "As a matter of public international law, or of treaty law and practice of the United Nations, does the objection of the State of Israel, dated 16 May 2014 (C.N.293.2014.TREATIES-IV.2), to the accession by the State of Palestine to the International Convention for the Elimination of All Forms of Racial Discrimination, dated 2 April 2014, of itself legally preclude the Committee from examining a communication filled by either State against the other under articles 11 to 13 of the Convention?
>
> 2. The Committee also seeks the legal advice of the Office of Legal Affairs as to the impact of the following issues on the assessment of the question posed:
> - the jus cogens or erga omnes character of the prohibition of racial discrimination as enshrined in the Convention;
> - the requirement that treaty reservations should be compatible with the object and purpose of the treaty, and the applicability of this requirement to objections;
> - 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."

In its reply dated 23 July 2019, the Office of Legal Affairs (OLA) provided the following opinion:

SUBJECT: **Competence of the Committee on the Elimination of Racial Discrimination to consider a matter brought to the attention of the Committee pursuant to Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination**
OBJET:

1. I refer to your memorandum, dated 21 May 2019, by which you have transmitted to us the following question posed by the Committee on the Elimination of Racial Discrimination ("the Committee"):

> As a matter of public international law, or of treaty law and practice of the United Nations, does the objection of the State of Israel, dated 16 May 2014 (C.N.293.2014.TREATIES-IV.2), to the accession by the State of Palestine to the International Convention on the Elimination of All Forms of Racial Discrimination, dated 2 April 2014, of itself legally preclude the Committee from examining a communication filed by either State against the other under articles 11 to 13 of the Convention?

2. You have mentioned in your memorandum that the Committee has also sought the views of the Office of Legal Affairs on the role which the following elements might play in the consideration of the above-mentioned question:

- The *jus cogens* or *erga omnes* character of the prohibition of racial discrimination as enshrined in the Convention;
- The requirement that treaty reservations should be compatible with the object and purpose of the treaty, and the applicability of this requirement to objections; and
- 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.

Background

3. The International Convention on the Elimination of All Forms of Racial Discrimination (the "Convention") was concluded on 7 March 1966 and entered into force on 4 January 1969. Pursuant to its Article 17, the Convention "is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention" and "is subject to ratification." Pursuant to its Article 18, the Convention is "open to accession by any State referred to in article 17, paragraph 1, of the Convention" and "[a]ccession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations."

4. Israel deposited its instrument of ratification on 3 January 1979, which contained a reservation stating that "[t]he State of Israel does not consider itself bound by the provisions of Article 22 of the said Convention". In accordance with its Article 19, paragraph 2, the Convention entered into force for Israel on 2 February 1979 (C.N.3.1979.TREATIES-1). The State of Palestine deposited its instrument of accession on 2 April 2014 without any reservation; and the Convention entered into force for it on 2 May 2014 (C.N.179.2014.TREATIES-IV.2 (Depositary Notification)). In connexion with Article 17 of the Convention, it is recalled that the State of Palestine has, since 2011, been a member of a specialized agency of the United Nations, namely, the United Nations Educational, Scientific and Cultural Organization (UNESCO).

5. In a communication that was submitted to the depositary on 16 May 2014 (C.N.293.2014.TREATIES-IV.2 (Depositary Notification)), Israel stated as follows:

> "'Palestine' does not satisfy the criteria for statehood under international law and lacks the legal capacity to join the aforesaid convention both under general international law and the terms of bilateral Israeli-Palestinian agreements.
>
> "The Government of Israel does not recognize 'Palestine' as a State, and wishes to place on record, for the sake of clarity, its position that it does not consider 'Palestine' a party to the Convention and regards the Palestinian request for accession as being without legal validity and without effect upon Israel's treaty relations under the Convention."

6. In a communication that was submitted to the depositary on 6 June 2014 (C.N.354.2014.TREATIES-IV.2 (Depositary Notification)), the State of Palestine stated as follows:

> "The Government of the State of Palestine regrets the position of Israel, the occupying Power, and wishes to recall United Nations General Assembly resolution 67/19 of 29 November 2012 according Palestine 'non-member observer

State status in the United Nations'. In this regard, Palestine is a State recognized by the United Nations General Assembly on behalf of the international community.

"As a State Party to the International Convention on the Elimination of all forms of Racial Discrimination, which entered into force on 2 May 2014, the State of Palestine will exercise its rights and honor its obligations with respect to all States Parties. The State of Palestine trusts that its rights and obligations will be equally respected by its fellow States Parties."

7. Paragraphs 1 and 2 of Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination provide as follows:

"1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

"2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State."

8. We understand that the State of Palestine sent a communication concerning Israel to the Committee on 23 April 2018. The communication, among other things, states that:

"[t]he State of Palestine exercises this right under Arts. 11-13 CERD, inherent in its status of being a member of CERD, given the urgency of the situation in the Occupied Palestinian Territory ('OPT') and the blatant, and indeed ever increasing, violations by Israel as the occupying power, of CERD which have taken place, and continue to take place in the OPT ever since Israel occupied Gaza, the West Bank, as well as East-Jerusalem, in 1967".

9. By a note verbale, dated 30 April 2018, addressed to the secretariat of the Committee (the secretariat), Israel stated that:

"[i]n light of Israel's official objection to the purported Palestinian accession and the absence of treaty relations between Israel and the Palestinian entity under the Convention, it follows that Article 11 cannot and should not be activated with respect to Israel in this situation, and that the Committee lacks the jurisdiction to initiate the mechanisms and procedures of this provision, including the initial transmission of the reported Palestinian communication,

> . . . [and] requests that the Committee decline to proceed with any Palestinian request pursuant to Article 11 of the Convention with respect to Israel".

10. The secretariat transmitted the communication of the State of Palestine to Israel on 7 May 2018. On the same day, the secretariat further informed both States Parties of the decision that had been adopted by the Committee at its 95th session, on 4 May 2018, according to which, "[w]ithout considering the substance of [the State of Palestine's] communication", the Committee had decided: "1. To request the Secretary-General of the United Nations to transmit the communication submitted by the State of Palestine to the State Party concerned, the State of Israel; 2. To invite the State of Israel to submit to the Committee; within three months, "written explanations or statements clarifying the matter and the remedy, if any, that may been taken by that State", as provided for by Article 11, para 1, of the said Convention". This was followed by a number of communications to the Committee from Israel and from the State of Palestine, dated 3 August 2018, 30 August 2018, 23 September 2018, 19 October 2018 and 23 October 2018, each of which was transmitted by the Secretariat to the other State Party.

11. In a Note Verbale dated 9 October 2018, the secretariat, referring to paragraph 2 of article 11 of the Convention, informed both States Parties that the deadline for referring the matter again to the Committee was 7 November 2018, adding that "[t]his reminder does not imply that any decision has been adopted on the admissibility of the matter under consideration". Acting consistently with Article 11, paragraph 2, of the Convention, the State of Palestine subsequently referred the matter again to the Committee on 7 November 2018.

12. At its 97th session, held in Geneva from 26 November to 14 December 2018, the Committee decided to give the opportunity to Israel to inform the Committee whether it wished to supply any relevant information on the issues of the jurisdiction of the Committee or the admissibility of the communication from the State of Palestine, including the question of the exhaustion of all available domestic remedies, and to give to the State of Palestine the opportunity to respond to the submission by Israel. This decision was communicated to Israel and to the State of Palestine by notes verbales, dated 14 December 2018, from the secretariat. The Committee also decided to examine any preliminary question at its 98th session, which was to take place from 23 April to 10 May 2019.

13. Subsequently, a number of communications were sent to the two States, including a communication to Israel, dated 6 March 2019, from the Committee's Working Group on communications that stated as follows: "No action undertaken by the Committee under article 11 of the Convention prejudges the issue of jurisdiction of the Committee. The Committee will not address the merits of the case, envisaged by article 12 of the Convention, nor any preliminary issue other than the issue of jurisdiction raised by the State of Israel, before having established whether it has jurisdiction to deal with the inter-

state communication of reference." Moreover, the Committee sent a communication, dated 29 April 2019, to both States which stated that "[t]he object of the upcoming proceedings [during the 98th session] is precisely to determine whether there is in respect of the Convention a treaty relation between the State of Israel and the State of Palestine, which would allow for the application of the articles 12 and 13 of the Convention." The Committee subsequently informed the two States that the relevant proceedings would be pursued during the Committee's 99th session to be held in August 2019.

14. We understand that the Committee has asked the question quoted in paragraph 1 above in the light of the above events.

Treaty relations between Israel and the State of Palestine

15. As mentioned above, following the State of Palestine's accession to the Convention on 2 May 2014, Israel submitted a communication dated 22 May 2014, stating as follows:

> "The Government of Israel does not recognize 'Palestine' as a State, and wishes to place on record, for the sake of clarity, its position that it does not consider 'Palestine' a party to the Convention and it regards the Palestinian request for accession as being without legal validity and without effect upon Israel's treaty relations under the Convention."

16. This statement raises two questions: first, the legal validity or otherwise of the State of Palestine's accession to the Convention and, secondly, the effects of Israel's statement that it regards that accession as being "without effect upon Israel's treaty relations under the Convention".

17. As for the first of these questions, it is recalled that, on 29 November 2012, the General Assembly adopted resolution 67/19, in which it decided to "accord to Palestine non-member observer State status in the United Nations". In consequence of this resolution, the Secretary-General, acting in his capacity as depositary, has, since that date, regarded the State of Palestine as a "State" for the purpose of participation in those multilateral treaties for which he acts as depositary. He has accordingly accepted in deposit instruments by which the State of Palestine has expressed its consent to be bound by those treaties that are open to participation by "all States".

18. Moreover, as has already been mentioned, the State of Palestine has been a Member State of UNESCO since 2011. It is therefore a "State . . . member of any of [the United Nations] specialized agencies" within the meaning of Articles 17 and 18 of the Convention. The Secretary-General accordingly accepted in deposit the State of Palestine's instrument of accession to the Convention on 2 April 2014.

19. In light of the above, and meeting a necessary and sufficient criterion laid down in the Convention for participation in it and having completed the steps laid down in the Convention for establishing its consent to be bound by it, this Office considers that the State of Palestine therefore is and must be considered to be a State Party to the Convention.

20. The further question therefore arises of whether or not, because of Israel's statement, there exist treaty relations under the Convention between Israel and the State of Palestine.

21. In its statement, Israel declares that it "does not recognize 'Palestine' as a State" and "regards the Palestinian request for accession as being ... without effect upon Israel's treaty relations under the Convention".

22. Statements of this kind are quite common in the practice of States with respect to multilateral treaties that are deposited with the Secretary-General. The International Law Commission considered their legal nature in the context of its study of "the law and practice relating to reservations".

23. In his third report on that topic, the Special Rapporteur, Mr. Alain Pellet, proposed the following draft guideline, entitled "reservations relating to 'non-recognition":

> "A unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made" (*Yearbook of the International Law Commission*, 1998, vol. II, pt. 1, at p. 253, para. 177).

24. The Commission considered this proposed draft guideline at its fiftieth session in 1998. A number of the Commission's members raised questions regarding the qualification of such statements as reservations, arguing that the legal regime of reservations under the 1969 Vienna Convention on the Law of Treaties could not apply to them. Thus, it was pointed out inter alia that, unlike reservations, these statements are made by States at any time, not only when signing or establishing their consent to be bound by a treaty; that they are made even with respect to treaties that contain provisions excluding, or permitting only specific types of, reservations; and that they do not concern the legal effect of the treaty itself or its provisions, but rather the capacity of the non-recognized entity to be bound by the treaty. At the same time, the Commission noted that these statements cannot be qualified as interpretative declarations, as they do not purport to interpret the treaty in respect of which they are made.

25. In light of these arguments, the Special Rapporteur proposed the following, revised draft guideline in his fourth report:

> "A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize as a State does not constitute either a reservation or an interpretative declaration, even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity" (*Yearbook of the International Law Commission*, 1999, vol. II, pt. 1, at p. 137, para. 53).

26. Ultimately, the Commission adopted the following guideline, entitled "Statements of non-recognition", and included it in its Guide to Practice:

> "A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize is outside the scope of the present Guide to Practice, even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity" (*Yearbook of the International Law Commission,* 2011, vol. II, pt. 2, at p. 27, Guideline 1.5.1).

27. In its accompanying commentary, the Commission differentiated between two forms that statements of non-recognition can take: one by which a party indicates that its participation in a treaty does not imply recognition of a non-recognized entity and another by which a party further indicates that its statement excludes the application of the treaty between itself and the non-recognized entity (*Yearbook of the International Law Commission,* 2011, vol. II, pt. 3, at p. 69, para. 2). The statement by Israel is of this second type.

28. The Commission considered that the first type of statement does not have any legal effects (loc. cit., para. 4). Indeed, it is now well established that participation in a multilateral treaty does not in itself imply recognition of every one of the parties to it (loc. cit.).

29. The second type of statement has a different nature and objective and specifically aims at preventing the application of the treaty between the State making the statement and the non-recognized entity. The Commission affirmed that such a statement "clearly purports to have (and does have) a legal effect on the application of the treaty, which is entirely excluded, but only in the relations between the declaring State and the non-recognized entity" (loc. cit., para. 5).

30. The International Law Commission did not further elaborate. It considered such statements, like statements of the first kind, to be neither reservations nor interpretative declarations and so to fall outside the scope of its study. (loc. cit., p. 70, para. 13). Nevertheless, States being free, by virtue of their sovereignty, to choose whether and with which other States to enter into treaty relations, it is difficult to see why statements of the second kind would not have the legal effect that the Commission attributed to them.

31. This being so, Israel's present statement is to be regarded as having had the effect of preventing the establishment of treaty relations under the Convention between it and the State of Palestine.

32. That said, it may be noted that the International Court of Justice is currently seized of similar questions in the case concerning the *Relocation of the United States Embassy to Jerusalem (Palestine* v. *United States)*. In that case, the State of Palestine seeks to found the jurisdiction of the Court on Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes. The United States has informed the Court of the communications that it has submitted to the Secretary-General in his capacity as depositary of the Convention and its Optional Protocol in which it declared that it did not consider itself to be in a treaty relationship with the applicant. By an Order dated 15 November 2018, the Court decided that the written pleadings in the case should first address the question of jurisdiction of the Court and that of the admissibility of the application. The State of Palestine was to file its Memorial by 15 May 2019. The United States is due to file its Counter-Memorial by 15 November 2019.

Treaty relations and the right to trigger the processes in Articles 11 to 13

33. There therefore being no bilateral treaty relations under the Convention between Israel and the State of Palestine, Israel does not owe any obligations under the Convention to the State of Palestine and the State of Palestine is not vested by the Convention with any correlative rights to require of Israel the performance of the obligations that the Convention imposes on it (and *vice versa*).

34. The question consequently arises whether the absence of any such right on the part of the State of Palestine precludes the Committee from examining its communication under Article 11 of the Convention.

35. As with any treaty, the Convention consists of a series of legal relations between the States that are party to it, consisting of obligations and correlative rights to require the performance of those obligations.

36. In the case of the Convention, as with other multilateral treaties for the protection of human rights, these relationships of rights and obligations are of two different kinds, at least in the case of the substantive rights and obligations deriving from the provisions in its Part I.

37. First, there are rights to require the performance of obligations that are vested in the State or States that would be injured in the event that those obligations are breached. In any given situation, there may be one such State or perhaps more than one; but not every State Party will be vested with such a right. As an "injured" State, that State Party may

claim from a State Party responsible for a breach the various forms of reparation known to international law, consistently with what is provided in Chapter II of Part Two of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (*Yearbook of the International Law Commission*, 2001, vol. II, part 2, at pp. 26-30).

38. Secondly, there are rights to require the performance of obligations that are vested in every State Party to the Convention, regardless of whether or not it would be injured in the event that those obligations are breached. In the event of a breach, every State Party may claim from a responsible State only certain forms of reparation — cessation of the breach and guarantees that it will not be repeated. It may also claim from it the performance of the obligations of reparation that it owes to the injured State or States. Looked at from the point of view of obligations rather than rights, each State Party owes this form of obligation in any given situation to every other State Party to the Convention: that is, the obligations are owed *erga omnes partes*. This category of obligations is reflected in Article 48, paragraph 1 (a), of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (loc. cit.)

39. Obligations and rights of the first type clearly do not exist as between Israel and the State of Palestine. If Israel conducts itself in a manner that is not consistent with any of the substantive provisions of the Convention, the State of Palestine therefore cannot assert that it is an injured State and, as such, claim from Israel full reparation for any harm that may thereby be caused to it.

40. The same applies also in the case of obligations and rights of the second type. It may be true that, if it engages in an activity that is not consistent with any of the substantive provisions of the Convention, Israel will thereby breach obligations that it owes under the Convention towards every other State Party and so violate the correlative rights to the performance of that obligation that the Convention vests in each of them. However, it will not thereby breach any obligation under the Convention towards the State of Palestine.

41. The fact that every other State Party would be able to invoke its rights under the Convention to require Israel to put an end to its breach and to provide guarantees against its repetition does not necessarily entail that the Convention vests the State of Palestine with those same rights. Rights of this second kind are just as much rights that are created by the Convention as are rights of the first kind; and just as the absence of treaty relations under the Convention between Israel and the State of Palestine entails that the State of Palestine is not vested with rights of the first kind under the Convention vis-à-vis Israel, it equally entails that right of the second kind are not vested in it, either.

42. It should be emphasized that this — the fact that, if Israel engaged in an activity that is not consistent with the any of the substantive provisions of the Convention, it would not thereby breach any obligations owed under the Convention towards the State

of Palestine — does not entail that Israel would not thereby violate any of the obligations that it may owe to the State of Palestine under other sources of international law. To the extent that the substantive provisions of the Convention are reflective of general customary international law, Israel could, by engaging in an activity that is not consistent with them, violate rights that are vested in the State of Palestine under that body of law. However, it would not thereby violate any right of the State of Palestine under the Convention, since no such right is vested in it. This is so whatever the nature of the right that is vested in the State of Palestine under customary international law may be — whether it is of the first or of the second kind — and whatever the nature of the correlative obligation may be — whether it is of the first kind or of the second — that is, an obligation *erga omnes*.

43. The same holds true if and to the extent that any of the substantive provisions of the Convention may be reflective of a peremptory rule of general international law (*jus cogens*). As far as the law of treaties is concerned, the fact that a rule is a peremptory norm of international law renders void any treaty or international agreement that is in conflict with it (Article 53 of the Vienna Convention on the Law of Treaties). However, the nature of Israel's statement is one that precludes the creation of treaty relations under the Convention between it and the State of Palestine. It is not its actual or intended effect to create a new treaty obligation, let alone one that is in conflict with any of the substantive provisions of the Convention.

44. The same analysis would also apply in the event that any of Israel's activities should constitute a serious breach of an obligation under a peremptory norm of general international law (*jus cogens*). Any such breach could cause to arise, as a matter of general international law, the specific legal consequences that are set out in Chapter III of Part Two of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (loc. cit. above); but there would still be no violation of any right of the State of Palestine under the Convention, since no such right is vested in it.

45. The possible status of any of the substantive provisions of the Convention as a norm of *jus cogens* therefore has no bearing on the answer to the question at hand.

46. In view of this analysis, it would appear that the absence of treaty relations under the Convention between Israel and the State of Palestine has the consequence that it is not possible for the State of Palestine to trigger the procedures that are set out in Article 11 of the Convention — that is, it cannot submit a communication alleging that Israel is not giving effect to the provisions of the Convention that would have the effect of empowering the Committee to examine that communication. The right to trigger those procedures would only exist if the State of Palestine is vested with rights under the Convention to require of Israel that it give effect to the Convention's provisions; and that, in the absence of treaty relations between them, it does not.

47. It would only be otherwise if the substantive obligations that the Convention imposes upon the States Parties to it are of such a nature that the right to require their performance does not, at least in certain respects, depend upon the existence of bilateral treaty relations under the Convention between the two States concerned or, alternatively, if those obligations are of such a nature that it is not possible for a State Party to take action the effect of which would be that the right to require their performance would not vest in any other State Party.

48. There are certain indications in the case law of certain human rights bodies that this may indeed be the case. Thus, the European Commission of Human Rights as long ago as 1961 took the position that "the obligations undertaken by the High Contracting Parties in the [European Convention on Human Rights] are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves" (*Austria v. Italy*, no. 788/60, Decision of the Commission as to admissibility of 11 January 1961, A/60/922, p. 18; reaffirmed in *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, nos. 9940-9944/82, Decision of the Commission as to admissibility of 6 December 1983, paras. 38-43, in *Alparslan Temeltasch v. Switzerland*, no. 9116/80, Report of the Commission of 5 March 1983, para. 63, and in *Cyprus v. Turkey*, no. 25781/94, Report of the Commission of 4 June 1999, para. 71).

49. In similar vein, the European Court of Human Rights has stated that the Convention "comprises more than mere reciprocal engagements between contracting States", since it "creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'" (*Ireland v. United Kingdom,* no. 5310/71, Judgment of 18 January 1978, para. 239).

50. The Inter-American Court of Human Rights, in its Advisory Opinion of 24 September 1982 on *The effect of reservations on the entry into force of the American Convention on Human Rights*, referred to the *Austria v. Italy* precedent of the European Commission noted above and held that "modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States" (Advisory Opinion No. OC-2/82 of 24 September 1982, at para. 29). It went on to affirm that, "[i]n concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction" (para. 29). Human rights treaties such as the American Convention are thus best seen, the Court stated, as a "framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction" (para. 33).

51. In 1999, the Inter-American Court forcefully reaffirmed this analysis and stated that "[t]he American Convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human person), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties, [...which instead...] govern mutual interests between and among the States Parties" (*Case of Ivcher-Bronstein v. Peru*, Judgment on Competence of 24 September 1999, para. 42).

52. As indicated by this body of case law, the "objective" or "non-reciprocal" nature of the substantive obligations under the European Convention on Human Rights and, likewise, under the American Convention on Human Rights stems, at least in part, from the fundamental notion that those obligations are subject to a system of collective guarantee and collective enforcement. Any State Party may enforce the obligations of any other State party under those conventions and, in doing so, does not thereby invoke a right to the performance of a correlative obligation that is owed to it by that, latter State party. Thus, in the case of the European Convention, any State party may trigger the operation of the machinery of collective enforcement that that Convention creates, without thereby invoking a right that is correlative to the obligation that is alleged to have been breached. This also holds true in the case of the American Convention in the event that the two States concerned have both deposited a declaration under Article 45 or Article 62 of the Convention, and have therefore recognized the competence of the Commission established by the Convention to receive and examine communications alleging that another State party has violated a human right set out in the Convention or if they have accepted the jurisdiction of the Court established by the Convention on all matters relating to the Convention's interpretation or application.

53. Following from this fundamental principle, it has been held that no State party to the European Convention can do anything that would prevent another State party from triggering in respect of it the machinery for the collective enforcement of the Convention that the Convention creates. Thus, the European Commission of Human Rights has affirmed that "to accept that a Government may void 'collective enforcement' of the Convention under Art. 24, by asserting that they do not recognise the Government of the applicant State, would defeat the purpose of the Convention" (*Cyprus v. Turkey*, no. 8007/77, Report of the Commission of 4 October 1983, para. 48, quoting and reaffirming paras. 43 of its Interim report on the State of the Proceedings of 12 July 1980). The fact that Turkey did not recognize the applicant as the Government of Cyprus and so did not consider it capable of lodging an application in its name therefore did not prevent the Commission from considering the complaints that Cyprus had made against it, nor did it absolve Turkey from its obligation to cooperate with the Commission in the proceedings. Significantly, the Commission also affirmed that the ability to trigger the system of collective enforcement that the Convention creates "does not of itself envisage any direct rights or obligations between the High Contracting Parties concerned" (loc. cit., quoting and reaffirming para. 40 of its Interim Report).

54. The European Court of Human Rights took a similar position in its 1995 judgment on preliminary objections in the case of *Loizidou v. Turkey* (no. 15318/89, Judgment on Preliminary Objections of 23 March 1995, para. 41). Thus, the Court affirmed that "recognition of an applicant Government by a respondent Government is not a precondition for either the institution of proceedings under Article 24 of the Convention or the referral of cases to the Court under Article 48". The Court added that, "[i]f it were otherwise, the system of collective enforcement which is a central element in the Convention system could be effectively neutralised by the interplay of recognition between individual Governments and States" (ibid.). The fact that the Government of Turkey did not accept the capacity of the applicant Government to represent the State and people of Cyprus was therefore irrelevant and the Court was not prevented for that reason from considering the case that Cyprus had referred to it.

55. In similar vein, in the 1999 *Case of Ivcher-Bronstein v. Peru* mentioned above, the Inter-American Court of Human Rights confirmed the "objective" nature of the obligations under the Convention and affirmed that the "international settlement of human rights cases (entrusted to tribunals like the Inter-American and European Courts of Human Rights) cannot be compared to the peaceful settlement of international disputes involving purely interstate litigation (entrusted to a tribunal like the International Court of Justice)" (*Case of Ivcher-Bronstein v. Peru*, Judgment on Competence of 24 September 1999, para. 48). The Court thus cited with approval the words of the European Court in the case of *Soering* vs. *the United Kingdom,* that "regard must be had to [the European Convention's] special character as a treaty for the collective enforcement of human rights" and that "its provisions must [therefore] be interpreted so as to make its safeguards practical and effective" (loc. cit., para. 44). No analogy could therefore be made between declarations that States may make under Article 36, paragraph, 2, of the Statute of the International Court of Justice and those that States Parties may make under the American Convention recognizing the jurisdiction of the Inter-American Court (loc. cit.., para. 47); and, while States may be able to withdraw the former, States Parties to the American Convention cannot withdraw the latter. Peru purported withdrawal of its declaration recognizing the Court's jurisdiction was consequently inadmissible (loc. cit., para. 56); and the Court was accordingly able to proceed to consider the merits of the case that the that the Inter-American Commission on Human Rights had filed with it concerning alleged violations by Peru of Mr. Ivcher-Bronstein's rights.

56. In the case of regional human rights treaties, there is therefore a body of case law that would seem to support the proposition that one State party cannot, by any unilateral action such as a statement of non-recognition, bar any other State party from taking steps to enforce those treaties by triggering the operation of the collective machinery that those treaties create.

57. If this is indeed the case, the question arises whether the same principle applies also to multilateral conventions for the protection of human rights in general and to the Convention in particular.

58. Echoing the European and Inter-American case law, the Human Rights Committee has taken the position in its General Comment No. 24 (52) that human rights treaties "are not a web of inter-State exchanges of mutual obligations" and that "[t]he principle of inter-State reciprocity has no place" in respect of them (CCPR/C/21/Rev.1/Add.6, reproduced in A/50/40, Vol. I, Annex V, at para.17; see also para. 7; and cf. the recommendation 3 of the working group on reservations of the Inter-Committee Meeting of human rights treaty bodies, HRI/MC/2007/5, at para. 16 [19]). The Committee accordingly considered that the provisions of the Vienna Convention on the Law of Treaties regarding objections to reservations are "inappropriate to address the problem of reservations to human rights treaties"; and it considered it "open to question", because of the "special characteristics" of human rights treaties such as the International Covenant on Civil and Political Rights, "what effect objections have between States *inter se*" (loc. cit.), specifically, whether they can have the effect of preventing the application of those treaties between the objecting State and the reserving State.

59. The Committee on Human Rights has thus come close to adopting, if it has not actually adopted, the analysis of the nature of the substantive obligations created by human rights treaties that has been espoused in the jurisprudence under the European and American conventions — an analysis that is antithetical to the notion that one State party can prevent another State party from invoking its failure to comply with its obligations under the Convention and requiring it to conform its conduct with those obligations (cf. the Joint Separate Opinion of Judges Higgins, Elaraby, Kooijmans, Owada and Simma in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports, 2006*, p. 4 at p. 69, para. 16).

60. In a separate, but related, line of reasoning, the Committee on Human Rights considered it to be part of the object and purpose of the Covenant "to provide an efficacious supervisory machinery for the obligations undertaken" by States parties (loc. cit. above, para. 7). Reservations designed to remove the "supportive guarantee" that this machinery represents would be contrary to that object and purpose and so be impermissible (cf. the Joint Separate Opinion of Judges Higgins, Elaraby, Kooijmans, Owada and Simma loc. cit. above, at p. 70, para. 21). From this, the Committee drew the conclusion that a State may not formulate a reservation the effect of which would be to exclude the obligation to present periodic reports to the Committee (loc. cit., para. 11). One could also draw from it the further conclusion that, where a human rights treaty creates machinery for considering inter-State complaints regarding its implementation that (unlike that in the Covenant) is automatically applicable to States parties, reservations that would exclude the competence of that machinery, either in whole or in part, would also be impermissible. Certainly, the Committee was of the view that a

reservation that would exclude its competence to interpret the Covenant would be so (loc. cit.).

61. This analysis would support an argument that, regardless of the juridical nature of the rights and obligations that are created by a human rights treaty, 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. Indeed, Article 20, paragraph 2, of the Convention specifically stipulates that "a reservation the effect of which would inhibit the operation of any of the bodies established by the Convention [shall not] be allowed". A reservation that would inhibit the Committee established under the Convention from examining any communication that might be made by a specific State Party would seem to fall within the scope of this stipulation, just as much as one that would inhibit it from examining a communication by any State Party. If such a reservation is impermissible, a statement of the kind at issue here would arguably be impermissible, also.

62. There is no evidence, however, that such an analysis is supported by States Parties to the Covenant. Indeed, several seem to have taken a different view of the matter. Thus, the United States, the United Kingdom and France each submitted observations on the Committee's General Comment No. 24 (52), maintaining that, notwithstanding anything that the Committee might have said to the contrary, the rules set out in Articles 20 and 21 of the Vienna Convention on the Law of Treaties do in fact apply in respect of reservations to the Covenant that are not incompatible with its object and purpose (see respectively: A/50/40, vol. I, Annex VI A, section 5; A/50/40 Vol. I, Annex VI B, at paras. 5, 13 and 15; and A/51/40, Vol. I, Annex VI, at para. 10). They accordingly considered that a State party is able to object to a permissible reservation and to do so in a manner that, as contemplated in Article 21, paragraph 3, of the Vienna Convention, prevents the entry into force of the Covenant as between itself and the reserving State — a position that is corroborated by the practice of States parties to the Covenant in responding to reservations (*Multilateral Treaties Deposited with the Secretary General*, Chapter IV, no. 4). The United Kingdom specifically affirmed that the practice of States parties demonstrates that they do in fact regard its substantive provisions as creating "a network of mutual bilateral undertakings" between the States parties to it (A/50/40, vol. I, Annex VI B., at para. 5).

63. As for the Convention itself, the Committee on the Elimination of Racial Discrimination seems at one point to have taken an approach similar to that of the Human Rights Committee. Thus, in 1997, the Committee decided to propose the topic of reservations to treaties for consideration by the Sub-Commission of the Commission on Human Rights on Prevention of Discrimination and Protection of Minorities. In explaining its proposal, the note that the secretariat prepared for the Committee (see CERC/C/SR.1189, para. 52) stated that the "concept of reciprocity" cannot be applied to treaties for the promotion of human rights (E/CN.4/1997/Sub.2/1997/31, at p. 3). Six years later, in a Preliminary Opinion on reservations to treaties on human rights that was

prepared for the Committee by three of its members, it was similarly stated that "human rights treaties are not a web of inter-State exchange[s] of mutual obligations" and that the implementation of the Convention is therefore, as in the case of other human treaties, "not a matter of reciprocity". At the same time, however, the Preliminary Opinion makes clear that its authors considered the Convention as, at least in part, a matter of "State to State relationships and commitments" and that becoming party to the Convention is a matter of establishing "relationships between different States parties" (CERD/C/62/Misc.20/rev.3, at p. 2).

64. This latter analysis is borne out by the Committee's consideration in 1981 of Syria's sixth periodic report under Article 9, paragraph1 (b), of the Convention (CERD/C/66/Add.22). Indeed, the Committee there seems to have taken the view that the Convention consists solely of commitments that are owed State to State in the normal manner and that it is possible for one State Party to prevent those relationships from arising vis-à-vis another specific State Party.

65. Thus, Syria's sixth periodic report stated that Israel's occupation of the Golan Heights prevented the application of the Convention in those territories and then made a number of allegations regarding Israel's activities there (para. 8). The Syrian representative repeated this in introducing his country's report before the Committee (CERD/C/SR.507, paras. 27 to 34). A member of the Committee raised a point of order, stating that this represented a communication by a State Party to the effect that another State Party is not giving effect to the provisions of the Convention, within the meaning of Article 11, paragraph 1, and that the Committee had consequently to follow the procedures set out in that article (para. 35). In response, the representative of Syria recalled that, on its accession to the Convention, his country had made a statement that its doing so did not signify that Syria was thereby entering into a relationship with Israel regarding any matter regulated by the Convention. He also stated that his country was not invoking Article 11 in this particular case (para. 37). Pursuant to the Committee's rules of procedure, the Chairman ruled that the relevant portion of Syria's report did not constitute a communication under Article 11, paragraph 1, of the Convention (para. 53). Explaining his ruling, he stated, among other things, that States Parties to the Convention had not raised any objection to the reservation made by Syria at the time of its accession, yet Article 11, paragraph 2, clearly implied that a relationship under the Convention must exist between two States Parties concerned (CERD/C/SR.519, para. 14). An appeal having been made against the Chairman's ruling, it was put to a vote. His ruling was then upheld by 11 votes to 2, with 1 abstention (CERD/C/SR.519, para. 20; A/36/18, para. 173).

66. The fact that, in the present case, the Committee, consistently with Article 11, paragraph 1, of the Convention, transmitted the communication of the State of Palestine to Israel does not entail that it has now rejected this analysis. Its decision at its 97th session to give Israel the opportunity to inform the Committee whether it wished to supply any relevant information on the issues of the Committee's jurisdiction or the

admissibility of the State of Palestine's communication clearly indicates that it has yet to consider the issue.

67. The practice of States Parties to the Convention in formulating and reacting to reservations to it and in making and reacting to statements of non-recognition would seem to indicate that they consider that the legal relationships established by the Convention are ones of the normal kind — namely, that they consist of obligations with correlative rights to require their performance — and that it is consequently possible for a State Party to prevent those relationships from arising between it and another State Party at the same time that those relationships exist between it and other States Parties. There is nothing in that practice to suggest that States Parties consider that the Convention creates a layer of "objective" obligations and rights, over and on top of the obligations and rights of a "reciprocal" nature. Indeed, the fact that several States Parties evidently consider that, by objecting to reservations, it is possible to prevent the entry into force of the Convention between themselves and reserving States concerned suggests that they do not (see the objection by Austria to the reservation of Saudi Arabia, of Cyprus to the declaration by Turkey, of Denmark to the reservation of Yemen, of Finland to the reservation of Yemen, of France to the reservation of Saudi Arabia, of Germany to the reservations of Saudi Arabia and Thailand, of Mexico to the reservation of Yemen, of the Netherlands to the reservation of Yemen, of Norway to the reservation of Saudi Arabia, of Romania to the reservation of Thailand, of Spain to the reservation of Saudi Arabia, of Sweden to the reservation of Yemen and to the declaration of Turkey and of the United Kingdom to the declaration of Turkey and to the reservations of Thailand and Grenada: *Multilateral Treaties Deposited with Secretary-General*, Chapter IV, no. 2).

68. There is also nothing in the practice of the States Parties to the Convention that would suggest that they consider that a State Party cannot take action that would result in Articles 11 to 13 of the Convention not applying as between that State and other States Parties. Indeed, it would appear from the Committee's consideration of Syria's sixth periodic report, discussed above, that the Committee considered this to be entirely possible.

Conclusion

69. The following conclusions can be drawn in the light of the preceding analysis:

(1) A State Party to the Convention is able, through a unilateral statement that is suitably framed, to prevent the creation of obligations and rights under the Convention between itself and another specific State Party.

(2) Israel's communication of 16 May 2014 is framed in such a manner as to have that effect as between itself and the State of Palestine.

(3) There is nothing, either in the juridical nature of the legal relationships that are established between States Parties to the Convention or about the provisions of Article 11, 12 and 13 of the Convention that would bar one State Party from taking action, by means of a unilateral statement suitably framed, the effect of which would be that a right does not vest in another specific State Party to submit a valid and effective communication against it under Article 11, paragraph 1, and so trigger the operation of the procedures set out in those Articles.

(4) Israel's communication of 16 May 2014 is suitably framed to have that effect vis-à-vis the State of Palestine.

(5) Israel's communication of 16 May 2014 therefore, of itself, precludes the Committee from examining a communication filed by the State of Palestine against it under Articles 11 to 13 of the Convention (and *vice versa*).