Committee on the Elimination of Racial Discrimination (CERD)

Statement by H.E. Ms. Aviva Raz Shechter
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Mr. Chairman, Distinguished members of the Committee,

Thank you for the opportunity to speak before you today.

The decision to address you today was not an easy one.

On the one hand, we want to demonstrate our respect for this Committee and its important work.

On the other hand, we must be faithful to our principled position that we do not recognize the Palestinian entity as a “State Party” to the Convention and are not in treaty relations with it.

I have decided to appear before you today after receiving appropriate assurances that this is not a deliberative or interactive session with Israel on the issue before the Committee.

Rather, it is an opportunity for Israel to address the Committee directly before it makes its decision regarding jurisdiction, and in a manner that is without prejudice to our position.

Mr. Chairman,

Israel appreciates the seriousness with which the Committee has sought to address the question of jurisdiction.

And yet, for all the detailed correspondence and argumentation, we believe that the jurisdictional question before the Committee is relatively straightforward.

Allow me to draw the Committee’s attention to some of the most salient points:

On 29 April 2019, this Committee informed both sides that the sole question before it at this stage was, and I quote: “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 articles 12 and 13 of the Convention”, end quote.

The Committee’s own unequivocal view, therefore, as expressed in an official communication, is that the application of the Article 11 mechanism is predicated on the existence of treaty relations.

Now, if, as the Committee has communicated, jurisdiction indeed depends on treaty relations, then the conclusion is inescapable – there are no treaty relations between Israel and the Palestinian entity under the Convention and thus there is no jurisdiction for the Committee to proceed with this complaint.
On 16 May 2014, Israel validly excluded treaty relations between itself and the Palestinian entity under the Convention by a formal communication duly submitted to the UN Secretary-General as depositary.

As has been amply demonstrated, it is firmly established in law and in practice – including the practice under the present Convention – that States may exclude treaty relations between themselves and an entity they do not recognize.

Indeed, this principle flows from the fundamental concept that treaties are based on consent.

What is more, this position was confirmed by the UN Office of Legal Affairs in a Memorandum dated 23 July 2019, prepared at the Committee’s own request. That Memorandum unequivocally concluded that Israel had validly excluded treaty relations and that, "this precludes the Committee from examining a communication filed by the State of Palestine against it under Articles 11 to 13 of the Convention", end quote.

This position is also confirmed by the Committee’s own precedents, in particular an instance involving Syria where the Committee explicitly determined that it lacked jurisdiction under Article 11 in the absence of treaty relations.

Option 2 of the Committee’s draft decision – which was issued just two nights ago – attempts to distinguish the Syrian precedent from the current situation. With respect, this attempt is wholly unpersuasive.

The distinctions raised are immaterial to the relevant legal view expressed by the Committee in the Syrian case. The question the Committee addressed in that instance was whether the absence of treaty relations would prevent jurisdiction over the Syrian complaint, if that complaint were regarded as activating Article 11. Its answer was clear, "Article 11(2) clearly implied that a relationship under the Convention must exist between the two State parties concerned", end quote. The OLA Memorandum confirms this assessment.

In the Syria case, then, the Committee expressed the plain view that treaty relations were a prerequisite for jurisdiction under Article 11. It repeated that in its communication to both sides in April 2019. For it to suddenly and selectively reverse that position is, respectfully, neither appropriate nor sustainable.

Finally, and without regard to the issue of jurisdiction, Israel reiterates to the Committee its continued willingness to address substantive Palestinian allegations through appropriate legal and remedial avenues, including the Committee’s reporting procedures, as it has explained in past correspondence. In fact, just last week Israel directly engaged with the Committee during
its periodical report presentation, in a frank and constructive manner, and addressed issues that overlapped with those raised in the Palestinian complaint.

Mr. Chairman,

Israel was surprised to receive, just two nights ago, a draft decision that includes not only the sound elaboration of arguments as to why the Committee lacks jurisdiction, but also – in the alternative - a lengthy attempt to justify jurisdiction in this case, entitled “Option 2” of the draft decision.

If I understand this draft correctly, it argues that human rights treaties, given their object and purpose, form a special category of treaties, and that therefore the enforcement mechanisms of such treaties, such as Article 11 of the present Convention, do not require treaty relations.

As an initial matter, Israel is compelled to express its concern regarding the extremely short notice given to respond to the arguments made under Option 2. Surely, this does not afford Israel a genuine opportunity to engage with this position.

As I have mentioned, the Committee officially communicated that the jurisdictional issue before it was whether there were treaty relations which “would allow” for the application of the Article 11 mechanism.

It was in reliance on this position that the bulk of Israel’s submissions to the Committee were made.

Now, just two days before the Committee’s decision, we are told that the existence of treaty relations may not be that relevant after all, and an alternative theory for jurisdiction is presented by the Committee.

Numerous legal questions and concerns arise from this draft which cannot be given due consideration in the context of my brief remarks today. There is a basic issue of fairness here.

Second, it is telling that Option 2 makes no effort to engage directly with the arguments made in the OLA Memorandum. In fact, it makes almost no mention of the Memorandum at all. And yet, the Memorandum itself specifically rejects the view reflected in Option 2.

Indeed, in the words of the Memorandum, after considering the category of human rights treaties: quote, “there is nothing in the practice of the States Parties to the Convention that would suggest that a State Party cannot take action that would result in Article 11 to 13 of the Convention not applying as between that State and other States Parties”, end quote.

It seems strange indeed for the draft decision in Option 2 to ignore the OLA Memorandum, and not engage in detail with its analysis and arguments. It is hard to comprehend why the legal
position of the Office that acts as depositary for this Convention, and whose views were specifically sought by the Committee, can be so casually dismissed.

Third, the course of action recommended by Option 2 seems particularly problematic for advancing the legal force of human rights treaties in general. Human rights treaties do not operate in a vacuum. They form an integral part of international law. In fact, they rely on the principles of general international law, and of treaty law in particular, for their very legitimacy, effectiveness and implementation.

To treat human rights treaties as a distinct category to which the most fundamental principle of consent to be bound by a treaty does not apply, does not increase their stature; it undermines it.

It is here it seems, that Option 2, fails to make a critical distinction that I would ask Committee members to pay special attention to.

It is one thing to say that human rights treaties, such as this Convention, have a special objective character that entitle third, non-affected, State parties to bring a complaint under Article 11. It is quite another thing to say that this notion applies even when there are no treaty relations between the States parties. It seems that Option 2 has conflated these two separate ideas.

The fact that the Convention’s Article 11 mechanism may enable non-affected State parties to bring a complaint does not invalidate the basic principles of consent under treaty law. There is simply no legal relationship between Israel and the Palestinian entity under the Convention. And there is no precedent for a complaint mechanism being used in this way, when there are not even treaty relations at the time recourse to the complaint mechanism is being sought.

And yet, Option 2 seeks not only to affirm the objective and special character of the Convention, but to enforce its application in the absence of the basic elements of treaty law. The underlying rationale of the draft decision in Option 2, and the sources it cites, simply does not justify going so far.

It is noteworthy, in this respect, that the European Court of Human Rights itself held that while it is necessary to be mindful of the special character of human rights treaties, quote “The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part”, ¹ end quote. And Bruno Simma, former judge of the International Court of Justice, has observed, that while human rights treaties do possess distinctive features, they quote “do not constitute ‘self-contained regimes’ decoupled from the general law of treaties …” ² end quote.

The very essence of a treaty, as the Vienna Convention stipulates, is agreement between States parties. This is the source of obligation. While human rights treaties have special qualities, those qualities surely don’t extend to nullifying the principles of mutual recognition and consent that lie at the heart of treaty law.

What is more, if the message sent by the Committee to States were to be that their objections to treaty relations will not be respected, then the Committee is likely to incentivize States who do not consent to being compelled into a relationship with non-recognized entities, to withdraw from, or refrain from joining, such treaties. It is hard to see how the cause of human rights treaty implementation would be helped in this way.

**Finally**, it is striking that Option 2 contends that the Committee should find jurisdiction in this case because the conciliatory nature of Articles 11 to 13 of the Convention should, *quote* “be implemented in a manner that is practical, constructive and effective”, *end quote*. This view, with respect, seems unrealistic and problematic. Conciliation – like any other means of peaceful settlement of disputes – is based on consent. Article 11 is about negotiation and conciliation between quote “parties to the dispute”.

Option 2 itself notes that the effectiveness of the Article 11 mechanism, *quote* “would depend on the will of the State parties involved”, *end quote*. But how is it “practical, constructive or effective” to try to compel a State into a conciliation process with an entity it does not even recognize under the Convention, and with which it is not in treaty relations? How is there a dispute - or conciliation of that dispute - between parties that do not legally recognize one another under the Convention?

Mr. Chairman,

It is impossible to ignore the selective treatment of Israel that would result from a determination that the Committee had jurisdiction in this case. Israel has a long and bitter experience with its selective treatment in many of the UN human rights bodies in Geneva. It would ask the Committee to consider the implications of embarking on a similar course.

If the Committee decides to ignore its own past practice and statements; to ignore its own explicit communication to both sides; to ignore the OLA Memorandum that the Committee itself requested; and to ignore widespread and established treaty law and practice; all in order to apply a different, unprecedented standard to a communication against Israel – what conclusion is there to reach?

It would be ironic indeed if the Committee on the Elimination of Racial Discrimination were to apply its own decisions in a discriminatory manner. But more than ironic, it would - we respectfully submit - gravely undermine the important role this Committee is entrusted with carrying out in enhancing universal compliance with the Convention.
Mr. Chairman,

Allow me, to end on a more personal note.

I have been a diplomat for my country for over thirty years. Prior to this position, I served as Deputy Director General for Middle East Affairs, a position which enabled me to engage in extensive efforts at dialogue and reconciliation with our Palestinian neighbors, and with many throughout the Middle East.

I have experienced first-hand how human interactions and genuine, respectful face-to-face dialogue between peoples can create opportunities for addressing grievances and resolving conflict. I have also witnessed first-hand how some dynamics in United Nations fora, especially in Geneva, turn the UN so easily into a stage upon which we act out our differences rather than a forum for resolving them.

No matter how adamantly Palestinian representatives at the UN try to present this conflict as a cartoon like narrative with one victim and one villain, the story of this conflict is more complex than that.

It is a conflict involving the rights of two peoples, not one. It is a conflict involving the obligations of two peoples, not one. It is a conflict involving the suffering of two peoples, not one. These kinds of conflicts need a negotiation process that brings peoples together, not more recriminations in UN bodies that will only pull them further apart.

I ask you, Mr. Chairman, Members of the Committee, what is to be gained from initiating a process under Article 11 in these circumstances? Quite apart from the fact that the case for jurisdiction is, we respectfully argue, legally untenable – there is another, no less, compelling consideration.

In what way are the noble and critical objectives of this Convention advanced by trying to compel a conciliation process in the absence of treaty relations and the consent of both sides? In what way is the difficult task of bringing an end to the Israeli-Palestinian tragedy advanced?

Whatever your objectives may be, and we do not question that they are well-intentioned, this course of action can only add to the atmosphere of tension and mutual recrimination between our two peoples. We have more than enough of that.

I would ask you, respectfully, to take all that into consideration as you make your decision. Thank you, Mr. Chairman and members of the Committee, for your kind attention.