Mission permanente d'Israël
auprès de l'Office des Nations Unies
et des Organisations Internationales à Genève

משלחת ישראל
ליד משרד האומות המאוחדות
והארגונים הבינלאומיים בג'נבה

Chairperson and Members of the
Committee on the Elimination of Racial
Discrimination and the CERD Secretariat
UNOG – OHCHR

Geneva, 13 November 2019

To the attention of the Chairperson, Committee Members and the Secretariat,

Please find herewith attached a communication submitted by Israel relating to the communication that was forwarded to the Permanent Mission of Israel by the Secretariat of CERD, dated 19 September and 15 October 2019 (Reference: ICERD-ISC 2018/3).

Sincerely,

Aviva Raz Shechter
Ambassador
Permanent Representative

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The Permanent Mission of Israel to the United Nations and other International Organizations in Geneva presents its compliments to the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) and wishes to refer to the Secretariat's Notes, dated 19 September and 15 October 2019 (Reference: ICERD-ISC 2018/3), by which two Palestinian submissions, made in connection with the Palestinian communication purportedly submitted under Article 11 of the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: "the Convention" or "CERD"), were transmitted to the Permanent Mission.

Before addressing the claims made in the abovementioned submissions, the Permanent Mission wishes to recall that the jurisdictional issue currently pending before the Committee on the Elimination of Racial Discrimination (hereinafter: "the Committee") with respect to the Palestinian communication is straightforward, as is the conclusion that is to be drawn regarding the lack of jurisdiction in this instance.

As the Committee has itself communicated to both sides in its Note Verbale of 29 April 2019, the question before it is **"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".** The Committee's own view, therefore, in keeping with its past practice and the terms of the Convention, is that application of the Article 11 inter-State complaint mechanism is predicated on the existence of treaty relations. In this regard, the extensive correspondence with the Committee[1] has amply demonstrated, *inter alia*:

- That it is firmly established in law and in practice – including under the present Convention – that States may well exclude treaty relations between themselves and an entity they do not recognize;
- That Israel has in fact validly excluded treaty relations between itself and the Palestinian entity under the Convention by a formal communication duly submitted to the United Nations Secretary-General as depositary;

[1] *See* Israeli communications dated 3 August 2018 (hereinafter: "Israeli Communication of August 2018"); 14 January 2019 (hereinafter: "Israeli Communication of January 2019"); and 20 March 2019 (hereinafter: "Israeli Communication of March 2019").

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- That the Committee, in a past instance, has explicitly determined that it lacks jurisdiction under Article 11 in the absence of bilateral treaty relations;
- That, accordingly, the Committee lacks jurisdiction in this instance to consider under Article 11 the Palestinian complaint, and that it would be acting contrary to international law and applying its own decisions in a discriminatory manner were it to decide differently in this case;
- That the United Nations Office of Legal Affairs in its Memorandum dated 23 July 2019, prepared at the Committee's request (hereinafter: "OLA Memorandum"), unequivocally concluded that Israel has validly excluded treaty relations with Palestinian entity under the Convention 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 (and *vice versa*)".[2]

Given this clear legal situation, the Permanent Mission regrets that the Palestinian submissions dated 28 August and 11 October 2019 continue to throw sand in the eyes of the Committee in an attempt to distract it from the straightforward jurisdictional question pending before it. Through a combination of rehearsed failed arguments and distorted counter-arguments, the submissions essentially ask the Committee to disregard established international law and practice, including its own. Yet the "trust of the international community at large in [the Committee's] objectivity", as the Palestinian side refers to it,[3] precisely requires the impartial and consistent application of both the law and the Committee's own precedents, and these cannot but lead to the conclusion that the Committee lacks jurisdiction in this instance.

As to the OLA Memorandum

Before turning to some of the inaccurate and misleading claims with which the Palestinian submissions are unfortunately replete, the Permanent Mission wishes to record its strong rejection of any Palestinian allegations of misconduct on Israel's part in gaining knowledge of the OLA Memorandum and in sharing that knowledge with the Committee.

As already explained in the Permanent Mission's Note Verbale dated 6 September 2019, information regarding the OLA Memorandum came to Israel's attention through no improper proactive measures of its own. Moreover, it is assumed that information regarding the conclusions drawn by the Memorandum had been similarly shared with the Palestinian side, which chose not to bring it to the Committee's attention given

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[2] OLA Memorandum, para. 69.
[3] 'Observations on the OLA Memorandum' submitted to the Committee by the Palestinian side on 28 August 2019 (hereinafter: "Palestinian Observations"), para. 44.

that those conclusions are so adverse to Palestinian claims. Either way, Palestinian allegations of wrongdoing on Israel's part in this regard are indeed both baseless and malicious. In Israel's view, informing the Committee in good faith that Israel was aware of the OLA Memorandum, and that it considers it to lend further support to its case, was appropriate, if not imperative. It was certainly not intended in any way to exert undue pressure on the Committee; and it is immaterial to the Committee's lack of jurisdiction in this instance, which the Memorandum fully corroborates.

To be sure, Israel's position is not based on the OLA Memorandum, which rather confirms the legal position regarding the absence of jurisdiction that had earlier been set out before the Committee in great detail. Nor does the OLA Memorandum require any interpretation or commentary of the kind that the Palestinian submissions seek to offer: its conclusions are unambiguous. Indeed, it is particularly puzzling to see the Palestinian submission criticize the OLA Memorandum for both its methodology and conclusions, while at the same time claiming, through distorted and tendentious reasoning, that it supports the position advanced by them (when it clearly does not).[4] In short, the OLA Memorandum provides an independent assessment that makes it clear that the Committee lacks jurisdiction in the present case, an assessment that is firmly established in law and practice, including the Committee's own past decisions.

As to the Palestinian submissions

Given the manifest lack of jurisdiction in this case, and the extensive correspondence already addressed to the Committee on this matter, it hardly seems necessary to reply to the many misleading and recycled claims made in the most recent Palestinian submissions. Nevertheless, out of respect for the Committee's work, and in the interest of setting the record straight, some of the more glaring flaws in these submissions will be briefly noted.

The International Law Commission's determination as to lack of treaty relations in cases of non-recognition

Regrettably, the Palestinian submissions attempt to set aside the explicit assertion by the International Law Commission, according to which a statement of non-recognition (such as that submitted by Israel with regard to the purported accession of the Palestinian entity to the Convention) "clearly purports to have **(and does have) a legal effect on the application of the treaty, which is entirely excluded**, but only in relations between the declaring State and the non-recognized entity".[5]

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[4] Palestinian Observations, paras. 11-17.

[5] Report of the International Law Commission, Sixty-third session, UN Doc. A/66/10/add.1, paragraph 5 of the commentary to Guideline 1.5.1 (emphasis added).

As the OLA Memorandum notes, there are indeed two types of statements of non-recognition: "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".[6] The Memorandum makes a point of noting that the statement made by Israel is of the second type, and that **"States, being free, by virtue of their sovereignty, to choose whether and with which other States to enter into relations, it is difficult to see why statements of the second kind would not have the legal effect that the Commission attributed to them. 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**".[7]

As may readily be seen, to argue, as the Palestinians do, that the International Law Commission did not take a position as to the legal effect of such statements,[8] is plainly incorrect.

Nothing in the erga omnes character of substantive treaty provisions affects the issue of jurisdiction

The Palestinian Observations yet again conflate the nature of certain substantive provisions of the Convention (as possibly creating obligations *erga omnes partes*) with the jurisdictional conditions necessary for the procedural mechanism established under Article 11. The OLA Memorandum, of course, reaches the opposite conclusion.[9] Indeed, the ICJ itself has emphasized more generally that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things", and that "the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute".[10] Put simply, the jurisdictional limits of procedural mechanisms are not rendered meaningless because of the importance of the substantive rules involved.

As the OLA Memorandum stresses, and notwithstanding Israel's obligation as a State Party to comply with the Convention, the absence of treaty relations between Israel and the Palestinian entity has the effect that "Israel does not owe any obligations

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[6] OLA Memorandum, para. 27.
[7] OLA Memorandum, paras. 30-31.
[8] Palestinian Observations, para. 18.
[9] OLA Memorandum, para. 40.
[10] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 32, para. 64; *see also* Israeli Communication of January 2019, p. 10-11; Israeli Communication of March 2019, para. 21.

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*)."[11]

The false claim that Israel has conceded that its statement excluding treaty relations is governed by the law on reservations

The Palestinian Observations insist on maintaining the untenable argument that Israel has accepted that its statement of non-recognition of the Palestinian entity is governed by the law on reservations.[12] This argument has been dealt with previously by Israel,[13] and can be quickly dismissed here.

To support this unfortunate claim, the Palestinian Observations quote from Israel's statement that an objection to treaty relations 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".[14] However, as a plain reading of the Permanent Mission's Note, dated 3 August 2018, makes clear, at no point was Israel arguing that objections and reservations are equivalent in all respects and should be treated as such. Under treaty law they are indeed understood as distinct. Israel's point was only that in their *legal effect* in the present instance there is a similarity "in as much as both would exclude the applicability of the Article 11 mechanism in relations between Israel and the Palestinian entity".[15] This is readily apparent from the words quoted in the Palestinian communication itself, including the terms *"in effect"* and *"in as much as"*. It is also an elementary matter that two different actions can have a similar legal effect without it meaning that they are necessarily governed by the same law. And, as the International Law Commission and other legal authorities have made clear, the exclusion of treaty relations between a State and a non-recognized entity is not a reservation, and its legal effects flow instead from the well-established and widely-recognized principle, that States cannot be compelled to be in treaty relations with entities they do not recognize.

This issue demonstrates yet another flaw in the Palestinian argument. Contrary to the Palestinian claim, Israel's objection to treaty relations between itself and the Palestinian entity does not "render the inter-State complaint mechanism ineffective": it simply produces a situation in which the mechanism is not, according to its own

[11] OLA Memorandum, para 33.
[12] Palestinian Observations, para. 35.
[13] Israeli Communication of January 2019, p.11.
[14] Palestinian Observations, para. 35.
[15] Israeli Communication of August 2018, p. 6.

terms, intended to apply. This is not an attempt to alter or somehow deconstruct the Article 11 mechanism: the mechanism itself requires treaty relations and if such relations do not exist it is simply not applicable.[16]

As the OLA Memorandum notes, the Committee itself has already determined that the inter-State mechanism of Article 11 requires treaty relations among the parties concerned –[17] a position the Committee reiterated in the present context in its Note Verbale of 29 April 2019. Indeed, in a previous instance before the Committee it was decided that Syria could not have been understood as activating the inter-State complaint mechanism with respect to Israel since, *inter alia*, it had made clear that its "ratification [of the Convention] would not imply any relationship with Israel," while **"Article 11, paragraph 2, clearly implied a relationship between two States parties"**.[18] This decision clearly demonstrates that the Committee has itself already concluded that States Parties may object to treaty relations under the Convention; that Article 11 requires the existence of treaty relations; and that, accordingly, where a State party has objected to treaty relations, the Article 11 mechanism cannot be activated. The conclusion that the Committee lacks jurisdiction to consider the Palestinian inter-State complaint purportedly made under Article 11 thus accords not only with treaty law and practice generally, but also with the Committee's own past decisions.

The Palestinian attempt to distinguish the Syrian precedent by pointing to the absence of objections to the Syrian statement excluding treaty relations either misunderstands or knowingly misrepresents the legal position. First, the Palestinian Observations conveniently ignore the Committee's own Note Verbale to the Israeli and Palestinian sides, according to which it is required to determine whether there are treaty relations in the present situation before the Article 11 mechanism may be activated. Second, as the OLA Memorandum notes as well, the Committee's decision did not turn on the issue of whether States objected to the Syrian statement. The Chairman of the Committee merely made a note of the fact that no objections were made to the Syrian statement, but then proceeded to state in general terms that Article 11 requires treaty relations. Third, as has been amply demonstrated in past communications, the legal validity of statements excluding treaty relations with a non-recognized entity does not depend in any manner on the position of other States Parties in this respect, and certainly not on the position of the non-recognized entity. Such statements are grounded in the legal principle that States may not be compelled to be in a treaty

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[16] Israeli Communication of January 2019, at p. 12.
[17] *See* OLA Memorandum, paras. 64-66 (citing the Committee in the context of Syria's sixth periodic report).
[18] Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 36th Sess. (1981), Supp. No.18, at 54, par. 173, A/36/18(SUPP).

relationship with an entity they do not recognize, whether or not the non-recognized entity accepts this situation. The fact that the Palestinian entity purported to object to Israel's statement has no legal implications in this context. As the OLA Memorandum confirms, it does not affect the legal validity of Israel's statement, and does nothing to diminish the force of the Committee's own precedents and decisions on this issue.

Irrelevance of the Human Rights Committee's General Comment 24 to the issue before the Committee

The Palestinian reliance on General Comment 24 of the Human Rights Committee[19] is equally without merit. The Palestinian Observations claim that 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'".[20] This claim is demonstrably misleading on several grounds. To begin with, it once again conflates the concept of *reservations* (made by a State Party to certain treaty provisions), with which the Human Rights Committee was concerned,[21] with that of *statements of non-recognition* that object to treaty relations. As noted above, a statement excluding treaty relations between a State and a non-recognized entity is not a reservation. Nothing in General Comment 24 implies that a State party to a treaty cannot exclude the application of that treaty between itself and an entity that it does not recognize.

Furthermore, General Comment 24 was provided in the limited context of the International Covenant on Civil and Political Rights and specifically concerned the interaction between State Parties to that Covenant and the Human Rights Committee. Even in that narrow context, the conclusions and reasoning of General Comment 24 remain disputed among States Parties to the Covenant.[22] Quite apart from this,

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[19] UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, https://www.refworld.org/docid/453883fc11.html [last accessed 7 November 2019] (hereinafter: "General Comment 24").

[20] Palestinian Observations, para. 13.

[21] General Comment 24, para. 2. Indeed, the HRC explicitly states that General Comment 24 "addresses the role of States parties in relation to the reservations of others and the role of the [Human Rights] Committee itself in relation to reservations".

[22] The OLA Memorandum notes, for instance, that "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 compatible with its object and purpose." [Emphasis added]. *See* the OLA Memorandum, para. 62.

however, the Human Rights Committee simply did not address, and obviously has no mandate to address, obligations that are owed under CERD or the jurisdictional conditions of the inter-State complaint mechanism referred to thereunder.

It is telling that the Palestinian citation of the OLA Memorandum in this regard is once again partial and appears to be intended to deliberately mislead. The Palestinian side claims that the "OLA itself agrees" with the Palestinian argument that General Comment 24 prevents the exclusion of CERD's enforcement machinery.[23] But the Memorandum does no such thing. The OLA merely examines whether such an argument is sustainable, and by no means states that it agrees with such an analysis. In fact, it directly contradicts the Palestinian assertion by explaining that "[t]here is no evidence ... that such an analysis is supported by States Parties to the [International] Covenant [on Civil and Political Rights]."[24]

The Palestinian side also criticizes the OLA Memorandum by claiming that it only examines the practice of a small number of States Parties to the ICCPR.[25] It fails to note, however, that the Memorandum is not limited in this respect to ICCPR practice but also examines extensively the practice of numerous States Parties to CERD.[26] It is following this general analysis that the Memorandum decisively concludes, contrary to Palestinian arguments, that: "[t]here 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 '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."[27]

It may also be noted that the Palestinian side refers in this context to a Preliminary Opinion that was prepared by members of CERD in 2003, which it claims supports the view that the Convention "is not a matter of reciprocity".[28] This Opinion has not been shared with the Israeli side, and it is unclear how the Palestinian side unilaterally got access to this document or what this claim is based upon. What is clear is that the OLA Memorandum dismisses this argument by clarifying that "the Preliminary Opinion makes it clear that its authors considered the Convention as, at least in part, a matter of 'State to State relationships and commitments' and that becoming a party to the

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[23] Palestinian Observations, para. 13.
[24] OLA Memorandum, para. 62.
[25] Palestinian Observations, para.12.
[26] OLA Memorandum, para. 67.
[27] *Id.*
[28] Palestinian Observations, para. 30

Convention is a matter of establishing 'relationships between different State Parties'".[29]

Israel's past references to statements of non-recognition

The references made by the Palestinian side to Israel's past statements on the exclusion of treaty relations under the Convention are no less disingenuous. The argument presented in the Palestinian Observations relies on a transparent manipulation of the text of Israel's reaction in 1969 to Iraq's statements of non-recognition made upon the latter's signature and ratification of the Convention.[30] Contrary to the Palestinian argument, Israel did not claim at the time that no legal relevance can be attached to the Iraqi statements excluding treaty relations. In fact, its exact statement was that "no legal relevance can be attached to those Iraqi statements which purport to represent the views of the other States".[31] Israel's assertion of a lack of legal relevance related clearly and specifically to the attempt in the Iraqi statement to purport to represent *"all* Arab states", not to the exclusion of treaty relations between Israel and Iraq under the Convention.[32] The Palestinian claim here is made possible only by deliberately omitting to quote Israel's statement in full, in the hope of misleading the Committee.

The Palestinian entity's reference to Israel's communication regarding Bahrain's accession to the Genocide Convention is likewise unfortunate.[33] As Israel has already explained, this argument fails to distinguish between the substantive obligations that are binding on a State party under a treaty, and the applicability of an inter-State complaint mechanism which requires treaty relations.[34]

The necessity of a treaty relationship under the Convention in order to activate the inter-State mechanism of Article 11

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[29] OLA Memorandum, para. 63, (citing CERD/C/62/Misc.20/rev.3/, at p.2).
[30] Palestinian Observations, para. 39.
[31] International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, Israel: Communication, C.N. 135.1969.TREATIES-14, 6 August 1969, https://treaties.un.org/doc/Publication/CN/1969/CN.133.1969-Eng.pdf (last accessed 6 November 2019) (emphasis added).
[32] Iraq specifically stated that "...approval by the **Arab States** of the said Convention and entry into it by their respective governments, shall in no way signify recognition of Israel or lead to entry by the **Arab States** into such dealings with Israel as may be regulated by the said Convention." [Emphasis added] International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, Iraq: Communication, C.N.26.1969.TREATIES-3, 31 March 2019, https://treaties.un.org/doc/Publication/CN/1969/CN.26.1969-Eng.pdf (last accessed 6 November 2019)
[33] Palestinian Observations, para. 38.
[34] *See* Israeli Communication of January 2019, pp. 10-11; *see also* Israeli Communication of March 2019, paras. 21, 31.

The remarkable shift in the Palestinian entity's argumentation, from first insisting that a treaty relationship exists between Israel and the Palestinian entity under the Convention, to now claiming that no treaty relationship is at all necessary, attests to the weakness of the Palestinian legal position.

In any event, as noted above, the Committee itself has already stipulated that the existence of a treaty relationship under the Convention is indeed indispensable for entertaining proceedings under the complaint mechanism provided for in the Convention.[35] Needless to say, this position is further supported in the OLA Memorandum, which explicitly concludes that the absence of treaty relations under the Convention between Israel and the Palestinian entity:

> **"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."[36]**

Looking to the future

As the Permanent Mission has earlier made clear, Israel acknowledges that lack of jurisdiction under Article 11 of the Convention does not relieve States of fulfilling in good faith their obligations under the Convention. Additionally, Israel remains willing to address Palestinian allegations through appropriate alternative avenues, including the one afforded by the Committee's reporting procedures. The open and constructive dialogue between the Committee and Israel has proven itself constructive in the past, and Israel is hopeful that it will continue to be constructive going forward.

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[35] *See* Reply adopted by the Committee on 29 April 2019, to the Note Verbale submitted by the State of Israel on 23 April 2019 ("The object of the upcoming proceedings is precisely to determine whether there is in respect of the Convention a treaty relation … which would allow for the application of the articles 12 and 13 of the Convention").

[36] OLA Memorandum, para. 46.

At the same time, Israel asks the Committee that it be impartial in its rulings, and apply its previous decisions, alongside the applicable legal principle and precedent, in a consistent and non-discriminatory manner. The Committee is entitled to expect of all States Parties to cooperate with its work. But States Parties are equally entitled to expect that the Committee base its determinations on well-established law and practice, as well as its own past decisions and statements. This is especially so in a situation as clear-cut as the present one, and after the submission of a Memorandum by the United Nations Office of Legal Affairs, at the Committee's own request, which unequivocally confirms the lack of jurisdiction to proceed under Article 11 in this instance.

Finally, the Permanent Mission respectfully requests that a decision of no jurisdiction be given without further delay. In cases such as this, where the lack of jurisdiction is indeed manifest, the proper administration of justice requires that all proceedings be brought to an end as rapidly as possible.

The Permanent Mission avails itself of this opportunity to renew to the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) the assurances of its highest consideration.

Geneva, 13 November 2019