EUROPEAN CENTRE FOR LAW AND JUSTICE

21 November 2016

VIA OVERNIGHT DELIVERY SERVICE

HE Vitaly Churkin
Ambassador
Permanent Mission of the Russian Federation
to the United Nations
[redacted]

RE: Potential Security Council Action Concerning the State of Israel

Your Excellency:

By way of introduction, the European Centre for Law and Justice (ECLJ) is an international not-for-profit law firm located in Strasbourg, France, dedicated to protecting human rights and religious freedom in Europe and around the world. The ECLJ has held Special Consultative Status as an NGO before the United Nations/ECOSOC since 2007[1]. The ECLJ submits this correspondence on behalf of its members and over 248,000 persons, including persons residing in 162 nations and territories.

We call your attention to a matter of grave importance. Reports indicate that certain Member States, intending to exploit the transition period between U.S. presidential administrations, plan to propose resolutions to the UN Security Council that would, if passed, be potentially damaging to the security, sovereignty and diplomatic standing of the State of Israel.

We are concerned about resolutions affecting Israel's borders or punishing Israel for allegedly illegal "settlement" activity in disputed territories. Measures could also include attempts to force a change in the *status quo* in Jerusalem and/or otherwise to impose terms or conditions upon or require concessions from the State of Israel prior to a resumption of peace negotiations.

The waning days of a U.S. presidential administration are not the time for the Security Council to advance measures which would disturb a very delicate *status quo* and may clash with U.S. policy under the incoming administration. It would be prudent to defer any such discussion or vote until the new U.S. presidential administration is in office.

In the event that any such resolution comes before the Security Council for consideration, we urge your country to exercise her veto power.

[1]NGO Branch, U.N. Dep't of Econ. & Soc. Affairs, Consultative Status for the European Centre for Law and Justice (2007), http.//esango.un.org/civilsociety/ (accessed by searching "European Centre: for Law and Justice" in the iCSO Database).

Blocking such provocative measures would be consistent with the position expressed by the incoming U.S. presidential administration and would send a clear and strong signal of cooperation from your country moving forward[2].

At this opportunity, we believe it important to remind you of the following:

I. The So-Called Pre-1967 Lines Were in Fact the 1949 Armistice Lines & Not Intended to Be Internationally Recognised Borders.

Historically, when Great Britain informed the U.N. in 1947 that it was going to withdraw its forces from Palestine in 1948, the U.N. General Assembly decided upon a plan to partition Palestine into an Arab state, a Jewish state, and an area under international control[3]. Jewish Palestinians accepted the plan, whereas Arab Palestinians rejected it. Following the British withdrawal in 1948, the newly proclaimed Jewish Palestinian State, called Israel, was immediately attacked by its Arab neighbours. The war continued into 1949, when a series of armistice agreements was signed[4].

The resulting 1949 armistice lines, which delimit the so-called West Bank and Gaza Strip (often referred to as the pre-'67 lines), have *never* been regarded as international boundaries. In fact, *it was at Arab insistence that the 1949 lines be designated as mere armistice lines, not international boundaries*, because the Arab world did not want to confer any form of international legitimacy on the newly proclaimed Jewish State of Israel. From 1949 until 1967, the portions of the Palestine Mandate not under the control of Israel remained under the military rule of Jordanian and Egyptian armed forces, respectively. No *Arab* Palestinian state was ever created in the West Bank or Gaza Strip between the 1948-49 and the 1967 Arab-Israeli wars, and no *Arab* Palestinian state has been created in any territory of Palestine since 1967, although Israeli leaders have expressed support for the position that an Arab Palestinian state may someday be created in parts of the West Bank and Gaza Strip *pursuant to direct negotiations between Israeli and Palestinian authorities*, a formula to which Arab Palestinian authorities have agreed[5].

Moreover, as a result of the 1967 Arab-Israeli war, Egyptian forces withdrew from the Gaza Strip, Jordanian forces withdrew from the West Bank, and Israel acquired control of both territories[6]. Following the 1967 war, the U.N. Security Council adopted Resolution 242[7]. A proper and historically accurate consideration of Resolution 242 leads to three important observations.

First, the language in that Resolution requires that Israel withdraw "from territories" it captured — *not* from "the" territories or "all the" territories it captured. We know from historical records that

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[2]*See* Nahal Toosi, *Trump Team Warns Obama Not to Make Major Moves on Foreign Policy*, POLITICO (10 Nov. 2016, 9:53pm), http://www.politico.com/story/2016/11/donald-trump-obama-foreign-policy-231188.

[3]G.A. Res. 181(11). U.N. Doc. A/RES/181 (29 Nov. 1947).

[4]General Armistice Agreement art. 5, para. 1, Isr.-Syria, 20 July 1949, 42 U.N.T.S. 327 (noting that the armistice line does not enshrine an ultimate territorial arrangement[]"); General Armistice Agreement art. 6, para. 9, Isr.-Jordan, 3 Apr. 1949, 42 U.N.T.S. 303 (noting that the armistice line is "without prejudice to future territorial settlements or boundary lines"); General Armistice Agreement art. 4, para. 2, Isr.-Leb., 23 March 1949, 42 U.N.T.S. 287 (noting that the "basic purpose" of the armistice line: is to "delineate the line beyond which the armed forces of the respective Parties shall not move"); General Armistice Agreement art. 5. para. 2. Isr.-Egypt, 24 Feb. 1949, 42 U.N.T.S. 251 (noting that the armistice line is "not to be construed . . . as a political or territorial boundary" and that the line is "delineated without prejudice" to the "ultimate settlement of the Palestine question").

[5]*See, e.g.*, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, 28 Sept. 1995, 36 I.L.M. 557.

[6]Israel also acquired control over the Sinai Peninsula and the Golan Heights.

[7]S.C. Res. 242, U.N. Doc. S/RES/242 (22 Nov. 1967).

these were intentional omissions from the language of the Resolution[8]. Moreover, Israel had also captured the Sinai Peninsula from Egypt and the Golan Heights from Syria in the 1967 war. Those areas were also part of the "territories" to which Resolution 242 referred, and Israel has, in fact, returned the entire Sinai Peninsula to Egypt pursuant to the peace treaty between the two countries[9], thereby demonstrating Israel's willingness to comply with Resolution 242 when their Arab counterparts are serious about making peace.

Second, the Resolution requires "secure . . . boundaries"[10]— something that did not exist prior to 1967 as evidenced by the persistent attacks mounted against Israel from Arab-controlled territory and would not exist today if the *status quo ante* were reinstated (i.e., the 1949 armistice lines were to serve as actual borders). Hence, any return to the 1949 armistice lines would be a recipe for war rather than a recipe for peace, as numerous Palestinian authorities have recognised (and advocated)[11].

Third, the Resolution calls for the termination of all "states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area . . ."[12]. None of that has occurred following the 1967 war, except with Egypt in 1979 and Jordan in 1994. Once again, by returning the Sinai Peninsula to Egypt, Israel has demonstrated its willingness to withdraw "from territories" it captured in 1967 via peace negotiations with its Arab neighbours.

To date, no internationally recognised, defensible borders have been negotiated between Israel and a future Arab Palestinian state to be carved out of remaining territory of the Mandate for Palestine. Any action by the Security Council which would attempt to force an Israeli withdrawal to the 1949 armistice lines or to similar "borders" would be offensive to both history and law. Any attempt to do so during the transition period between U.S. presidential administrations would be especially imprudent and could lead to an increasing unwillingness on the part of Israel to engage in resolving the outstanding issues between Israelis and Arab Palestinians, likely supported by a new resolve on the part of the incoming U.S. Administration to aid Israel in overcoming the historical and legal injustice such a decision by this Council would visit upon Israel.

II. Jewish "Settlement" Activity Takes Place in Disputed, as opposed to "Occupied", Territory

The issue of Israeli "settlement" activity in disputed territory, east of the 1949 Armistice Lines ("the West Bank"), is hardly new — in fact, it is nearly fifty years old. Thus, any manufactured or purported need to rush a resolution addressing the "settlement" activity through the Security Council in the next sixty days—before the new U.S. presidential administration takes office—is nothing more than a calculated political maneuver. Further, declaring that Israeli settlements are in "occupied

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[8]According to Lord Caradon, then Permanent Representative of the United Kingdom to the United Nations and chief drafter of Resolution 242:

> Much play has been made of the fact that we didn't say "the" territories or "all the" territories. But that was deliberate. I myself knew very well the 1967 boundaries and if we had put in the "the" or "all the" that could only have meant that we wished to see the 1967 boundaries perpetuated in the form of a permanent frontier. This I was certainly not prepared to recommend.

Id at I(i). Note that the territories Israel captured included the Sinai Peninsula and the Golan Heights in addition to the West Bank and the Gaza Strip.

[9]Peace Treaty Between Israel and Egypt, Isr.-Egypt, 26 Mar. 1979, 32 U.S.T. 2146.

[10]S.C. Res. 242, *supra* note 7, at I(ii).

[11]*See, e.g.*, Chris Hedges, *Arafat Calls P.L.O. Pact with Israel a 'First Step' to a Full Pullout*, N.Y. TIMES (Sept. 20, 1993), http://www.nytimes.com/1993/09/20/world/arafat-calls-plo-pact-with-israel-a-first-step-to-a-full-pullout.html ("Yasir Arafat promised Arab foreign ministers today that the peace accord with Israel was only the 'first step' in an effort to regain lands controlled by Israel, including East Jerusalem.").

[12]Note also that the language does not refer at all to the Palestinians, since there was no Palestinian "state" at the time, and no Palestinian "state" currently exists.

Palestinian Territory" is both factually inaccurate and legally questionable. The main argument repeatedly raised against Israeli "settlements" is that they violate Article 49(6) of the Fourth Geneva Convention of 1949, which states: "The occupying power shall not deport or transfer parts of its own civilian population into territories it occupies" [13]. Yet, the cited provision presupposes the "occupation" of the territory of a High Contracting Party (a state party to the Convention)[14], whereas the territory in question (i.e., the West Bank[15]) has not belonged to any State since the Ottoman Empire. In the absence of a prior sovereign, the Fourth Convention does not apply to the Israeli presence in the West Bank[16].

Moreover, as explained below, Israel has legitimate claims to West Bank territory and, thus, is not and cannot be considered an occupier. The most accurate term to describe the status of the West Bank is "disputed territory"—a position Israel has continuously asserted since 1967. Consider the following brief historical analysis:

Article 6 of the British Mandate permitted Jewish settlement throughout the territory of the Palestinian Mandate[17], territory that encompassed the current State of Israel, a portion of the Golan Heights (ceded by Great Britain to the French Mandate of Syria in 1923)[18], the West Bank, and the Gaza Strip[19]. The State of Israel was established in 1948 on part of the territory of the Mandate, but, with respect to the remainder of the territory, i.e., the West Bank and the Gaza Strip, nothing has extinguished the terms of the Mandate for Palestine; its terms still constitute valid international law[20] and will remain so until a binding final status arrangement comes into effect. As such, the Jewish population of the Palestinian Mandate (present-day Israelis) have at least as much claim to the remaining unallocated territories as do its Arab residents. Hence, labeling Israel's presence in the West Bank as an "occupation" of Palestinian (by which is meant *Arab*) territory is, at best, questionable. At worst, it is totally false.

Following the 1973 Arab-Israeli war, the U.N. Security Council adopted Resolution 338, which essentially reiterates the call to implement the terms of Resolution 242[21]. Since Resolutions 242 and 338 anticipate negotiated territorial adjustments, it is simply incorrect to conclude that Israel is an occupying power. In short, Israel has an outstanding, valid, internationally-sanctioned claim to (as yet

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[13]Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49, para. 6, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. It is also questionable whether Article 49 applies when a government takes no action to move its population, but the population moves itself based on individual choices. The words "deport" and "transfer" imply coercive governmental action, not passive acquiescence or private choices.

[14]*See id.* art. 2.

[15]All Israeli armed forces and settlers were removed from the Gaza Strip in 2005. *Settlers Protest at Gaza Pullout*, BBC (15 Aug. 2005), http://news.bbc.co.uk/2/hi/middle_east/4150028.stm. Hence, the issue of Israeli settlements in the Gaza Strip is now moot. Note also that Israel has the will to remove settlements and would do so from the West Bank pursuant to an agreement freely negotiated between themselves and the Palestinians.

[16]It should be noted, however, that as a matter of domestic legal policy, Israel voluntarily applies the humanitarian provisions of the Fourth Geneva Convention de facto even though those provisions do not apply de jure.

[17]Mandate for Palestine, League of Nations Doc. C.529.M.314.1922 VI (1922). According to Article 6, "the Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, *shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes*" (emphasis added).

[18]Martin Gilbert, THE ROUTLEDGE ATLAS OF THE ARAB-ISRAELI CONFLICT 8 (9th ed. 2008).

[19]Trans-Jordan was separated from the Mandate and designated by the British as an exclusively Arab homeland in 1921.

[20]*See* Eugene V. Rostow, Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestinian Mandate, 5 Yale Stud. World Pub. Order 147, 157-59 (1979); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 ¶ 55 (21 June 1971); U.N. Charter art. 80.

[21]S.C. Res. 338, ¶ 2, U.N. Doc. S/RES/338 (22 Oct. 1973).

undefined) portions of the so-called "occupied territories". In sum, the Mandate for Palestine was and remains a valid part of international law. The Mandate expressly permitted Jews to settle *throughout* Palestine. Hence, until a final bilateral agreement is reached between Israelis and Palestinians, the Jewish people have a right to settle throughout the territory of the Palestinian Mandate, including the West Bank and East Jerusalem. To state otherwise misrepresents international law.

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The Palestinian-Israeli conflict cannot be resolved by third parties imposing, in advance of, or as a precondition to, negotiations, artificial time and territorial requirements. Resolution of the conflict is only possible with voluntary, good faith negotiations between the parties, free of agenda-driven preconditions on either side. Moreover, one-sided intervention by the Security Council fails as a practical matter: No reasonable party to any negotiation would surrender its leverage or bargaining power before negotiations even begin. Efforts to directly or indirectly force the State of Israel to negotiate or make concessions against its will prior to the onset of negotiations are unwise at any point in time, but especially so when the U.S. presidential administration is in transition, given the important role that the United States has played in the past and will play in the future.

Any attempts to force Israel to the negotiating table constitute duress that is inconsistent with the norms of international law. Moreover, the stakes are too high for ill-considered political maneuvers. There is already too much regional and global uncertainty and unrest. To the extent that the Security Council, during the U.S. presidential transition period, entertains any resolution purporting to coerce Israel, it is likely that any such actions would introduce even more uncertainty and volatility into the region and could jeopardise diplomatic relations amongst the P5 going forward.

In sum, we urge the Russian Federation to oppose discussion of any resolution affecting the interests of the State of Israel until such time as the incoming U.S. President assumes office. In the event that the Council hears any such resolution, we respectfully urge your country to exercise her veto power to prevent its passage.

Respectfully submitted,

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