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**Committee on the Elimination of Racial Discrimination****Inter-State communication submitted by the State of  
Palestine against Israel\*\***

<i>Communication Submitted by:</i>	State of Palestine
<i>Communication submitted against:</i>	Israel
<i>Date of the communication:</i>	23 April 2018 (initial submission)
<i>Date of the present decision</i>	12 December 2019
<i>Subject matter:</i>	Question of treaty relations between the parties, local remedies
<i>Substantive issue:</i>	Discrimination on the ground of national or ethnic origin
<i>Procedural issue:</i>	Jurisdiction of the Committee
<i>Articles of the Convention</i>	11(3)

\* The present document is being issued without formal editing.

\*\* The present decision has been adopted with the participation of the following members: Nourredine Amir, Marc Bossuyt, Chinsung Chung, Fatimata-Binta Victorie Dah, Bakari Sidiki Diaby, Rita Izák-Ndiaye, Keiko Ko, Gun Kut, Yanduan Li, Gay McDougall, Yemhelhe Mint Mohamed Taleb, Pastor Elías Murillo Martínez, Verene Sheperd, María Teresa Verdugo Moreno and Yeung Kam John Yeung Sik Yuen.



1.1 The present document has been prepared pursuant to article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter ‘the Convention’).

1.2 The State of Palestine (“the Applicant State” / “the Applicant”) acceded to the Convention on 2 April 2014. Israel ratified the Convention on 3 January 1979. On 23 April 2018, the ‘Applicant submitted a communication against Israel (the ‘Respondent State’ / “Respondent”) under Article 11 of the Convention, claiming that Israel has violated Articles 2, 3 and 5 of the Convention with regard to Palestinian citizens living in the Occupied Palestinian Territory (‘OPT’), including East Jerusalem.

1.3 In view of the referral of the matter by the Applicant State to the Committee on 7 November 2018, in accordance with article 11(2) of the Convention.

1.4 The present decision should be read in conjunction with CERD/C/100/3 and CERD/C/100/5.

## I. Observations of the Applicant State

2.1 On 15 February 2019, the Applicant State submitted new observations, addressing the different issues raised in the Respondent State’s submission of 14 January 2019.

### A. Respondent State’s attempt to politicize the current proceedings

2.2 There were no suggestions of anti-Semitism in the previous submission. Regarding the Respondent State’s argument that the State of Palestine commits gross violations of the Convention, it may be interpreted as demonstrating that the Respondent State considers the Applicant State to be in a position to violate the Convention, by way of being a contracting party and in treaty relations with Israel. Should the Respondent State exercise its right to bring an interstate complaint under Article 11 by way of a counter-claim or separate complaint, the Applicant State is willing to engage.

2.3 The Respondent intends to intimidate by asserting that consideration of the communication at hand and the legal arguments therein would undermine the Committee’s independence and impartiality and have ‘broad implications’. These intimidation tactics are in line with a practice of undermining international organisations and mechanisms that recognise the Palestinian people’s human rights.<sup>1</sup> A Committee decision would have positive consequences that would reinforce the standing and relevance of the Committee.

### B. Treaty Relations between the State of Palestine and Israel

#### 1. Res judicata

2.4 While jurisdiction was established by the Committee in its 4 May 2018 decision (transmittal of the inter-state communication), the Respondent State contends that this position is “founded on a misreading of the Convention and its Rules of Procedure”. Given that the Committee must be assumed to have considered the jurisdictional preconditions for any further steps taken *proprio motu* before transmitting the Applicant State’s communication to the Respondent State, the Committee finds itself in the same position as the ICJ was in in the *Bosnian Genocide* case.<sup>2</sup>

<sup>1</sup> Middle East Monitor, Israel’s Ambassador attacks UNESCO after adoption of resolutions in favour of Palestine (12 October 2018), available at <https://www.middleeastmonitor.com/20181012-israels-ambassador-attacks-unesco-after-adoption-of-resolutions-in-favour-of-palestine/>; Haaretz, Israel Firmly Rejects ICJ Fence Ruling (11 July 2004), available at <https://www.haaretz.com/1.4754360>.

<sup>2</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgement ICJ Reports 2007, para. 114.

2.5 The Respondent's reference to the pending *Case Concerning the Relocation of the United States Embassy to Jerusalem* before the ICJ is misplaced and misleading. Here, the ICJ was simply acting in accordance with prior process when requesting the Parties to previously address the issues of jurisdiction.<sup>3</sup> Despite the argument raised by the United States that "no treaty relations exist between the United States and the Applicant",<sup>4</sup> and the subsequent absence of Court jurisdiction with respect to the Application,<sup>5</sup> the Court decided to keep the case on its docket and to continue with the proceedings.

## 2. Palestinian Statehood

2.6 The Applicant argues that Palestinian Statehood has been settled and reaffirmed repeatedly, and as such, it will not engage with this point. Notably, Article 18(1) of the Convention, which provides that it is open for accession by "any State referred to in Article 17, paragraph 1". The Committee has consistently treated the Applicant as a 'State party' with respect to the Article 9 reporting mechanism<sup>6</sup> and scheduling constructive dialogue.<sup>7</sup> In its decision of the 97<sup>th</sup> Session, the Committee referred to possible comments by "the States concerned", invited "the States parties concerned" to appoint a representative for the oral hearing, and invited such representatives to present the views "of the State party concerned".<sup>8</sup>

## 3. Willingness of the Respondent State to address the matter in other fora

2.7 The Respondent has argued that the dispute could be addressed in other appropriate fora, yet; it has continuously denied the applicability of the Convention in the occupied territory and has proven unwilling to engage in meaningful dialogue. In addition, the Respondent State has taken the "position that the Convention does not apply beyond national borders". The Respondent argues that the Article 9 reporting procedure cannot replace the procedure under Articles 11 to 13, which provides the opportunity to present evidence and arguments to the Committee. Moreover, the Respondent State has not acted *bona fide* with respect to the Article 9 reporting procedure.<sup>9</sup> The widespread racial discrimination requires the Committee, and eventually an *ad hoc* Commission, to undertake a holistic review of the situation and to recommend remedies.

## 4. The Respondent State's claim to have excluded treaty relations with the Applicant State

2.8 The Respondent is trying to undercut the *jus cogens* and *erga omnes* character of the Convention and the obligations therein. The Convention's provisions do not depend on formal or legal bonds, but are primarily intended to ensure individual rights. The obligations contained in the Convention are of an *erga omnes* character, owed towards all other contracting parties. As such, the Committee has a responsibility to ensure universal respect for the *erga omnes* rights enshrined in the Convention.

2.9 The Respondent argues that under customary international law, States Parties are entitled to a multilateral treaty to exclude, by way of unilateral declaration, treaty relations with another State that has validly become a State party of the same multilateral treaty, even where the other State party objects to this attempt. Should such customary international law

<sup>3</sup> ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America)*, Provisional Measures, Order, ICJ Rep 1984, p. 22.

<sup>4</sup> Letter, United States Department of State to the Registrar of the ICJ dated 2 November 2018, 2

<sup>5</sup> *ibid.*

<sup>6</sup> Article 9 requires States parties to submit regular reports as to the implementation of the Convention.

<sup>7</sup> Initial and Second periodic reports submitted by the State of Palestine under Article 9 of the Convention (21 March 2018) CERD/C/PSE/1-2

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=29](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=29).

<sup>8</sup> Secretariat of the United Nations (Office of the High Commissioner for Human Rights), Note to the Permanent Mission of the State of Palestine to the United Nations Office of Geneva, ICERD-ISC 2018/3 (14 December 2018), p. 2, para. 4.

<sup>9</sup> United Nations Committee on the Elimination of Racial Discrimination, Concluding Observations, UN Doc CERD/C/ISR/CO/14-16 (3 April 2012), p. 2, para. 10.

prove to exist, it cannot apply in cases concerning multilateral treaties of an *erga omnes* and *jus cogens* character. It is insufficient for the Respondent to prove the general existence of customary international law. Rather, the Respondent must prove the existence of sufficient practice that specifically addresses multilateral treaties of *erga omnes* and *jus cogens* character. If the position of the Respondent State was indeed reflective of customary international law, applicable to multilateral treaties of *erga omnes* and *jus cogens* character, there would be wider practice of declarations made by States that do not recognise a State of Palestine.<sup>10</sup>

2.10 Moreover, the Respondent's approach to the matter is inconsistent, as evidenced by its handling of treaty relations with the representative UN Council for Namibia, following its accession to the Convention: in that case, the Respondent did not object to the existence of contractual relations.

2.11 With respect to the Respondent State's reference to the work of the International Law Commission (ILC), it must be recognised that the ILC did not include references to the issue of unilateral objections as reservations, and rather points out that the Guidelines on Reservations confirm that the ILC did not want to address the matter.

2.12 As to the Respondent's argument that Article 17(1) of the Convention only applies where entities are members of specialised agencies as State members, the Applicant recalls that it is a 'State member' of a UN specialised agency, namely UNESCO. In accordance with Article II (2) of the UNESCO Convention, the Applicant State has been recognized as a State member. Further, the Convention provides under Article 17(1) in conjunction with Article 18(1) that a State member of a UN specialized agency may accede to it without limiting the legal effects of such accession.

2.13 The Respondent has sought to undermine the relevance of the Vienna formula by referring to the practice of the UN Secretary General in his function as depository. While such depository practice is indeed not binding on States Parties, it is indicative of the position of the Secretary General as to which entities are in his view to be considered State members of specialised agencies of the United Nations.<sup>11</sup> The Respondent's argument that States parties could unilaterally exclude member States who are entitled to accede to a treaty given their membership of a specialised UN agency, is incompatible with the object and purpose of the Vienna formula.

2.14 As to the Respondent State's reference to the 1961 Hague Apostille Convention ('Apostille Convention'), article 12 of this treaty includes a specific treaty-based provision enabling States parties to exclude treaty relations with another contracting party. Where a State has sought to exclude treaty relations with another contracting party without explicit reference to Article 12, this exclusion has been treated as if made in accordance with Article 12(2) as seen by the treatment of the Dutch Government to a Note Verbale from Serbia, which objected to the accession of Kosovo to the said Convention without specific reference to Article 12.<sup>12</sup> Despite the lack of specific mention to Article 12, the Dutch Government treated the said objection as being one made in accordance with Article 12(2). This is indicative of the position of the Netherlands that, even where a State party to the Apostille Convention does not recognise another State and where the former State wants to exclude treaty relations, it must rely, either explicitly or implicitly, on the treaty-based provision, here namely Article 2(2). The fact that a number of States, in objecting to Kosovo's accession to the Apostille Convention did not do so expressly in reference to Article 12 is therefore irrelevant. Despite the Respondent State's reference to the 'Practical Guide' on the Apostille

<sup>10</sup> Only two (United States of America and Israel) of the 177 State parties to the Convention have lodged objections identical to that submitted by the Respondent State: United Nations Depository Notifications, C.N.258.2014.TREATIES-IV.2 (13 May 2014) <https://treaties.un.org/doc/Publication/CN/2014/CN.258.2014-Eng.pdf>; United Nations Depository Notifications, C.N.293.2014.TREATIES-IV.2 (13 May 2014) <https://treaties.un.org/doc/Publication/CN/2014/CN.293.2014-Eng.pdf>.

<sup>11</sup> United Nations, Final Clauses of Multilateral Treaties Handbook (2003), 15.

<sup>12</sup> Republic of Serbia, Note Verbale no. 2015.660990 (2 December 2015).

Convention,<sup>13</sup> this document is not of any official status and does not limit the scope of application of the Convention.<sup>14</sup> Further, the Explanatory Report, which forms part of the Convention's *travaux préparatoires*, refers to objections to accession on the basis of Article 12(2), rather than on the basis of customary international law.<sup>15</sup>

2.15 The Respondent fails to demonstrate *opinio juris* as to objections to accession by other States, which is requisite to the creation of customary international law. Further, its own actions have been contradictory, as in the past it has portrayed such unilateral declarations as being political in nature, and thus not based on *opinio juris*. Although the Respondent seeks to accept the legal effect of communications as to the exclusion of treaty relations by applying the principle of reciprocity, this is devoid given that the Applicant has repeatedly objected to the Israeli declaration purporting to preclude treaty relations between the two States.<sup>16</sup>

2.16 Following the Respondent's assertion that the legal effects of an objection to accession are indistinguishable from a reservation to Article 11, it must be recalled that such reservations are subject to compatibility requirements with the Convention overall, and thus so should objections be. While applying the reservation legal regime *mutatis mutandis*, the Respondent argues that the objection would be valid given the lack of reactions by more than two thirds of the States parties to ICERD. However, in the *Case Concerning Armed Activities on the Territory of Congo*, the ICJ reserved for itself the competence to decide whether a given reservation is compatible with the object and purpose of the Convention, regardless of whether two thirds of the contracting parties had objected to the reservation or not. The ICJ also noted that the reservation had not been objected to by the other States concerned.<sup>17</sup> In contrast to that case, the Applicant protested the Respondent's objection.<sup>18</sup> Requiring the objection of two-thirds of member States to Israel's declaration would be nonsensical, as all of the other contracting parties are not concerned by the objection.

2.17 Not a single State party to the Convention has attempted to exclude the applicability of its Article 11 by way of a reservation, which is indicative of the *opinio juris* of State parties that unilateral declarations purporting to render the interstate communication procedure Articles 11 to 13 obsolete are impermissible. Further, the ability of the Committee to make findings as to the permissibility of declarations excluding Articles 11 to 13, regardless of the two-thirds requirement under Article 20, is confirmed by the Committee's own practice.<sup>19</sup>

2.18 In response to the Bahraini objection to treaty relations with the Respondent State under the Genocide Convention, the State stated this objection "cannot in any way affect whatever obligations are binding upon Bahrain".<sup>20</sup> Given that the Genocide Convention and the Convention are both of *jus cogens* and *erga omnes* character, the same considerations must apply to the Convention *mutatis mutandis*. The Respondent nevertheless argues against this outcome by drawing a distinction between substantive and enforcement obligations. However, in order for a State to be able to eventually invoke another State's responsibility,

<sup>13</sup> How to Join and Implement the Apostille Convention: A Brief Guide for Countries Interested in Joining the Hague Convention of 5 October 1961 Abolishing the Requirement of Legislation for Foreign Public Documents, Hague Conference on Private International Law, available at <https://assets.hcch.net/docs/0cfe4ad6-402d-4a06-b472-43302b31e7d5.pdf>.

<sup>14</sup> *Ibid.*, para. 63.

<sup>15</sup> Hague Conference on Private International Law, *Explanatory Report on the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (1961), available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=52>.

<sup>16</sup> United Nations, Depository Notification, C.N.354.2014.TREATIES-IV.2 (12 June 2014).

<sup>17</sup> ICJ, *Case Concerning 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. 35, para. 77.

<sup>18</sup> United Nations, Depository Notification, C.N.354.2014.TREATIES-IV.2 (12 June 2014).

<sup>19</sup> Report of the 9th meeting of persons chairing the human rights treaty bodies, UN Doc. A/53/125 (14 May 1998), p. 4, para. 18.

<sup>20</sup> United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide.

all obligations under this treaty must be owed to the other State by a contractual bond.<sup>21</sup> If the Respondent is under an obligation owed to the Applicant to fulfil its obligations arising under the Convention, and must include the means to enforce these obligations, that would otherwise be rendered obsolete.

##### **5. The Respondent State is precluded from excluding treaty relations with the Applicant State under ICERD**

2.19 There are two interlinked arguments as to why the Committee should consider this interstate communication, even if the Committee is to find that no treaty relations exist between the two parties.

2.20 Firstly, the Respondent is legally precluded from arguing that it is not in treaty relations with the Applicant State. The Respondent seeks to create a legal vacuum, wherein its actions in the occupied territory would not be subject to the Convention, by denying any extraterritorial applicability of it, by entering a reservation to Article 22, and by purporting to exclude the ability of the Applicant State to trigger the interstate procedures under Articles 11 to 13. As decided in the Preliminary Objections to the *Loizidou* case, this is legally impermissible as unilateral declarations cannot create “separate regimes of enforcement of Convention obligations depending on the scope of their acceptances”,<sup>22</sup> as this would create inequality between member States and the existence of a restrictive clause governing reservations “suggests that States could not qualify their acceptance [of the optional clauses] thereby effectively excluding areas of their law and practice within their ‘jurisdiction’ from supervision by the Convention institutions”. The inequality between contracting States which said permissibility of qualified acceptances creates would “run counter to the aim, as expressed in the Preamble to the Convention”.<sup>23</sup>

2.21 Secondly, the Respondent is barred from denying the Applicant State’s membership to the Convention on the basis of statehood, given it acts in bad faith, namely to illegally annex the occupied territory. The Respondent has yet to address the argument that its ulterior motive in opposing Palestinian statehood is its intention to illegally annex the occupied territory. The Committee may conclude that this is one of the reasons for Israel’s refusal to recognise Palestinian statehood and to accept treaty relations under the Convention. The bad faith may be evidenced by the enactment of the ‘Basic Law: Israel as the Nation-State of the Jewish People’ law, which legislated the *de facto* annexation of the occupied territory. These territorial ambitions are in violation of the *jus cogens* right of the Palestinian people to exercise its right of self-determination.<sup>24</sup>

##### **6. Article 11 ICERD does not require inter-State treaty relations**

2.22 Given the *erga omnes* and *jus cogens* character of the Convention, any violation by the Respondent State constitutes a violation of the Convention in relation to all other contracting parties, as all contracting parties of the Convention have a legally protected interest under the rules of State responsibility.<sup>25</sup> As confirmed by the wording and drafting history of the Convention, the procedure under Article 11 is not exclusively of a bilateral character, but aims at bringing before the Committee violations of the universal public order enshrined in the Convention.<sup>26</sup>

2.23 As to the Respondent State’s attempt to distinguish the *Pfunders* case on the basis of Austria’s recognised State status, and emphasis on Austria’s entitlement to bring the

<sup>21</sup> ICJ, *Case Concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422.

<sup>22</sup> European Court of Human Rights, *Loizidou v. Turkey* (Preliminary Objection) Application no. 15318/89 (23 March 1995), para. 72.

<sup>23</sup> *Ibid.*, para. 77.

<sup>24</sup> ICJ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

<sup>25</sup> Article 48, ILC Articles on State Responsibility.

<sup>26</sup> European Commission of Human Rights, *Austria v. Italy*, in particular Application no. 788/60 (11 January 1961), p. 13 et seq.

complaint only once it became a High Contracting party to the ECHR, the Applicant State recalls that its State party status to the Convention is not 'questionable', and that although Austria was not a contracting party at the given time, the claim was not barred. In response to the Respondent's reference to the Committee's prior practice in relation to the occupied Syrian Golan, the Applicant notes that Syria did not invoke Article 11 of the Convention,<sup>27</sup> and as such any comment by the Committee on the matter is mere *obiter dictum*. No objections to the Syrian declaration purporting to exclude treaty relations with Israel were made, unlike the objection made to the Respondent's attempts to exclude treaty relations under the Convention with the Applicant.<sup>28</sup>

## C. Exhaustion of Local Remedies

### 1. The burden of proof lies with the Respondent State

2.24 Under generally recognised principles of international law, it is for the party arguing the non-exhaustion of local remedies to prove that effective local remedies exist, and that they have not been exhausted.<sup>29</sup> The Respondent has relied on the role and availability of the court system in protecting individual rights, and has failed to refer to case law demonstrating effective legal protection for nationals.

### 2. Exhaustion of domestic remedies

2.25 The Applicant maintains that Palestinian nationals do not have access to the territory of the Respondent State and therefore are barred from bringing claims before Israeli courts, unless they are supported by Israeli non-governmental organisations or are able to gain a permit to enter Israel. For this reason, Palestinian nationals cannot be expected to exhaust local remedies. This approach was confirmed by the jurisprudence of the African Commission of Human and People's Rights, which dealt with a comparable occupation of Eastern border provinces of the Democratic Republic of the Congo by armed forces from Burundi, Uganda and Rwanda.<sup>30</sup> This approach must apply *mutatis mutandis* to the nationals of the Applicant State.

2.26 The exhaustion of local remedies is not required given that the Respondent's violations of the Convention amount to 'administrative practice'. The Palestinian population living in the occupied territory as a whole faces systematic violations of ICERD, which extends beyond individualised cases.<sup>31</sup> Under such circumstances, each and every violation of the treaty cannot be expected to have been raised in individual proceedings before local courts of the occupying power. The requirement of exhaustion of local remedies does not apply if it is a legislative or administrative practice that is being challenged.<sup>32</sup> While

<sup>27</sup> Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 36th Sess. (1981), Supp. No.18, at 54, para. 173, A/36/18(SUPP) p. 54.

<sup>28</sup> United Nations, Depositary Notification, C.N.354.2014.TREATIES-IV.2 (12 June, 2014).

<sup>29</sup> *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award of 6 March 1956, UNRIIAA vol. XII, p. 83 et seq. (119); Rules of Procedure of the Committee on the Elimination of Racial Discrimination, CERD/C/35/Rev.3 (1989), Article 92(7); African Commission of Human and Peoples' Rights, Communication 71/92, *Rencontre africaine pour la défense des droits de l'Homme (RADDHO)/Zambia*, Decision on Merits, para. 12 (31 October 1997); Inter-American Court of Human Rights, *Case of Escher et al. v. Brazil*, Judgment of July 6, 2009, para. 28.

<sup>30</sup> African Commission of Human and Peoples' Rights, Communication 227/99, *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, 33rd Ordinary Session, May 2003.

<sup>31</sup> United Nations, CERD, Concluding Observations, UN Doc. CERD/C/ISR/CO/14-16 (3 April, 2012), para. 24.

<sup>32</sup> Examples: European Commission on Human Rights, *Greece v. UK*, Complaint no 176/56, Decision of 2 June 1956, Yearbook of the European Convention on Human Rights 2, p. 182 ss.; European Commission on Human Rights, *Denmark, Norway, Sweden and the Netherlands v. Greece*, Yearbook of the European Convention on Human Rights 11, p 690 .ss.; European Commission on Human Rights, *Denmark, Norway, Sweden and the Netherlands v. Greece*, Collection of Decisions 34, p. 70 et seq. (73); African Commission on Human Rights, *Open Society Justice Initiative v. Côte d'Ivoire*, Communication 318/06, adopted during the 17th Session of the Commission (18 to 28 February 2015),

administrative practice can “only be determined after an examination of the merits”, “[a]t the stage of admissibility *prima facie* evidence while required, must also be considered as sufficient”.<sup>33</sup> Such *prima facie* evidence of administrative practice exists “where the allegations concerning individual cases are sufficiently substantiated, considered as a whole and in the light of the submissions of both the applicant and the respondent Party”.<sup>34</sup> The observations of the Committee with respect to the Respondent’s general policies and practices violating the Convention<sup>35</sup> demonstrate systematic violations amounting to *prima facie* evidence of administrative practice. As such, in line with general principles of international law, this constitutes an additional reason why there is no need to exhaust local remedies before triggering the interstate complaint procedure under Articles 11 to 13.

### 3. Lack of efficient local remedies

2.27 Under generally recognised principles of international law, domestic remedies must be available, efficient, sufficient and adequate.<sup>36</sup> A remedy is ‘available’, if the petitioner can pursue it without impediment in practice. It is ‘effective’, if it offers a reasonable prospect of success to relieve the harm suffered. It is ‘sufficient’, if it is capable of producing the redress sought after. Purely administrative and disciplinary remedies cannot be considered adequate and effective;<sup>37</sup> local remedies must be available and effective in order for the rule of domestic exhaustion to apply;<sup>38</sup> domestic remedies are unavailable and ineffective, if the national laws legitimize the human rights violation being complained of,<sup>39</sup> if the State systematically impedes the access of the individuals to the Courts,<sup>40</sup> and if the judicial remedies are not legitimate and appropriate for addressing violations further fostering impunity;<sup>41</sup> the enforcement and sufficiency of the remedy must have a binding effect and ought not be merely recommendatory in nature, which the State would be free to disregard;<sup>42</sup> the court must be independent and impartial.<sup>43</sup>

2.28 The Respondent State’s judicial system is illegitimate, futile, unavailable, ineffective and insufficient. The Respondent State overlooks the interests of Palestinian nationals living in the occupied territory through various means. In the case of *Abu Safyah v Minister of Defense*, in which the Israeli High Court of Justice (HCJ) denied the applicability of the Fourth Geneva Convention to the occupied territory and maintained a selective position regarding the applicability of international humanitarian law, thereby undermining the collective and individual rights of the Palestinian people.<sup>44</sup> The Court has also avoided rendering decisions by holding that the general question of settlements is political and

paras. 45 ss.; *Malawi African Association et al. v. Mauritania Communications* 54/91, 61/91, 98/93, 164/97, 210/98 (2000) AHRLR 149 (ACHPR 2000) para. 85.

<sup>33</sup> European Commission on Human Rights, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, nos. 9940-9944/82, 6 December 1983, DR 35, para. 22.

<sup>34</sup> *Ibid.*, para. 22.

<sup>35</sup> CERD, 18th session (13 February – 9 March 2012), CERD/C/ISR/CO/14-16, para. 25.

<sup>36</sup> International Justice Resource Center, *Exhaustion of Domestic Remedies in the United Nations System* (August 2017) (IJRC); *See for the respective provision under the ICCPR, M. Nowak, UN Covenant on Civil and Political Rights: CCPR commentary* (2nd ed. 2005), p. 769 et seq.

<sup>37</sup> Human Rights Committee, *Basnet v. Nepal*, Communication No. 2051/2011, Views adopted on 26 November 2014, U.N. Doc. CCPR/C/112/D/2051/2011, para. 7.4; *Giri v. Nepal*, Communication No. 1761/2008, Views adopted on 24 March 2011, para. 6.3.

<sup>38</sup> CCPR, *Vicenter et al. v. Colombia*, para. 5.3.

<sup>39</sup> Manfred Nowak, *A Handbook on the individual complaints procedures of the UN Treaty Bodies* (Boris Wijkstrom 2006), pp. 64-65.

<sup>40</sup> CCPR, *Grioua v. Algeria*, Communication No. 1327/2004, Views adopted on 10 July 2007, para. 7.8.

<sup>41</sup> CCPR, *El Abani v. Libyan Arab Jamahiriya*, Communication No. 1640/2007, views adopted on 26 July 2010, para. 7.10.

<sup>42</sup> CERD, *D.R. v. Australia*, Communication No. 42/2008, U.N. Doc. CERD/C/75/D/42/2008, para. 6.4.

<sup>43</sup> CCPR, *Arzuaga Gilboa v. Uruguay*, Communication No. 147/1983, views adopted on 1 November 1985, U.N. Doc. CCPR/C/OP/2 at 176, para. 7.2; CERD, *L. R et al. v. Slovak Republic*, Communication No. 31/2003, views adopted on 3 October 2005, CERD/C/66/D/31/2003, para. 9.2.

<sup>44</sup> HCJ 2150/07 *Ali Hussein Mahmoud Abu Safiya, Beit Sira Village Council Head et al. v. Minister of Defense, IDF Commander in the West Bank, Binyamin Brigade Commander, Shurat HaDin, Israel Law Center et al. and Fence for Life* (December 29, 2009) paras. 21 and 38.



therefore must be resolved by other branches of government.<sup>45</sup> Even where the HCJ appears to rule in a manner consistent or aligned with international law, these rulings are not respected or implemented. As such, resorting to local remedies would be futile.

2.29 The HCJ is not independent as it has been placed under the responsibility of the army, the body presently being investigated.<sup>46</sup> The structural deficiency and intrinsic lack of independence and impartiality was noted by the Committee of Experts, in reference to the Military Advocate General, who conducts prosecutions of alleged misconduct carried out by IDF (Israeli Defence Forces), as to independence and impartiality.<sup>47</sup>

2.30 Although the Respondent argues that the HCJ, as a civilian court, reviews the decisions of the Military Advocate General, it is unable to effectively do so, given that its competence and rules of procedure are only invoked in exceptional circumstances.<sup>48</sup> The HCJ has also affirmed that it is unable to rule on violations of international humanitarian law.<sup>49</sup>

2.31 Israeli law has been the instrument of oppression, discrimination and segregation. The Basic Law states that “[e]xercising the right to national self-determination in the State of Israel is unique to the Jewish people”, and thus excludes the Palestinian right to self-determination. Further, the Basic Law stipulates that “[t]he state views the development of Jewish settlement as a national value, and will act to encourage it and to promote and to consolidate its establishment”.<sup>50</sup> This violates Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, which states that: “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”. By incorporating the Basic Law, the Respondent State has legitimized and perpetuated a war crime in contravention of Article 8(2)(b)(iii) of the Rome Statute. The incorporation of the Basic Law is an express declaration that violating international law is a state policy to achieve Jewish demographic dominance by establishing maximum *de facto* control over the occupied territory. The HCJ further confirmed its role as a tool of oppression and discrimination when it dismissed a petition by an Israeli organization<sup>51</sup> and Israeli parliament members calling for the rejection of the Basic Law.<sup>52</sup>

2.32 The Military law system is inaccessible to Palestinian victims, who are *de facto* unable to file complaints with the Military Police Investigation Unit (‘MPIU’) directly, but must rely on human rights organizations or attorneys to file the complaints on their behalf. The MPIU has no basis in the occupied territory and Palestinian nationals are not allowed to enter Israel without a special permit. Statements are usually collected in ‘Israeli District Coordination Offices’. Where complaints are received, their processing is often unreasonably prolonged so that the soldiers who are the subjects of the complaints are no longer in active service and under military jurisdiction.<sup>53</sup> Additionally, Palestinian nationals face excessive court fees, the

<sup>45</sup> HCJ, *Mara’abe v. The Prime Minister of Israel* (2005) 45 *International Legal Materials* 202 at para. 19; Y Ronen, ‘Israel, Palestine and the ICC - Territory Uncharted but Not Unknown’ (2014) 12 *Journal of International Criminal Justice* 7, 24-25; HCJ 4481/91 *Bargil v. The Government of Israel* (1993), See Justice Shamgar opinion, para. 3.

<sup>46</sup> The International Federation for Human Rights Report (hereinafter: ‘FIDH’), *Shielded from Accountability: Israel’s Unwillingness to Investigate and Prosecute International Crimes* (September 2011), p. 2.

<sup>47</sup> UN Report of the Committee of Experts on Follow-up to Recommendations in the Goldstone Report, A/HRC/15/50, 23, para. 91 (September 2010); see also the Second Report of the Committee of Experts on Follow-up to Recommendations in the Goldstone Report, A/HRC/16/24, para. 41.

<sup>48</sup> Benvenisti’s report to the Turkel Commission, p. 24; HCJ 10665/05; *Shtanger v. The Attorney General*, (16 July 2006); HCJ 4550/94 *Anonymous v. Attorney-General et al.*, PD 49(5) 859; HCJ 8794/03 *Yoav Hess et al. v. Judge Advocate General et al.*

<sup>49</sup> HCJ 474/02 *Thabit v. Attorney General* (30 January 2011).

<sup>50</sup> ‘Basic Law: Israel as the Nation-State of the Jewish People,’ available at <https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf>.

<sup>51</sup> The Applicant State refers to the Legal Centre for Arab Minority Rights in Israel.

<sup>52</sup> Adalah, Israeli Supreme Court refuses to allow discussion of full equal rights & ‘state of all its citizens’ bill in Knesset (30 December 2018), available at <https://www.adalah.org/en/content/view/9660>.

<sup>53</sup> B’Tselem, No Accountability (11 November 2017), available at <https://www.btselem.org/accountability>.

prevention of witnesses from travelling to court, and the inability of lawyers to travel to and from the occupied territory to represent their clients.<sup>54</sup>

## II. Reply of Israel

### A. Lack of jurisdiction

3.1 On 20 March 2019, the Respondent submitted its comments to the Applicant State's submission.

3.2 Given the lack of jurisdiction, questions of admissibility, including the failure to invoke and exhaust local remedies do not arise in this case. It argues that the Israeli legal system provides Palestinians with unfettered and effective access to its courts.

#### 1. Inapplicability of the Article 11 mechanism in the absence of treaty relations and the consequent lack of jurisdiction

3.3 Under principles of international law, every State has a sovereign right to decide whether an entity merits recognition, and whether such recognition should in fact be granted.

3.4 States cannot be compelled to be in treaty relations with entities they do not recognise, given the discretionary nature of recognition and the fundamental tenet of treaty law, according to which consent determines treaty obligations, as reflected in widespread international practice and in various international instruments, including the Vienna Convention on the Law of Treaties.

3.5 The Committee has itself already recognized that the Article 11 mechanism cannot be resorted to in the absence of treaty relations. Where Syria stated that it does not recognize Israel and excluded any treaty relations with it, the Committee decided that "Article 11, paragraph 2, clearly implied a relationship between two States parties" and accepted that the mechanism may not be activated where such a relationship does not exist.<sup>55</sup> The Committee specifically referred to the requirement of treaty relations as a reason not to activate the inter-State mechanism of Article 11.<sup>56</sup> Any application of a different legal standard in the present case would not only be inconsistent with the Committee's prior decision, but would also be discriminatory towards the Respondent State.

3.6 The language used in the drafting history of Article 11 leaves no doubt that the Convention was intended not to be applied in the absence of treaty relations. Articles 11 to 13 explicitly refer to "parties to the dispute" and involve interaction, including negotiation, conciliation and other procedures between two State parties. Given that the Respondent State excluded the application of the Convention between itself and the Applicant State, the Article 11 mechanism is inapplicable.

3.7 The Respondent State validly excluded treaty relations with the Applicant State by objecting to the validity of the purported Palestinian accession to the Convention by an official and timely communication that was deposited with the UN Secretary General as depository. This objection was confirmed in a letter of the United Nations Office of Legal Affairs, which notes that the intended legal effect of Israel's objections was "to exclude the application of all provisions of the Convention as between Israel and the Palestinian entity".<sup>57</sup>

3.8 Moreover, the Respondent was not obligated to submit an explicit objection to treaty relations with the Applicant, although such obligations are prevalent in international

<sup>54</sup> FIDH, *Shielded from Accountability: Israel's Unwillingness to Investigate and Prosecute International Crimes*, (September 2011), p. 24; Michael Sfard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (2018), p. 16.

<sup>55</sup> Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 36th Sess. (1981), Supp. No. 18, at 54, para. 173, A/36/18(SUPP). See supra para. 9.15 and footnote 92 of the summary.

<sup>56</sup> *Ibid.*, para. 173.

<sup>57</sup> Depository Notification, 22 May 2014 ((Reference: C.N.293.2014.TREATIES-IV.2).

practice.<sup>58</sup> Such objections 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.

## 2. Immateriality and imprecision of other arguments of the Applicant State

3.9 On the Applicant's claim to statehood before the Committee, the Respondent argues that this is irrelevant to the question of whether an entity is able to force treaty relations on those State parties that do not recognise it and have objected to treaty relations with it.

3.10 The Applicant's arguments as to its State party membership to the Convention are not for the concern of the Committee. Rather, the United Nations Office of Legal Affairs made clear that the mere circulation by the Secretary General of an instrument or communication relating to the Convention "does not constitute a determination as to the existence of bilateral treaty relations". Therefore, it is for the State to determine the validity and effect of such an instrument of accession. Whether treaty relations exist under a Convention is resolved by the Respondent's express stipulation that it objects to treaty relations in this case.

3.11 With reference to the argued *jus cogens* and *erga omnes* character of the Convention, the Applicant State conflates the substantive legal obligations of contracting State parties with the mechanism established by the Convention to bring the inter-State mechanism to effect. This conflation is impermissible.<sup>59</sup>

3.12 The Respondent did not accept the Applicant State as a State party to the Convention, capable of violating provisions therein, and did not accuse the Applicant State of violating the Convention, but only of the "norms embodied in the Convention".

3.13 The Applicant seeks to undermine the legal status of objections to relations by focusing on the 'Apostille Convention'. Such objections have long-standing State practice.<sup>60</sup> The Applicant mistakenly argues that Article 12 of the Apostille Convention established a particular mechanism of objections to treaty relations, and that therefore the Apostille Convention cannot serve as evidence for the existence of a general State practice of objections to treaty relations. The Applicant recalls Serbia's objection to Kosovo's accession to the Convention and the statement of the Depository that, even though Serbia did not explicitly mention that its objection was made under Article 12, it should nevertheless be considered to have been done so. However, the Applicant fails to mention that Serbia strongly rejected the Depository's comment and issued a statement clarifying that its objection to Kosovo's accession was made in general terms and not under Article 12, as it concerned the preliminary question of Kosovo's disputed statehood.<sup>61</sup>

3.14 The Applicant State has engaged in an act of bad faith by trying to bring a complaint against the Respondent State under the Convention when its own discriminatory practices against Israelis are endemic. The Respondent State affirms that it did not assert that the Applicant State's argument of bad faith was anti-Semitic, but rather sought to demonstrate the hypocrisy of alleging bad faith.

<sup>58</sup> See Annex III: "Non-exhaustive List of Official Communications Objecting to the Validity of an Instrument of Accession or Otherwise Stipulating the Absence of Treaty Relations as between a State Party and a Non-Recognized Entity".

<sup>59</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J., 99, 140, para. 93; *East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J., 102, para. 29; see also *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, 6, para. 64.

<sup>60</sup> Annex III: "Non-exhaustive List of Official Communications Objecting to the Validity of an Instrument of Accession or Otherwise Stipulating the Absence of Treaty Relations as between a State Party and a Non-Recognized Entity".

<sup>61</sup> Note by Serbia to the depositary of the Apostille Convention, 18 December 2015, available at [https://verdragenbank.overheid.nl/en/Treaty/Details/009051\\_b.html](https://verdragenbank.overheid.nl/en/Treaty/Details/009051_b.html).

## B. Exhaustion of Remedies

3.15 In light of the lack of jurisdiction, the Committee need not address admissibility issues such as exhaustion of local remedies. However, given that the Applicant has misrepresented facts and law, the Respondent has decided to address such inaccuracies.

### 1. Onus rests on the Applicant State to demonstrate the exhaustion of available domestic remedies

3.16 The Applicant has failed to demonstrate the exhaustion of domestic remedies and seeks to apportion the burden of proof on the Respondent,<sup>62</sup> despite it being well recognised under international law that the burden of proof lies with the Applicant.<sup>63</sup> Once the Applicant has demonstrated the exhaustion of domestic remedies, the Respondent may point to domestic remedies that are indeed available and have not yet been exhausted.<sup>64</sup>

3.17 Recognising its failure to meet the legal burden, the Applicant State argues that, because the alleged violations occurred outside Israeli territory in an area of occupation, the Palestinian nationals are exempt from seeking remedies before Israeli courts and that the exhaustion of domestic remedies is not required where the alleged violations amount to “administrative practice” of a State. Contrary to this argument, in the *Demopoulos* case, the ECtHR ruled that “as a general rule applicants living outside the jurisdiction of a Contracting State are not exempted from exhausting domestic remedies within that State, practical inconveniences or understandable personal reluctance notwithstanding”.<sup>65</sup> The Court ultimately found that the domestic mechanisms available for the Greek Cypriots provided “an accessible and effective framework of redress” and that applicants who had not exhausted this mechanism must have their complaints rejected for failure to exhaust domestic remedies.<sup>66</sup> As such, the fact that Palestinian nationals reside outside Israeli territory does not exempt them from exhausting local Israeli remedies.

3.18 As to the argument that Israeli ‘administrative practice’ violates the Convention, Israeli courts have the jurisdiction to conduct both constitutional and administrative review of legislative and executive actions, meaning that there are avenues to challenge legislative or administrative practices domestically. In light of the existence of such domestic legal avenues, the Applicant has failed to meet the requirement of presenting *prima facie* evidence of an administrative practice. In cases in which the State has a mechanism in place that could potentially provide an effective remedy, it would be premature to absolve an applicant State from first exhausting that remedy before adjudicating the matter at the international level.<sup>67</sup>

### 2. Domestic Legal Frameworks

3.19 The Respondent refutes the assertions that the HCJ “facilitates the settlement enterprise” or allows for the “existence of two separate legal regimes”. Rather, the HCJ routinely examines the actions or decisions of the IDF military commander pertaining to the West Bank in light of the humanitarian obligations as set forth in the Fourth Geneva Convention and any obligations in customary international law pertaining to belligerent

<sup>62</sup> The State party refers to Article 92(7) of the Committee’s Rules of Procedure, expressly related to individual complaints under Article 14 of the Convention, and not inter-State communications.

<sup>63</sup> *Certain Norwegian Loans (France v. Norway)*, Judgment, 1957 I.C.J., 9; *Certain Norwegian Loans (France v. Norway)*, Judgment, 1957 I.C.J., Separate Opinion of Judge Sir Hersch Lauterpacht, at 39; H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Volume 1 (OUP 2013) 612; 1989 ICJ.

<sup>64</sup> See Bernard Robertson, *Exhaustion of Local Remedies in International Human Rights Litigation: The Burden of Proof Reconsidered*, 39(1), INT’L COMP. L. Q. 191, 193 (1990).

<sup>65</sup> *Takis Demopoulos et al. v. Turkey*, E.C.t.H.R., 46113/99 (2010), para. 98.

<sup>66</sup> *Ibid.*, para. 127.

<sup>67</sup> *Ibid.*

occupation.<sup>68</sup> Moreover, the HCJ determined that the substantive rules of Israeli administrative law apply to any executive actions in the West Bank.<sup>69</sup>

3.20 Security measures are implemented and executed in accordance with the military commander's responsibility to ensure public order and safety.<sup>70</sup> While their application may affect Israeli and Palestinian nationals differently, they are not a systematic attempt to dominate or discriminate against the Palestinian population.<sup>71</sup>

### 3. Effective Domestic Remedies

3.21 Israel's HCJ has heard thousands of cases involving Palestinian interests over the years and has not hesitated to strike down executive policy and even legislation when these have been found to excessively contravene individual rights. Palestinians seeking to undertake legal proceedings before Israeli courts must receive permits to enter, which are regularly granted.<sup>72</sup> Instituted guidelines and mechanisms ensure that access to the courts and the ability to conduct legal proceedings are not hindered, including the procedural criteria for the entry of claimants and witnesses from the Gaza strip to Israel for legal proceedings,<sup>73</sup> and guidelines issued by the State Attorney pertaining to litigation by Gaza strip residents following the 2008/2009 Gaza Strip conflict.<sup>74</sup> Further, the HCJ has determined that, while security is of concern, it is "the position of the State, that maximum procedural fairness is achieved".<sup>75</sup> Following this determination, the State formulated relevant procedures, to facilitate the carrying out of legal proceedings in Israel by Gaza strip residents, which the HCJ deemed adequately addressed the challenges raised, prompting it to dismiss the petition.<sup>76</sup>

3.22 In response to the Applicant State's argument that individuals are "*de facto* barred from bringing claims before Israeli courts", the Respondent State refers to ECtHR jurisprudence which recognises that the right to access a court includes the right to institute civil proceedings, but does not entail a general right to be physically present in court in civil proceedings.<sup>77</sup> According to HRC jurisprudence, even in criminal proceedings, a hearing in the absence of the accused may, in some circumstances be permissible where in the interest of the proper administration of justice.<sup>78</sup>

<sup>68</sup> HCJ 7015/02 *Ajuri v. The IDF Commander in the West Bank* [2002] (03.09.2002) IsrSC 56(6) 352, 364.

<sup>69</sup> HCJ 619/78 *Al-Taliya v. The Minister of Defense* [1979] (28.05.79) IsrSC 33(3) 505; HCJ 7015/02 *Ajuri v. The IDF Commander in the West Bank* [2002] (03.09.2002) IsrSC 56(6) 352, 365; HCJ 393/82 *Ja'amait Ascan Cooperative Society v. The IDF Commander in Judaea and Samaria* [1983] (28.12.83) IsrSC 37(4) 785, 810; HCJ 358/88 *Association for Civil Rights in Israel v. The Central Commander* [1989] (30.7.89) IsrSC 43(2) 529, 536-538; HCJ 4764/04 *Physicians for Human Rights v. The IDF Commander in Gaza* [2004] (30.5.04) 58(5) 385, para. 10; HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel* [2004] (30.6.04) IsrSC 58(5) 807, 828.

<sup>70</sup> See Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Article 43.

<sup>71</sup> In HCJ 2150/07 *Abu Safiyeh et al. v. The Minister of Defense* [2009] (29.12.09), IsrSC 63(3) 331, 379.

<sup>72</sup> Procedure for Processing Requests for Legal Proceedings (October 2014), COGAT – Coordination of Government Activities in the Territories.

<sup>73</sup> See Procedure for the Review of Requests by Palestinian Residents of the Gaza Strip for the Purpose of Managing Legal Proceedings in Israel, COGAT – Coordination of Government Activities in the Territories (May 2013), available in Hebrew at <https://bit.ly/2w8fwk9>.

<sup>74</sup> See Guidelines Relating to Litigation by Gaza Strip Residents related to Operation Cast Lead; and HCJ 9408/10 *The Palestinian Center for Human Rights v. The Attorney General*, Supplementary Response for the State, para. 3.

<sup>75</sup> *Idem*.

<sup>76</sup> See *The Procedure for the Review of Request*: the authorities tasked with reviewing requests may consider security or criminal considerations pertaining to the requesting individual, whether a denied request would be detrimental to a legal proceeding, exceptional humanitarian circumstances which warrant deviation from general policy. Decisions rejecting entry into Israel are reviewable by Israeli courts.

<sup>77</sup> *Kabwe v. The United Kingdom, E.C.t.H.R.*, 33269/08 (2010); *X. v. Sweden*, No. 434/58, p. 370, 1959 and *Muyldermans v. Belgium*, 23 October 1991, § 64, Series A No. 214 A).

<sup>78</sup> *Paul Perterer v. Austria*, CCPR/C/81/D/1015/2001, para. 9.3.

#### 4. Court Security Deposits

3.23 The Applicant State alleges that the payment of a guarantee imposed by the courts is an impediment to conducting legal proceedings, particularly before the HCJ. However, it is not the general practice of the HCJ to impose securities in HCJ petitions.<sup>79</sup> The Supreme Court has given guidelines in its case-law for the lower courts when imposing a security deposit on plaintiffs, which call for the consideration of the complexity of proceedings, identity of the parties and the extent of the claimant's good faith in initiating proceedings.<sup>80</sup> As a result, legal proceedings are regularly conducted by Palestinian claimants before Israeli courts, despite said deposits.<sup>81</sup>

#### 5. The High Court of Justice

3.24 The Applicant State erroneously states that the HCJ is not independent and has been placed under the responsibility of the army. Rather, judges of the HCJ are selected by a Judicial Selection Committee, which is independent.<sup>82</sup> The court system is separate from the military, in that there is no connection between the two.<sup>83</sup>

3.25 The Court determined that it has jurisdiction to hear cases pertaining to the actions of the State in the West Bank and the Gaza strip, and petitions filed by residents of the West Bank and the Gaza Strip.<sup>84</sup> The HCJ also conducts constitutional review of Israeli legislation applicable to both Palestinians and Israelis. Constitutional review in favour of individuals has been carried out with respect to cases concerning detention hearings of suspects in absentia,<sup>85</sup> and the exception to State liability for tort damages caused in a zone of conflict for acts of security forces.<sup>86</sup>

3.26 Furthermore, the Applicant State erroneously claims that a legal challenge of the Basic Law before the HCJ was rejected, "evidencing the HCJ's role as a tool of oppression and discrimination". Rather, the Respondent State asserts that 14 petitions relating to the Basic Law are currently pending before the Court.

#### 6. Accessibility

3.27 Any interested party is entitled to petition the Court directly to claim that a certain government action or policy is *ultra vires*, unlawful or unreasonable.<sup>87</sup> In 2017, over 2,500 petitions were filed with the Court in its capacity as the HCJ alone and in 2016, 2,270

<sup>79</sup> HCJ 1700/14 *Nuora Khaled v. Commander of IDF Forces in the West Bank*.

<sup>80</sup> Ci.Ap.Req. 1007/08 *Estate of the Late Ali Ja'alia v. The State of Israel* (31.01.10).

<sup>81</sup> Recent examples include Ci.C. 35484-08-10 (Be'er Sheva District Court) *Estate of the Late Abu-Halimeh v. The State of Israel* (07.01.18); Ci.C. 40777-12-10 (Jerusalem District Court) *Estate of the Late Abu Al-Ayash v. The State of Israel*; Ci.C. 7503-01-11 (Be'er Sheva District Court) *Al-Halo v. The State of Israel*; Ci.C. 21677-07-12 (Be'er Sheva District Court) *Estate of the Late Abu Sayid v. The State of Israel*.

<sup>82</sup> The Judicial Selection Committee is composed of all three branches of government, as well as professionals from the Israel Bar Association. The judges are appointed by the President, following a recommendation of the Committee, which is chaired by the Minister of Justice, and includes another Cabinet minister, the President of the Supreme Court, two other justices of the Supreme Court, two Members of Knesset, and two representatives of the Israel Bar Association.

<sup>83</sup> Israel's Basic Law: The Judiciary.

<sup>84</sup> See HCJ 302/72 *Khelou v. The Government of Israel* [1973] (21.05.1973) IsrSC 27(2) 169, 176; See Meir Shamgar, Legal concepts and problems of the Israeli military government – The initial stage, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980* Vol.1, 13, 56 (Meir Shamgar ed., 1982); Eli Nathan, The Power of Supervision of the High Court of Justice over Military Government, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980* Vol.1, 13, 56 (Meir Shamgar ed., 1982).

<sup>85</sup> Ci.Ap. 8823/07 *Anonymous v. The State of Israel* [2010] (2.11.2010) IsrSC 9 (3) 500.

<sup>86</sup> HCJ 8276/05 *Adalah – The Legal Center for Arab Minority Rights in Israel, et al. v. The Minister of Defense, et al.* [2006] (12.12.06), IsrSC 8(1)1.

<sup>87</sup> HCJ 769/02 *PCATI v. State of Israel* [2006] (14.12.2006), IsrSC 62(1) 507.

petitions were filed.<sup>88</sup> Additionally, the HCJ has gradually widened the scope of its judicial review to include matters which were previously regarded as non-justiciable or 'off-limits' in many other jurisdictions.<sup>89</sup> Moreover, the Court has taken a particularly staunch position regarding the justifiability of alleged violations of human rights.<sup>90</sup>

3.28 In numerous cases, the Israeli government has revised its position in the course of the proceedings themselves, whether at the Court's urging or as a result of a dialogue with petitioners.<sup>91</sup> In some cases, even if the Court ultimately dismisses a petition, it may set forth guidelines for the government to follow in order to ensure that the State's actions conform to its legal obligations.<sup>92</sup> Even with respect to petitions relating to sensitive operational military activity, the Court has required senior military personnel to appear before it and provide information regarding activities on the ground in "real-time".<sup>93</sup>

3.29 These examples demonstrate the availability of legal recourse before the HCJ has a substantive impact on the tailoring of executive policy and decision-making pertaining to issues of national security and human rights. The effect of litigation before the HCJ on the state of human rights in the West Bank and the Gaza Strip is reflected not only in rulings in favour of petitioners, but also in alternative manners of resolution of disputes before the Court. The HCJ has earned international respect and recognition for its jurisprudence, as well as for its independence in enforcing the law.<sup>94</sup>

## 7. HCJ jurisprudence pertaining to Palestinian rights in the West Bank

3.30 The HCJ regularly addresses claims of alleged violations of the freedom of movement, including cases concerning Palestinians seeking travel permits in face of security concerns,<sup>95</sup> the broad discretion of the Ministry of Defence,<sup>96</sup> and the military commander's duty to ensure public order and safety.<sup>97</sup>

3.31 The HCJ has decided in favour of Palestinian nationals in cases concerning workers' rights, in particular those with respect to employment rights of Palestinian employees working in Israeli settlements,<sup>98</sup> pension deductions,<sup>99</sup> minimum wage and the cost of living allowance.<sup>100</sup>

<sup>88</sup> Israeli Judiciary Annual Report 2017, 13, available

at [https://www.gov.il/BlobFolder/reports/statistics\\_annual\\_2017/he/annual2017.pdf](https://www.gov.il/BlobFolder/reports/statistics_annual_2017/he/annual2017.pdf).

<sup>89</sup> HCJ 201/09 *Physicians for Human Rights v. the Prime Minister of Israel* [2009] (19.1.2009).

<sup>90</sup> Examples: HCJ 769/02 *PCATI v. The Government of Israel* [2006] (14.12.2006), IsrSC 62(1) 507, para. 50; HCJ 390/79 *Dawikat v. The State of Israel* [1979] (22.10.79) IsrSC 34 (1) 1, 15; A Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 106-110, 97-106; A Bendor, 'Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience' (1997) 7 *IND. INT'L & COMP. L. REV.* 311; Baruch Bracha, 'Judicial Review of Security Powers in Israel: A New Policy of the Courts' (1991) 28 *STAN. J. INT'L L.* 39, 96-97.

<sup>91</sup> HCJ 3969/06 *Head of Deir Samit Village Council v. The Commander of the IDF Forces in the West Bank* (22.10.2009); HCJ 7210/04 *Societe Fonciere De Terre-Sainte v. The State of Israel* (19.08.2004); HCJ 5743/04 *Abu Romi v. The Military Commander in the West Bank* (07.09.2004); HCJ 1890/03 *Bethlehem Municipality v. The State of Israel* (03.02.2005); HCJ 5383/04-B *El-Quds University v. The State of Israel* (17.06.2004); HCJ 6181/04 *El-Darawi v. The Minister of Defense* (22.03.2005); HCJ 2626/04 *Diaab v. The Government of Israel* (04.11.2004).

<sup>92</sup> HCJ 769/02 *PCATI v. The Government of Israel* [2006] (14.12.06), 62 (1) 507.

<sup>93</sup> HCJ 201/09 *Physicians for Human Rights v. the Prime Minister of Israel* [2009] (19.1.2009).

<sup>94</sup> Supreme Court of Canada Judgments Application under s. 83.28 of the Criminal Code, [2004] S.C.R. 248, 2004 SCC 42, 7.

<sup>95</sup> HCJ 3764/16 *Jamal Ali v. The Military Commander in the West Bank* (2017).

<sup>96</sup> HCJ 2964/18 *The Parents Circle-Families Forum v. The Minister of Defense* (17.4.18).

<sup>97</sup> HCJ 2150/07 *Abu Safiyeh v. The Minister of Defense*, para. 35.

<sup>98</sup> HCJ 5666/03 *Kav La'Oved Association v. The National Labour Court* [2007] (10.10.07), IsrSC 62 (3) 264.

<sup>99</sup> Ot.La.D. 48438-02-15, *Neetuv – Management and Development Co. LTD. v. Badawi Gitan's (deceased) inheritance* (2018).

<sup>100</sup> The Respondent State indicates that after the *Worker's Hotline* decision, the Order Regarding Employment of Workers in Certain Areas (Judea and Samaria) (No. 967) 5742-1982, was amended in

3.32 The HCJ routinely reviews petitions challenging alleged violations of the right to property raised by Palestinian petitioners. It has adjudicated claims pertaining to construction on Palestinian-owned land, in relevant cases ordering the removal of illegally established construction.<sup>101</sup> It has also addressed petitions pertaining to the seizure of property for security purposes in the West Bank, examining the legality of the military commander's decisions.<sup>102</sup>

3.33 The HCJ has also reviewed allegations relating to proceedings before Military Courts in the West Bank, including the accessibility of documents,<sup>103</sup> and the length of detention periods.<sup>104</sup> The proceedings before the HCJ contributed to a major reform in the criminal procedure of the military courts in the West Bank, which included: the establishment of a specialised juvenile court in the West Bank; raising the age of majority; full separation between adults and minors during the judicial process; a special shortened statute of limitations; and parental involvement.

3.34 In consideration of international law, the HCJ has reviewed the operational activities of the IDF, including extended detention periods,<sup>105</sup> local resident assisted arrests,<sup>106</sup> and time periods for examining entry requests.<sup>107</sup>

## 8. Civil Proceedings

3.35 Israel's civil courts are available to Palestinian residents of the West Bank, with respect to property rights, for instance rightful ownership.<sup>108</sup> The HCJ has also considered cases concerning compensation for damage or injury caused by security forces in the West Bank.<sup>109</sup>

## 9. Criminal Proceedings

3.36 Criminal courts in Israel have jurisdiction over crimes committed by Israelis in the West Bank. The Israeli criminal courts have prosecuted and convicted Israelis for crimes committed against or with respect to Palestinians,<sup>110</sup> in particular, the criminal courts have decided on cases concerning racially-motivated or discriminatory crimes.<sup>111</sup>

## 10. Military Criminal Justice System

3.37 As to the Applicant's comments with respect to the independence of the Israeli military criminal justice system, the Respondent stipulates that the Military Advocate General's Corps ('MAG Corps') is composed of two units, the law enforcement unit,

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order to provide an entitlement to minimum wage and cost-of-living allowance to Palestinian employees.

<sup>101</sup> HCJ 8887/06 *Al-Naboot v. The Minister of Defense* (02.07.11); HCJ 9669/10 *Kassem v. The Minister of Defense* (08.09.14); HCJ 9949/08 *Hamed v. The Minister of Defense* (14.11.16); HCJ 9496/11 *Muhamad v. The Minister of Defense* (04.11.15).

<sup>102</sup> HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel* [2004] (30.6.04) IsrSC 58(5) 807; HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* (15.09.2005).

<sup>103</sup> *Chaeled Al'Arage v. The Commander of the Central Command in the West Bank*.

<sup>104</sup> HCJ 3368/10 *Palestinian Prisoners' Ministry v. The Minister of Defense* [2014] (06.04.14); HCJ 4057/10 *Israel Civil Rights Association v. The Minister of Defense* [2010] (25.05.10).

<sup>105</sup> HCJ 3239/02 *Mar'ab v. The Military Commander of the West Bank* [2003] (5.02.2003), IsrSC 57(2) 349.

<sup>106</sup> HCJ 3799/02 *Adalah v. The Military Commander* [2005] (06.10.05) IsrSC 30 (3) 67.

<sup>107</sup> HCJ 9815/17 *Anonymous v. The Minister of Defence* (19.3.18).

<sup>108</sup> C.C. (Jer.) 3329/09 *Baakri v. Tal Construction Co.* (Apr. 18, 2012); Civ.C. 2425/08 (Jerusalem District Court) *Dr. Hamdi et al. V. Himnuta L.T.D. et al.*

<sup>109</sup> Ci.Ap. 3991/09 *The Ministry of Defense v. Estate of the Late Fhatma Ibrahim Abdallah Abu Samara* (8.11.10); Ci.Ap.Rq. (Jerusalem District Court) 37000-06-17 *The State of Israel v. Na'alwa* (30.01.18).

<sup>110</sup> Cr.C. (Jerusalem District Court) 4001-05-15 *The State of Israel v. S.T.* (22.07.2015); Jerusalem District Court, S.Cr.C. 34700-07-14, *The State of Israel v. Yossef Haim Ben David, et al.* (19.04.2016).

<sup>111</sup> Cr.C. 41705-08-14 *The State of Israel v. Lior Cohen* (19.09.17); Cr.C. 55372-08-15 *The State of Israel v. Avraham Gafni et al.* (29.09.16).



responsible for enforcing the law throughout the IDF,<sup>112</sup> and the legal advice unit, responsible for providing legal advice to all military authorities).<sup>113</sup> The head of the MAG Corps is appointed by the Minister of Defence, a civilian authority,<sup>114</sup> and is “subject to no authority but the law”.<sup>115</sup> The Military Courts, which adjudicate charges against IDF soldiers for military and other criminal offenses, are independent of both the MAG and the IDF chain of command. The Military Court system includes regional courts of first instance, as well as a Military Court of Appeals, whose decisions are subject to review by the HCJ.

3.38 The primary entity for investigating allegations of criminal offences is the Military Police Criminal Investigation Division (‘MPCID’), which is an entirely separate unit from the MAG Corps and enjoys complete professional independence.<sup>116</sup> With respect to principles of independence, impartiality, effectiveness, thoroughness, promptness, and transparency, the Turkel Commission also compared Israel’s investigations system favourably to the systems of Western nations.<sup>117</sup>

#### **11. Civilian administrative and judicial review of the military criminal justice system**

3.39 The military criminal justice system in Israel is subject to civilian oversight by the Attorney General and the Supreme Court. Any interested individual can seek review of a decision made by the Military Advocate General regarding whether to open a criminal investigation or to file an indictment in cases concerning alleged violations of international humanitarian law by referring the issue for review by the Attorney General; and this is routinely done.<sup>118</sup> The Attorney General may also examine or convey his opinion regarding general legal matters pertaining to the military.<sup>119</sup>

3.40 This is in addition to the avenue of judicial review by the HCJ of all decisions of the MAG, as well as the Attorney General. The HCJ may review and reverse decisions of the MAG and the Attorney General, including decisions whether to open a criminal investigation, to file a criminal indictment, to bring certain charges, or to appeal a decision of the Military Courts.<sup>120</sup> Although the MAG, and the Attorney General are generally afforded broad discretion by the HCJ, where their decision is found to be unreasonable by the Court, the HCJ will intervene.<sup>121</sup>

<sup>112</sup> Military Justice Law 5715–1955, LA 189, Section 178(2), (4); IDF Supreme Command Order 2.0613, The Military Advocate General Corps, para. (2)(a) (March 5, 1976).

<sup>113</sup> Military Justice Law, Section 178(1); IDF Supreme Command Order 2.0613(2)(b) and 3(d). See Attorney General’s Directive No. 9.1002, The Military Advocate General, art. 2(b) (last updated April 2015).

<sup>114</sup> Military Justice Law, *supra* note 149, Section 177(a), Section 178(1).

<sup>115</sup> IDF Supreme Command Order 2.0613, (9)(a); Attorney General’s Directive No. 9.1002, Section 3.

<sup>116</sup> The 2014 Gaza Conflict 7 July – 26 August 2014: Factual and Legal Aspects (May 2015), 222.

<sup>117</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report – The Turkel Commission: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law (February 2013), 152-264.

<sup>118</sup> HCJ 4723/96 *Avivit Atiyah v. Attorney General* [2007] (29.07.1997) 51(3), 714.

<sup>119</sup> Attorney General’s Directive No. 9.1002, Section 2(b), See Directives regarding the Military Advocate General and Review of the Military Advocate General’s decisions, Israeli Ministry of Justice.

<sup>120</sup> HCJ 474/02 *Thabit v. The Attorney General* (30.1.11).

<sup>121</sup> See HCJ 425/89 *Jamal Abed al Kader Mahmoud Zofan et al. v. The Military Advocate General* [1989] (27.12.1989), IsrSC 43 (4) 718; HCJ 11343/04 *Brian Avery v. The Military Advocate General* (09.10.05); HCJ 7195/08 *Ashraf Abu Rahma et al. v. The Military Advocate General et al.* [2009] (1.7.2009), IsrSC 63 (2) 325.

