United Nations CERD/C/100/4*

International Convention on the Elimination of All Forms of Racial Discrimination

Distr.: General
16 June 2021

Original: English

Committee on the Elimination of Racial Discrimination

Inter-State communication submitted by the State of Palestine against Israel: supplementary submissions**, ***

Applicant:	State of Palestine
Respondent:	Israel
Date of communication:	23 April 2018 (initial submission)
Date of adoption of decision (jurisdiction):	12 December 2019 (See CERD/C/100/5)
Subject matter:	Question of treaty relations between the parties; local remedies
Procedural issue:	Jurisdiction of the Committee
Substantive issue:	Discrimination on the ground of national or ethnic origin
Article of the Convention	11 (4)

1. The present document has been prepared pursuant to article 11 of the Convention.

2. On 7 November 2018, the State of Palestine (the applicant) referred the matter again to the Committee, in accordance with article 11 (2) of the Convention.

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

I. Observations of the applicant

4. On 15 February 2019, the applicant submitted additional observations, addressing the different issues raised in the respondent's submission of 14 January 2019.[1]

A. Respondent's attempt to politicize the current proceedings

5. The applicant submits that there were no suggestions of antisemitism in its previous submission. The respondent's argument that the State of Palestine commits gross violations

* Second reissue for technical reasons (15 July 2021).

** The present document was adopted by the Committee at its 100th session (25 November–13 December 2019).

*** The following members of the Committee participated in the consideration of the supplementary submissions: Noureddine Amir, Marc Bossuyt, Chinsung Chung, Fatimata-Binta Victoire Dah, Bakari Sidiki Diaby, Rita Izák-Ndiaye, Ko Keiko, Gun Kut, Li Yanduan, Gay McDougall, Yemhelhe Mint Mohamed Taleb, Pastor Elías Murillo Martínez, Verene Albertha Shepherd, María Teresa Verdugo Moreno and Yeung Kam John Yeung Sik Yuen.

[1] See CERD/C/100/3.

of the Convention may be interpreted as demonstrating that the respondent considers the applicant 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 exercise its right to bring an inter-State complaint under article 11 by way of a counterclaim or separate complaint, the applicant is willing to engage.

6. 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 organizations and mechanisms that recognize the Palestinian people's human rights.[2] 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

7. While the applicant considers that jurisdiction was established by the Committee in its decision, adopted on 4 May 2018, to transmit the inter-State communication, the respondent 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's communication to the respondent, the Committee finds itself in the same position the International Court of Justice was in a case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide.[3]

8. The respondent's reference to the case concerning the relocation of the Embassy of the United States of America to Jerusalem pending before the International Court of Justice is misplaced and misleading. In that case, the Court was simply acting in accordance with prior process when it indicated that the question of jurisdiction must be settled first.[4] Despite the argument raised by the United States that no treaty relations existed between the United States and the applicant,[5] and that consequently the Court had no jurisdiction with respect to the application,[6] the Court decided to keep the case on its docket and to continue with the proceedings.

2. Palestinian statehood

9. The applicant argues that Palestinian statehood has been settled and reaffirmed repeatedly, and as such, it will not engage with that point. Notably, article 18 (1) of the Convention provides that the Convention is open for accession by any State referred to in article 17 (1) of the Convention. The Committee has consistently treated the applicant as a State party with respect to the article 9 reporting mechanism[7] and scheduling constructive dialogue.[8] In a decision taken at its ninety-seventh session, the Committee referred to the potential comments and observations as being submitted by "the States concerned", invited

[2] "Israel's Ambassador attacks UNESCO after adoption of resolutions in favour of Palestine", *Middle East Monitor*, 12 October 2018, available at www.middleeastmonitor.com/20181012-israels-ambassador-attacks-unesco-after-adoption-of-resolutions-in-favour-of-palestine/; and Shlomo Shamir and others, "Israel firmly rejects ICJ fence ruling", *Haaretz*, 11 July 2004, available at www.haaretz.com/1.4754360.

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 114.

[4] *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America), Order of 15 November 2018, I.C.J. Reports 2018*, p. 708.

[5] Letter dated 2 November 2018 from the United States Department of State addressed to the Registrar of the International Court of Justice.

[6] Ibid.

[7] Article 9 requires States parties to submit regular reports on the implementation of the Convention.

[8] The applicant refers to the initial and second periodic reports submitted by the State of Palestine under article 9 (CERD/C/PSE/1-2).

"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".[9]

3. Willingness of the respondent to address the matter in other forums

10. The respondent has argued that the dispute could be addressed in other appropriate forums, yet it has continuously denied the applicability of the Convention in the occupied territory and has proved unwilling to engage in meaningful dialogue. In addition, the respondent has taken the position that the Convention does not apply beyond national borders. The applicant 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 has not acted in a bona fide manner with respect to the article 9 reporting procedure.[10] The widespread racial discrimination requires the Committee, and eventually an ad hoc Conciliatory Commission, to undertake a holistic review of the situation and to recommend remedies.

4. Respondent's claim to have excluded treaty relations with the applicant

11. 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.

12. The respondent argues that under customary international law, States parties to a multilateral treaty are entitled 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 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 were 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 recognize a State of Palestine.[11]

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

14. With respect to the respondent's reference to the work of the International Law Commission, it must be recognized that the Commission did not include references to the issue of unilateral objections as reservations, and the respondent points out that the guidelines on reservations confirm that the Commission did not want to address the matter.

15. As to the respondent's argument that article 17 (1) of the Convention applies only where entities are members of specialized agencies as States, the applicant recalls that the State of Palestine is a "State member" of the United Nations Educational, Scientific and Cultural Organization (UNESCO). In accordance with article II (2) of the UNESCO Constitution, the applicant has been recognized as a State member. Further, the Convention provides under article 17 (1), read in conjunction with article 18 (1), that a member of a

[9] Letter dated 14 December 2018 from the Secretariat of the United Nations (Office of the United Nations High Commissioner for Human Rights) addressed to the Permanent Mission of the State of Palestine to the United Nations Office at Geneva, p. 2.

[10] CERD/C/ISR/CO/14-16, para. 10.

[11] Only one other of the States parties to the Convention (United States of America) has lodged an objection almost identical to that submitted by the respondent. See depository notifications No. 258 (2014) and No. 293 (2014). Depository notifications are available from https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en.

United Nations specialized agency may accede to it, without limiting the legal effects of such accession.

16. The respondent has sought to undermine the relevance of the Vienna formula by referring to the practice of the 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 members of specialized agencies of the United Nations.[12] 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 United Nations specialized agency is incompatible with the object and purpose of the Vienna formula.

17. As to the respondent's reference to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention), article 12 of that Convention 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 by the Government of the Netherlands (the depository of the Apostille Convention) of a note verbale in which Serbia objected to the accession of Kosovo to the Convention without specific reference to article 12.[13] Despite the lack of a specific mention of article 12, the Government of the Netherlands treated the objection as having been 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 recognize another entity and where the former State wants to exclude treaty relations, the non-recognizing State must rely, either explicitly or implicitly, on the treaty-based provision, here article 12 (2). The fact that a number of States in objecting to the accession by Kosovo to the Apostille Convention did not do so expressly in reference to article 12 is therefore irrelevant. Despite the respondent's reference to the guide on how to join and implement the Apostille Convention,[14] the guide has no official status and does not limit the scope of the application of the Convention.[15] 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.[16]

18. The respondent fails to demonstrate *opinio juris* as to objections to accession by other States, which is a requisite for 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 of any legal substance given that the applicant has repeatedly objected to the Israeli declaration purporting to preclude treaty relations between the two States.[17]

19. 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 requirements of compatibility with the International Convention on the Elimination of All Forms of Racial Discrimination overall, and thus so should objections be. While applying the legal regime for reservations *mutatis mutandis*, the respondent argues that the objection would be valid given the lack of reactions by more than two thirds of the States

[12] United Nations, *Final Clauses of Multilateral Treaties Handbook* (United Nations publication, Sales NO. E.04.V.3), p. 15.

[13] Note by Serbia addressed to the depository of the Apostille Convention, 18 December 2015. See https://treatydatabase.overheid.nl/en/Verdrag/Details/009051_b.html.

[14] Hague Conference on Private International Law, *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*. Available at https:assets.hcch.net/docs/0cfe4ad6-402d-4a06-b472-43302b31e7d5.pdf.

[15] Ibid., para. 63.

[16] 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 www.hcch.net/en/publications-and-studies/details4/?pid=52.

[17] See, for example, depository notification No. 354 (2014).

parties to the Convention. However, in the case concerning armed activities on the territory of the Democratic Republic of the Congo, the International Court of Justice reserved for itself the competence to decide whether a given reservation was compatible with the object and purpose of the Convention, regardless of whether two thirds of the contracting parties had objected to the reservation. The Court also noted that the reservation in question had not been objected to by the other States concerned.[18] In contrast to that case, the applicant has protested the respondent's objection.[19] Requiring the objection of two thirds of member States to the declaration made by Israel would be nonsensical, as none of the other contracting parties are concerned by the objection.

20. Not a single State party to the Convention has attempted to exclude the applicability of article 11 by way of a reservation, which is indicative of the *opinio juris* of States parties that unilateral declarations purporting to render the inter-State communication procedure under articles 11 to 13 obsolete are impermissible. Furthermore, 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.[20]

21. In response to the objection by Bahrain to treaty relations with the respondent under the Convention on the Prevention and Punishment of the Crime of Genocide, Israel stated that the objection "cannot in any way affect whatever obligations are binding upon Bahrain".[21] Given that the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Elimination of All Racial Discrimination are both of *jus cogens* and *erga omnes* character, the same considerations must apply to the latter 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, all obligations under the treaty must be owed to the other State by a contractual bond.[22] If the respondent is under an obligation owed to the applicant to fulfil its obligations arising under the Convention, this obligation must include the means to enforce these obligations, otherwise the mechanism would be rendered obsolete.

5 Preclusion from excluding treaty relations with the applicant under the Convention

22. There are two interlinked arguments as to why the Committee should consider the inter-State communication at hand, even if the Committee is to find that no treaty relations exist between the two parties.

23. Firstly, the respondent is legally precluded from arguing that it is not in treaty relations with the applicant. 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 to trigger the inter-State procedures under articles 11 to 13. As decided in the Preliminary Objections for 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",[23] since this would create inequality between member States, and the existence of a restrictive clause governing reservations suggested "that States could not qualify their acceptance of the optional clauses [Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)] thereby effectively excluding areas of their law and practice within their 'jurisdiction' from supervision by the Convention institutions". The inequality between contracting States

[18] *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, para. 77.

[19] Depository notification No. 354 (2014).

[20] A/53/125, para. 18.

[21] See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en#EndDec.

[22] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422.

[23] European Court of Human Rights, *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgment, 23 March 1995, para. 75.

that said permissibility of qualified acceptances might create would "run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights".[24]

24. Secondly, the respondent is barred from denying the applicant's accession to the Convention on the basis of statehood, given that the respondent is acting 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 the refusal by Israel to recognize Palestinian statehood and to accept treaty relations under the Convention. The bad faith may be evidenced by the enactment of the basic law on Israel as the nation-State of the Jewish people, 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.[25]

6. Absence in article 11 of a requirement of inter-State treaty relations

25. Given the *erga omnes* and *jus cogens* character of the Convention, any violation by the respondent 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.[26] As confirmed by the wording and drafting history of the Convention, the procedure under article 11 is not exclusively of a bilateral character, but is aimed at bringing before the Committee violations of the universal public order covered by the Convention.

26. As to the respondent's attempt to distinguish the *Pfunders* case[27] on the basis of the recognized State status of Austria, and the emphasis on the entitlement of Austria to bring the complaint only once it became a high contracting party to the European Convention on Human Rights, the applicant recalls that its own status as a State party 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 the Syrian Arab Republic did not invoke article 11 of the Convention,[28] and as such any comment by the Committee on the matter is mere *obiter dictum*. No objections to the declaration made by the Syrian Arab Republic purporting to exclude treaty relations with Israel were made, unlike the objection made to the respondent's attempts to exclude treaty relations with the applicant under the Convention.[29]

C. Exhaustion of local remedies

1. Burden of proof

27. Under generally recognized 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.[30] The respondent has relied on the role and availability of the

[24] Ibid., para. 77.

[25] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136.

[26] Articles on responsibility of States for internationally wrongful acts, adopted by the International Law Commission, art. 48.

[27] European Commission of Human Rights, *Austria v. Italy*, Application No. 788/60, Decision on Admissibility, 11 January 1961.

[28] A/36/18, para. 173.

[29] Depository notification No. 354 (2014).

[30] *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award of 6 March 1956, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 1963.V.3), pp. 83–153, specifically p. 119; rules of procedure of the Committee on the Elimination of Racial Discrimination, rule 92, paragraph 7; African Commission on Human and Peoples' Rights, *Rencontre africaine pour la défense des droits de l'homme (RADDHO) v. Zambia*, communication No. 71/92, Decision, October 1997, para. 12; and Inter-American Court of Human Rights, *Escher et*

court system in protecting individual rights, and has failed to refer to case law demonstrating effective legal protection for Palestinian nationals.

2. Exhaustion of domestic remedies

28. The applicant maintains that Palestinian nationals do not have access to the territory of the respondent and therefore are barred from bringing claims before Israeli courts. For this reason, Palestinian nationals cannot be expected to exhaust local remedies. This approach was confirmed by the jurisprudence of the African Commission on 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, Rwanda and Uganda. This approach must apply *mutatis mutandis* to the nationals of the applicant.

29. 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 the Convention, which extend beyond individualized cases.[31] 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.[32] While an administrative practice can only be determined after an examination of the merits, at the stage of admissibility prima facie evidence, while required, must also be considered as sufficient.[33] Such prima facie evidence of administrative practice exists where the allegations concerning individual cases are sufficiently substantiated and considered as a whole in the light of the submissions of both the applicant and the respondent.[34] The observations of the Committee with respect to the respondent's general policies and practices violating the Convention[35] 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 inter-State complaint procedure under articles 11 to 13 of the Convention.

3. Lack of efficient local remedies

30. Under generally recognized principles of international law, domestic remedies must be available, effective, sufficient and adequate. Purely administrative and disciplinary remedies cannot be considered adequate and effective;[36] local remedies must be available and effective in order for the rule of domestic exhaustion to apply;[37] domestic remedies are unavailable and ineffective if the national laws legitimize the human rights violation being complained of,[38] if the State systematically impedes the access of the individuals to the

al. v. Brazil, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 6 July 2009, para. 28.

[31] CERD/C/ISR/CO/14-16, para. 24.

[32] See, for example, European Commission of Human Rights, *Kingdom of Greece v. United Kingdom of Great Britain and Northern Ireland*, Application No. 176/56, Decision on Admissibility, 2 June 1956; European Commission of Human Rights, *The Greek Case (Denmark, Norway, Sweden and the Netherlands v. Greece)*, Applications Nos. 3321/67–3323/67 and No. 3344/67, *Yearbook of the European Convention on Human Rights*, vol. 11, pp. 690 ff.; African Commission on Human and Peoples' Rights, *Open Society Justice Initiative v. Côte d'Ivoire*, communication No. 318/06, Decision, February 2015, paras. 45 ff.; and African Commission on Human and Peoples' Rights, *Malawi African Association and Others v. Mauritania*, communications No. 54/91, No. 61/91, No. 98/93, No. 164/97 and No. 210/98, 11 May 2000, para. 85.

[33] European Commission of Human Rights, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Application Nos. 9940/82–9944/82, Decision, 6 December 1983, para. 22.

[34] Ibid., para. 22.

[35] CERD/C/ISR/CO/14-16, para. 25.

[36] Human Rights Committee, *Basnet and Basnet v. Nepal* (CCPR/C/112/D/2051/2011), para. 7.4; and *Giri et al. v. Nepal* (CCPR/C/101/D/1761/2008 and Corr.1), para. 6.3.

[37] Human Rights Committee, *Vicente et al. v. Colombia* (CCPR/C/60/D/612/1995), para. 5.2.

[38] Sarah Joseph and others, *A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, OMCT Handbook Series, vol. 4 (World Organisation Against Torture, 2006), pp. 64–65.

courts[39] and if the judicial remedies are not legitimate and appropriate for addressing violations, further fostering impunity;[40] the enforcement and sufficiency of the remedy must have a binding effect and decisions should not be merely recommendatory in nature, as a State would be free to disregard such decisions;[41] and the court must be independent and impartial.[42]

31. The respondent overlooks the interests of Palestinian nationals living in the occupied territory while protecting the interests of the illegal settlers. In the case of *Abu Safiyeh et al. v. Minister of Defense et al.*, the High Court of Justice of Israel denied the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (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.[43] The Court has also avoided rendering decisions by holding that the general question of settlements is political and therefore must be resolved by other branches of government.[44] Even where the Court 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.

32. The High Court of Justice is not independent, as it has been placed under the responsibility of the army, the body being investigated.[45] The structural deficiency and intrinsic lack of independence and impartiality was noted by the committee of independent experts in international humanitarian and human rights laws established pursuant to Human Rights Council resolution 13/9, in reference to the Military Advocate General, who conducts prosecutions of alleged misconduct carried out by the Israel Defense Forces.[46]

33. Although the respondent argues that the High Court of Justice, 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 invoked only in exceptional circumstances.[47] The High Court of Justice has also affirmed that it is unable to rule on violations of international humanitarian law.[48]

34. Israeli law has been the instrument of oppression, discrimination and segregation. The basic law on Israel as the nation-State of the Jewish people states that the exercise of the right to national self-determination in Israel is unique to the Jewish people, thus excluding the Palestinian right to self-determination. Further, the basic law stipulates that the State views the development of Jewish settlement as a national value, and will act to encourage, promote and consolidate its establishment. This violates article 49 of the Fourth Geneva Convention, which states that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". By adopting that basic law, the respondent has legitimized and perpetuated a war crime in contravention of article 8 (2) (b) (viii) of the Rome

[39] Human Rights Committee, *Grioua v. Algeria* (CCPR/C/90/D/1327/2004), para. 7.8.

[40] Human Rights Committee, *El Abani and others v. Libyan Arab Jamahiriya* (CCPR/C/99/D/1640/2007), para. 7.10.

[41] Committee on the Elimination of Racial Discrimination, *D.R. v. Australia* (CERD/C/75/D/42/2008), para. 6.4.

[42] Human Rights Committee, *Arzuaga Gilboa v. Uruguay*, communication No. 147/1983, para. 7.2, and Committee on the Elimination of Racial Discrimination, *L.R. et al. v. Slovak Republic* (CERD/C/66/D/31/2003 and Corr.1), para. 9.2.

[43] HCJ 2150/07, Judgment, 29 December 2009, paras. 21 and 38.

[44] *Mara'abe et al. v. Prime Minister of Israel et al.*, HCJ 7957/04, Judgment, 15 September 2005, para. 19. See also Yaël Ronen, "Israel, Palestine and the ICC – territory uncharted but not unknown", *Journal of International Criminal Justice*, vol. 12 (2014), pp. 24–25; and High Court of Justice, *Bargil v. Government of Israel*, HCJ 4481/91, Judgment, 25 August 1993, in particular the opinion of Justice Shamgar, para. 3.

[45] International Federation for Human Rights, *Shielded from Accountability: Israel's Unwillingness to Investigate and Prosecute International Crimes* (Paris, 2011), sect. 1.

[46] A/HRC/15/50, para. 91. See also A/HRC/16/24, para. 41.

[47] Eyal Benvenisti, "The duty of the State of Israel to investigate violations of the law of armed conflict", expert opinion submitted on 13 April 2011 to the Turkel Commission, p. 24; and *Shtanger v. Attorney General*, HCJ 10665/05, 16 July 2006.

[48] The applicant cites *Thabit v. Attorney General*, HCJ 474/02, Judgment, 30 January 2011.

Statute of the International Criminal Court. The incorporation of that 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 High Court of Justice further confirmed its role as a tool of oppression and discrimination when it dismissed a petition by an Israeli organization and Israeli parliament members calling for the rejection of the basic law.[49]

35. The military law system is inaccessible to Palestinian victims, who de facto are unable to file complaints with the Military Police Investigation Unit directly, but must rely on human rights organizations or attorneys to file the complaints on their behalf. The Military Police Investigation Unit has no jurisdiction 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, thus the soldiers who are the subjects of the complaints are often no longer in active service and under military jurisdiction.[50] Additionally, Palestinian nationals face excessive court fees, the prevention of witnesses from travelling to court, and the inability of lawyers to travel to and from the occupied territory to represent their clients.[51]

II. Reply of the respondent

A. Lack of jurisdiction

36. On 20 March 2019, the respondent submitted its comments to the applicant's submission.

37. Given the lack of jurisdiction, questions of admissibility, including the failure to invoke and exhaust local remedies, do not arise in this case. The respondent 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

38. 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.

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

40. The Committee has itself already recognized that the article 11 mechanism cannot be resorted to in the absence of treaty relations. Where the Syrian Arab Republic stated that it did not recognize Israel and excluded any treaty relations with it, the Committee decided that article 11 (2) clearly implied a relationship between two States parties and accepted that the mechanism may not be activated where such a relationship did not exist.[52] The Committee specifically referred to the requirement of treaty relations as a reason not to activate the inter-State mechanism of article 11.[53] 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.

41. 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

[49] Adalah: Legal Center for Arab Minority Rights in Israel, "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.

[50] B'Tselem, "No accountability", 11 November 2017. Available at www.btselem.org/accountability.

[51] International Federation for Human Rights, *Shielded from Accountability*, annex 4. See also Michael Sfard, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights* (New York, Henry Holt and Company, 2018).

[52] A/36/18, para. 173.

[53] Ibid.

13 explicitly refer to "parties to the dispute" and involve interaction, including negotiation, conciliation and other procedures between two States parties. Given that the respondent excluded the application of the Convention between itself and the applicant, the article 11 mechanism is inapplicable.

42. The respondent validly excluded treaty relations with the applicant by objecting to the validity of the purported Palestinian accession to the Convention, through an official and timely communication that was deposited with the Secretary-General as depository. The objection was confirmed in a letter to the Office of Legal Affairs, in which it is noted that the intended legal effect of the objections of Israel was "to exclude the application of all provisions of the Convention as between Israel and the Palestinian entity".[54]

43. Moreover, the respondent was not obligated to submit an explicit objection to treaty relations with the applicant, although such obligations are prevalent in international practice.[55] 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

44. 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 recognize it and that have objected to treaty relations with it.

45. The applicant's arguments as to its State party membership to the Convention are not for the concern of the Committee. Rather, the 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.

46. With reference to the argued *jus cogens* and *erga omnes* character of the Convention, the applicant 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.[56]

47. The respondent did not accept the applicant as a State party to the Convention, capable of violating provisions therein, and did not accuse the applicant of violating the Convention, but only of the norms embodied in the Convention.

48. The applicant seeks to undermine the legal status of objections to relations by focusing on the Apostille Convention. Such objections are a long-standing State practice.[57] The applicant mistakenly argues that article 12 of the Apostille Convention established a particular mechanism of objections to treaty relations, and that therefore that Convention cannot serve as evidence for the existence of a general State practice of objections to treaty relations. The applicant recalls the objection made by Serbia to the accession by Kosovo 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

[54] Letter dated 12 July 2018 from the Permanent Representative of Israel to the United Nations addressed to the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel.

[55] The respondent refers to its submission to the Committee dated 3 August 2018, annex III, entitled "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".

[56] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, para. 93; and *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, 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*, p. 6, para. 64.

[57] The respondent refers to its submission to the Committee dated 3 August 2018, annex III.

depository's comment and issued a statement clarifying that its objection to accession by Kosovo was made in general terms and not under article 12, as it concerned the preliminary question of the disputed statehood of Kosovo.[58]

49. The applicant has engaged in an act of bad faith by trying to bring a complaint against the respondent under the International Convention on the Elimination of All Forms of Racial Discrimination when its own discriminatory practices against Israelis are endemic. The respondent affirms that it did not assert that the applicant's argument of bad faith was antisemitic, but rather sought to demonstrate the hypocrisy of alleging bad faith.

B. Exhaustion of remedies

50. 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 on the applicant to demonstrate the exhaustion of available domestic remedies

51. The applicant has failed to demonstrate the exhaustion of domestic remedies and seeks to apportion the burden of proof on the respondent,[59] despite it being well recognized under international law that the burden of proof lies with the applicant.[60] 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.[61]

52. Recognizing its failure to meet the legal burden, the applicant argues that, because the alleged violations occurred outside Israeli territory in an area of occupation, the Palestinian nationals are barred from seeking remedies before Israeli courts and that the exhaustion of domestic remedies is not required where the alleged violations amount to an "administrative practice" of a State. Contrary to this argument, in the *Demopoulos* case, the European Court of Human Rights 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".[62] 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 the mechanism must have their complaints rejected for failure to exhaust domestic remedies.[63] As such, the fact that Palestinian nationals reside outside Israeli territory does not exempt them from exhausting local Israeli remedies.

53. 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 from first exhausting that remedy before adjudicating the matter at the international level.[64]

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[58] Note by Serbia addressed to the depositary of the Apostille Convention, 18 December 2015.

[59] The State party refers to rule 92, paragraph 7, of the Committee's rules of procedure, expressly related to individual complaints under article 14 of the Convention, and not inter-State communications.

[60] *Case of Certain Norwegian Loans, Judgment of July 6th, 1957: I.C.J. Reports 1957*, p. 9; *Case of Certain Norwegian Loans*, Separate Opinion of Judge Sir Hersch Lauterpacht, p. 39; and Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol. 1 (Oxford University Press, 2013), p. 612.

[61] Bernard Robertson, "Exhaustion of local remedies in international human rights litigation: the burden of proof reconsidered", *International and Comparative Law Quarterly*, vol. 39, No. 1 (January 1990), p. 193.

[62] *Demopoulos and others v. Turkey*, Application No. 46113/99 and others, Decision on Admissibility, 1 March 2010, para. 98.

[63] Ibid., para. 127.

[64] Ibid.

2 Domestic legal frameworks

54. The respondent refutes the assertions that the High Court of Justice facilitates the settlement enterprise or allows for the existence of two separate legal regimes. Rather, the Court routinely examines the actions or decisions of the Israel Defense Forces military commander pertaining to the West Bank in light of the humanitarian obligations set forth in the Fourth Geneva Convention and any obligations in customary international law pertaining to belligerent occupation.[65] Moreover, the Court has determined that the substantive rules of Israeli administrative law apply to any executive actions in the West Bank.[66]

55. Security measures are implemented and executed in accordance with the military commander's responsibility to ensure public order and safety.[67] While their application may affect Israeli and Palestinian nationals differently, they are not a systematic attempt to dominate or discriminate against the Palestinian population.[68]

3. Effective domestic remedies

56. The High Court of Justice of Israel 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.[69] Instituted guidelines and mechanisms ensure that access to the courts and the ability to conduct legal proceedings are not hindered, including with regard to the procedural criteria for the entry of claimants and witnesses from the Gaza Strip to Israel for legal proceedings,[70] and guidelines issued by the State Attorney pertaining to litigation by Gaza Strip residents following the 2008/09 Gaza Strip conflict (Operation Cast Lead). Further, the Court has determined that, while security is of concern, it is the position of the State that maximum procedural fairness is achieved.[71] Following this determination, the State formulated relevant procedures to facilitate the carrying out of legal proceedings in Israel by Gaza Strip residents, which the Court deemed adequately addressed the challenges raised, prompting it to dismiss the petition.[72]

57. In response to the applicant's argument that individuals are de facto barred from bringing claims before Israeli courts, the respondent refers to jurisprudence in which the European Court of Human Rights recognizes 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

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[65] See, for example, *Ajuri et al. v. Israel Defense Forces Commander in the West Bank et al.*, HCJ 7015/02, 3 September 2002.

[66] *Al-Taliya v. Minister of Defense*, HCJ 619/78, 28 May 1979; *Ajuri et al. v. IDF Commander in the West Bank et al.*, HCJ 7015/02, Judgment, 3 September 2002; *Ja'amait Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Cooperative Society Registered at the Judea and Samaria Area Headquarters v. IDF Commander in Judea and Samaria and the Supreme Planning Committee in the Judea and Samaria Area*, HCJ 393/82, 28 December 1983; *Association for Civil Rights in Israel and others v. Central Commander and another*, HCJ 358/88, Judgment, 30 July 1989; *Physicians for Human Rights et al. v. IDF Commander in Gaza*, HCJ 4764/04, Judgment, 30 May 2004, para. 10; and *Beit Sourik Village Council v. Government of Israel and the Commander of the IDF in the West Bank*, HCJ 2056/04, Judgment, 30 June 2004.

[67] See the Convention respecting the Laws and Customs of War on Land, art. 43, and the annex to the Convention (Regulations respecting the Laws and Customs of War on Land).

[68] *Abu Safiyeh et al. v. Minister of Defense et al.*, HCJ 2150/07, Judgment, 29 December 2009.

[69] Coordinator of Government Activities in the Territories, procedure for processing requests for legal proceedings (October 2014).

[70] Coordinator of Government Activities in the Territories, procedure for the review of requests by Palestinian residents of the Gaza Strip for the purpose of managing legal proceedings in Israel (May 2013).

[71] The respondent refers to High Court of Justice, *The Palestinian Center for Human Rights v. The Attorney General*, HCJ 9408/10, Supplementary Response for the State.

[72] See the procedure for the review of requests. 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, and exceptional humanitarian circumstances that warrant deviation from general policy. Decisions rejecting entry into Israel are reviewable by Israeli courts.

court in civil proceedings.[73] According to jurisprudence of the Human Rights Committee, 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.[74]

4. Court security deposits

58. The applicant alleges that the payment of a guarantee imposed by the courts is an impediment to conducting legal proceedings, particularly before the High Court of Justice. However, it is not the general practice of the Court to impose security deposits in High Court of Justice petitions. The Supreme Court has given guidelines in its case law for the lower courts on imposing a security deposit on plaintiffs, which call for the consideration of the complexity of proceedings, the identity of the parties and the extent of the claimant's good faith in initiating proceedings.[75] As a result, legal proceedings are regularly conducted by Palestinian claimants before Israeli courts, despite the requirement of said deposits.[76]

5. High Court of Justice

59. The applicant erroneously states that the High Court of Justice is not independent and has been placed under the responsibility of the army. Rather, judges of the Court are selected by the Judicial Selection Committee, which is independent.[77] The court system is separate from the military, in that there is no connection between the two.[78]

60. The High Court of Justice has 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.[79] The Court 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,[80] and the exception to State liability for tort damages caused in a zone of conflict as a result of acts of security forces.[81]

61. Furthermore, the applicant erroneously claims that a legal challenge of the basic law on Israel as the nation-State of the Jewish people before the High Court of Justice was rejected, evidencing the Court's "role as a tool of oppression and discrimination". The respondent asserts, rather, that 14 petitions relating to that basic law are currently pending before the Court.

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[73] *Kabwe and Chungu v. United Kingdom,* Applications No. 29647/08 and No. 33269/08, Decision on Admissibility, 2 February 2010; *X. v. Sweden,* Application No. 434/58, Decision on Admissibility, 30 June 1959; and *Muyldermans v. Belgium,* Judgment, 23 October 1991, Series A, No. 214-A, para. 64.

[74] *Perterer v. Austria* (CCPR/C/81/D/1015/2001), para. 9.3.

[75] *Estate of the late Ali Ja'alia et al. v. State of Israel,* Ci.Ap.Req. 1007/08, 31 January 2010.

[76] Recent examples include Beersheba District Court, *Estate of the late Abu-Halimeh et al. v. State of Israel*, Ci.C. 35484-08-10; Jerusalem District Court, *Estate of the late Abu al-Ayash v. State of Israel*, Ci.C. 40777-12-10; Beersheba District Court, *Al-Halo et al. v. State of Israel,* Ci.C. 7503-01-11, 10 December 2018; and Beersheba District Court, *Estate of the late Abu Sayid v. State of Israel*, Ci.C. 21677-07-12.

[77] The judges are appointed by the President, following a recommendation of the Judicial Selection Committee, which is chaired by the Minister of Justice and whose members include another Cabinet minister, the President of the Supreme Court, two other justices of the Supreme Court, two Members of the Knesset, and two representatives of the Israel Bar Association. Thus all three branches of government, and the Israel Bar Association, are represented on the Committee.

[78] See Israel, Basic Law: The Judiciary.

[79] *Khelou et al. v. Government of Israel et al.*, HCJ 302/72, 21 May 1973; Meir Shamgar, "Legal concepts and problems of the Israeli military government – the initial stage" and Eli Nathan, "The power of supervision of the High Court of Justice over military government", in Meir Shamgar, ed., *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects*, vol. I (Jerusalem, Harry Sacher Institute for Legislative Research and Comparative Law, Hebrew University Jerusalem, 1982).

[80] The respondent refers to Ci.Ap. 8823/07 *Anonymous v. The State of Israel*, 2 November 2010.

[81] *Adalah: Legal Center for Arab Minority Rights in Israel et al. v. Minister of Defense et al.*, HCJ 8276/05, HCJ 8338/05 and HCJ 11426/05, 12 December 2006.

6. Accessibility

62. Any interested party is entitled to petition the Supreme Court directly to claim that a certain government action or policy is ultra vires unlawful or unreasonable.[82] In 2017, over 2,500 petitions were filed with the Court in its capacity as the High Court of Justice alone and in 2016, 2,270 petitions were filed.[83] Additionally, the High Court of Justice 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.[84] Moreover, the Court has taken a particularly staunch position regarding the justifiability of alleged violations of human rights.[85]

63. In numerous cases, the Government of Israel 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.[86] 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.[87] 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.[88]

64. These examples demonstrate that the availability of legal recourse before the High Court of Justice 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 High Court of Justice 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 Court has earned international respect and recognition for its jurisprudence, as well as for its independence in enforcing the law.[89]

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[82] *Public Committee against Torture in Israel and LAW–Palestinian Society for the Protection of Human Rights and the Environment v. Government of Israel et al.*, HCJ 769/02, Judgment, 14 December 2006.

[83] Israeli judiciary annual report for 2017. Available at www.gov.il/BlobFolder/reports/statistics_annual_2017/he/annual2017.pdf (in Hebrew).

[84] *Physicians for Human Rights and others v. Prime Minister of Israel and others*, HCJ 201/09; and *Gisha Legal Centre for Freedom of Movement and others v. Minister of Defence*, HCJ 248/09, Judgment, 19 January 2009.

[85] See, for example, *Public Committee against Torture in Israel and LAW–Palestinian Society for the Protection of Human Rights and the Environment v. Government of Israel et al.*, HCJ 769/02, Judgment, 14 December 2006, para. 50; *Dawikat et al. v. State of Israel et al.*, HCJ 390/79, Judgment, 22 October 1979; Aharon Barak, "A judge on judging: the role of a supreme court in a democracy", *Harvard Law Review*, vol. 116 (2002), pp. 106–110 (see also pp. 97–105); Ariel L. Bendor, "Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of the Israeli and American experience", *Indiana International & Comparative Law Review*, vol. 7, No. 2 (1997); and Baruch Bracha, "Judicial review of security powers in Israel: a new policy of the courts", *Stanford Journal of International Law*, vol. 28 (1991–1992), pp. 96–97.

[86] *Head of Deir Samit Village Council et al. v. Commander of the IDF in the West Bank and the Commander of the Hebron Brigade*, HCJ 3969/06, Judgment, 22 October 2009; *Société Foncière De Terre-Sainte v. State of Israel et al.*, HCJ 7210/04, 19 August 2004; *Abu Romi v. Military Commander in the West Bank*, HCJ 5743/04, 9 September 2004; *Bethlehem Municipality and 22 others v. State of Israel – Ministry of Defence and IDF Commander in Judea and Samaria*, HCJ 1890/03, Judgment, 3 February 2005; *Al-Quds University v. State of Israel*, HCJ 5383/04-B, 17 June 2004; and *Diaab et al. v. Government of Israel et al.*, HCJ 2626/04, Judgment, 4 November 2004.

[87] *Public Committee against Torture in Israel and LAW–Palestinian Society for the Protection of Human Rights and the Environment v. Government of Israel et al.*, HCJ 769/02, Judgment, 14 December 2006.

[88] See *Physicians for Human Rights and others v. Prime Minister of Israel and others*, HCJ 201/09; and *Gisha Legal Centre for Freedom of Movement and others v. Minister of Defence*, HCJ 248/09, Judgment, 19 January 2009.

[89] Supreme Court of Canada, Application under section 83.28 of the Criminal Code, Judgment, 23 June 2004, para. 7.

7. Jurisprudence of the High Court of Justice of Israel pertaining to Palestinian rights in the West Bank

65. The High Court of Justice regularly addresses claims of alleged violations of the freedom of movement, including cases concerning Palestinians seeking travel permits, in the context of security concerns,[90] the broad discretion of the Ministry of Defense,[91] and the military commander's duty to ensure public order and safety.[92]

66. The High Court of Justice 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,[93] pension deductions,[94] minimum wage and the cost of living allowance.[95]

67. The Court 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.[96] 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.[97]

68. The Court has also reviewed allegations relating to proceedings before military courts in the West Bank, including the accessibility of documents,[98] and the length of detention periods.[99] The proceedings before the Court contributed to a major reform in the criminal procedure of the military courts in the West Bank, which included: the establishment of a specialized juvenile court in the West Bank; the raising of the age of majority; full separation between adults and minors during the judicial process; a special shortened statute of limitations; and parental involvement.

69. In consideration of international law, the Court has reviewed the operational activities of the Israel Defense Forces, including extended detention periods,[100] local-resident-assisted arrests,[101] and time periods for examining entry requests.[102]

8. Civil proceedings

70. The civil courts of Israel are available to Palestinian residents of the West Bank with respect to property rights, for instance rightful ownership.[103] The High Court of Justice has

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[90] The respondent refers to *Jamal Ali v. The Military Commander in West Bank*, HCJ 3764/16, Judgment, 2017.

[91] *Parents Circle-Families Forum, Bereaved Families for Peace and Combatants for Peace Ltd. v. Minister of Defense and the IDF Commander in Judea and Samaria*, HCJ 2964/18, Judgment, 17 April 2018.

[92] *Abu Safiyeh et al. v. Minister of Defense et al.*, HCJ 2150/07, 29 December 2009, para. 35.

[93] *Kav LaOved Association and others v. National Labour Court, Jerusalem, and others*, HCJ 5666/03, Judgment, 10 October 2007.

[94] *Neetuv – Management and Development Company Ltd v. Estate of Badawi Gitan et al.*, 48438-02-15, 2018.

[95] The respondent indicates that after the *Kav LaOved* [Worker's Hotline] decision, Order No. 967 (1982) regarding employment of workers in certain areas (Judea and Samaria) was amended in order to provide an entitlement to a minimum wage and cost of living allowance for Palestinian employees.

[96] *Hamed et al. v. Minister of Defense et al.*, HCJ 9949/08, Judgment, 14 November 2016; *Muhamad v. Minister of Defense*, HCJ 9496/11, Judgment, 4 November 2015.

[97] *Beit Sourik Village Council v. Government of Israel and the Commander of the IDF in the West Bank*, HCJ 2056/04, 30 June 2004; and *Mara'abe et al. v. Prime Minister of Israel et al.*, HCJ 7957/04, Judgment, 15 September 2005.

[98] *El-Arah et al. v. Central Commander of the Israeli Army and another*, HCJ 2775/11.

[99] *Ministry of Palestinian Prisoners and others v. Minister of Defense and others*, HCJ 3368/10, Judgment, 6 April 2014.

[100] *Mar'ab et al. v. IDF Commander in the West Bank, and Judea and Samaria Brigade Headquarters*, HCJ 3239/02, Judgment, 5 February 2003.

[101] *Adalah: Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, HCJ 3799/02, Judgment, 6 October 2005.

[102] *Anonymous v. Minister of Defence*, HCJ 9815/17, Judgment, 19 March 2018.

[103] See Jerusalem District Court, *Baakri v. Tal Construction Co.*, Civil Claim No. 3329/09, Judgment, 18 April 2012; and *Hamdi et al. v. Himnuta L.T.D. et al.*, Civil Claim No. 2425/08, 15 July 2010.

also considered cases concerning compensation for damage or injury caused by security forces in the West Bank.[104]

9. Criminal proceedings

71. 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,[105] in particular, the criminal courts have decided on cases concerning racially motivated or discriminatory crimes.[106]

10. Military criminal justice system

72. 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 is composed of two units: the law enforcement unit, responsible for enforcing the law throughout the Israel Defense Forces,[107] and the legal advice unit, responsible for providing legal advice to all military authorities.[108] The head of the Corps is appointed by the Minister of Defense, a civilian authority,[109] and is subject to no authority but the law.[110] The military courts, which adjudicate charges against Israel Defense Forces soldiers for military and other criminal offences, are independent of both the Military Advocate General and the Israel Defense Forces chains of command. The military court system includes regional courts of first instance, as well as the Military Court of Appeals, whose decisions are subject to review by the High Court of Justice.

73. The primary entity for investigating allegations of criminal offences is the Military Police Criminal Investigation Division, which is a unit entirely separate from the Military Advocate General's Corps and enjoys complete professional independence.[111] With respect to principles of independence, impartiality, effectiveness, thoroughness, promptness and transparency, the Turkel Commission also favourably compared the investigations system of Israel to the systems of Western nations.[112]

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

74. 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 by referring the issue for review by the Attorney General; this is routinely done.[113] The Attorney General may also examine or convey his opinion regarding general legal matters pertaining to the military.[114]

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[104] The respondent refers to *Ministry of Defense v. Estate of the Late Fhatma Ibrahim Abdallah Abu Samara*, Ci.Ap. 3991/09; and Jerusalem District Court, *State of Israel v. Na'alwa*, Ci.Ap.Rq. 37000-06-17.

[105] Jerusalem District Court, *State of Israel v. S.T. and other*, Cr.C. 4001-05-15, 22 July 2015; Jerusalem District Court, *State of Israel v. Ben David et al.*, S.Cr.C. 34700-07-14, 19 April 2016.

[106] The respondent refers to *State of Israel v. Cohen*, Cr.C. 41705-08-14, 19 September 2017 and *The State of Israel v. Avraham Gafni et al.*, Cr.C. 55372-08-15.

[107] The respondent refers to Military Justice Law (No. 5715–1955), sect. 178, and Israel Defense Forces Supreme Command Order 2.0613 of 5 March 1976 on the Military Advocate General's Corps.

[108] The respondent refers to Military Justice Law, sect. 178 (1) and Israel Defense Forces Supreme Command Order 2.0613. See also the Attorney General's Directive (No. 9.1002) on the Military Advocate General, version of April 2015, para. 2 (b).

[109] Military Justice Law, sect. 177 (a).

[110] The respondent refers to Israeli Defense Forces Supreme Command Order 2.0613 and Attorney General's Directive No. 9.1002, para. 3.

[111] Israel, Ministry of Foreign Affairs, *The 2014 Gaza Conflict, 7 July–26 August 2014: Factual and Legal Aspects* (2015), p. 222.

[112] The Public Commission to Examine the Maritime Incident of 31 May 2010 (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*, second report (February 2013), pp. 152–264.

[113] The respondent refers to *Avivit Atiyah v. Attorney General*, HCJ 4723/96, Judgment, 29 July 1997.

[114] Attorney General's Directive No. 9.1002, para. 2 (b). See also directives from the Ministry of Justice regarding the Military Advocate General and Review of the Military Advocate General's decisions.

75. This is in addition to the avenue of judicial review by the High Court of Justice of all decisions of the Military Advocate General and of the Attorney General. The Court may review and reverse decisions of the Military Advocate General 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.[115] Although the Military Advocate General and the Attorney General are generally afforded broad discretion by the High Court of Justice, where it finds their decision unreasonable, the Court will intervene.[116]

[115] *Thabit v. Attorney General*, HCJ 474/02, Judgment, 30 January 2011.

[116] *Avery v. Military Advocate General*, HCJ 11343/04, 9 October 2005; and *Abu Rahma et al. v. The Military Advocate General et al.*, HCJ 7195/08, Judgment,1 July 2009.