



# International Convention on the Elimination of All Forms of Racial Discrimination

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## Committee on the Elimination of Racial Discrimination

### Inter-State communication submitted by the State of Palestine against Israel: decision on admissibility\*, \*\*

<i>Applicant:</i>	State of Palestine
<i>Respondent:</i>	Israel
<i>Date of communication:</i>	23 April 2018 (initial submission)
<i>Date of adoption of decision:</i>	30 April 2021
<i>Subject matter:</i>	Effective protection and remedy against any act of racial discrimination; generalized policy and practice with regard to inter-State communications; obligations of the State
<i>Procedural issue:</i>	Admissibility of the communication
<i>Substantive issue:</i>	Discrimination on the ground of national or ethnic origin
<i>Articles of the Convention:</i>	2, 3, 5, 11 (2), (3) and (5) and 12 (1)

1. The present document was prepared pursuant to article 11 (3) of the Convention.
2. The State of Palestine (the applicant) acceded to the Convention on 2 April 2014. Israel (the respondent) ratified the Convention on 3 January 1979. The applicant claims that the respondent has violated articles 2, 3 and 5 of the Convention with regard to Palestinian citizens living in the Occupied Palestinian Territory, including East Jerusalem.
3. The present document should be read in conjunction with CERD/C/100/3, CERD/C/100/4 and CERD/C/100/5.
4. On 23 April 2018, the applicant submitted a communication against the respondent under article 11 (1) of the Convention.
5. On 7 November 2018, the applicant again referred the matter to the Committee, in accordance with article 11 (2) of the Convention. The present document contains a summary of the main arguments regarding admissibility raised by both parties pursuant to the Committee's decision of 14 December 2018, in which the Committee requested the parties

\* Adopted by the Committee at its 103rd session (19–30 April 2021).

\*\* The present decision on admissibility has been adopted with the participation of the following members: Sheikha Abdulla Ali Al-Misnad, Chinsung Chung, Ibrahima Guissé, Gun Kut, Mehrdad Payandeh, Vadili Mohamed Rayess, Verene Shepherd, Stamatia Stavrinaki, Faith Dikeledi Pansy Tlakula and Yeung Kam John Yeung Sik Yuen. The following members, who signed a dissenting opinion regarding the decision on jurisdiction adopted on 12 December 2019 at the 100th session, indicated that they did not participate in the drafting and adoption of the present decision on admissibility: Marc Bossuyt, Rita Izsák-Ndiaye, Ko Keiko and Li Yanduan. Four members were absent.



to inform it whether they wished to supply any relevant information on the issues of the jurisdiction of the Committee or the admissibility of the communication.<sup>1</sup>

6. On 12 December 2019, at its 100th session, in accordance with article 11 (5) of the Convention, following the oral statements delivered by the representatives of both States parties concerned, the Committee decided that it had jurisdiction to deal with the inter-State communication submitted by the State of Palestine against Israel.<sup>2</sup> The Committee noted that the applicant and the respondent had submitted arguments on both jurisdiction and admissibility and decided that submissions made on the issue of admissibility would be considered at a later stage.<sup>3</sup>

## I. Observations of the respondent regarding admissibility

7. The respondent, through its responses dated 3 August 2018, 23 September 2018, 14 January 2019 and 20 March 2019, submitted that the applicant's complaint was inadmissible.

8. Firstly, the respondent argues that the allegations raised by the applicant are subject to judicial review and numerous domestic remedies are available. Without prejudice to the inadmissibility of the communication, or to its position regarding the substance of the case, the respondent submits that it rejects out of hand the baseless and sweeping Palestinian claim regarding the ineffectiveness of local remedies.<sup>4</sup>

9. Secondly, in its submission dated 23 September 2018, the respondent states that it is necessary to distinguish between the preliminary question of the (in)admissibility of the communication and other admissibility issues, including those that relate to efforts made by the parties to adjust the situation and those related to the exhaustion of domestic remedies.<sup>5</sup> The respondent also states that what is at issue before the Committee at this stage is the inability *ab initio* of the applicant's communication to trigger the article 11 mechanism at all, given the absence of treaty relations between Israel and the Palestinian entity under the Convention. This is distinct from "admissibility" issues that arise as part of the article 11 process and that would need to be addressed, in accordance with the timeline and procedures established by the Convention, only in circumstances in which this process was applicable and lawfully initiated.

10. Thirdly, in its submission dated 14 January 2019,<sup>6</sup> concerning the Committee's decision of 14 December 2018, the respondent submits that the communication is inadmissible because of the applicant's failure to invoke and exhaust local remedies, as required under article 11 (3) of the Convention. The communication is not relevant since the Committee lacks jurisdiction to consider it; therefore, the article 11 mechanism cannot be regarded as being activated and, consequently, questions of admissibility do not arise.

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<sup>1</sup> Since both parties provided arguments on both jurisdiction and admissibility, the arguments already submitted are used in the present decision.

<sup>2</sup> See CERD/C/100/5.

<sup>3</sup> Due to the coronavirus disease (COVID-19) pandemic and its effect on the Committee's sessions in 2020, the matter was brought before the plenary during the 103rd session of the Committee.

<sup>4</sup> See, for example: High Court of Justice of Israel, *Abu Safiyeh et al. v. Minister of Defense et al.*, HCJ 2150/07, Judgment, 29 December 2009; *El-Arah et al. v. Central Commander of the Israeli Army and another*, HCJ 2775/11; Supreme Court, *Anonymous v. State of Israel*, CHR 8823/07, Decision, 11 February 2010; and *Adalah Legal Centre for Arab Minority Rights in Israel et al. v. Israel Defence Forces Central Commander*, HCJ 3799/02, Judgment, 6 October 2005.

<sup>5</sup> The respondent indicates that the transmittal of its reply to the applicant dated 3 August 2018 is without prejudice to the absence of treaty relations between the parties and to the question of the legal admissibility of the communication.

<sup>6</sup> The respondent indicates that its submission is made without prejudice to its position that it does not recognize the "Palestinian entity" as a State, and that it has no treaty relationship with it under the Convention.

## II. Observations of the applicant regarding the exhaustion of local remedies

11. On 15 February 2019, the applicant submitted additional observations, addressing the different issues raised in the respondent's submission of 14 January 2019, including the issues of the burden of proof, the exhaustion of local remedies and the lack of efficient local remedies.

12. In that submission, the applicant submits that the Committee had determined in its decision adopted on 14 December 2018, at its ninety-seventh session, that the matter had not been adjusted to the satisfaction of both parties.

13. The applicant submits that the respondent, the occupying Power, continues to deny the applicability of the Convention in the occupied territory of the State of Palestine and has proven that it is not willing to engage in any meaningful dialogue with the State of Palestine as to its observance of its international obligations vis-à-vis the Palestinian people. The applicant also submits that the object and purpose of its communication under article 11 of the Convention relate to a widespread and systematic system of racial discrimination and segregation inherent in the "Israeli settlement project", which cannot be remedied by minor or cosmetic changes such as those referred to in the respondent's observations of 14 January 2019.

### A. Burden of proof with regard to the exhaustion of local remedies

14. The applicant submits that 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.<sup>7</sup> The applicant also argues that 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 Palestinian nationals.

15. Regarding the first argument, the applicant indicates that this was confirmed as early as 1959 by the arbitral tribunal in the *Ambatielos* case when it stated that, "in order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used".<sup>8</sup> This has also been confirmed by various human rights treaty bodies, in particular when it comes to inter-State complaints. Thus, already in its very first inter-State case, brought by Greece against the United Kingdom of Great Britain and Northern Ireland, the European Commission of Human Rights decided that in accordance with the said generally recognised rules of international law it is the duty of the Government claiming that domestic remedies have not been exhausted to demonstrate the existence of such remedies.<sup>9</sup>

16. The applicant submits that this approach is further confirmed by the practice under the Convention on the Elimination of All Forms of Discrimination against Women, and references in particular article 69, paragraph 6, of that Committee's rules of procedure, which explicitly provides that if a State party concerned disputes the contention of the author or authors of a communication that all available domestic remedies have been exhausted, the State party must give details of the remedies available to the alleged victim; that is, the State party carries the burden of proof in relation to the exhaustion of local remedies. This approach

<sup>7</sup> The applicant refers to *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 al. v. Brazil*, Judgment, 6 July 2009, para. 28.

<sup>8</sup> *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, p. 119. The applicant emphasizes that, in the case at hand, "the defendant State" is Israel.

<sup>9</sup> *Ibid.*

is also confirmed by the African Commission on Human and Peoples' Rights<sup>10</sup> and the Inter-American Court of Human Rights.<sup>11</sup>

17. The applicant adds that the respondent, the occupying Power, has generally referred to the role and availability of its court system in protecting individual rights; however, it has failed to specifically refer to case law that would demonstrate the possibility for nationals of the State of Palestine to, even in theory, seek effective legal protection from acts of the occupying Power. This holds true, in particular, when it comes to the systematic set-up of illegal settlements throughout the occupied territory of the State of Palestine.

## B. Exhaustion of domestic remedies

18. The applicant submits that Palestinian nationals do not have access to the territory of the respondent and therefore are barred from bringing claims before Israeli courts, unless they are supported by Israeli non-governmental organizations or are able to gain a permit to enter Israel. For this reason, Palestinian nationals cannot be expected to exhaust local remedies. The applicant submits that this approach was confirmed by the jurisprudence of the African Commission on Human and People's Rights, which in 2003 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.

19. The applicant also submits that the exhaustion of local remedies is not required given that the respondent's violations of the Convention amount to an administrative practice. The Palestinian population living in the occupied territory as a whole faces systematic violations of the Convention, which extend beyond individualized cases.<sup>12</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 applicant affirms that the requirement of exhaustion of local remedies does not apply if it is a legislative or administrative practice that is being challenged.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> The observations of the Committee with respect to the respondent's general policies and practices violating the Convention<sup>16</sup> demonstrate systematic violations amounting to *prima facie* evidence of administrative practice. As such,

<sup>10</sup> *Rencontre africaine pour la défense des droits de l'Homme (RADDHO) v. Zambia*, para. 12.

<sup>11</sup> Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Judgment (Preliminary Objections), 26 June 1987, para. 88. See further developments of this rule, which according to the Court not only derives from the specific provision of the American Convention on Human Rights dealing with the exhaustion of local remedies, but is also rooted in general international law (Inter-American Court of Human Rights, Advisory Opinion OC-11/90 on exceptions to the exhaustion of domestic remedies (articles 46 (1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights)), 10 August 1990, para. 41. See also Inter-American Court of Human Rights, *Escher et al. v. Brazil*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 6 July 2009, para. 28.

<sup>12</sup> CERD/C/ISR/CO/14-16, para. 24.

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> *Ibid.*, para. 22.

<sup>16</sup> CERD/C/ISR/CO/14-16, para. 25.

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.

### C. Lack of efficient local remedies

20. Under generally recognized principles of international law, domestic remedies must be available, effective, sufficient and adequate. 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>17</sup> local remedies must be available and effective in order for the rule of domestic exhaustion to apply;<sup>18</sup> domestic remedies are unavailable and ineffective if the national laws legitimize the human rights violation being complained of,<sup>19</sup> if the State systematically impedes the access of the individuals to the courts<sup>20</sup> and if the judicial remedies are not legitimate and appropriate for addressing violations, further fostering impunity;<sup>21</sup> 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;<sup>22</sup> and the court must be independent and impartial.<sup>23</sup>

### D. Israeli judicial system

21. The respondent's judicial system is illegitimate, futile, unavailable, ineffective and insufficient. 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.<sup>24</sup> 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.<sup>25</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> Human Rights Committee, *Vicente et al. v. Colombia* (CCPR/C/60/D/612/1995), para. 5.2.

<sup>19</sup> 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.

<sup>20</sup> Human Rights Committee, *Grioua v. Algeria* (CCPR/C/90/D/1327/2004), para. 7.8.

<sup>21</sup> Human Rights Committee, *El Abani and others v. Libyan Arab Jamahiriya* (CCPR/C/99/D/1640/2007), para. 7.10.

<sup>22</sup> Committee on the Elimination of Racial Discrimination, *D.R. v. Australia* (CERD/C/75/D/42/2008), para. 6.4.

<sup>23</sup> 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.

<sup>24</sup> HCJ 2150/07, Judgment, 29 December 2009, paras. 21 and 38.

<sup>25</sup> *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.

## E. Non-independent nature of the Israeli judicial system

22. The applicant submits that the High Court of Justice is not independent, as it has been placed under the responsibility of the army, the body being investigated.<sup>26</sup> The structural deficiency and intrinsic lack of independence and impartiality was noted by the committee of independent experts on 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.<sup>27</sup>

23. 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.<sup>28</sup> The High Court of Justice has also affirmed that it is unable to rule on violations of international humanitarian law.<sup>29</sup>

## F. Legitimation of human rights violations within the national law

24. The applicant submits that 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.

25. 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.<sup>30</sup>

26. 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.<sup>31</sup> In addition to the payment of court fees, the courts require the payment of a court insurance/guarantee (set at a minimum of 10,000 new shekels, but usually much higher, reaching to over 100,000 new shekels in some cases, equivalent to \$28,000), before the case can proceed. The applicant states that article 519 of the Israeli Civil Code grants the High Court of Justice the right to request payment of a guarantee, before the case begins, to cover the expenses of the parties in the event that the case is lost; the policy is applied only against Palestinians.

## III. Further observations of the respondent

27. In its note verbale dated 20 March 2019, the respondent provided further observations on the admissibility of the communication. It reiterated its position on the non-exhaustion of

<sup>26</sup> International Federation for Human Rights, *Shielded from Accountability: Israel's Unwillingness to Investigate and Prosecute International Crimes* (Paris, 2011), sect. 1.

<sup>27</sup> A/HRC/15/50, para. 91. See also A/HRC/16/24, para. 41.

<sup>28</sup> 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 *Shanger v. Attorney General*, HCJ 10665/05, 16 July 2006.

<sup>29</sup> The applicant cites *Thabit v. Attorney General*, HCJ 474/02, Judgment, 30 January 2011.

<sup>30</sup> B'Tselem, "No accountability", 11 November 2017. Available at [www.btselem.org/accountability](http://www.btselem.org/accountability).

<sup>31</sup> 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).

domestic remedies, including with regard to the burden of proof, the domestic legal frameworks, the effectiveness of the domestic remedies, and the reliability of the Israeli justice system and access thereto by Palestinian victims.

### A. Onus on the applicant to demonstrate the exhaustion of available domestic remedies

28. The applicant has failed to demonstrate the exhaustion of domestic remedies and seeks to shift the burden of proof on the respondent,<sup>32</sup> despite it being well recognized under international law that the burden of proof lies with the applicant.<sup>33</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>34</sup>

29. 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 de facto barred from seeking remedies before Israeli courts and that the exhaustion of domestic remedies is not required where the alleged violations constitute 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”.<sup>35</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 the mechanism must have their complaints rejected for failure to exhaust domestic remedies.<sup>36</sup> As such, the fact that Palestinian nationals reside outside Israeli territory does not exempt them from exhausting local Israeli remedies.

30. 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.<sup>37</sup>

### B. Domestic legal frameworks

31. 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

<sup>32</sup> 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.

<sup>33</sup> *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.

<sup>34</sup> 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.

<sup>35</sup> *Demopoulos and others v. Turkey*, Application No. 46113/99 and others, Decision on Admissibility, 1 March 2010, para. 98.

<sup>36</sup> *Ibid.*, para. 127.

<sup>37</sup> *Ibid.*

to belligerent occupation.<sup>38</sup> Moreover, the Court has determined that the substantive rules of Israeli administrative law apply to any executive actions in the West Bank.<sup>39</sup>

32. Security measures are implemented and executed in accordance with the military commander's responsibility to ensure public order and safety.<sup>40</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>41</sup>

### C. Effective domestic remedies

33. 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.<sup>42</sup> 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,<sup>43</sup> and guidelines issued by the State Attorney pertaining to litigation by Gaza Strip residents following the 2008–2009 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.<sup>44</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 Court deemed adequately addressed the challenges raised, prompting it to dismiss the petition.<sup>45</sup>

34. 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 court in civil proceedings.<sup>46</sup> According to jurisprudence of the Human Rights Committee,

<sup>38</sup> See, for example, *Ajuri et al. v. Israel Defense Forces Commander in the West Bank et al.*, HCJ 7015/02, 3 September 2002.

<sup>39</sup> *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 Judaea 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.

<sup>40</sup> See the Convention respecting the Laws and Customs of War on Land, article 43, and the annex to the Convention (Regulations respecting the Laws and Customs of War on Land).

<sup>41</sup> *Abu Safiyeh et al. v. Minister of Defense et al.*, HCJ 2150/07, Judgment, 29 December 2009.

<sup>42</sup> Coordinator of Government Activities in the Territories, procedure for processing requests for legal proceedings (October 2014).

<sup>43</sup> 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).

<sup>44</sup> 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.

<sup>45</sup> 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.

<sup>46</sup> *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.



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>47</sup>

#### D. High Court of Justice

35. 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.<sup>48</sup> The court system is separate from the military, and there is no connection between the two.<sup>49</sup>

36. 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.<sup>50</sup> 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,<sup>51</sup> and the exception to State liability for tort damages caused in a zone of conflict as a result of acts of security forces.<sup>52</sup>

37. 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.

38. In addition, the applicant alleges that 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.<sup>53</sup> As a result, legal proceedings are regularly conducted by Palestinian claimants before Israeli courts, despite the requirement of the said deposits.<sup>54</sup>

<sup>47</sup> *Perterer v. Austria* (CCPR/C/81/D/1015/2001), para. 9.3.

<sup>48</sup> 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 in the Committee.

<sup>49</sup> See Israel, Basic Law: The Judiciary.

<sup>50</sup> *Khelou et al. v. Government of Israel et al.*, HCJ 302/72, 21 May 1973; and 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).

<sup>51</sup> The respondent refers to Ci.Ap. 8823/07 *Anonymous v. The State of Israel*, 2 November 2010.

<sup>52</sup> *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.

<sup>53</sup> *Estate of the late Ali Ja'alia et al. v. State of Israel*, Ci.Ap.Req. 1007/08, 31 January 2010.

<sup>54</sup> 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.

## E. Accessibility

39. 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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> Moreover, the Court has taken a particularly staunch position regarding the justifiability of alleged violations of human rights.<sup>58</sup>

40. 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.<sup>59</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>60</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>61</sup>

41. 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.<sup>62</sup>

<sup>55</sup> *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.*, H CJ 769/02, Judgment, 14 December 2006.

<sup>56</sup> Israeli judiciary annual report for 2017. Available at [www.gov.il/BlobFolder/reports/statistics\\_annual\\_2017/he/annual2017.pdf](http://www.gov.il/BlobFolder/reports/statistics_annual_2017/he/annual2017.pdf) (in Hebrew).

<sup>57</sup> *Physicians for Human Rights and others v. Prime Minister of Israel and others*, H CJ 201/09; and *Gisha Legal Centre for Freedom of Movement and others v. Minister of Defence*, H CJ 248/09, Judgment, 19 January 2009.

<sup>58</sup> 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.*, H CJ 769/02, Judgment, 14 December 2006, para. 50; *Dawikat et al. v. State of Israel et al.*, H CJ 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.

<sup>59</sup> *Head of Deir Samit Village Council et al. v. Commander of the IDF in the West Bank and the Commander of the Hebron Brigade*, H CJ 3969/06, Judgment, 22 October 2009; *Société Foncière De Terre-Sainte v. State of Israel et al.*, H CJ 7210/04, 19 August 2004; *Abu Romi v. Military Commander in the West Bank*, H CJ 5743/04, 9 September 2004; *Bethlehem Municipality and 22 others v. State of Israel – Ministry of Defence and IDF Commander in Judaea and Samaria*, H CJ 1890/03, Judgment, 3 February 2005; *Al-Quds University v. State of Israel*, H CJ 5383/04-B, 17 June 2004; and *Diaab et al. v. Government of Israel et al.*, H CJ 2626/04, Judgment, 4 November 2004.

<sup>60</sup> *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.*, H CJ 769/02, Judgment, 14 December 2006.

<sup>61</sup> See *Physicians for Human Rights and others v. Prime Minister of Israel and others*, H CJ 201/09; and *Gisha Legal Centre for Freedom of Movement and others v. Minister of Defence*, H CJ 248/09, Judgment, 19 January 2009.

<sup>62</sup> Supreme Court of Canada, Application under section 83.28 of the Criminal Code, Judgment, 23 June 2004, para. 7.

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

42. 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,<sup>63</sup> the broad discretion of the Ministry of Defense,<sup>64</sup> and the military commander's duty to ensure public order and safety.<sup>65</sup>

43. 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,<sup>66</sup> pension deductions,<sup>67</sup> minimum wage and the cost of living allowance.<sup>68</sup>

44. 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.<sup>69</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>70</sup>

45. The Court has also reviewed allegations relating to proceedings before military courts in the West Bank, including the accessibility of documents,<sup>71</sup> and the length of detention periods.<sup>72</sup> 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.

46. In consideration of international law, the Court has reviewed the operational activities of the Israel Defense Forces, including extended detention periods,<sup>73</sup> local-resident-assisted arrests,<sup>74</sup> and time periods for examining entry requests.<sup>75</sup>

<sup>63</sup> The respondent refers to *Jamal Ali v. The Military Commander in West Bank*, HCJ 3764/16, Judgment, 2017.

<sup>64</sup> *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.

<sup>65</sup> *Abu Safiyeh et al. v. Minister of Defense et al.*, HCJ 2150/07, 29 December 2009, para. 35.

<sup>66</sup> *Kav LaOved Association and others v. National Labour Court, Jerusalem, and others*, HCJ 5666/03, Judgment, 10 October 2007.

<sup>67</sup> *Neetuv – Management and Development Company Ltd v. Estate of Badawi Gitan et al.*, 48438-02-15, 2018.

<sup>68</sup> 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.

<sup>69</sup> *Al-Naboot v. Minister of Defense*, HCJ 8887/06, Judgment, 2 July 2011; *Kassem v. Minister of Defense and others*, HCJ 9669/10, Judgment, 8 September 2014; *Hamed et al. v. Minister of Defense et al.*, HCJ 9949/08, Judgment, 14 November 2016; and *Muhamad v. Minister of Defense*, HCJ 9496/11, Judgment, 4 November 2015.

<sup>70</sup> *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.

<sup>71</sup> *El-Arah et al. v. Central Commander of the Israeli Army and another*, HCJ 2775/11.

<sup>72</sup> *Ministry of Palestinian Prisoners and others v. Minister of Defense and others*, HCJ 3368/10, Judgment, 6 April 2014.

<sup>73</sup> *Mar'ab et al. v. IDF Commander in the West Bank, and Judea and Samaria Brigade Headquarters*, HCJ 3239/02, Judgment, 5 February 2003.

<sup>74</sup> *Adalah: Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, HCJ 3799/02, Judgment, 6 October 2005.

<sup>75</sup> *Anonymous v. Minister of Defence*, HCJ 9815/17, Judgment, 19 March 2018.

## G. Civil and criminal proceedings

47. The civil courts of Israel are available to Palestinian residents of the West Bank with respect to property rights, for instance rightful ownership.<sup>76</sup> The High Court of Justice has also considered cases concerning compensation for damage or injury caused by security forces in the West Bank.<sup>77</sup>

48. 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>78</sup> in particular, the criminal courts have decided on cases concerning racially motivated or discriminatory crimes.<sup>79</sup>

## H. Military criminal justice system

49. 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,<sup>80</sup> and the legal advice unit, responsible for providing legal advice to all military authorities.<sup>81</sup> The head of the Corps is appointed by the Minister of Defense, a civilian authority,<sup>82</sup> and is subject to no authority but the law.<sup>83</sup> 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.

50. 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.<sup>84</sup> 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.<sup>85</sup>

<sup>76</sup> 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.

<sup>77</sup> 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.

<sup>78</sup> Jerusalem District Court, *State of Israel v. S.T. and other*, Cr.C. 4001-05-15, 22 July 2015; and Jerusalem District Court, *State of Israel v. Ben David et al.*, S.Cr.C. 34700-07-14, 19 April 2016.

<sup>79</sup> 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.

<sup>80</sup> 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.

<sup>81</sup> 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).

<sup>82</sup> Military Justice Law, sect. 177 (a).

<sup>83</sup> The respondent refers to Israeli Defense Forces Supreme Command Order 2.0613 and Attorney General's Directive No. 9.1002, para. 3.

<sup>84</sup> Israel, Ministry of Foreign Affairs, *The 2014 Gaza Conflict, 7 July–26 August 2014: Factual and Legal Aspects* (2015), p. 222.

<sup>85</sup> 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.

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

51. 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 on 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; this is routinely done.<sup>86</sup> The Attorney General may also examine or convey his opinion regarding general legal matters pertaining to the military.<sup>87</sup>

52. 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.<sup>88</sup> 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.<sup>89</sup>

## **IV. Consideration of admissibility**

53. The Committee recalls its decision dated 12 December 2019 declaring its jurisdiction concerning the communication. That decision referred to the Committee's decision dated 14 December 2018, in which the Committee decided that, for the purposes of article 11 (3) of the Convention, the matter had not been adjusted to the satisfaction of both parties. Therefore, the Committee considers that other alternative mechanisms were not able to settle the matter brought to its attention.

54. With regard to the admissibility of the communication, the Committee observes that the respondent raises in particular the issue of non-exhaustion of local remedies.

55. The Committee notes that the respondent argues that the claims submitted are subject to judicial review and numerous domestic remedies are available, while the applicant submits that such remedies are neither available nor effective.

### **A. Exhaustion of domestic remedies**

56. Under article 11 (3) of the Convention, the Committee is required to ascertain that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. In its responses of 23 September 2018, 14 January 2019 and 20 March 2019, the respondent argues that the applicant has failed to establish that local remedies are not available.

### **B. Availability of domestic remedies and requirement of exhaustion of domestic remedies**

57. With regard to the question of the availability of domestic remedies, the Committee notes that the applicant submits that the fact that its nationals do not have access to the respondent's territory, except when a travel permit is granted, seriously hinders their ability to bring their claims before Israeli courts. The Committee also notes the applicant's argument that the exhaustion of local remedies is not required where the violations amount to

<sup>86</sup> The respondent refers to *Avivit Atiyah v. Attorney General*, HCJ 4723/96, Judgment, 29 July 1997.

<sup>87</sup> 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.

<sup>88</sup> *Thabit v. Attorney General*, HCJ 474/02, Judgment, 30 January 2011.

<sup>89</sup> *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.

administrative practice and that the observations of the Committee with respect to the respondent's general policies and practices violating the Convention<sup>90</sup> illustrate systematic violations amounting to prima facie evidence of administrative practice.

58. In its reply dated 20 March 2019, the respondent argues that for decades, the judiciary of Israel has opened its doors to Palestinians wishing to bring forward legal challenges against the State of Israel and that Palestinians have continued to conduct legal proceedings in Israel even during times of intense hostilities. The respondent also argues that the Palestinians have failed to meet the requirement of presenting prima facie evidence of an administrative practice and that to the extent that Israeli legislation or policy is considered by the Palestinians to violate the norms embodied in the Convention, there are avenues available to challenge such legislative or administrative practices domestically.

### **C. Effectiveness of local remedies**

59. With regard to the effectiveness of domestic remedies, the Committee notes that according to the applicant's submission of 15 February 2019, the local remedies provided by the respondent are not efficient and the Israeli judicial system is used as an instrument of oppression and discrimination, including most especially by serving as a rubber stamp to the discriminatory policies of Israel that violate the basic tenets of international law, including the Convention. The applicant asserts that the judicial system is not independent and that if any judgment appears to be ruled in favour of international law and Palestinian rights, the ruling remains ineffective and not enforced. The applicant also states that Israeli national law legitimizes human rights violations against Palestinians and that Israeli law does not include all acts considered as grave as racial discrimination. The applicant states that, on the contrary, it has been an instrument of oppression, discrimination and segregation.

60. In its response of 20 March 2019, the respondent argues that Israel dedicates extensive resources to facilitate litigation by Palestinians before Israeli courts and that the arguments based on the "inadequacy of Israel's legal system are deconstructed" and reveal a failure on the part of the Palestinians to show exhaustion of domestic remedies and why exhaustion of domestic remedies in those cases is unnecessary. The Committee notes that the respondent argues that the High Court of Justice reviews numerous petitions annually pertaining to a myriad of issues relevant to Palestinians.

### **D. Burden of proof**

61. The Committee furthermore notes that, according to the respondent, allegations of administrative practice do not absolve the applicant from exhausting local remedies. The respondent submits that even though the alleged violations occurred outside the Israeli territory in an area of occupation, the Palestinians should exhaust local Israeli remedies. The onus is on the applicant to demonstrate the exhaustion of available domestic remedies. The Committee notes the above position of the respondent, while also noting that when reporting to the Committee pursuant to article 9 of the Convention the respondent insisted that it had no obligation to report on the human rights situation in the Occupied Palestinian Territory (territories under the effective control of the State party, except East Jerusalem, which it claims to have annexed).<sup>91</sup> The Committee notes that the applicant submits that under generally recognized principles of international law, it is for the respondent, arguing the non-exhaustion of local remedies, to prove that effective local remedies exist and that they have not been exhausted.

## **V. Decision on admissibility**

62. The Committee points out that under article 11 (3) of the Convention, the requirement that all available domestic remedies have been invoked and exhausted applies in conformity

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<sup>90</sup> CERD/C/ISR/CO/14-16, para. 25.

<sup>91</sup> CERD/C/ISR/CO/14-16, para. 10.

with the generally recognized principles of international law. Against this background, the Committee notes the well-established jurisprudence of human rights courts and human rights commissions on the requirement of the exhaustion of domestic remedies in the context of inter-State communications and applications. In this context, the Inter-American Commission on Human Rights has recognized an exception to the rule of exhaustion of domestic remedies in cases of an “alleged existence of a generalized practice of discrimination”.<sup>92</sup> Building on the jurisprudence of the European Commission of Human Rights, the European Court of Human Rights has held that the rule of exhaustion of domestic remedies “does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Court to give a decision on each of the cases put forward as proof or illustrations of that practice”.<sup>93</sup> The Court further held that “an administrative practice involves two distinct elements: a repetition of acts and official tolerance”.<sup>94</sup>

63. Against this background, the Committee considers that the allegations of the applicant refer to measures taken as part of a policy ordered and coordinated at the highest levels of government, which may amount to a generalized policy and practice with regard to a range of substantive issues under the Convention. The Committee considers that exhaustion of domestic remedies is not a requirement where a generalized policy and practice has been authorized.<sup>95</sup> In line with the jurisprudence of regional human rights commissions and courts, the Committee considers, however, that it is not sufficient that the existence of such a generalized policy and practice is merely alleged; rather, *prima facie* evidence of such a practice must be established.

64. In this context, the Committee recalls the concerns expressed in its concluding observations on the combined seventeenth to nineteenth periodic reports of Israel with regard to the maintenance of several laws that discriminated against Arab citizens of Israel and Palestinians in the Occupied Palestinian Territory, and that created differences among them, regarding their civil status, legal protection, access to social and economic benefits, or right to land and property.<sup>96</sup> The Committee furthermore expressed concern about the lack of detailed information on racial discrimination complaints filed with the national courts and other relevant Israeli institutions, as well as on investigations, prosecutions, convictions and sanctions, and on the reparations provided to victims, and that people belonging to minority groups, including Palestinians, could face obstacles in accessing justice while seeking remedies for cases of discrimination.<sup>97</sup> Furthermore, the Committee expressed concern regarding the continuing segregation between Jewish and non-Jewish communities.<sup>98</sup> The Committee also expressed its concern regarding reports that the judiciary might handle cases of racial discrimination by applying different standards based on the alleged perpetrator’s ethnic or national origin.<sup>99</sup> In light of the submissions of the States parties as well as in light of the concluding observations of the Committee, the Committee is satisfied that the threshold of *prima facie* evidence of a generalized policy and practice that touches upon substantive issues under the Convention is fulfilled and that, consequently, the rule on exhaustion of domestic remedies does not apply.

## VI. Conclusion

65. In respect of the inter-State communication submitted on 23 April 2018 by the State of Palestine against Israel, the Committee rejects the objections raised by the respondent State concerning the admissibility of the inter-State communication.

<sup>92</sup> *Nicaragua v. Costa Rica*, Interstate Case No. 01/06, Decision, 8 March 2007, paras. 253 ff.

<sup>93</sup> European Court of Human Rights and *Georgia v. Russia (II)*, Application No. 38263/08, Decision, 13 December 2012, *Georgia v. Russia (II)*, para. 85, with further reference to previous case-law.

<sup>94</sup> *Ibid.*

<sup>95</sup> CERD/C/99/4, para. 40.

<sup>96</sup> CERD/C/ISR/CO/17-19, para. 15.

<sup>97</sup> *Ibid.*, para. 19 (b).

<sup>98</sup> *Ibid.*, paras. 21 ff.

<sup>99</sup> *Ibid.*, para. 26 (c).

66. The Committee requests its Chair to appoint, in accordance with article 12 (1) of the Convention, the members of an ad hoc Conciliation Commission, which shall make its good offices available to the States concerned with a view to an amicable solution of the matter on the basis of States parties' compliance with the Convention.



## Annex

### List of submissions

1. Communication submitted by the State of Palestine pursuant to article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, dated 23 April 2018.
  2. Observations of the State of Palestine, dated 29 October 2018, referring the matter again to the Committee in accordance with article 11 (2) of the Convention.
  3. Observations of Israel, dated 30 April 2018.
  4. Observations of the State of Palestine, dated 3 August 2018.
  5. Additional observations of Israel, dated 28 September 2018.
  6. Observations of Israel, dated 23 October 2018.
  7. Observations of the State of Palestine, dated 7 November 2018.
  8. Observations of Israel, dated 14 January 2019, concerning the Committee's decision of 14 December 2018.
  9. Observations of the State of Palestine, dated 15 February 2019, replying to the observations of Israel dated 14 January 2019.
  10. Observations of Israel, dated 20 March 2019, replying to the observations of the State of Palestine dated 15 February 2019.
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