

## On to the Conciliation Commission: An Explainer on Recent Developments at the Committee on the Elimination of Racial Discrimination in *State of Palestine v. Israel*

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On 23 April 2018, the State of Palestine filed an inter-state complaint against Israel alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD/the Convention). Since then, the Committee has examined the issues of jurisdiction and admissibility, including the exhaustion of domestic remedies.

On 21 May 2021, the Committee decided in favor of the State of Palestine and allowed the complaint to proceed and called for a Conciliation Commission to be established. This is only the third time in history that such a Commission has been established for an ICERD inter-state complaint, with the other two coming in relation to disputes between *Qatar v. Kingdom of Saudi Arabia*, and *Qatar v. United Arab Emirates*.

ICERD was first opened for signature and ratification in 1965. Israel ratified the convention in 1979, and the State of Palestine acceded to it in 2014.<sup>1</sup> Following the State of Palestine's accession, Israel issued a statement of objection declaring that it did not recognize Palestine as a State party to ICERD and that it considered that the accession of Palestine would not have any effect on Israel's relations and obligations under the Convention.<sup>2</sup> These arguments form the foundation of one of Israel's now-failed objections against the admissibility of the State of Palestine's complaint.

### 1. Procedure for ICERD Inter-State Complaints

The Convention allows for inter-state complaints, which it refers to as both complaints and communications, and establishes the procedure for handling such in Articles 11, 12, and 13.<sup>3</sup> Article 11 of ICERD outlines the process for filing the communication and for giving notice to the state accused of violating the Convention (in this case Israel). Once notification is sent to the Committee and the accused party, the two states have six months to try and settle their dispute through bilateral negotiation.<sup>4</sup> If those negotiations fail, then either party could again refer the matter to the Committee under Article 11(2) of the Convention. On 7 November 2018, the State of Palestine did just that and on 14 December 2018, the Committee requested that that Palestine

<sup>1</sup> *Status of Ratification Interactive Dashboard*, UN Human Rights Office of the High Commissioner, accessed 21 June 2021, <https://indicators.ohchr.org/>

<sup>2</sup> CERD/C/103/R.6, para. 9

<sup>3</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination (hereafter ICERD), 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

<sup>4</sup> ICERD Art. 11(2)

and Israel gather and transmit information on their arguments regarding the jurisdiction of the Committee to hear the complaint and the admissibility of the complaint, with reference to the provisions of ICERD.<sup>5</sup>

## 2. Admissibility

Israel's objections to the admissibility of the State of Palestine's complaint centered on two grounds. First, that Israel does not recognize Palestine as a state party to the ICERD. Second, that Palestine did not comply with the procedures for filing an inter-state complaint, in particular, the requirement that Palestine exhaust all potential domestic remedies, as required by Article 11(3) of ICERD, including through the use of Israel's courts, which Israel argues are legitimate and adequate venues to hear complaints by Palestinian nationals against Israeli officials for rights violations.<sup>6</sup>

Palestine countered these claims on multiple fronts. First, Palestine argued that Israeli courts are not adequate venues for bringing claims against Israel and Israeli officials for rights violations, particularly in the context of Israel's illegal settlements.<sup>7</sup> To highlight this inadequacy, Palestine pointed out that Israel did not cite to any case law that shows how Palestinian rights could be vindicated on an individual basis in Israeli courts.<sup>8</sup> Palestine also pointed out to the Committee that the restrictions on Palestinians' freedom of movement have made it unduly difficult, if not functionally impossible, for Palestinians to reliably access Israeli courts as both plaintiffs and as witnesses. Lastly, Palestine contended that Israel's violations are the result of an administrative practice and are therefore systemic, rather than individualized, violations. As such, Palestine contends that the exhaustion requirement is not applicable since the national systems they would have to exhaust are part and parcel of the violations being complained of.<sup>9</sup> These systemic violations are the result of the biased nature of Israel's national law, the lack of access for Palestinians to Israeli national courts, the lack of Israeli courts' independence, and, in the rare instances when Israeli courts do rule in Palestinians' favor, the mere recommendatory treatment of such decisions by the relevant power structures.<sup>10</sup>

On 21 May 2021, the Committee decided in favor of the State of Palestine, finding the communication admissible. Specifically, the Committee found that Palestine had met the evidentiary threshold to establish that the violations are part of a generalized practice and policy,

<sup>5</sup> CERD/C/103/R.6, paras. 5, 6

<sup>6</sup> CERD/C/103/R.6 paras. 8, 27

<sup>7</sup> CERD/C/103/R.6, para. 17

<sup>8</sup> CERD/C/103/R.6, para. 14

<sup>9</sup> CERD/C/103/R.6, para. 19

<sup>10</sup> CERD/C/103/R.6/paras. 20-23



and therefore “the rule on exhaustion of remedies does not apply.”<sup>11</sup> As such, the Committee, in the conclusion of its report, called for the establishment of an *ad hoc* Conciliation Commission (the Commission).<sup>12</sup>

### 3. The Conciliation Commission

The progress toward a Conciliation Commission is complicated by the dearth of institutional experience with them. Both previous Commissions, *Qatar v. Saudi Arabia* and *Qatar v. United Arab Emirates*, were suspended on a motion by Qatar after an agreement was reached by the parties outside of the framework of the Commission.<sup>13</sup> However, ICERD, the Committee’s general rules of procedure, and the experience that was gained prior to the suspension of the previous two Commissions does offer a roadmap for the early steps that will be taken going forward.

First, the Committee will obtain and collate relevant information from both parties pursuant to Article 11(4) and, if the parties so choose, hear from representatives thereof in accordance with Article 11(5) of ICERD.<sup>14</sup> After the information is obtained and collated, the Chairperson of the Committee will appoint a five-person *ad hoc* Commission in consultation with both Israel and the State of Palestine.<sup>15</sup> In the three months following the conclusion reached on 21 May, the Chairperson will seek the consent of both Palestine and Israel on all five members of the Commission. If there is a failure to get both Palestinian and Israeli consent on the five Commission members, then the Committee will hold a secret ballot to fill any vacancies.<sup>16</sup> For example, if Israel and Palestine agree on four commissioners but not a fifth, only that final commissioner will be appointed via secret ballot. Any candidates for the Commission must garner a two-thirds majority of the votes to be appointed.<sup>17</sup> Only members of the Committee may vote. Once a Commission is

<sup>11</sup> CERD/C/103/R.6/para. 64

<sup>12</sup> CERD/C/103/R.6, para. 66

<sup>13</sup> Decision of the *ad hoc* Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication *Qatar v. the Kingdom of Saudi Arabia* (hereafter *Qatar v. Saudi Arabia Decision*), UN Human Rights Office of the High Commissioner, Conciliation Commission for *Qatar v. the Kingdom of Saudi Arabia*, 15 March 2021; Decision of the *ad hoc* Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication *Qatar v. the United Arab Emirates* (hereafter *Qatar v. UAE decision*), UN Human Rights Office of the High Commissioner, Conciliation Commission for *Qatar v. the United Arab Emirates*, 15 March 2021

<sup>14</sup> ICERD Art. 11(4), “In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information”. ICERD Art. 11(5) “When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration”.

<sup>15</sup> ICERD Art. 12(1)(a)

<sup>16</sup> ICERD Art. 12(1)(b)

<sup>17</sup> Ibid.

fully formed, the Chairperson alerts both parties. One final requirement is that Commission members cannot be a Palestinian national or an Israeli national.<sup>18</sup>

Commissioners serve in their personal capacity and not as representatives of their home States while on the Commission. Once the five members are agreed to or elected, the Commission will convene, either at UN Headquarters or “any other convenient place as determined by the Commission.”<sup>19</sup> If a vacancy arises on the Commission in the course of its work, the vacancy will be filled the same way the Commission was originally composed – Israel and Palestine can agree to the replacement or a new Commissioner is appointed via super-majority vote.<sup>20</sup> Once composed, the Commission is responsible for reviewing the information the Committee collected and, if necessary, solicit more information from both parties. The Commission is responsible for appointing its own Chair and for adopt its own rules of procedure, underscoring the ad hoc nature of the body.<sup>21</sup>

Once the Commission has fully considered the matter and reviewed all relevant information, a report will be submitted to the Committee Chairperson and then distributed to the parties concerned.<sup>22</sup> This report is recommendatory in nature and therefore will not bind either party without their consent. Consent or disagreement must be communicated within three (3) months of receipt of the report by the parties.<sup>23</sup>

#### 4. Analysis

There are a number of concerns going forward. First, some commentators have noted that Israel may simply decide that it will no longer participate in the dispute’s proceedings.<sup>24</sup> Given that the Commission is not yet composed and therefore has neither drafted nor adopted its rules of procedure it is unclear how it would deal with such a scenario. Neither of the Qatari-concerned Commissions had to deal with such an issue prior to the Al Ula Agreement’s adoption. Another issue is the fact that the Commission’s decision is wholly recommendatory and there is no mechanism either in ICERD or in the Committee’s rules of procedure that confront the denial of the recommendations by one party, beyond demanding that such refusal be communicated to the

<sup>18</sup> ICERD Art. 12(2)

<sup>19</sup> ICERD Art. 12(4)

<sup>20</sup> Rules of Procedure of the Committee on the Elimination of Racial Discrimination, Rule 76

<sup>21</sup> ICERD Art. 12(2)

<sup>22</sup> ICERD Art. 13 (1)

<sup>23</sup> ICERD Art. 13(2), 13(3)

<sup>24</sup> *Breaking new ground? The CERD Committee’s decision on jurisdiction in the inter-State communications procedure between Palestine and Israel*, Jan Eiken, EJIL:Talk! Blog of the European Journal of International Law, 29 January 2020

Committee.<sup>25</sup> In addition, there are no clearly outlined terms for human rights NGOs to engage with the process. Previously, the Palestinian Human Rights Organizations Council ([PHROC](#)) intervened submitting an ad hoc petition. Lastly, despite closing early due to the Al Ula Agreement resolving the issue at the heart of Qatar's complaints against Saudi Arabia and the United Arab Emirates, the Commission's announcement of the suspension went out of its way to note that, *inter alia*, a lack of funds had slowed the Commission's progress, particularly insofar as funds were needed to secure interpreters.<sup>26</sup>

These are uncharted waters for ICERD, its Committee, and the soon-to-be-established Conciliation Commission. The historic nature of this decision should not be diminished in any way. However, it is important to note that with uncharted waters come unforeseen obstacles, and any Commission truly concerned with resolving this case between the State of Palestine and Israel must be clear-eyed about the potential issues that may arise.

### Recommendations:

1. With reference to the previous 2019 submissions to ICERD by Palestinian and regional organizations, Al-Haq offers the following recommendations:
  - i. For the Conciliation Committee to include in its terms of reference, the invitation of national, regional and international human rights organizations to submit written communications and make oral interventions to the Conciliation Committee on the violations alleged in the complaint.
  - ii. For the Conciliation Committee to include in its mandate, the examination of inhumane acts of institutionalized racial discrimination and apartheid against Palestinians on both sides of the Green Line, to ensure consistency with the conclusions in paragraph 23 of the 2019 CERD Concluding Observations to Israel.
  - iii. We urge the Committee to recognise and declare that Israel's discriminatory laws, policies, and practices have established, and continue to maintain, an institutionalised regime of racial domination and oppression over the Palestinian people as a whole, using fragmentation as a main measure to maintain its apartheid regime, in violation of Article 3 of ICERD, and giving rise to individual criminal responsibility at the ICC in addition to giving rise to Israel's State

<sup>25</sup> ICERD Arts. 13(2), 13(3)

<sup>26</sup> Qatar v. Saudi Arabia Decision, *Having been informed* section (c); Qatar v. UAE Decision, *Having been informed* section (c)



responsibility and obligations of third States to bring the illegal situation to an end, in line with the findings of the 2017 ESCWA report.

- iv. We recommend that the Committee demand that Israel repeal all legislation enshrining racial discrimination, domination, and oppression, including repealing the Basic Laws and other statutes that directly or indirectly effect the enjoyment of human rights through racial and/or racialized distinctions, including on the basis of religion. In particular, we urge the Committee to call on Israel to repeal the following laws, as foundational to Israel's creation of an apartheid regime, including but not limited to:
  - a. The Basic Law: The Law of Return (1950);
  - b. The Citizenship Law (1952);
  - c. The Absentee Property Law (1950);
  - d. The Entry into Israel Law (1952) and its amendments; and
  - e. The Basic Law: Israel as the Nation-State of the Jewish People (2018).
- v. We urge the Committee to recognise and to declare that the Jewish Nation-State Law (2018) is antithetical to the object and purpose of the Convention as it has the purpose of nullifying the recognition, enjoyment, and exercise, on an equal footing, of all human rights and fundamental freedoms in the State Party.
- vi. We recommend that the Committee call on Israel to revoke the 2003 Citizenship and Entry into Israel Law (Temporary provision) and ensure family unification of all persons within its territory or subject to its effective control, irrespective of their ethnicity or national or other origin.
- vii. We urge the Committee to call on Israel to cease all measures and policies which contribute to the fragmentation of the Palestinian people, including the denial of Palestinian refugee return, the closure of Jerusalem and of the Gaza Strip, the construction of the Annexation Wall, and the imposition of severe movement and access restrictions, as core elements in Israel's creation of an apartheid regime over the Palestinian people on both sides of the Green Line and elsewhere. We also urge the Committee to demand Israel make suitable and sufficient reparation to all fragments of the affected Palestinian people, including Palestinian refugees and displaced persons, as mandated by international law.



- viii. We urge the Committee to consider Israel’s persistent refusal to grant Palestinian refugees and displaced persons their right of return to their homes and property in their villages, towns, and cities of origin, as a core element in its creation and maintenance of an institutionalised regime of racial domination and oppression over the Palestinian people, and urge the Committee to reaffirm the right of return of all Palestinian refugees and internally displaced persons to their homes, property, and land which they were forced in flee in 1948 and thereafter, and to call on Israel to comply with Articles 5(d)(ii) and 5(d)(v) of ICERD.
- ix. We urge the reversal of Israel’s policies and practices with regards to demographic manipulation as a manifestation of the crimes of population transfer and apartheid, in violation of Article 3 of the Convention, through the fragmentation of the Palestinian people as a whole, the prolonged and illegal closure of Gaza, the closure of Jerusalem and the precarious “permanent residency” status of Palestinians in East Jerusalem, the imposition of two separate legal systems in the occupied West Bank, and the denial of the internationally recognised right of return of Palestinians living as refugees and in exile.
- x. We urge the Committee to demand Israel cease forthwith the ongoing closure and lift the blockade of Gaza with immediate effect, to lift restrictions on dual use items, and to recognise that Israel’s discriminatory policies, and practices, amounting to the crime of apartheid, have already made the Gaza Strip uninhabitable and violate the full spectrum of rights owed to the Palestinian people, including Palestinian refugees, in the Gaza Strip by denying them the enjoyment on an equal footing of fundamental rights and freedoms, in violation of Articles 3 and 5 of the Convention.
- xi. We urge the Committee to request information from Israel, the occupying Power, on measures taken to implement the recommendations of the UN Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory (OPT), and in particular in relation to the Committee’s calls on Israel to lift the blockade on Gaza with immediate effect, to fulfil the right to health of all Palestinians, and to bring Israel’s rules of engagement for the use of live fire in line with international human rights law, and refrain from resort to excessive and lethal force in violation of international standards.
- xii. We urge the Committee to call on Israel to uphold the right of the Palestinian people to the highest attainable standard of physical and mental health, including to ensure Palestinians in the Gaza Strip, including those injured during the Great

March of Return, are ensured their right to access treatment in the rest of the OPT, in Israel, or abroad, ensuring the safety of health workers from attacks by the Israeli occupying forces, refraining from obstructing healthcare provision in the OPT, and removing all barriers to the enjoyment of the right to health of Palestinians, including the underlying determinants of good health and well-being.

- xiii. We recommend that the Committee reaffirm the findings of the 2004 ICJ Advisory Opinion on the illegality of the Annexation Wall built in the occupied West Bank, including in and around East Jerusalem, and call on Israel to uphold its obligation to cease forthwith the works of construction of the Annexation Wall, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with international law.
- xiv. We call on the Committee to urge Israel to cease conferring public functions of the State to the WZO/JA and JNF, which are chartered to carry out material discrimination against non-Jewish persons and have historically prevented the indigenous Palestinian people on both side of the Green Line from accessing or exercising control over their means of subsistence, including their natural wealth and resources, by exploiting and diverting Palestinian natural resources for the benefit of Israeli-Jewish settlers.
- xv. We urge the Committee to call on Israel to reconsider its entire planning and zoning policy in consultation with the indigenous Palestinian people directly affected by Israel's discriminatory measures, including illegal house demolitions and destruction of property, denial of access to land and natural resources, and the creation of coercive environments designed to drive Palestinian transfer. We further recommend that the Committee consider Israel's discriminatory planning and zoning regime as a manifestation of the crimes of population transfer and apartheid, in violation of Article 3 of the Convention.
- xvi. In light of the ongoing targeting of human rights defenders, organisations, and members of civil society, as well as individual Palestinians in their private capacity online, we urge the Committee to demand Israel immediately cease any and all practices of intimidation and silencing of these groups, in violation of their right to freedom of expression, including through arbitrary detention, torture and ill-treatment, institutionalised hate speech and incitement, residency revocations, deportations, and other coercive or punitive measures.





- xvii. We urge the Committee to demand Israel immediately cease the construction of all illegal settlements in the occupied West Bank, including East Jerusalem, and dismantle those already in existence, in accordance with its obligations, as occupying Power, under international humanitarian law and as mandated by international criminal law, in particular the Rome Statute applicable in the OPT, and to call for an end to Israel's prolonged occupation of the Palestinian territory, in line with its obligation to uphold the right of the Palestinian people to self-determination, including permanent sovereignty over natural wealth and resources.
- xviii. We urge the Committee to call for accountability and access to justice for apparent and serious violations of international law as a means of bringing to an end and rectifying this illegal situation created and maintained by Israel. Further we call on the Committee to urge State parties to the Rome Statute to cooperate with the investigation of the Office of the Prosecutor of the ICC as a viable independent judicial body capable of ending impunity for crimes committed in the OPT and effectively deterring the commission of future crimes.