Committee on the Rights of Persons with Disabilities

Views adopted by the Committee under article 5 of the Optional Protocol, concerning Communications Nos. 67/2019 and 68/2019*

<table>
<thead>
<tr>
<th>Communication submitted by:</th>
<th>Gashao Mangisto and Shaaban al-Sayed (represented by the International Human Rights Clinic of the Clinical Legal Education Center at the Hebrew University of Jerusalem)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alleged victims:</td>
<td>Avera Mangisto and Hisham al-Sayed</td>
</tr>
<tr>
<td>State party:</td>
<td>State of Palestine</td>
</tr>
<tr>
<td>Date of communication:</td>
<td>12 September 2019 (initial submission)</td>
</tr>
<tr>
<td>Document references:</td>
<td>Decision taken pursuant to rules 64 and 70 of the Committee’s rules of procedure, transmitted to the State party on 20 September 2019 (not issued in document form)</td>
</tr>
<tr>
<td>Date of adoption of Views:</td>
<td>23 March 2023</td>
</tr>
<tr>
<td>Subject matter:</td>
<td>Disappearance and incommunicado detention of persons with psychosocial disabilities</td>
</tr>
<tr>
<td>Procedural issues:</td>
<td>Another procedure of international investigation or settlement; exhaustion of domestic remedies; substantiation of claims; admissibility ratiocine temporis</td>
</tr>
<tr>
<td>Substantive issues:</td>
<td>Right to life; equality before the law; liberty and security of the person; freedom of torture or cruel, inhuman or degrading treatment or punishment; freedom from exploitation, violence and abuse; right to the enjoyment of the highest attainable standard of health</td>
</tr>
<tr>
<td>Articles of the Convention:</td>
<td>4, 10, 11, 12, 14, 15, 16, 25</td>
</tr>
<tr>
<td>Articles of the Optional Protocol:</td>
<td>2 (c-f)</td>
</tr>
</tbody>
</table>

* Adopted by the Committee at its twenty-eights session (6-24 March 2023).

** The following members of the Committee participated in the examination of the communication: Muhammad Salah Al-Azzeb, Rosa Idalia Aldana Salguedo, Rehab Mohammed Boresli, Gerel Dondoydorj, Gertrude Oforiwa Fefoame, Vivian Fernández de Torrijos, Laverne Jacobs, Samuel Njuguna Kabue, Rosemary Kayess, Mi Yeon Kim, Alfred Kouadio Kouassi, Abdelmajid Makni, Robert George Martin, Floyd Morris, Markus Schefer and Saowalak Tongkuay. Pursuant to rule 60 (1) of the Committee’s rules of procedure, Odelia Fitoussi did not participate in the examination of the present communication.
1.1 The communications are submitted by Shaaban al-Sayed and Gashao Mangisto, both nationals of Israel born in 1960 and 1981, respectively. Mr. al-Sayed submits the communication on behalf of his son, Hisham al-Sayed a national of Israel of Bedouin descent born in 1988. Mr. Mangisto submits the communication on behalf of his brother, Avera Mangisto, a national of Israel of Ethiopian descent, born in 1986. The authors note that both alleged victims have been diagnosed with psychosocial disabilities, and that they crossed into the Gaza Strip on 20 April 2015 (Hisham al-Sayed) and on 7 September 2014 (Avera Mangisto), where they claim that the alleged victims were subjected to enforced disappearance. The authors claim a violation of the alleged victims’ rights under articles 4, 10, 11, 12, 14, 15, 16 and 25 of the Convention. The Optional Protocol entered into force for the State party on 10 May 2019. The authors are represented by counsel.

1.2 On 20 September 2019, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, issued interim measures under article 4 of the Optional Protocol, requesting the State party to take all diplomatic, judicial and other measures necessary to prevent irreparable harm to the alleged victims and to guarantee the protection of their rights enshrined by the Convention. In particular the State party was requested: To take all measures that were necessary to ensure the immediate search for the alleged victims, to guarantee their placement under the protection of the law and to ensure their access to the care and attention required, taking into account their psychosocial disabilities; in case the location of the alleged victims could be confirmed, to inform the Committee, the alleged victims’ families and representatives as to their whereabouts and to use all legal and diplomatic means available to enable the alleged victims to be in contact with their families, relatives and representatives, and to ensure that they could return to their families; and to provide the Committee with information as to the measures taken to implement each of the recommendations, and about the result of those actions. The requests for interim measures were reiterated on 6 July 2022.

1.3 On 23 March 2023, pursuant to rule 67 of the Committee’s rules of procedure, the Committee decided to consider communications Nos. 67/2019 and 68/2019 jointly, in view of the substantial factual and legal similarities.

A. Summary of the information and arguments submitted by the parties

Facts as submitted by the authors

Hisham al-Sayed

2.1 The author notes that his son was diagnosed with “personality disorder and unspecified behavioural and emotional disorders” in 2009, “acute psychotic disorders” in 2010, and “schizophrenia and mild mental retardation” in 2013. He further notes that in 2007 his son had also been diagnosed with hearing loss, vertigo and tinnitus. His son received a disability stipend from the National Insurance Institute of Israel (the national social security agency) and spent significant time in several different psychiatric institutions, including by court orders. Due to his mental health condition, his son disappeared several times in Jordan, the West Bank, and the Gaza Strip; each time he was located by the authorities and was returned to his family. The author notes that his son crossed into the Gaza Strip twice before, in 2010 and 2013. He further informs that after almost three months of service in the Israeli army, his son was found “incompatible for service” and was released from military service.

2.2 The author notes that his son left his home in the al-Sayed tribe (al-Hura) in the Negev region of Israel, on 20 April 2015 in the morning. His mother was the last person to see him leave. During that day the author tried to reach his son by phone, but his son’s cell phone had been turned off. When he had not yet returned home in the afternoon, the family reported him missing to the Israeli police. They also searched for him in places he had gone to previously, and they reported the disappearance to the local police in Jordan and in the West Bank. The author notes that according to a Human Rights Watch report, Israeli officials stated that photos captured by Israeli authorities on the day of the disappearance showed his son
walking across the Gaza Strip border from the east\(^1\). The author further claims that a video published by Hamas in April 2016 confirmed that his son was being held by Hamas in the Gaza Strip. He states that this information has also been confirmed by Israeli authorities.

*Avera Mangisto*

2.3 The author notes that his brother was diagnosed with schizophrenia after he had voluntarily admitted himself for psychiatric hospitalization in 2013. According to medical records he was hospitalized due to a “psychotic condition combined with self-endangering behaviour”. His mental health condition on one occasion led him to harm himself, and on several occasions, he left his home and was later found in different locations in Israel. He was found “not medically fit for service” in the military by a medical committee and was exempted from the compulsory draft.

2.4 The author notes that his brother left his home in the city of Ashkelon, Israel, on 7 September 2014. He left at around noon and his mother was the last member of the family to see him. He did not carry a phone. When he did not return home in the evening, his family searched for him, checked with his friends and reported his disappearance to the Israeli police.

2.5 The author notes that, according to information provided by the Israeli authorities, on the day of his brother’s disappearance, Israeli soldiers noticed on camera a person walking along the shoreline towards the Israel-Gaza border fence. Soldiers arrived at the scene and shouted at the man, ordering him to stop, they also shot in the air, however the man did not react. The man managed to climb the wire fence and entered the Gaza Strip. Israeli authorities later identified this person as the author’s brother, based on personal items left behind in a bag. A week later, Israeli authorities informed the family that, according to its intelligence information, the author’s brother was being held by Hamas in the Gaza Strip. The Israeli authorities officially announced the author’s disappearance in July 2015, after a gag order on the case was lifted\(^2\).

*Further information concerning both alleged victims*

2.6 The authors note that in April 2016, Hamas’ military wing, the Izz al-Din al-Qassam Brigades, published a video in which they indirectly acknowledged holding both the alleged victim’s captive. The video portrays the alleged victims in military uniforms, apparently by using photoshopped pictures of them, which were subsequently published in the media, alongside two Israeli soldiers reportedly killed during the 2014 Gaza conflict, whose remains were reported to be in Hamas’ custody.

2.7 The authors note that the alleged victims were not soldiers in the Israeli army nor affiliated with the Israeli government when they entered the Gaza Strip. They were both found incompatible for service in the Israeli army and entered the Gaza Strip as civilians due to their psychosocial disability, which led them to wander and expose themselves to danger. They refer to a report by Human Rights Watch according to which Hamas refused to acknowledge the detention of the alleged victims in a September 2016 meeting with the organization but stated that “there are no civilians in Israel” since all serve in the army, and that “Israelis who enter Gaza are spies”. According to the report, Hamas officials stated that they would not divulge any information about the missing Israeli citizens until Israel releases 54 Hamas members arrested by Israel\(^3\).

2.8 The authors note that in spite of the indications that the alleged victims are, or at least at some point were, held in the custody of Hamas, Hamas did not confirm their detention; or, if no longer held by Hamas - whether it has any information regarding their whereabouts and fate. The authors also note that in its annual report of 2019, Human Rights Watch stated that “Hamas authorities continue to disclose no information about two Israeli civilians with

---


\(^3\) Human Rights Watch, 2 May 2017.
psychosocial disabilities, Avera Mangisto and Hisham al-Sayed, whom they have apparently held for several years, in violation of international law. In September 2015, then UN Secretary General submitted his report on ‘Peaceful settlement of the question of Palestine’ to the General Assembly. In his report, he addressed the situation of the alleged victims and called on “all relevant Palestinian actors in Gaza to provide information as to the possible whereabouts and conditions of the missing Israelis and to take prompt action to facilitate their safe return to their families.”

2.9 The authors further note that to the best of their knowledge, the State party has not taken any action to obtain any information regarding the alleged victims’ whereabouts and to prevent the continued violation of their rights under the Convention. They claim that the State party failed to act despite being aware of the situation taking place in a territory under its jurisdiction.

Jurisdiction

2.10 The authors note that the alleged victims disappeared after crossing into the Gaza Strip and that, according to the little evidence available, they are or were held by Hamas in the Gaza Strip. Thus, they are under the State party’s jurisdiction, as required by article 1 of the Optional Protocol. They argue that the fact that the alleged victims are not nationals of the State party does not change the State party’s obligations towards them as stipulated by article 4 of the Convention, which does not distinguish between nationals and non-nationals. The authors argue that although the acts detailed above are primarily attributed to the military wing of Hamas, a non-state actor, the obligations of States in international human rights law, also include taking appropriate measures to prevent, investigate, prosecute and provide remedies for human rights abuses committed by non-state third parties on its territory. They note that the Gaza Strip is controlled by Hamas. However, they submit that the State party still bears responsibility for violations occurring in the Gaza Strip, which is part of its territory. They argue that international human rights courts and other human rights treaty bodies have recognized that even when a State has lost effective control over a part of its territory to a non-state group, this cannot mean that the territory and the people in it are left in a legal vacuum and that the State is exempt from any responsibility to protect the human rights of its residents. The State is required to diligently seek to repress the abuses committed by non-state groups and to implement its own international obligations to the extent of its authority.

2.11 The authors refer to the European Court of Human Rights judgement in Ilascu and Others v. Moldova and Russia, in which the Court found that the positive obligation of a State to take appropriate steps to ensure respect for rights within its territory “remain even where the exercise of the State’s authority is limited in part of its territory”. The Court established that the State has a duty in such situations to take all the appropriate measures which are still within its power to take.

2.12 The authors submit that even if the State party does not have effective control over the Gaza Strip, it is required to take all the reasonable measures at its disposal to ensure the application of human rights in the Gaza Strip. They argue that the State party has several means at its disposal to influence the conduct of Hamas in the Gaza Strip. They note that the Palestinian Authority and Hamas have been negotiating for reconciliation for several years, with several reconciliation agreements achieved, although not implemented. In addition, the Palestinian Authority pays wages to civil servants in the Gaza Strip, funds the electricity in the Gaza Strip and operates programs that support Palestinians in the Gaza Strip, and has

5 UN, Monthly Bulletin on Action by UN System and Intergovernmental Organizations Relevant to the Question of Palestine, September 2015.
7 European Court of Human Rights, Ilascu and others v. the Republic of Moldova and Russia, Application no. 48787/99, para. 313.
previously used its financial support to pressure Hamas to accede to certain political demands.  

**Competence ratione temporis**

2.13 The authors emphasize that while the events in question began before the Optional Protocol entered into force for the State party, the disappearances of the alleged victims entail a continued violation of the Convention.

**Exhaustion of domestic remedies**

2.14 The authors argue that there are no effective domestic remedies available to them in the State party as Israeli nationals do not have access to Palestinian courts and cannot enter Palestine’s territory for that purpose. In addition, due to Hamas’ control of the Gaza Strip, Palestinian courts cannot in practice exercise their jurisdiction and enforce judgments in the Gaza Strip. They also note that the fact that the alleged victims have been subjected to enforced disappearance prevents them from exercising any of their rights, including to obtain any local remedies in the Gaza Strip.

**Another procedure of international investigation or settlement**

2.15 The authors note that a communication on an alleged enforced or involuntary disappearance was submitted to the Working Group on Enforced or Involuntary Disappearances on 29 January 2019 on behalf of the alleged victims. They however argue that such a communication cannot be considered as another procedure of international investigation or settlement under article 2 (c) of the Optional Protocol. They further argue that the request submitted to the Working Group does not concern the same matter as it was not based on the disability of the alleged victims and did not raise claims relating to their rights as persons with disabilities. It dealt with the issue of enforced disappearance.

**The complaint**

3.1 The authors claim a violation of the alleged victims’ rights under articles 4, 10, 11, 12, 14, 15, 16 and 25 of the Convention. They claim that there is a causal relation between the alleged victims’ psychosocial disabilities and the acts that amount to violations of their rights under the Convention. Their disability is what brought them to cross into the Gaza Strip, a hostile territory, which led to their enforced disappearance and related violations.

3.2 The authors further note that article 11 of the Convention requires States parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict and humanitarian emergencies. They note that the alleged victims entered the Gaza Strip in conditions unrelated to the armed conflict between Israel and Hamas, and not during active hostilities. However, they argue that the ongoing armed conflict situation and the status of the Gaza Strip as an area under military siege or blockade place the alleged victims in a situation of heightened risk, which clearly falls within the purview of article 11 of the Convention. They argue that article 11 is based on the recognition of the special and heightened vulnerability of persons with disabilities during situations of risk, including armed conflict. This implies a greater duty of care and protection for the State party. They submit that it thus follows that the State party also violated its special obligation to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, with respect to the rights invoked under articles 10, 12, 14, 15, 16 and 25 of the Convention.

---

8 The authors refer to: ‘Palestinian Authority Rejects Direct Arab Support to Hamas’, Asharq al-Awsat, 29 April 2019; The Office of the European Union Representative (West Bank and Gaza Strip, UNRWA), ‘The Palestinian Authority and the European Union Support Gaza Farmers with €3.7 Million’, 30 April 2019; and The Middle East Media Research Institute (MEMRI), Campaign in West Bank Against Palestinian Authority's Sanctions on Gaza, Inquiry & Analysis Series No. 1402, 21 June 2018.

3.3 The authors further submit that it is important to understand that the facts described in the communication also amount to an enforced disappearance of the alleged victims, as they were deprived of their liberty while their capturers refuse to acknowledge their detention or to provide information about their fate and whereabouts, placing them outside the protection of the law. The authors argue that the deprivation of liberty was committed by Hamas’ military wing, with the acquiescence of the State party. They argue that the State party’s jurisdiction, combined with its knowledge of the situation and failure to take any action to protect the alleged victims’ rights under the Convention, substantiate the State party’s acquiescence to Hamas’ conduct.

Article 16

3.4 The authors claim that the alleged victims are, or have been held, by Hamas with no information regarding their fate and whereabouts and with no contact with the outside world, amounting to grave abuse and cruel exploitation of their status as persons with disabilities. They argue that their crossing into the Gaza Strip due to their psychosocial disability was exploited by their capturers to pressure Israel and promote Hamas’ political interests in obtaining concessions, using the alleged victims as means to achieve those ends.

3.5 The authors argue that the State party did not take any measures to protect the alleged victims from their continued exploitation and abuse, to ensure access to medical care and to secure their prompt release. Even efforts to obtain information regarding their fate and whereabouts would assist in ceasing such exploitation and abuse. In refraining from taking any action regarding the situation, the State party has violated its obligations under article 16, read in conjunction with article 11 of the Convention.

Article 15

3.6 The authors refer to General Comment no. 36 (2018) of the Human Rights Committee in which that Committee observed that enforced disappearance, which constitutes the deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, violates the prohibition on torture and cruel, inhumane or degrading treatment or punishment. They further note that article 15 (2) of the Convention adds the requirement that States parties are under the obligation to take all effective measures to prevent persons with disabilities from being subjected to ill-treatment or punishment, on an equal basis with others. They submit that this provision acknowledges that some treatment that would not qualify as inhumane for a victim who is not a person with disabilities may qualify as such for persons with disabilities.

3.7 The authors claim that the enforced disappearances of the alleged victims violate the prohibition on torture or cruel, inhumane or degrading treatment, in violation of article 15, read in conjunction with article 11 of the Convention, due to the State party’s failure to take any effective measure in its power to prevent the victims from being subjected to such treatment.

Article 10

3.8 The authors note that according to General Comment no. 36 (2018) of the Human Rights Committee, enforced disappearance constitutes a unique and integrated series of acts and omissions representing a grave threat to life, which places the life of the disappeared person at serious and constant risk. They argue that it follows that the enforced disappearances of the alleged victims violate their right to life. They submit that by not taking measures in its power to protect the lives of the victims against the risks attendant to their enforced disappearance, the State party has violated their rights under article 10, read in conjunction with article 11 of the Convention.

---

11 Hart, Crock, McCallum & Saul, at 165.
12 Human Rights Committee, General Comment No. 36, para. 58.
Article 14

3.9 The authors note that the Committee, in its Guidelines on article 14 has stated that: “In particular, all persons with disabilities, and especially persons with intellectual disabilities and psychosocial disabilities are entitled to liberty pursuant to article 14 of the Convention”. They also refer to the Human Rights Committee’s findings in its General Comment no. 36 that enforced disappearance also violates the right to liberty and security of persons. They claim that the alleged victims were unlawfully and arbitrarily detained by Hamas due to their psychosocial disability, without having committed any crime or posing any threat. The authors submit that in addition, once the alleged victims were deprived of their liberty, the State party breached its obligation under article 14 (2) of the Convention when it did not ensure the implementation of proper safeguards according to international human rights law and the principles of the Convention, such as provision of information regarding the alleged victims’ fate and whereabouts, contact with their families, and suitable detention conditions.

Article 12

3.10 The authors claim that the enforced disappearances of the alleged victims and their inability to exercise their rights under the Convention violate their right to recognition as persons before the law in violation of article 12 of the Convention. They argue that in accordance with article 12 (3) of the Convention, the State party is under the obligation to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity and that the State party’s failure to do so is a violation of this obligation.

Article 25

3.11 The authors note that they have no information suggesting that the alleged victims have, or have had, any access to any health services with a view to their specific health needs, as no information has been provided as to their whereabouts or health condition. They argue that there is therefore a serious concern that the alleged victims, detained indefinitely and incommunicado by a hostile armed group, do not enjoy the highest attainable standards of health. The alleged victims have been diagnosed with serious mental disabilities, which require medical treatment. They submit that it is reasonable to argue that the mere fact of being disconnected from their families and support systems, and from the outside world, is the opposite of the “highest attainable standard of health”. The authors submit that the State party in failing to take measure available to it to end the worsening of the alleged victims’ mental health condition has violated its obligations under article 25 of the Convention.

Requested remedies

3.12 The authors request the Committee to recommend the State party to take all measures at its disposal to ensure the rights of the alleged victims and end the continuing violations of their rights. This includes taking all measures within its power to investigate their enforced disappearances, to obtain and release information regarding their fate and whereabouts, to guarantee their safety and access to medical care, including in relation to their disability, to re-establish as soon as possible contact with their families, and to ensure their prompt release and safe return to Israel and to their families.

State party’s observations on admissibility and the merits

4.1 On 22 January and 8 June 2021, the State party submitted its observations on the admissibility and merits of the communications. It submits that the communications should be found inadmissible as: a) being examined under another procedure of international investigation or settlement; b) domestic remedies have not been exhausted; and c) the complaints are not sufficiently substantiated.

4.2 The State party notes that it is aware of conflicting media reports regarding the whereabouts of the alleged victims. It notes that Mr. Mangisto may have entered the Gaza Strip in September 2014 and Mr. al-Sayed in April 2015 and that it is alleged that they are being held by non-State actors. It however argues that reports from Palestinian, Israeli and international organizations provide inconsistent and conflicting information as to their whereabouts. It notes that as concerns Mr. al-Sayed, media described the circumstances of his alleged disappearance as unclear and his father stated in a media interview that he was confident that his son was in safe hands in the Gaza Strip, with the family wishing that he would rather remain in Gaza and marry there.\(^{14}\) The State party also notes that in another media interview the father stated that he will not negotiate to get his son back, and urged Israeli authorities to not negotiate for the release of his son\(^{15}\). The State party further notes that, as reported by several media outlets, Mr. Mangisto allegedly walked into the occupied Gaza Strip in September 2014 and “was seen crossing the border into Gaza out of his own volition”\(^{16}\). The State party notes that in the media it was reported that Israel did not consider Mr. Mangisto to be captive, and that Israel was treating the matter as a humanitarian issue\(^{17}\). The State party notes that Hamas has publicly stated that Mr. Mangisto left Gaza through tunnels in Rafah and continued on to Egypt\(^{18}\). The State party notes that due to the lack of information as to the alleged victims’ fate and whereabouts, it has had to resort to media outlets to provide information on the victims’ alleged disappearance. It notes that it reached out to its security forces, who could not confirm the alleged victims’ whereabouts.

4.3 The State party claims that the Israeli government employs indiscriminate and illegal measures to prevent entry and exit from the occupied Gaza Strip and has erected so-called “no-go-zones” to which it forbids access. It argues that the practical effect of these zones is to do away with even the most basic safeguards of humanitarian law intended to protect civilians in conflict zones. Any person entering these zones automatically loses the benefits of those safeguards. They are presumed to be a military target and may be subject to indiscriminate lethal violence without regard to their status as a civilian. It argues that Israel is in effective control of the military buffer zone established on the territory of the occupied Gaza Strip and is thus responsible for investigating events that allegedly violate international law. It claims that in light of this situation it is difficult to comprehend how the alleged disappearances of the victims into the Gaza Strip went unhindered and uninterrupted by Israeli forces.

4.4 The State party notes that information contained in the public domain regarding the alleged victims’ disappearances could not be independently verified by it. It claims that Israel’s continued illegal occupation and blockade of the occupied Gaza Strip undermines a determination on the veracity of the claims and the identification of any alleged perpetrators. It further notes that it continues to confront the consequences of the political division and Hamas’ unlawful control over the occupied Gaza Strip, which has led to the severance of its security control in the Gaza Strip, further hampering the ability to verify the information. It notes that while Hamas entered Legislative Council elections in 2006 and became part of the political system, it does not have members in the current government, owing to its ongoing unlawful control of the occupied Gaza Strip. The State party further notes that notwithstanding the lack of security control in the Gaza Strip, and in line with its principled commitments to international law, it has repeatedly and continually condemned any acts of violence against civilians. When the alleged disappearance of Mr. Mangisto was brought to the attention of President Mahmoud Abbas, the President met with his family and promised to do everything in his power to inquire into his whereabouts, stating that he saw the case as a humanitarian one.\(^{19}\) Following this meeting, out of humanitarian concern, and in line with the State party’s obligations and duties under international law, the President instructed the

---

\(^{14}\) Times of Israel, ‘Family of Bedouin Missing in Gaza Confident of his Return’, 13 July 2015

\(^{15}\) i24 News, ‘Don’t negotiate with Hamas to free my son, says father of Gaza-held Israeli’, 14 July 2017.


\(^{17}\) Times of Israel, ‘Hamas Holding Two Israelis Hostage for Months’, 9 July 2015.

\(^{18}\) Ibid.

\(^{19}\) The Times of Israel, ‘Abbas Meets Family of Israeli Held in Gaza, offers to Help’, 12 September 2019.
relevant authorities to provide all possible assistance to establish the whereabouts of Mr. Mangisto. These efforts are ongoing.

4.5 The State party notes that there exist important factors that directly affect the possibility of an effective investigation of the claims raised in the communications before the Committee at the domestic level, as due to the blockade of the Gaza Strip its capacity to reach the occupied Gaza Strip and conduct investigations are severely curtailed and sometimes completely undermined by the practices, limitations, and prohibitions imposed by the Israeli occupation forces. It additionally notes that the blockade has thus far prevented all attempts – domestic or international – to enter the occupied Gaza Strip with a view to investigate or verify allegations of crimes committed by non-State actors, except for international organizations, including the International Committee of the Red Cross (ICRC). It also claims that so far Israel has completely failed to cooperate with the State party by, inter alia, denying access to the occupied Gaza Strip to any official, organization or group investigating the matter. It argues that in so doing, Israel has directly contributed to the alleged crimes remaining unresolved. It notes that State party authorities have taken efforts to secure justice for victims of alleged crimes but that, due to the factors mentioned above, it has resorted to international bodies and mechanisms, including special procedures, to independently verify and investigate alleged crimes and violations of international humanitarian and human rights law perpetrated in the State party. It notes that it is also aware and supportive of several international interventions to establish the whereabouts of the alleged victims, including by several States, such as Switzerland and Egypt, and most importantly by the ICRC.20 Out of concern, the State party authorities are in regular contact with the ICRC and have expressed their willingness to cooperate when and if needed.21 Within its mandate, the ICRC plays a crucial and interlocutory role on humanitarian issues, including those of detainees and prisoners. The ICRC remains in direct contact with the parties involved and the case is being examined by them.

Authors’ comments on the State party’s submission

5.1 On 25 May and 10 October 2021, the authors submitted their comments on the State party’s observations. They maintain that the communications are admissible. The authors argue that much of the observations by the State party focus on the responsibilities of the State of Israel and imply that the communications were submitted in coordination with it. The authors note that the communications were submitted on behalf of the alleged victims without any involvement of the State of Israel and that the clinic representing them in the communications provides pro bono legal services every year to a large number of victims, and that most of these cases are in fact directed against the State of Israel. The present communications are directed against the State party since it is the internationally responsible entity able to give account for human rights committed in the Gaza Strip by the de facto authorities. The authors also reiterate that they stand firmly behind the communications and that media reports referred to in the State party’s observations with regard to Mr. Shaaban al-Sayed, suggesting he does not wish for the return of his son, were misinterpreted and taken out of context.

5.2 The authors reiterate that the fact that these and other cases are also pending before the Working Groups on Enforced and Involuntary Disappearance do not bar the admissibility of the present communications given that the Working Group does not exercise quasi-judicial authority and as the cases before the Working Group does not involve the same claims.

5.3 Regarding the State party’s submission that the communications should be found inadmissible for failure to exhaust domestic remedies, the authors note that the State party has not identified any remedies that would be available to them. They reiterate their argument that Israeli nationals cannot enter Palestinian territory and do not have access to Palestinian

---


courts. They further argue that when the harms caused to the victims are as grave as in the present communications, States parties have an *ex officio* obligation to investigate the alleged violations and provide remedies to the victims.  

5.4 The authors submit that the communications elaborate on the factual background underlying the alleged enforced disappearances of the victims and provide substantive evidence in proof of the allegations. It is therefore sufficiently substantiated for the purposes of admissibility. The authors note that the State party refers to alleged violations of international law by the State of Israel. They argue that alleged violations of the Convention or other norms of international law by states other than the State party have no relevance to the present communications, and that the responsibility of other states for certain aspects of the chain of events that led to the claimed violations is not at issue before the Committee.

5.5 The authors note that the situation in the Gaza Strip is complex and that it is plausible that more than one State or non-state actors have influence over certain events. They however argue that the present communications do not require the Committee to delineate the division of responsibilities between all relevant parties. Rather, the communications seek to determine that the State party failed its responsibility under the Convention to take whatever measures in its power to protect the rights of persons with disabilities in its territory. They further note that, as a party to the Convention, the State party reports on the application of the Convention in the Gaza Strip. The authors also note the State party’s claim that Hamas’ control over the Gaza Strip prevents it from investigating the facts presented. They reiterate their argument that there are constant political interactions and links between the State party authorities and Hamas, and they note that the State party authorities are also involved in international discussions concerning the reconstruction of the Gaza Strip, humanitarian initiatives and border controls.

5.6 The authors further argue that the State party does not specify any measure taken to obtain more information concerning the fate and whereabouts of the alleged victims or to facilitate their safe return.

**Further submission by the authors**

6. On 29 June 2022, the authors informed that Hamas published a short video showing Mr. Hisham al-Sayed lying on what appeared to be a hospital bed and connected to what seemed to be an oxygen mask. The video was widely disseminated on social media and in the world press. The TV broadcast in the background of the video showed images from the Qatar Economic Forum, which took place in June 2022, suggesting that the video was filmed in June 2022. They note that the publication of the video may be in connection to a statement by Hamas the previous day, indicating that the health situation of one of the Israeli nationals it holds has deteriorated. The authors argue that the video provides clear proof that Mr. al-Sayed is still being held by Hamas in the Gaza Strip. They argue that the new information is also essential to the communication submitted on behalf of Mr. Mangisto, who is probably in the same situation as Mr. al-Sayed.

**B. Committee’s consideration of admissibility and the merits**

**Consideration of admissibility**

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

---

22 *X v. Tanzania* (CRPD/C/18/D/22/2014), para. 7.3.
23 Initial report submitted by the State of Palestine under article 35 of the Convention, CRPD/C/PSE/1, 14 June 2019.
24 On 16 January 2023, it was further reported in Israeli media that Hamas had published a of Avera Mangisto, i24News, ‘Hamas posts undated video showing Israeli hostage Avera Mengistu alive’, 16 January 2023.
Jurisdiction

7.2 The Committee notes the State party’s submission that the restrictions imposed by the blockade limits its ability to access the Gaza Strip and conduct an effective investigation into the alleged violations, and that it is Israel that has effective control over the area. The Committee also notes the authors’ submission that although the disappearances of the alleged victims are primarily attributed to the military wing of Hamas, a non-state actor, the obligations of States in international human rights law also include taking appropriate measures to prevent, investigate, prosecute and provide remedies for human rights abuses committed by non-state third parties on a part of a State’s territory.

7.3 The Committee recalls that under article 1 of the Optional Protocol it has competency to receive and consider communications from or on behalf of individuals or groups of individuals subject to the State party’s jurisdiction who claim to be victims of a violation by that State party of the provisions of the Convention. The Committee notes the judgement of the European Court of Human Rights in Ilascu and others v. the Republic of Moldova and Russia in which the Court observed that from the standpoint of public international law, the words “within their jurisdiction” must be understood to mean that a State’s jurisdictional competence is primarily territorial, but also that jurisdiction is presumed to be exercised normally throughout the State’s territory. This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory.25 The Court has further found that the obligations by States to refrain from interfering with the enjoyment of the rights and freedoms guaranteed and the positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory remain even where the exercise of the State’s authority is limited in part of its territory. It has a duty to take all appropriate measures which are still within its power to take.26 The Court thus concluded that even in the absence of effective control by a State over parts of its territory, it still has a positive obligation to take the diplomatic, economic, judicial or other measures that are in its power to take and are in accordance with international law to secure to the residents in such a territory the rights guaranteed by the European Convention.27 Similarly, the Inter-American Court of Human Rights has held that the State is obliged to prevent and react to human rights violations by paramilitary groups in areas controlled by said groups.28 The Human Rights Committee,29 the Committee on the Elimination of Discrimination Against Women,30 the Committee Against Torture31, the Committee for the Rights of the Child32 and the Committee on Economic, Social and Cultural Rights33 have also recalled State obligations to protect individuals under their territorial jurisdiction and prevent violations, including in areas where they may not have effective control. The Committee therefore considers that notwithstanding the existing limitations in the State party’s ability to exercise its authority in the Gaza Strip, the alleged victims are within its jurisdiction within the meaning of article 1 of the Optional Protocol, and the Committee is therefore not precluded from considering the present communications.

25 Ilascu and others v. the Republic of Moldova and Russia para. 312.
26 Ibid. para. 313.
27 Ibid. para. 331, see also European Court of Human Rights, Mozer v. the Republic of Moldova and Russia, Application No. 11138/10, paras. 97-98.
28 19 Merchants v. Colombia, judgment of 5 July 2004 (Merits, Reparations and Costs), para. 140; Mapiripán Massacre v. Colombia, judgment of 15 September 2005 (Merits, Reparations and Costs), paras 111–114 (referring to erga omnes obligations); Pueblo Bello Massacre v. Colombia, judgment of 31 January 2006 (Merits, Reparations and Costs), paras 113, 126, 139; Ituango Massacres v. Colombia, judgment of 1 July 2006 (Merits, Reparations and Costs), paras 134, 291, 315; Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, judgment of 20 November 2013 (Preliminary objections, Merits, Reparations and Costs), paras 224, 370–373.
29 CCPR/C/MDA/CO/2, para. 5; CCPR/C/GEO/CO/3, para. 6; see Serna v. Colombia, (CCPR/C/114/D/2134/2012), para. 9.3
30 CEDAW, General recommendation No. 28, para. 12; CEDAW, General recommendation No. 30, para. 5.
31 CAT/C/UKR/CO/6, para. 11(a).
32 CRC/C/IRQ/CO/2-4, paras 6, 45, 53(a).
33 E/C.12/CAF/CO/1, para. 8.
Another procedure of international investigation or settlement

7.4 The Committee notes the State party’s submission that the communications are inadmissible under article 2 (c) of the Optional Protocol as being investigated under another procedure of international investigation or settlement, namely by the Working Group on Enforced or Involuntary Disappearances. The Committee notes, however, the authors’ argument that the requests submitted to the Working Group cannot be considered as “another procedure of international investigation or settlement” within the meaning of article 2 (c) of the Optional Protocol. The Committee also notes the authors’ argument that the request submitted to the Working Group does not concern the same matter as the present communication, as it was not based on the disability of the alleged victims and did not raise claims relating to their rights as persons with disabilities.

Exhaustion of domestic remedies

7.5 The Committee notes the jurisprudence of the Human Rights Committee which has observed that that extra-conventional procedures or mechanisms established by the Human Rights Council, including requests submitted to the Working Group on Enforced or Involuntary Disappearances, do not generally constitute an international procedure of investigation or settlement within the meaning of the treaty body complaints procedures. Accordingly, the Committee considers that it is not precluded, for purposes of admissibility, by article 2 (c) of the Optional Protocol, from examining the communications.

Admissibility ratione temporis

7.7 The Committee notes the authors’ submission that while the events in question began before the Optional Protocol entered into force for the State party, the disappearances of the alleged victims entail a continued violation of the Convention. The Committee notes that under article 2 (f) of the Optional Protocol a communication shall be found to be inadmissible if the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for the State Party concerned unless those facts continued after that date. The Committee notes that the alleged victims entered the Gaza Strip in 2014 and 2015 respectively, and that, according to the information available on file, it appears that they were possibly detained by the military wing of Hamas and held incommunicado. Although these alleged disappearances and/or arbitrary detentions took place before the entry into force of the Optional Protocol for the State party, the Committee notes that, from the information on file, and in particular in light of the video published by Hamas in June 2022 showing Mr. Hisham al-Sayed lying on what appeared to be a hospital bed, the alleged victims could still be detained under these conditions. Considering the alleged victims’ psycho-social disability, the detention conditions, in particular the lack of contact with the families and the lack of information regarding their whereabouts and health condition, all of which has continued after such entry into force, the Committee considers that it is not precluded by article 2 (f) of the Optional Protocol from considering the present communications.

Manifestly ill-founded

7.8 The Committee finally notes the State party’s submission that the communications should be inadmissible as manifestly ill-founded under article 2 (e) of the Optional Protocol. It notes the authors’ claims that the alleged disappearances of the victims are in violation of their rights under articles 10, 14, 15 and 25, read alone and in conjunction with article 11 of the Convention as their disappearances and incommunicado detention have exposed them to a risk to their lives and health, ill-treatment and deprivation of liberty. The Committee considers that the authors have sufficiently substantiated these claims for the purposes of admissibility.

7.9 The Committee however notes that the authors have not provided sufficient arguments to establish the violations invoked under articles 12 and 16 of the Convention, that are not already encompassed within the claims as raised under articles 10, 14, 15 and 25 of the Convention. The Committee therefore finds, based on the information on file, that these claims are insufficiently substantiated and inadmissible under article 2 (e) of the Optional Protocol.

7.10 In the absence of any other challenges to the admissibility of the communications, the Committee declares the communications admissible insofar as it concerns the authors’ claims under articles 10, 14, 15 and 25, read alone and in conjunction with article 11 of the Convention, related to the State party’s failure to protect the alleged victims and investigate their alleged disappearance and arbitrary detention, and proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the communications in the light of all the information it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of its rules of procedure.

8.2 The Committee notes the authors’ claim that the alleged victims have been subjected to enforced disappearance and incommunicado detention in the Gaza Strip. The Committee further notes the authors’ claims that by failing to take any action to try to determine the fate and whereabouts of the alleged victims or to facilitate their safe return the State party has violated their rights under articles 10, 14, 15 and 25, read alone and in conjunction with article 11 of the Convention.

8.3 The Committee notes the State party’s information that it has not been able to independently verify the alleged victims’ whereabouts or fate, and its argument that there is conflicting information contained in the public domain regarding their disappearances. It notes the State party’s claims that the blockade of the occupied Gaza Strip undermines a determination on the veracity of the claims and the identification of any alleged perpetrators. The Committee, however, notes the authors’ uncontested information that statements and a video published by Hamas indicate that the alleged victims are, or have been, held by Hamas in the Gaza Strip. The Committee further notes the State party’s argument that Hamas’ control over the Gaza Strip has led to the severance of the State party’s security control in the Gaza Strip, further hampering its ability to verify the claims raised by the authors. It finally notes the State party’s argument that these factors directly affect the possibility of conducting an effective investigation of the claims raised in the communications at the domestic level, as its capacity to reach the Gaza Strip and conduct investigations is severely curtailed.

8.4 Concerning the State party’s ability in practice to make attempts to verify the whereabouts and fate of the alleged victims and to attempt to facilitate their safe return to their families, given the situation in the Gaza Strip, the Committee notes the jurisprudence of the European Court of Human Rights in Ilascu and Others v. Moldova and Russia, holding that a State party does not cease to have jurisdiction over those parts of its territory in which it is prevented from exercising its authority by a constraining de facto situation, such as when
a separatist regime is set up\textsuperscript{35}. However, such a factual situation may reduce the scope of the State party’s substantive obligations under the Convention. The focus of the analysis is therefore on the State party’s positive obligations. In the current context, the State party must endeavour to take the diplomatic, economic, judicial or other measures that are within its power and are in accordance with international law to secure to the authors the rights guaranteed by the Convention\textsuperscript{36}. The European Court of Human Rights observed that although it was not for it to indicate which measures the authorities should take to comply with their obligations most effectively, it must verify that the measures actually taken in the case at hand were appropriate and sufficient. When faced with a partial or total failure to act, it found that its task was to determine to what extent a minimum effort was nevertheless possible and whether it should have been made and that determining that question was especially necessary in cases concerning an alleged infringement of absolute rights such as the right to life and the prohibition of torture or inhuman or degrading treatment or punishment\textsuperscript{37}.

8.5 Following the jurisprudence above, the Committee considers that in the present cases the question before it is therefore to determine whether the State party discharged its positive obligations to take appropriate and sufficient measures -including diplomatic, economic, judicial or other measures- that are within its power to secure the alleged victims’ rights as guaranteed by the Convention.

8.6 The Committee notes the authors’ specific claims that the alleged victims were unlawfully and arbitrarily detained in violation of their rights under article 14 of the Convention, that the State party violated their rights under article 15 of the Convention by failing to take any effective measure in its power to prevent the alleged victims from being subjected to torture or cruel, inhumane or degrading treatment and that the State party by failing to take measures in its power to protect the lives of the alleged victims against the risks attendant to their disappearance, violated their rights under article 10 of the Convention. The Committee also notes the authors’ claim that the alleged victims’ rights under article 25 of the Convention were violated due to them being deprived of adequate medical care, and the State party’s failure to make any attempt to remedy their situation. In this regard, the Committee notes the authors’ information that according to a statement released by Hamas, the health situation of one of the Israeli nationals it holds has deteriorated, while a video was posted of Mr. al-Sayed in a hospital bed. Additionally, as concerns the authors’ claim under article 10 of the Convention the Committee also notes the findings of the Human Rights Committee that the right to life, including the right to protection of life, may overlap with the right to security of person and that extreme forms of arbitrary detention that are themselves life-threatening violate the right to personal liberty and personal security and are incompatible with the right to life.\textsuperscript{38}

8.7 The Committee further notes the authors’ submission that the substantive claims raised above should be read in conjunction with the State party’s obligations under article 11 of the Convention. The Committee recalls that in accordance with article 11 States parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters. Regarding the application of article 11 to the present communications the Committee notes the general human rights and humanitarian situation in the Gaza Strip which is of a nature to cause a particular situation of risk, as expressed for example in the annual OHCHR report on the implementation of Human Rights Council resolutions S-9/1 and S-12/1, covering the period from 1 November 2020 to 31 October 2021 in which it was noted

\textsuperscript{35} Conceptualized in, Ilascu and Others v. Moldova and Russia, ibid. para. 333; see also IACHR, Peace Community of San José de Apartadó v. Colombia, Order, 18 June 2002, para. 11: “The State Party is under the obligation, erga omnes, to protect all persons who are under its jurisdiction, … not only with respect to the power of the State but also with respect to actions by third parties, including irregular armed groups of any type”.

\textsuperscript{36} Ilascu and Others v. Moldova and Russia, ibid. para. 331.

\textsuperscript{37} Ibid. para. 334.

\textsuperscript{38} Human Rights Committee, General comment No. 36 on Article 6: right to life, para. 57.
that in May 2021, the most significant escalation in hostilities between Israel and Palestinian armed groups since 2014 caused significant civilian casualties and destruction of civilian infrastructure, and worsened the humanitarian situation in Gaza, already heavily affected by 15 years of blockade.\footnote{A/HRC/49/83, para. 3.} Reports were also made that individuals arrested by Gaza de facto authorities’ security forces were allegedly subjected to ill-treatment or torture, restricted access to legal aid and other concerns in fair trial guarantees.\footnote{Ibid, para. 53.} In particular, a number of people detained by the Internal Security Agency alleged having been held in incommunicado detention and subjected to beating, suspension, sleep deprivation, stress positions and forced exercise with the aim of extracting confessions from them. They did not have access to legal counsel and there was no judicial review of their detention despite multiple extensions by a military prosecutor.\footnote{Ibid.} As concerns the health-care system in the Gaza Strip there were reported serious shortages of health-care professionals, inadequate treatment equipment and low supplies of drugs and medicines\footnote{Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/49/87, para. 45.}. The Committee considers that taking the particularly vulnerable situation of the alleged victims into account, including their need to accessible and adequate health care, the situation in the Gaza Strip can be considered to be a situation of risk as to engage the State party’s obligations under article 11 of the Convention.

8.8 The Committee notes the State party’s argument that due to its lack of effective control over the Gaza Strip its ability to access the Gaza Strip and investigate the claims raised in the communications is severely limited. It notes that treaty bodies in their concluding observations have recognized that these challenges limit the State party’s effective control over its own territory and its capacities to effectively prevent and combat human rights violations, but that the conventions in questions are applicable in the State party’s entire territory and that the State party therefore has the obligation to take all possible measures to implement the conventions in all parts of its territory.\footnote{CEDAW/C/PSE/CO/1, paras. 9-10, CAT/C/PSE/CO/1, para. 4.} As noted above (see para. 8.4) the Committee therefore observes that even in the absence of effective control by the State party over parts of its territory, and while acknowledging the constraints faced by the State party, it still has a positive obligation to take the diplomatic, economic, judicial or other measures that are within its power to take and are in accordance with international law to secure to the persons in that territory the rights guaranteed by the Convention.\footnote{Ibid.} The Committee notes that in the present cases the State party has not provided any specific information on any such significant measure it has taken, apart from the visit with Mr. Mangisto’s family and its information provided on its contacts with the ICRC - to discharge its positive obligations and to ensure respect for the alleged victims’ rights under the Convention, particularly on their right to life, right to liberty and security of the person, freedom of torture or cruel, inhuman or degrading treatment or punishment and right to the enjoyment of the highest attainable standard of health. In particular the Committee observes that the State party has not provided any information on any measure taken to attempt to inquire into the fate and whereabouts of the alleged victims or the conditions of detention, including by attempting to engage the de facto authorities in the Gaza Strip to address the alleged victims’ situation; to facilitate and secure their release and safe return to their families; to guarantee their placement under the protection of the law; to ensure that they have access to adequate health care, taking into account their psychosocial disabilities and particularly vulnerable situation; and to enable them to be in contact with their families, relatives and representatives, especially taking into account that the alleged disappearances of the victims date back to 2014 and 2015 without the victims’ families being provided with any information as to their fate and whereabouts or current health condition. The Committee concludes that the failure by the State party to take any such measure to investigate, verify or inquire into the fate and whereabouts of the alleged victims, including on the alleged risk to their lives, the alleged ill-treatment they have endured, and the alleged deprivation of liberty as well as access to health care, amount to a violation of

\footnote{Ibid. Ilascu v. Moldova and Russia, para. 331, see also European Court of Human Rights, Mozer v. the Republic of Moldova and Russia, Application No. 11138/10, 23 February 2016, paras. 97-98.}
of the alleged victims’ rights under articles 10, 14, 15 and 25, read alone and in conjunction with article 11 of the Convention.

The Committee’s request for interim measures

8.9 The Committee notes that on 20 September 2019 it issued requests for interim measures under article 4 of the Optional Protocol in the present communications which were reiterated on 6 July 2022 (see para. 1.2). The State party has however not provided any information on any measure it has taken, or attempted to take, to comply with the Committee’s requests. The Committee recalls that interim measures under article 4 of the Optional Protocol and rule 64 of its rules of procedure, are essential to the Committee’s role under the Protocol. Non-compliance with the rule undermines the protection of Convention rights through the Optional Protocol. The Committee therefore finds that the State party’s failure to comply with the request for interim measures violates article 4 of the Optional Protocol.

C. Conclusion

9. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under articles 10, 14, 15 and 25, read alone and in conjunction with article 11 of the Convention and its obligations under article 4 of the Optional Protocol. The Committee therefore makes the following recommendations to the State party:

(a) Concerning the authors and the alleged victims, the State party is under an obligation to:

(i) Provide the authors with an effective remedy, including compensation for any legal costs incurred in filing the present communications.

(ii) Take all diplomatic, economic, judicial or other measures available in accordance with international law to: (a) conduct a prompt investigation that is effective and thorough, impartial and independent, and transparent into the circumstances of the alleged disappearances and arbitrary detention of Mr. Mangisto and Mr. al-Sayed, with a view to establishing the truth and securing their safe return to their families; (b) provide the authors with detailed information on the outcome of the investigation; (c) to guarantee Mr. Mangisto’s and Mr. al-Sayed’s safety and access to medical care, including in relation to their disability, as well as contact with their families and representatives.

(iii) Publish the present Views and circulate them widely in accessible formats so that they are available to all sectors of the population.

(b) In general, the State party is under an obligation to take measures to prevent similar violations in the future. In that regard, the Committee requires the State party to ensure, in particular, that claims of disappearances are promptly investigated in order to establish the fate and whereabouts of the alleged victims and ensuring their release.

10. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee’s rules of procedure, the State party should submit to the Committee, within six months, a written response, including information on any action taken in the light of the present Views and recommendations of the Committee.