

What Future for the Palestinian Military Justice System?

Summary Report and Recommendations



Palestinian Centre for
Strategic Studies and
Research (PCSSR)



Geneva Centre for the
Democratic Control of
Armed Forces (DCAF)



Overview

Problem statement

Many Palestinians believe that the current Palestinian system of military justice is in dire need of development and reform. Political leaders, civil servants, security officials and civil society representatives view the current system as incompatible with the modern legal and

institutional framework required for statehood. They want a modern and democratic military justice system that corresponds to international standards. In their view, the existing legal and institutional set-up of the military judiciary fails to meet these standards.

Response

The Palestinian Centre for Strategic Studies and Research (PCSSR) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) facilitated between November 2010 and May 2011 a consultation process, which aimed at:

- ▶ Documenting the expectations of key Palestinian stakeholders of the future Palestinian military justice system;
- ▶ Developing recommendations for reforming the Palestinian military justice system.

PCSSR and DCAF initiated this process based on official request of the Palestinian Military Judicial Commission and under the patronage of the Office of the President.

The present report summarises the findings of the consultation process and makes recommendations for the development of the Palestinian military justice system. The report is intended for Palestinian decision-makers, the concerned institutions of the Palestinian National Authority (PNA), as well as Palestinian civil society.

Approach

In order to gauge stakeholder expectations and develop recommendations for the reform of the Palestinian military justice system, PCSSR and DCAF adopted the following approach:

- ▶ PCSSR and DCAF first jointly developed a questionnaire to assess the expectations of Palestinian stakeholders concerning the future Palestinian military justice system (See Annex A for questionnaire).
- ▶ PCSSR and DCAF then conducted a stakeholder consultation process in the

West Bank and the Gaza Strip. The process included 16 working group sessions and 18 personal interviews with stakeholders on the basis of the questionnaire (See Annex B for list of working group sessions and interviews).

- ▶ Based on the inputs received during the consultation process, PCSSR and DCAF finally identified a set of criteria for identifying good options and, subsequently, developed three options for a future Palestinian military justice system.

Broad consensus on the need of reform

Participants in the consultation process agreed that there is a need for a comprehensive overhaul of the Palestinian military justice system.

Shortfalls of the current system

In their view, the current system suffers from a number of shortfalls:

- ▶ **The validity of legislation currently applied is contested:** The military judiciary works on the basis of legislation issued by the Palestine Liberation Organisation (PLO) in 1979. The applicability of this legislation in the West Bank and the Gaza Strip is highly contested, as it was approved abroad and not published in the Official Gazette according to the Amended Basic Law of 2003. The Amended Basic Law of 2003 (Article 101 (2)) calls for the establishment of military courts by special laws and specifies that “such courts shall not have any jurisdiction beyond military affairs”. To this date, such legislation has not been enacted yet.

- ▶ **Civilians are tried by military courts:** The current legal framework allows for the trial of civilians before military courts. This practice is in contravention of international standards.
- ▶ **Contradictions with international human rights obligations:** The current legal framework also contains several provisions that violate international human rights law, such as forced labour sentences - both temporary and for life - and capital punishment for minor offences.
- ▶ **Lack of judicial independence:** In institutional terms, the military courts are currently part of the executive authority and lack judicial independence. Military judges are appointed by the President in the capacity of the Higher Commander and part of the functional hierarchy of the security forces.
- ▶ **Lack of fair trial guarantees:** Serious doubts exist about the sufficiency of fair trial guarantees, as in many cases the military judiciary itself assumes the role of the defence counsel. Furthermore, rulings by military courts are not subject to appeal before regular courts and can only be overruled by the Higher Commander.
- ▶ **Weak human resources management:** Participants agreed that there is a lack of criteria for the appointment of military judges and prosecutors and no systematic training and judicial inspection. Military judges also suffer from lack of financial independence and receive considerably lower salaries than civil judges.

Addressing these problems requires in the view of the participants, reform at the legal, institutional and administrative level.

Before discussing options of reform, PCSSR and DCAF asked participants to identify the principles which should in their view govern the Palestinian military justice system as well as the criteria for testing these options.

What principles should govern the Palestinian military justice system?

Participants in the consultation process said that the following five principles should govern the future Palestinian military justice system:

- ▶ The military justice should be fully regulated by law.
- ▶ The military justice system should comply with international standards in the field of military justice. This includes the separation of powers, respect for standards of international law, exclusion of civilians from jurisdiction of military courts, the limitation of their jurisdiction to offences of military nature committed by military personnel, the right to a competent, independent and impartial trial, the public nature of hearing, and the recourse to procedures in regular courts.
- ▶ The function of the military justice system should be to maintain discipline in the security forces and to ensure their proper functioning.
- ▶ The military justice system should be based on the principle of judicial independence.
- ▶ The military justice system should exclude jurisdiction of military courts over civilians.

What are the criteria for identifying good options?

There was a broad consensus among the stakeholders that were consulted that a good option for reform would need to meet the following five criteria:

- ▶ Provide for the effective delivery of justice
- ▶ Ensure transparency of the system
- ▶ Comply with fair trial guarantees
- ▶ Provide for a cost-effective system
- ▶ Ensure socio-cultural acceptability

Options

During the consultation process, participants made different proposals as to how the future Palestinian military justice system should look like. These proposals can be summed up in three different options. In the following, these options are briefly introduced and assessed in light of the criteria identified above.

Option 1: Purely military model

The purely military model would include a system of military courts with exclusive jurisdiction over all offences (ordinary crimes, military crimes and disciplinary violations) committed by members of the Palestinian security forces. Civilians,

irrespective of the crime they committed, would be tried by regular courts.

Table 1 provides an overview of how participants see the strengths and weaknesses of this model when assessed against the five criteria identified above.

Table 1: Strengths and weaknesses of the purely military model

Strengths		Weaknesses
Effective delivery of justice	<ul style="list-style-type: none"> ■ Military judges and prosecutors possess the necessary expertise in military criminal law and disciplinary procedures and are familiar with the life and culture in the security forces. ■ Allows for fast and effective procedures for dealing with offences committed by security forces personnel. 	
Transparency of the system		<ul style="list-style-type: none"> ■ Closed system of military justice, with very limited external oversight. ■ May not guarantee the right to a public hearing and leave less room for oversight through civilian courts and civil society organisations. ■ Risk of further widening the gap between security forces and civilian institutions/population.
Compliance with fair trial guarantees		<ul style="list-style-type: none"> ■ Risk that judges and prosecutors follow the views of their superiors in dealing with cases and thus compromise judicial independence and fair trial guarantees (such as the right to legal assistance of own choosing or the right to appeal).
Cost-effectiveness of the system		<ul style="list-style-type: none"> ■ Costly system: Requires the establishment of appropriate infrastructure and administrative structures for the military judiciary. System would also require a significant number of personnel (judges, prosecutors and administrative staffers) leading to additional costs (salaries, insurances, training, pensions).
Socio-cultural acceptability	<ul style="list-style-type: none"> ■ Likely to correspond with the expectations of security forces personnel in terms of their special professional and societal status vis-à-vis civilians. 	<ul style="list-style-type: none"> ■ Unlikely to reflect the preference of civil society and the public, which favour stronger civil-democratic control over the security forces.

Option 2: Hybrid jurisdiction model

The model would be based on a division of jurisdiction between military and civilian courts. Such division of labour could be made on the basis of the identity of the victim: Military courts would deal with offences committed by a member of the security forces against another member of the security forces or by members of the security forces against the security institutions. In turn, regular courts would try offences committed by

members of the security forces against civilians. Jurisdiction could be further limited to offences committed by security forces personnel on active duty only. Regular courts would try civilians, irrespective of the crime they commit.

Table 2 provides an overview of how participants see the strengths and weaknesses of this model when assessed against the five criteria identified above.

Table 2: Strengths and weaknesses of the hybrid jurisdiction model

	Strengths	Weaknesses
Effective delivery of justice	<ul style="list-style-type: none"> Ensures that military judges and prosecutors have the knowledge and expertise in dealing with offenses of military nature. It would thus guarantee that military offences are dealt with swiftly, while ensuring that offences of non-military nature are handled by competent civilian courts. 	
Transparency of the system	<ul style="list-style-type: none"> Offers higher level of transparency (compared to option 1) since offences committed against or related to civilians are removed from the jurisdiction of the military courts. Brings security institutions closer to civilian institutions and ensures accountability of security forces personnel before civilian courts. As a result, public trust in the security forces is likely to increase. 	
Compliance with fair trial guarantees	<ul style="list-style-type: none"> Lower likelihood (compared to option 1) of infringement with fair trial guarantees, as part of the offences committed by security forces personnel would be handled by civilian courts. As a hybrid system, the model may also include the option of appeal against military court judgements before higher civilian courts. 	
Cost-effectiveness of the system		<ul style="list-style-type: none"> Although requiring fewer resources than the purely military model, the hybrid model would still incur significant costs, as it would encompass a military court system comprised of specialised judges and prosecutors and appropriate administrative structures.
Socio-cultural acceptability	<ul style="list-style-type: none"> Likely to win support by civil society organisations and the public. 	<ul style="list-style-type: none"> Likely to lead to opposition from security forces personnel that may refuse to submit to civilian jurisdiction due to their special professional status.

Option 3: Disciplinary tribunal model

The disciplinary tribunal model would consist of disciplinary tribunals at the level of the security forces that would deal with disciplinary violations. Military and ordinary crimes committed by

security forces personnel would be dealt with through the regular courts.

Table 3 provides an overview of how participants see the strengths and weaknesses of this model when assessed against the five criteria identified above.

Table 3: Strengths and weaknesses of the disciplinary tribunal model

	Strengths	Weaknesses
Effective delivery of justice		<ul style="list-style-type: none"> Requires special training for civilian judges and prosecutors who do not have the specialist knowledge of the affairs of the security forces or only limited experience of practicing military law. May be slower in dealing with minor criminal offences committed by security personnel, as compared to option 1 and 2.
Transparency of the system	<ul style="list-style-type: none"> High degree of civil-democratic oversight over the security forces, as security officers are submitted to civilian jurisdiction for all criminal offences. Ensures high degree of public oversight through civil society organisations and media. 	
Compliance with fair trial guarantees	<ul style="list-style-type: none"> Higher likelihood (than option 1 & 2) that fair trial guarantees are respected, as civilian judges are independent of the hierarchy of the security forces. 	
Cost-effectiveness of the system	<ul style="list-style-type: none"> Rather cost-effective: Entails lower personnel, administrative and infrastructure costs, as the civilian judiciary deals with all criminal offences committed by security forces personnel. 	
Socio-cultural acceptability	<ul style="list-style-type: none"> Likely to win support of civil society organizations and the wider public, which resents military courts, because it associates them to the occupation. Disciplinary tribunals on the level of the security forces would also circumvent the politically sensitive issue of whether the Palestinian security forces are in fact military bodies. 	<ul style="list-style-type: none"> Likely to be met with opposition by security officers, who view themselves as being different from civilians in their professional and socio-cultural status.

Recommendations

Based on the input gathered during the consultative process and the options discussed above, PCSSR and DCAF recommend that:

1. The Palestinian authorities initiate a comprehensive reform process to bring the current system of military justice in line with international standards.
2. The Palestinian authorities ensure that the new system of military justice fully responds to expectations of the Palestinian society as laid out in this report. In particular, the new system should:
 - ▶ guarantee the independence of the courts or tribunals dealing with offences committed by security forces personnel;
 - ▶ exclude civilians from the jurisdiction of military courts or tribunals;
 - ▶ fully respect fair trial guarantees, including the right to appeal before a civilian court.
3. The Palestinian authorities conduct an institutional review process of the military judicial system in order to gauge in detail the administrative and financial implications of the three options.
4. The Office of the President, the Ministry of Interior and the Ministry of Justice jointly develop a vision statement as to the future of the Palestinian military justice system in line with the chosen option.
5. The Palestinian authorities initiate the development of new military justice legislation that defines military crimes as well as the scope of military jurisdiction in line with international standards, based on the vision statement and a corresponding legislative policy statement.

Annex A: Questionnaire ‘What future for the Palestinian military justice system?’

The questionnaire used by PCSSR and DCAF for structuring discussions during the working group sessions and individual interviews comprised the following questions:

- A. **Developing criteria for reform:** What are the criteria that a good Palestinian military justice system should fulfil?
- B. **Assessing the current situation:** Does the current legal and administrative framework of the Palestinian military justice system correspond with stakeholder expectations?
- C. **What are the expectations from the future military justice system concerning**
 - ▶ the values, vision and mission of the Palestinian military justice system?
 - ▶ the jurisdiction of Palestinian military courts?
 - ▶ the independence of the Palestinian military justice system?
 - ▶ the conformity with guarantees of fair trial?

Annex B: Working Group Sessions and Interviews on ‘What future for the Palestinian military justice system?’

The Palestinian Centre for Strategic Studies and Research (PCSSR) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) conducted workshop and interviews with the following stakeholders.

Working group sessions

- ▶ Six working group session with the Palestinian Military Judicial Commission, West Bank (MG Ahmad Umbayed, BG Abdelkarim Salman, and 10 military judges and prosecutors) (between 11 November 2010 and 26 May 2011)
- ▶ One working group session with the Palestinian Military Judicial Commission, Gaza Strip (Col Hassan Attallah and seven judges and prosecutors) (10 Apr 2011)
- ▶ Five working group session with civil society organization in the West Bank (Palestinian Independent Commission for Human Rights, AMAN, Al-Haq, Center for the Rehabilitation of Victims of Torture, Jerusalem Center for Legal Aid, Institute of Law/Birzeit University, Hurriyat, three independent lawyers) (6 April to 11 May 2011)
- ▶ One working group session with civil society organisations in the Gaza Strip (Mizan Center, Gaza Mental Health Committees, Palestinian Center for Human Rights, Ad-Dameer, Arab Center for Agricultural Development, Palestinian NGO Network) (23 May 2011)
- ▶ One working group session with the Fatah parliamentary bloc (seven members) (10 February 2011)
- ▶ One working group session with the Change and Reform parliamentary bloc (eight members) (28 March 2011)
- ▶ One working group session with retired military officers (four Major-Generals) (23 February 2011)

Individual interviews

a. Executive Authority

- ▶ MG Ismail Jabr, Assistant to the Higher Commander of the Palestinian Security Forces (26 January 2011)
- ▶ Dr. Ali Khashan, Minister of Justice (15 December 2010)
- ▶ Ahmad Mghanni, Attorney-General (9 February 2011)
- ▶ Dr. Hassan Al-Aouri, Legal Adviser to the President (1 March 2011)
- ▶ MG Jihad Jayousi, Military Secretary to the President (23 January 2011)
- ▶ MG Muhammad Jibrini, Assistant to the Minister of Interior for Security Affairs (23 February 2011)

b. Judicial Authority

- ▶ Farid Jallad, Head of the High Judicial Council/President of High Court of Justice (10 February 2011)

c. Security Forces

- ▶ MG Majed Farraj, Head of the General Intelligence (9 February 2011)
- ▶ BG Nidal Abu Dukhan, Head of the Military Intelligence (26 January 2011)
- ▶ Maj Raed Taha, Legal Adviser to the Preventive Security (2 March 2011)

d. Members of the Palestinian Legislative Council

- ▶ Qais Abu Laila, Democratic Front for the Liberation of Palestine (13 February 2011)
- ▶ Khalida Jarrar, Popular Front for the Liberation of Palestine (6 February 2011)
- ▶ Bassam Salhi, Palestine People's Party (23 January 2011)

e. Political Parties

- ▶ Jibril Rajoub, Central Committee, Fateh (24 February 2011)

- ▶ Othman Abu Gharbieh, Central Committee, Fateh (23 February 2011)
- ▶ Abdelrahim Mallouh, Deputy Secretary General, Popular Front for the Liberation of Palestine (13 February 2011)

f. Other

- ▶ Dr. Mamdouh Al-Aker, Commissioner-General, Palestinian Independent Commission for Human Rights (2 March 2011)
- ▶ Randa Sinoira, Director-General, Palestinian Independent Commission for Human Rights (2 March 2011)

The Palestinian Center for Research and Strategic Studies (PCRSS)

The Palestinian Center for Research and Strategic Studies (PCRSS) is a national center which focuses on research concerning the political, social, and legal aspects of the Palestinian cause. It seeks to contribute to building the Palestinian society through its researches and studies.

The Geneva Centre for the Democratic Control of Armed Forces (DCAF)

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) promotes good governance and reform of the security sector. The Centre conducts research on good practices, encourages the development of appropriate norms at the national and international levels, makes policy recommendations and provides in-country advice and assistance programmes. DCAF's partners include governments, parliaments, civil society, international organisations and the range of security sector actors such as police, judiciary, intelligence agencies, border security services and the military.

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