



# **Palestine Transitional Justice Consolidated Position Papers**

## **Civil Society Organizations' Vision on Integrating Transitional Justice Mechanisms in the Reconciliation Process**

**Muhammed Al-Khader and Francesca Del Mese**

**MUSAWA - The Palestinian Center for the Independence of the Judiciary  
and the Legal Profession**

**2021**

*This publication was developed by the Palestinian Center for the Independence of the Judiciary and the Legal Profession (MUSAWA) with the support of the UNDP, UN Women and UNICEF Joint Programme "Sawasya II: Promoting Rule of Law in the State of Palestine" generously funded by the Government of the Netherlands, the Swedish International Development Cooperation Agency (SIDA) and the Spanish Agency for International Development Cooperation (AECID).*

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## Table of Contents

<b>Introduction</b> .....	<b>5</b>
<b>FIRST PAPER - The Role of Transitional Justice mechanisms in the Palestinian Reconciliation Process</b> .....	<b>11</b>
<b>Executive summary</b> .....	<b>11</b>
<b>Introduction</b> .....	<b>12</b>
<b>First: What is transitional justice?</b> .....	<b>13</b>
<b>Second: An overview of the Palestinian political context and the absence of transition</b> .....	<b>15</b>
<b>Third: The Palestinian Reconciliation Agreements and transitional justice</b> .....	<b>17</b>
<b>Fourth: The role of civil society in the reconciliation process</b> .....	<b>19</b>
<b>Fifth: What bodies are proposed to ensure the realisation of justice?</b> .....	<b>20</b>
<b>Sixth: Ensuring gender inclusivity</b> .....	<b>22</b>
<b>Conclusions and recommendations</b> .....	<b>23</b>
<b>SECOND PAPER - Prosecuting perpetrators of violations relating to the Palestinian division</b> .....	<b>27</b>
<b>Executive summary</b> .....	<b>27</b>
<b>First: Historical background - the violations</b> .....	<b>29</b>
<b>Second: Why violations should be prosecuted</b> .....	<b>30</b>
<b>Third: Who are the perpetrators?</b> .....	<b>31</b>
<b>Fourth: The Palestinian Reconciliation Agreements</b> .....	<b>32</b>
<b>Fifth: Lessons learned from other countries</b> .....	<b>33</b>
<b>Sixth: International Humanitarian and Human Rights Law</b> .....	<b>35</b>
<b>Seven: A prosecution mechanism for Palestine</b> .....	<b>36</b>
<b>Implementing relevant legislation and policies:</b> .....	<b>38</b>
<b>Judicial appointments and judicial reform:</b> .....	<b>39</b>
<b>Rule of Law Unit created under the Social Reconciliation Commission</b> .....	<b>39</b>
<b>Justice sector reform:</b> .....	<b>40</b>
<b>Eight: The role of civil society in ensuring accountability</b> .....	<b>40</b>
<b>Conclusion and Recommendations</b> .....	<b>42</b>

Recommendations to civil society:.....	42
Recommendations to the parties (Fatah and Hamas): .....	43
Recommendations to the international community: .....	43
<b>THIRD PAPER - Reparations for Victims of the Division.....</b>	<b>45</b>
<i>Executive summary</i> .....	<i>45</i>
Introduction .....	46
<i>First: The definition of reparations and international standards.....</i>	<i>46</i>
<i>Second: Lessons learned from other countries .....</i>	<i>48</i>
<i>Third: the Palestinian context.....</i>	<i>49</i>
<i>Fourth: The definition of victim: who should be compensated and for which violations?</i> .....	<i>50</i>
<i>Fifth: Financing reparations, calculating damages and corruption .....</i>	<i>51</i>
<i>Sixth: A reparations model for Palestine.....</i>	<i>53</i>
<i>Conclusion and recommendations .....</i>	<i>55</i>
<b>FOURTH PAPER - Safeguarding publicly funded positions: vetting and institutional reforms.....</b>	<b>58</b>
<i>Executive summary</i> .....	<i>58</i>
Introduction .....	60
<i>First: What are safeguarding provisions and why are they important? .....</i>	<i>60</i>
<i>Second: Examples of safeguarding procedures from other countries that have undergone transition .....</i>	<i>61</i>
<i>Third: Historical background to Palestine and public positions.....</i>	<i>63</i>
<i>Fourth: The reconciliation agreements and public positions.....</i>	<i>65</i>
<i>Fifth: Safeguarding in the Palestinian context: which entities and individuals should be vetted? .....</i>	<i>66</i>
<i>Sixth: How should a safeguarding process be carried out in Palestine? .....</i>	<i>67</i>
<i>Seven: Institutional reforms as opposed to vetting. ....</i>	<i>68</i>
<i>Conclusions and recommendations .....</i>	<i>70</i>
<i>Overall conclusions .....</i>	<i>72</i>
<i>Overall recommendations .....</i>	<i>74</i>

## Introduction

For the past approximately fourteen years, Palestine has been divided between the Fatah-controlled West Bank and the Hamas-controlled Gaza Strip, with the parties being embroiled in a complex and protracted battle for political supremacy. The resulting impact upon Palestinian citizens has been devastating. Not only has the bitter legacy of the inter-Palestinian division never been properly addressed by State entities, but the consequent effects of impunity, corruption and disregard for rule of law have compounded to exacerbate the poverty, challenges and state of emergency that Palestinians were already facing. The Palestinian Reconciliation Agreements demonstrate attempts to unify Palestine and move away from internal conflict. However, they do not properly address transitional justice issues, the implementation of which could help prevent the cycle of violence and political conflict from continuing. A united and peaceful Palestine will not only improve the quality of life of those living in Gaza and the West Bank, but it will also enhance democratic processes and strengthen national State institutions in line with international standards. This in turn will facilitate engagement with the international community, thus accelerating realization of the Sustainable Development Goals and allowing for better mutual legal assistance and cooperation.

This report comprises a consolidated series of four separate papers that focus on **transitional justice, prosecutions, vetting and reparations**. The papers are presented here as a consolidated series because they are interdependent and therefore each should be read in tandem with the others. The position papers are based on discussions that took place during the workshops organized by the Palestinian Center for the Independence of the Judiciary and Legal Profession "MUSAWA", who facilitated workshops for national consultations on the requirements of transitional justice and their impact on the accountability and trial processes in Palestine. After the workshops, MUSAWA organized more focused consultations with civil society organizations, local and international experts, during which technical and specialized opinions were received from institutions working in the areas of rule of law, human rights and victim relief. The four papers convey the most prominent opinions in the form of anonymous comments, and reflect those consultations according to expert reports submitted afterwards. In addition, these papers present the result of comprehensive research and discussions from multiple national and international experts. It should be noted that these papers are not academic in nature. Rather, they provide an overview that summarizes key considerations, and practical recommendations that must be taken into account when seeking to ensure the application of justice mechanisms in Palestine.

## Historical background

After the presidential elections in 2005, and the legislative elections in January 2006, political tensions began to escalate in Palestine. This resulted in widespread human rights violations committed by State agencies, as well as a division between the West Bank and Gaza Strip in mid-2007. Subsequently, two separate governments were formed: a legislative authority exercised by the Executive authority in the West Bank, and another in the Gaza Strip. This resulted in two separate Executives and judiciaries. Both entities claim to be the legitimate government of the Palestinian people.

It has been widely and consistently stated that both sides committed gross violations of human rights against citizens<sup>1</sup>, and both sides exploit and politicize society's needs and demands for institutional reform or fighting corruption in an opportunity to consolidate gains and influence<sup>2</sup>. The reality remains that the reconciliation process has only strengthened political loyalties, without any tangible improvement on the ground for citizens. In the West Bank, the Executive authority controls the other pillars of government, although there is no legislative council, which has been suspended since 2007. It is also commonly asserted that there is a lack of independent and impartial judiciary, and that criminal justice agencies, including the security services, the police and the Public Prosecution Office, operate without effective accountability<sup>3</sup>. They are implicated in numerous human rights violations, operating under *de facto* political immunity, and almost without judicial oversight<sup>4</sup>.

In the Gaza Strip the situation is similar to a large extent in terms of *de facto* criminal justice and security agencies acting outside of accountability frameworks, as there is overlap between the political party, the government and the military wing of Hamas. Consequently, there is no separation between State powers. The security services, police, Public Prosecution Office, and members of the military wing are not accountable for their actions, which include the commission of extrajudicial executions, torture and enforced disappearances. As a result, a culture of impunity for public officials is endemic throughout Palestine.

## Transitional justice

The *United Nations Guidance Note issued by the Secretary-General on the United Nations approach to transitional justice* (2010) outlines key components of transitional justice.

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<sup>1</sup> Two Authorities, One Way, Zero Dissent: Arbitrary Arrest and Torture Under the Palestinian Authority and Hamas, Human Rights watch, October 2018.

<sup>2</sup> Why Palestinians Need to Reclaim the PLO, M. Fatafta and A. Tartir, Foreign Policy, August 2020

<sup>3</sup> Mapping Palestinian Politics, European Council on Foreign Relations

<sup>4</sup> POLICING THE PEOPLE, BUILDING THE STATE: Authoritarian Transformation in the West Bank and Gaza, Yezid Sayighm February 2011.

These include prosecutions, truth seeking, reparations, vetting and national consultations. These mechanisms are interdependent; each is reliant on the others in order to provide citizens with the most holistic and comprehensive justice framework in a post-transition context. However, Palestine represents an anomaly in the theory and practice of transitional justice, as there has been no real or perceived transition, and reconciliation agreements are not transitional in and of themselves. This means that a careful and strategic approach must be taken regarding the incorporation of transitional justice requirements into reconciliation agreements. There is no 'winner' or 'loser' in the Palestinian context, and some of the same people who were in leadership positions during the transition are still in power now. It should therefore not be left to the parties alone to deal with the issues of transitional justice. Consequently, this report stresses the importance of the role of civil society in calling for effective, fair and comprehensive justice for the victims.

The first paper entitled "The Role of Transitional Justice Mechanisms in the Reconciliation Process" provides an overview of transitional justice and how it applies to the Palestinian context. It discusses *first*: An overview of transitional justice and the various transitional justice mechanisms, *second*: An overview of the Palestinian political context and the absence of the transition period, *third*: Palestinian reconciliation and transitional justice agreements, *fourth*: The role of civil society in the reconciliation process, *fifth*: The proposed bodies that can implement transitional justice in Palestine, *sixth*: ensuring gender inclusiveness. Finally, the paper sets out conclusions and recommendations.

## **Prosecutions**

The prosecution of perpetrators of gross human rights violations is a fundamental pillar of post-conflict justice, as stipulated in the above-mentioned UN *Guidance Note*. Accountability serves a number of purposes, as it will not only provide a form of redress for the victims, but it also acts as a deterrent regarding the commission of further violations. In addition, prosecution of serious violations enhances respect for the law and human rights, and restores public confidence in the government and political parties. This in turn would contribute to a stable and secure Palestine.

The Palestinian Reconciliation Agreements are based on the premise that there is a need to move away from the past, focusing on reconciliation as the ultimate goal. They consequently omit to mention prosecution for violations. Unfortunately, this approach sacrifices the victims' rights to know the truth, and to see the perpetrators punished accordingly. In principle, and in accordance with the Palestinian Basic Law, human rights violations cannot be reconciled or waived; it is the right of the victim to resort to civil and penal responsibility, and this right is not subject to the statute of limitations. Instead of fighting impunity, they grant a blanket amnesty to perpetrators with "realistic immunity

from accountability" whenever the crimes committed are part of the political conflict. According to the terms of the Agreements, the responsibility for the payment of compensation or blood money falls to the political faction to which the perpetrators is affiliated. In other words, the Agreements negate the principle of individual responsibility in contravention of national and international law. Whilst it is accepted that it is sometimes necessary to offer a form of amnesty in order to encourage perpetrators to reveal information about victims and to promote reconciliation, in the Palestinian context, a blanket amnesty was granted in the absence of any fact-finding initiative being proposed. Therefore, victims do not benefit from this amnesty; the only beneficiaries are the perpetrators themselves.

The perceived absence of prosecution procedures in the agreements imposes an obligation on civil society organizations to play a crucial and vital role in seeking to implement accountability mechanisms for human rights violations in line with international standards, as well as ensuring that this process is not politicized. While the realization of prosecutions may appear weak in the Palestinian context, this does not negate the urgent need for criminal prosecutions within the principles and provisions of the law. At present, the main obstacle to an effective criminal investigation and trial is the persistence of division and the parties' refusal to initiate a true reconciliation process that would ensure genuine prosecution and accountability. Those who ordered or committed violations remain in leadership and continue to participate in reconciliation efforts, which clearly gives them the power to intervene and undermine accountability initiatives for fear that this would negatively affect their status or freedom. Members of the military wings in Fatah and Hamas also fear identification and prosecution. If prosecutions do take place, there is a risk that the entire legal process could be derailed or politicized, or subject to external influences by other States involved in Palestinian internal affairs (including Qatar, Turkey, Egypt, Iran and Israel).

The paper entitled "Prosecuting the perpetrators of violations related to the Palestinian division", sets out, *first*: an overview of the background and context in which the violations occurred, *secondly*: the purpose of pursuing the perpetrators, *third*, who the perpetrators are, *fourth*, the Palestinian Reconciliation Agreements, *fifth* lessons learned from other countries, *sixth* international humanitarian law and human rights law, *seventh* mechanisms for prosecuting the perpetrators of human rights violations in Palestine, *eighth*, the role of civil society in ensuring accountability and prosecuting perpetrators. Finally, the paper sets out conclusions and recommendations.

## **Reparations**

Under the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious*

*Violations of International Humanitarian Law*, victims are entitled to a "right to an effective remedy". International standards confirm that no true reconciliation can take place in a country that has suffered from conflict without compensating the victims of violations committed by State agencies. The issue of compensation has a profound impact on the reconciliation process and its prospects for success in Palestine. This is especially important when considering the traditions and revenge mentality prevalent in parts of Gaza and the West Bank. The granting of compensation by authorities will help reform and strengthen citizens' confidence in State institutions, moving away from a tribal system predicated on revenge, towards a more cohesive, peaceful society governed by rule of law. According to the Palestinian Reconciliation Agreements, both Hamas and Fatah have a responsibility to promote reconciliation and tolerance, as is the case for the various committees that were established under the agreements. However, tolerance and forgiveness should not be a substitute for material compensation or other legal procedures (such as litigation) if there is a basis for pursuing those other remedies.

The third position paper, entitled "Compensation for Victims of Violations," discusses *first*: the definition of reparation, international standards, and the Palestinian context. *Second*: Examples of compensation from other countries. *Third*: Defining the victim: who is compensated and what. *Fourth*: Financing compensation, calculating damages and confronting corruption, and *Fifth*: The expected reparation model in Palestine. Finally, the paper presents the most important conclusions and recommendations for civil society, the parties in Palestine and the international community.

### **Vetting and institutional reforms**

The struggle of many decision-makers to retain public office is a key issue for any Palestinian reconciliation agreement. However, given that there has been no clear transition, or 'winning' side, there will be diminished political will for some office-holders to go through a vetting process, as it could oust many incumbents from their positions. Therefore, the term "vetting" may itself be politically inflammatory and impede the reconciliation process. This in turn poses a threat to the success of the ongoing dialogues and the implementation of the relevant measures.

While this report calls for an end to impunity for perpetrators of serious violations, it also calls for a successful reconciliation. This is a complex and fragile process that involves many initiatives and compromises across both sides. Ultimately, this may involve striking an unpalatable balance between justice and peace.

The fourth paper presented herein, entitled "Safeguarding publicly funded positions: vetting and institutional reforms" discusses seven key issues: *first*: what is vetting and why is it important? *Second*: examples from other countries; *third*: the historical

background of the Palestinian context and the approach to dealing with positions funded by public money; *fourth*: the Reconciliation Agreements and publicly funded positions; *fifth*: who should be vetted in the Palestinian context; *sixth*: how to conduct a vetting process in Palestine; and *seventh*: institutional reforms as an alternative to vetting.

# FIRST PAPER - The Role of Transitional Justice mechanisms in the Palestinian Reconciliation Process

## Executive summary

Following the presidential elections in 2005, and the legislative elections in January 2006, political tensions began to escalate in Palestine. This resulted in large-scale human rights violations that were perpetrated by State entities, as well as a division between the West Bank and the Gaza Strip in mid-2007<sup>5</sup>. Subsequently, two separate governments were formed: a legislative authority in the West Bank and another in the Gaza Strip, as well as two separate Executives and Judiciaries. In the West Bank, the Executive controls the other pillars of government, although there is no Legislative, as it was suspended since 2007. There is also no independent and impartial Judiciary. Security and justice entities, including the security services, the police and the Public Prosecution Office, operate without effective accountability. They are implicated in many human rights violations, with political cover and almost no judicial oversight. These bodies exercise authority without regard to the constitutional principles and values on which the Palestinian Basic Law is based. Both parties claim they are the legitimate people's government.

Fatah and Hamas have both perpetrated grave human rights violations against citizens, and both parties exploit and politicise societal needs and demands for institutional reform into an opportunity to consolidate gains and influence<sup>6</sup>. The unfortunate reality is that the reconciliation process has only reinforced political loyalties without any tangible improvement on the ground for citizens.

In the Gaza Strip there is greater overlap between the political party, the government and the military wing of Hamas. This means there is no separation of State powers. The security services, police, Public Prosecution, and members of the resistance are not accountable for their actions, which include the commission of extrajudicial executions, torture, and multiple enforced disappearances. Consequently, a culture of immunity for publicly appointed officials operates across Palestine.

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<sup>5</sup> Two Authorities, One Way, Zero Dissent: Arbitrary Arrest and Torture Under the Palestinian Authority and Hamas, Human Rights watch, October 2018.

<sup>6</sup> Why Palestinians Need to Reclaim the PLO, M. Fatafta and A. Tartir, Foreign Policy, August 2020

There is an absence of a clear and comprehensive approach or vision regarding human rights violations and transitional justice in the Palestinian Reconciliation Agreements. The Agreements have not adopted a clear concept of what constitutes a 'victim', or the effects of the harm the parties have inflicted on individuals. Moreover, the committees that were formed under the Agreements were not delegated quasi-judicial powers, including the power to compel the appearance of perpetrators and witnesses, or the making orders for the disclosure of evidence. Nor have they been given authority to vet those who hold publicly funded positions.

Palestine represents an anomaly to transitional justice theory and practice, as there has not been any real or marked transition; the Reconciliation Agreements are not a transition in themselves, and in any event have not been properly implemented. A careful and strategic approach must therefore be taken when considering the incorporation of transitional justice requirements into the Reconciliation Agreements. It should not be left to the parties alone to address these issues, given that it was the parties themselves who inflicted the violations onto the Palestinian people.

## **Introduction**

This paper discusses the complex relationship between the Reconciliation Agreements and the requirements of transitional justice. It should be read alongside the other three position papers that accompany this document: on vetting, reparations and prosecutions. All four position papers state that the necessary implementation of transitional justice measures leads to the acceleration of an effective and sustainable reconciliation process. This paper is not intended to be an exhaustive or academic account of transitional justice processes, but rather an introduction to, and overview of, relevant mechanisms that would be appropriate for Palestine. It also identifies expected scenarios and expectations when dealing with the requirements of justice mentioned in the previous Reconciliation Agreements.

Findings and recommendations set out herein were compiled after publicly accessible workshops took place, attended by a wide variety of people in both Gaza and the West Bank. They were organized 'to open up opportunities for individuals to participate and express their views and MUSAWA's position on the requirements of transitional justice and its impact on the reconciliation process'. During these workshops, the recommendations provided in the *United Nations Guidance Note* (see below) were discussed, in an attempt to link the audience's views and positions with the political and

legal context. Subsequent to the public workshops, MUSAWA organized consultations with civil society organizations, during which more specialized opinions were received from institutions working in the field of the rule of law, human rights, the rights of victims. The content of this position paper does not depend solely on the opinions expressed during the public or specialized workshops, but also on research and international experiences.

This paper is set out in the following sections: **firstly**, an overview of transitional justice and different transitional justice modalities. **Secondly**, an overview of the Palestinian political context. **Thirdly**, the Palestinian Reconciliation Agreements and transitional justice. **Fourth**, the role of civil society in the reconciliation process. **Fifth**, proposed bodies that could implement transitional justice in Palestine **Sixth**, ensuring gender inclusivity. **Finally**, the paper sets out conclusions and recommendations.

#### **First: What is transitional justice?**

*The United Nations Approach to Transitional Justice Guidance Note of the Secretary-General* (2010), hereinafter referred to as the *UN Guidance Note*, defines transitional justice as ‘the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability service justice and achieve reconciliation’. Transitional justice consists of both judicial and non-judicial processes including prosecutions, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof.

Neglecting to address the implications of the absence of the rule of law and impunity results in degradation of the citizen-State relationship, thus enabling retributive acts and the continuation of the cycle of violence. Any transitional justice mechanism must therefore be based on a re-examination of the role of the citizen in any future process; be it therapeutic, accusatory or preventive, and at the same time, it should seek to address past abuses, leading to the rehabilitation of the victims, punishment of perpetrators, and reintegration of persons into society. It is clear, therefore, that there is no template mechanism that can be imposed upon each country. Rather, a contextually-specific blend of appropriate processes should be implemented, after consultation, that will hopefully satisfy the victims’ needs for justice and a political transition towards long-term stability. The notion of ‘justice’ will obviously differ from individual to individual, but it is reasonable to assume that punitive and restorative justice measures, if imposed sensitively and properly sequenced, will satisfy the needs of most victims.

The *UN Guidance Note* identifies four elements to transitional justice:

- i. **Prosecution initiatives**, which aim to ensure that those responsible for committing crimes, including serious violations of international humanitarian law and gross violations of international human rights law are tried in accordance with international standards of fair trial processes, and where appropriate, punished. This requires a competent and independent judiciary and prosecutorial system.
- ii. **Truth-seeking initiatives**. These processes are normally undertaken by Truth Commissions or Commissions of Inquiry. Activities usually include taking statements from victims and witnesses, conducting thematic research, organising public hearings and other awareness-raising programmes, and publishing a final report outlining findings and recommendations.
- iii. **Reparations programmes**. These seek to redress systemic violations of human rights by providing a range of material and symbolic reparations to victims. Reparations are not limited to financial compensation, but can include medical and psycho-social care, or the right to return to property that was wrongfully appropriated.
- iv. **Institutional reform**. This is a long-term measure that will not necessarily satisfy the individual needs of victims in the immediate term, but it nonetheless demonstrates a willingness of the State to improve institutions and adopt a mindset of public service in its office-holders. Institutional reform will often include the creation or updating of policy frameworks that govern institutions (most relevant here would be the justice and security sectors). It can also include the more immediate vetting process, where individuals are screened when applying for publicly funded positions in order to ascertain whether they have been involved with gross human rights violations.

The *UN Guidance Note* was published approximately ten years ago. Not only does it make clear that there is no one model for transitional justice, but it should also be emphasised that the past decade has seen a number of shifts in how communities have pro-actively mobilised to create their own new forms of transitional justice, without the direction or authorisation of the State. Conflicts in countries such as Libya and Syria have demonstrated the tragic reality that those who commit gross violations are unlikely to be prosecuted, or if they are, those prosecutions will only represent a small fraction of gross violations that were committed. More recent methods of creating justice include the burgeoning of community archiving practices, which constitute independent, grass-roots efforts to document a society's own history using a broad range of materials (e.g. videos, drawings, songs, poetry) consolidated and stewarded by representatives from the local community. This constitutes a much broader body of material than that which would be considered appropriate for court proceedings, and is also more inclusive and flexible in terms of how the material is presented.

Bearing the above in mind, a dynamic attitude towards achieving transitional justice should be adopted, as this will avoid a prescriptive stance that is controlled by the dicta of academia, dry law and policies, and which ultimately may not satisfy the broader needs of citizens in the wake of mass violations having been committed.

### **Second: An overview of the Palestinian political context and the absence of transition**

After holding the presidential elections at the beginning of 2005, and later the legislative elections in January 2006, a state of internal tension began to escalate in Palestine. This tension resulted in conflict and large-scale violations of human rights, followed by a division between the West Bank and the Gaza Strip in mid-2007. As is well known, the West Bank government is affiliated with and supported by Fatah, while the de facto authorities in Gaza is affiliated with and supported by Hamas. Since then, there have been two separate governments: a legislative institution in the West Bank and a corresponding legislative institution in the Gaza Strip, which also had their separate Executive and Judicial systems. These bodies exercised full governmental power; each claiming legitimacy due to their respective victories in the elections; Fatah won the presidential elections, and Hamas won the legislative election. Both parties claimed they were the legitimate people's government.

In the West Bank, the Executive controls other authorities, although the Legislative has been inactive or non-existent since 2007, and the independence and impartiality of the judiciary has been severely undermined. This means that the Executive, represented by the President, has been exercising legislative jurisdiction since 2007 without any oversight by other internal authorities.

In the Gaza Strip the situation is more complicated given the greater overlap between the party, the government, and the military wing of Hamas, resulting in a situation where there is no separation of powers. The interrelationship between the principle of separation of powers and human rights is imperative in any political and legal organization. In the absence of separation of powers, the relationship between individuals and State authorities is asymmetric, facilitating a culture of impunity. The legitimacy of authority is consequently not based on democratic legitimacy, but rather on power and subjugation. Courts are also biased towards the Executive and the security services<sup>7</sup>.

In both the West Bank and Gaza Strip the justice system's penal institutions, including the security services, the police, and the prosecution, operate without effective

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<sup>7</sup> Mapping Palestinian Politics, European Council on Foreign Relations

accountability. Human rights violations in the West Bank or Gaza are often justified by an accusation of the other party's commission of violations in the other region<sup>8</sup>. Moreover, in many cases one party's adoption of legislative, administrative, or judicial measures triggers the other party to take corresponding retaliatory measures in return. In addition, it should be noted that some officials have personally benefited directly or indirectly from the political division, so there may be diminished appetite to resolve the tensions if they are going to undermine a personal advantageous position.

The strong consensus from Palestinians in the West Bank and Gaza Strip is that the dire political situation will ameliorate through a reconciliation process that will achieve security and stability, and ensure the rule of law and respect for individual rights. However, it is challenging to achieve stability due to vested interests and intra-party conflicts. When considering transitional justice, it is also important to understand what Palestine is transitioning to. Palestine represents an anomaly to transitional justice theory and practice, as there has not been any real or marked transition; the Reconciliation Agreements are not a transition in themselves, and in any event have not been properly implemented. This ties in with what was reflected by one workshop participant, who maintained that "The transition to any new political phase is possible only after holding perpetrators accountable, which shall not only address individuals but also institutions, through investigating the extent to which they contributed to promoting division". In other contexts, there is a general understanding of what is being transitioned to, even if the process is complex, e.g. a liberal democracy (South Africa).

In Palestine, there is an on-going attempt to transition to what some might see as an ambiguous future. Efforts are currently underway to unite two opposing factions and unify publicly funded entities that exist in duplicate. Transitions in the Arab world have been complex, and often accompanied by an absence or degraded form of rule of law. Despite the lack of transition in Palestine, this paper argues that the absence of such does not necessarily mean that transitional justice principles should not be applied. The fact there is no 'winning' or 'losing' side does not obviate the need to base reconciliation efforts on justice principles and the prioritisation of the rights of citizens; instead it reinforces the need to utilise some of these models to ensure long-term stability takes place. In this respect, Palestine has a great opportunity to advance transitional justice in a pioneering way in the Arab world.

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<sup>8</sup> Palestine: Authorities Crush Dissent, Arbitrary Arrests, Torture Systematic, Human Rights Watch, October 2018

Some of those consulted believed that the hope for establishing a democratic State and a cohesive society remains elusive in light of the immunity that individuals enjoy, despite the violations they have committed and the disregard of the suffering of victims. Emphasizing this trend, some perceived that the requirements of justice are of particular importance in the Palestinian context, given that the division took place during the nation-building phase when institutions failed to strengthen citizens' trust in the State. This exacerbated Palestinians' loss of hope in the professionalism and neutrality of these institutions, especially the Judiciary that was subservient to the Executive.

Although there is a consensus on the importance of integrating the requirements of transitional justice into the reconciliation process, there are those who believe that this is unrealistic. Some of the same persons who triggered the division and committed violations are the ones now mandated to implement the accountability process. It was also stated that all factions of the Palestine Liberation Organization participated in this division, alongside community institutions that monitored violations and also overlooked them. This means that anyone who holds a public position, and participated or remained silent in response to the division, should be held accountable, or at least not to be assigned to membership of, or be able to influence the work of any of the committees established under the Reconciliation Agreements. Given the perception amongst some citizens that official authorities have been, or are, involved in corruption and human rights violations, it is relevant to note how agencies deal with, and respond to, appeals for combating corruption and addressing human rights violations. There has been a tendency that authorities form committees consisting of the same corrupt persons that contributed to the original corruption and human rights violations, thus compounding the issue and not providing any effective accountability process or relief.

Accordingly, careful handling of the integration of transitional justice requirements into reconciliation agreements is crucial. This means that the parties that caused the violations must not act as decision-makers, since this can lead to non-implementation, and waiving the principles of law and justice.

### **Third: The Palestinian Reconciliation Agreements and transitional justice**

The process of restoring unity is expected to take place in three stages: *firstly*, by reaching a reconciliation agreement, *secondly*, by completing the reconciliation process, *thirdly*, through non-repetition guarantees by the government. To realize that, the reconciliation process must implement and integrate multiple justice modalities, including punitive justice mechanisms, reparations, reconciliation initiatives, safeguarding public positions, grass-roots memorialisation events, and institutional and legislative reform.

The Cairo Agreement of 2011, and the Cairo Agreement of 2017 on enabling the Palestinian government to take over the governance of the Gaza Strip, adopted limited elements of transitional justice requirements.

**Prosecutions:** The Reconciliation Agreements did not include clear mechanisms for judicial prosecution, but rather offered the complete opposite: unconditional amnesties for perpetrators whose crimes were part of the political conflict. According to the terms of the Cairo Agreement 2011, perpetrators are responsible for their criminal offences, while those who commit crimes in the context of political conflict are immune from individual accountability; rather, the party with which they are affiliated will be responsible for conflict resolution and compensation. This flies in the face of natural justice and international standards, e.g. the Statute of the International Criminal Court, other UN war crimes tribunals as well as international law, which specify the principle of individual responsibility, and undermines the principle of individual culpability.

**Reparation:** Although the Reconciliation Agreement provided for mandating the Community Reconciliation Commission to ensure adequate compensation for victims and to promote a culture of tolerance and reconciliation, little attention was paid to prioritising the needs of the victims themselves. The Gaza Change & Reform Bloc submitted a draft law on civil reconciliation, which was debated on first reading. Despite what is suggested by the name of this draft law, it aims to protect the perpetrators of violations by making them immune from accountability, and limiting the concept of reconciliation for victims to financial compensation. Not only does this serve to completely evade any culpability or statement of regret on the part of the authorities, but it fails to recognise that financial compensation alone is not adequate as it does not address the long-term physical and psychological ramifications of, for example, severe injury or torture. In addition, many victims felt that if they received financial compensation, or '*diyya*' (blood money) then it would cancel their right to pursue other legal remedies, i.e. civil litigation or criminal prosecutions.

**The right to truth:** The Reconciliation Agreements avoid referring to truth-seeking, or the right to know it or recount it; instead emphasising the need for tolerance and reconciliation. Although the Reconciliation Commission formed under the Agreement sought to hear the victims' testimonies, the purpose of those hearings was to quantify any damage sustained, not to establish and document the truth regarding culpability for its own importance and relevance.

**Guarantees of non-reoccurrence and institutional reform:** Although the Agreements include some aspects relating to institutional reform, such as reconstructing the security services and electing a new Legislative Council, other entities such as the judiciary have been overlooked, as well as legislative reform. This is significant given the large number of unconstitutional laws and judicial rulings rendered during the division period. In addition, the Agreements do not address vetting and safeguarding of publicly appointed positions in relation to cases of corruption and human rights violations. Although institutional reform is a long-term goal, it is often overlooked in transitional justice efforts, and is not generally seen as a transitional justice mechanism. However, it is important to include institutional reforms in reconciliation agreements as not only are they complementary to auditing or job vetting procedures, but they help reduce corruption and promote a culture of internal accountability. Institutional reforms also ensure the accountability of all publicly funded entities, including the security services.

#### **Fourth: The role of civil society in the reconciliation process**

The involvement of civil society institutions in the reconciliation process is of particular relevance, both in terms of resisting attempts to exploit reconciliation for obtaining unjustified immunity, and also to ensure the parties are committed to incorporating the principles of justice in the peace process. Civil society must declare its rejection of any reconciliation settlement that does not include the essential elements of transitional justice, in particular with regard to the granting of immunity to persons who committed, assisted, or failed to reasonably prevent gross violations of human rights.

The Palestinian case is characterized by the presence of two governments in two separate geographical areas: The West Bank and the Gaza Strip. Each of these governments considers itself legitimate and justifies pursuing the members of the other party and the political opponents. This means that, in any reconciliation agreement, each party will seek to establish the changes they have made on the ground and to legitimise their position to decision-makers e.g. the military. Given this contentious situation, the participation of a neutral party is fundamental. Civil society organizations (CSOs) can play a critical role in liaising between the parties, although it is acknowledged that CSOs can sometimes not be neutral either. This is why the recommendations put forward in these position papers are inclusive and aim to cut across both sides of the divide, thereby voicing a consolidated and unified approach.

In order to ensure the rule of law and its proper application, the workshops' participants indicated the importance of the role of citizens through initiatives of civil society. To that

end, a proposal was submitted to activate civil society through the formation of a coalition of community-based institutions. This coalition would include organisations concerned with supporting victims of violence, those involved in monitoring the rule of law and the independence of the judiciary, and those working in the area of freedom of expression.

In any reconciliation process, the key role of community organizations is to ensure the principle of non-impunity, which is consistent with article 32 of the Basic Law. In her research entitled "Transitional Justice and Civil Society", Al-Siddiqi Karima (2018) reiterates this, stating "[civil society] organizations are independent of the State's supervision and control, as they draw on self-organization, initiative, volunteerism, serving the public interest and the defending of citizens' rights in an organized legal manner. Thus, these organizations are instrumental in guiding the State in case constitutional institutions deviate from the path charted by the society and exercising control over the actions of the government, concluding that civil society is the genuine guarantee for the implementation of the provisions of the constitution and the laws and the safety valve of the tyranny of the state". Civil society must adopt a strategy that encompasses a comprehensive concept of transitional justice and the principle of the rule of law. This means that any agreement that contributes to promoting impunity is contrary to the principle that such violations may not be subject to any statute of limitations, as provided in **article 32** of the **Basic Law**: *"Any violation of any personal freedom, of the sanctity of the private life of human beings, or of any of the rights or liberties that have been guaranteed by law or by this Basic Law shall be considered a crime. Criminal and civil cases resulting from such violations may not be subject to any statute of limitations. The National Authority shall guarantee a fair remedy to those who suffer from such damage"*.

Given the above, civil society must adopt a comprehensive and inclusive **Transitional Justice Strategy**, taking into account the principles espoused in the UN Guidelines, and adapting them to the unique context of the Palestinian situation. The proposed Strategy should set out clear principles that can be used to guide future efforts in a time-sensitive way, considering the complementary nature of all the various mechanisms that it is hoped will be implemented.

#### **Fifth: What bodies are proposed to ensure the realisation of justice?**

During the reconciliation process it was agreed that six committees should be established to serve as mechanisms for implementing the Reconciliation Agreements:

- **Supreme Security Committee,**
- **Community Reconciliation Committee,**

- **Civil Liberties Committee,**
- **Legal and Administrative Committee,**
- **Joint Committee for the Implementation of National Reconciliation,**
- **PLO Committee.**

Undoubtedly, the work of these committees overlaps and intersects with the requirements of transitional justice, particularly the **Committee on Community Reconciliation** and the **Committee on Civil liberties**. There are many drawbacks to the texts and mechanisms relating to the committees. For example, the **Community Reconciliation Committee** competence to hear victims and determine the level of compensation requested, this committee does not have the authority to deal with cases related to political prisoners or travel bans, as this competence has been referred to the **Civil Liberties Committee**. This demonstrates that the process is not victim-focused, as it cuts across two entities and has no jurisdiction to cover all relevant violations. This is confusing for victims, as there is no unilaterally agreed definition of ‘victim’, or consistency or clarity regarding the level damages payable to individuals.

The **Community Reconciliation Commission** also has the authority to hold community meetings to promote a culture of tolerance and reconciliation. However, this Commission was not empowered to subpoena perpetrators and witnesses, or to make quasi-judicial orders for the disclosure of documents and other evidence. Similarly, **the Legal and Administrative Committee** was entrusted with conducting studies and making recommendations on the reunification of official institutions and employees’ rights, however, it was not empowered to carry out vetting processes to determine whether publicly funded individuals are fit for office if they have been involved with human rights violations or corruption.

Based on the aforementioned, Abu Hashem (supra, 2018) concludes that the Reconciliation Agreements regarding the prosecution of perpetrators is inconsistent with the three principles of transitional justice: the fight against impunity, the application of the comprehensive approach to transitional justice, and linking transitional justice to the principle of the rule of law. He states: "The Reconciliation Agreements have not paid due consideration to the deep roots of the division, but rather, they reflected a superficial understanding of community reconciliation by limiting it to forgiveness and ignoring the need to rebuild trust between former rivals”.

Based on the opinions expressed during consultations, there was a broad consensus that an official **Truth and Equality Commission** should be created, responsible for

implementing the Transitional Justice Strategy that is needed and which civil society will present. Some believed in reconstituting the Community Reconciliation Commission, granted the power to form subsidiary committees, including the Truth and Equity Commission and the Rule of Law Commission. This would be similar to the Tunisian experience (the *Tunisian Organic Law on Establishing and Organizing Transitional Justice* of 2013, article 40). Alternatively, some of those consulted suggested granting this Commission the power to make recommendations concerning transitional justice requirements, including the request to initiate prosecution or vetting processes, as well as the authority to propose alternative sanctions or amnesties in cases where perpetrators voluntarily bring themselves to justice intending to reveal the truth and provide an apology to victims. In an endorsement of the previous views, a proposal can be submitted by civil society regarding the Commission's mandate, barring its members from running or holding public office during a period of time determined after concluding the Commission's work. It should also submit its reports and recommendations regarding the required amendments on the legal, judicial and criminal justice systems.

#### **Sixth: Ensuring gender inclusivity**

The centrality of the role of women in the history of the Palestinian cause, resistance to occupation and the pursuit of liberation is indicated in the Declaration of Independence Document of 1988, which emphasises gender equality as one of the principles or foundations on which Palestinian internationalism is based. In addition, Article 9 of the Basic Law sets out that equality is a foundation principle upon which other rights are based. However, it is noticeable that there is a significant decline in gender inclusivity in public life since the division. It is implied that parties to the division have an interest in this exclusion for various reasons; the most important of which is enforcing patriarchal beliefs through religious ideology<sup>9</sup>, in addition to seeking to obtain legitimacy through traditional gender norms that reinforce that the role of women must remain defined within the framework of religious traditions, reliance on male relatives and guardians, and be focused exclusively on the home<sup>10</sup>.

Unfortunately, the Constitutional Court has been used as one of the most important tools to reinforce the division. This also undermines the standing of international instruments in the national context, as international law must pass through the national legislature in

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<sup>9</sup> Palestinian Women and Security: Why Palestinian Women and Girls Do Not Feel Secure, DCAF 2009

<sup>10</sup> Report on The status of women and girls in the State of Palestine, General Union of Palestinian Women, 2017

order to take effect. This will undoubtedly include provisions relating to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

In addition, the division has been an opportunity for factions to re-debate or further suppress the role of women and the role of feminist movements and community organizations that defend women. Many initiatives that were based on official and tribal support were formed in order to reinforce the lack of independence of women and their subordination to men, and also their ineligibility to exercise all civil and political rights on equal terms with men. These initiatives used social media, and in many cases pushed women to the fore to talk about their lack of desire for equality based on civil laws, and say that they adhere to traditional roles and laws that affirm these roles, such as the *Personal Status Law*.

In order to restore respect for the principles on which the Basic Law and the Declaration of Independence are based, civil society must support the participation of women in discussing the requirements and mechanisms of transitional justice. This includes ensuring equal representation and attendance in dialogues and membership of committees. The implications of different transitional justice tools and mechanisms on women must also be taken into account, as well as the risks women face. For example, the need for victim and witness protection programmes and how they should operate according to gender. Many women suffer indirectly if they do not have economic independence and their husbands have been killed or arrested. In addition to the participation of women in dialogues and committees, reconciliation and transitional justice should be an opportunity to reform laws and institutions to be based on gender equality in the long term. In Colombia, the transition process included the passage of the *Victims Act*, which had a particular focus on gender, allowing preferential treatment for women including prioritizing cases where the applicant was a woman.

### **Conclusions and recommendations**

Palestine now stands at a crossroads of decision-making, the ramifications of which will be felt for many generations to come. What the authorities decide to do now, as well as the actions of civil society, are critical if the hope of a sustainable and unified Palestine is to be realised. Both parties to the divide have vested interests and political preferences, and it is not in the interests of either party to invite or encourage an open debate about past atrocities. This conflicts with the essence of transitional justice, which calls for an open discussion and admission about violations, accompanied by procedural mechanisms that offer various forms of justice to victims. All of these modalities are critical in their

own right, but are also interdependent and complementary. For example, there is no merit in implementing a prosecution process if laws are not reformed to prevent further violations or punish past atrocities. Similarly, symbolic guarantees of non-reoccurrence by the authorities will be meaningless if they are not accompanied by tangible reparations to victims of violations. Therefore, the full spectrum of transitional justice tools must be properly considered as a matrix consisting of many critical parts; each one needs to be carefully considered and communicated to the public, implemented and properly sequenced.

To this end, the following **recommendations** are made to **civil society**, the **parties**, and the **international community**:

- Civil society institutions play a key role in addressing human rights violations, and should consolidate to form a **Community Coalition for Transitional Justice**. This coalition will be formed of concerned NGOs and institutions that consider each individual transitional justice modality. Various sub-committees or units can be formed within the Coalition in order for it to focus on the various modalities. Its aim will be to:
  - i. Monitor the progress of the Reconciliation Agreements, and the implementation of any transitional justice mechanism espoused in the Agreements,
  - ii. Advocate for transitional justice mechanisms in line with international standards and best practice,
  - iii. Act as a unified platform that will advocate with one voice for the adoption of the Transitional Justice Strategy (see below), and provide advice to the various State mechanisms charged with implementing justice to victims.
  - iv. Provide technical advice and guidance to State entities on issues relating to transitional justice modalities.
  - v. Ensure gender equality is achieved throughout the Reconciliation Process and the implementation of transitional justice measures.
- There is a need to form a Commission, or to constitute the **Community Reconciliation Commission**, whereby it is granted the power to form sub-committees such as the **Truth and Equality Commission** and the **Rule of Law Commission** with the power to request to initiate prosecution procedures, or vetting, and propose recommendations on transitional justice requirements.
- Civil society should agree and promote a **Transitional Justice Strategy** and calls on the same to be adopted by both parties in a two-stage process. This will

encompass all relevant transitional justice modalities, and act as a focus for all parties and entities to ensure that they are implemented in proper sequence, and in a time sensitive manner. The Transitional Justice Strategy should be comprised of

- i. A set of **aims** and / or a **vision** statement.
- ii. Once the above is adopted by the parties, thorough consultations will need to take place with individual entities from both sides, including justice and security entities, to decide on a practical **Road Map** or **Action Plan** that sets out how the aims of the Strategy will be realised: how the Strategy will be implemented, any mile-stones, what the challenges are, and the relevant time-frames involved.

The Strategy should also include the commitment to **institutional reform** as a component of transitional justice, as this is highly relevant to the Palestinian context. Institutional reforms can be considered complementary to auditing or job vetting procedures, as they help reduce corruption and promote a culture of internal accountability.

- Civil society must focus on how it can best advocate for the **participation of women** in the transitional justice process. This includes representation and attendance in dialogues and committees, as well as ensuring any related tools are gender-sensitive.
- Civil society must focus on how it can best advocate for the **participation and representation of victims** in the transitional justice process. This includes representation and attendance in dialogues and committees, as well as ensuring accessibility and reforms are victim-sensitive.
- Civil society calls on the **international community** to support the recommendations of civil society, and to provide both technical and financial support to ensure its objectives are achieved.
- Reconciliation agreements have usually been discussed outside of Palestine (hosted in Egypt), which undermines civil society's participation in the reconciliation process. Civil society calls upon **the parties** to adopt a mindset of inclusivity and ensure reasonable access to decision-makers and the reconciliation process.

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## SECOND PAPER - Prosecuting perpetrators of violations relating to the Palestinian division

### Executive summary

The prosecution of perpetrators of grave human rights violations is deemed an essential pillar of transitional justice, as mandated by the *UN Guidance Note of the Secretary-General on the UN Approach to Transitional Justice* (2010). Holding perpetrators accountable for violations committed in connection with the division in Palestine would serve a number of purposes; not only would it act as a form of remedy for victims, but also a deterrent for committing further violations, thereby eroding impunity. In addition, prosecuting grave violations enhances respect for law and human rights, restoring the confidence of the public in the government and political parties, which in turn would contribute to a stable and peaceful Palestine.

This position paper discusses punitive accountability mechanisms for human rights violations, and judicial accountability relating to the Palestinian division. It focuses on violations committed during the period of internal fighting between Fatah and Hamas in June 2007, and subsequent violations caused by the repercussions of the division, from July 2007 until the present day. The paper forms part of a comprehensive study into transitional justice, and should be read in conjunction with the other three papers in this series; on vetting, reparations and transitional justice.

The Reconciliation Agreements are prosecution blind<sup>11</sup>; i.e. they completely fail to address the issue of criminal accountability of perpetrators. The Agreements deem that the political faction to which perpetrators affiliate must bear the responsibility by paying compensation, or blood money (*'diyya'*). In other words, the Agreements obviate the principle of individual responsibility, contrary to national and international law. In the context of truth commissions, it is sometimes deemed necessary to invoke amnesties in order that perpetrators will be encouraged to divulge information about the whereabouts of victims, and to promote reconciliation. However, in the Palestinian context, a blanket amnesty has been provided to perpetrators, without even a truth-seeking initiative being proposed. There is therefore no benefit to victims of any amnesty; the only beneficiaries of the amnesty provision are the perpetrators themselves.

The notable absence of prosecution measures in the Agreements requires that civil society organizations play a decisive and critical role in advocating for the implementation of punitive accountability mechanisms in line with international standards, also ensuring that this process is not politicized. At present, the main obstacle to effective criminal investigation and prosecution is the continuity of the division and the parties' refusal to

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<sup>11</sup> Palestinian Reconciliation and the Potential of Transitional Justice, Mia Swart, Brookings 2019.

initiate a genuine reconciliation process that guarantees prosecution and genuine accountability. Those who have ordered or committed the violations are still in command and participating in reconciliation efforts, which obviously grants them the power to intervene and undermine accountability initiatives for fear that it might negatively affect their position or liberty. Members of the military wings of Fatah and Hamas also fear being identified and prosecuted. If prosecutions did take place, there is a risk that the entire prosecution process could be derailed, politicised or subjected to external influences by other States that are involved in Palestinian internal affairs (including Qatar, Turkey, Egypt, Iran, and Israel).

The Reconciliation Agreements consider that there is a need to break with the past, viewing reconciliation as the ultimate goal. Unfortunately, this approach sacrifices the rights of victims to know the truth about what happened, and for perpetrators to be punished accordingly. Civil society believes that this is impermissible, as true reconciliation cannot be achieved without redressing the victims, apologizing to them, revealing the truth behind the violations, and invoking punitive justice. Ignoring these requirements undermines all reconciliation efforts and defeats the entire transitional justice process. Thus, national and community reconciliation **must** be linked to criminal accountability and the recognition of crimes and violations. Whilst the scope for prosecutions may seem weak in the Palestinian context, this does not negate the critical need for criminal trials within the framework of the law.

## **Methodology**

This paper is based on discussions that were held during workshops organized by the Palestinian Center for the Independence of the Judiciary and the Legal Profession (MUSAWA). The workshops facilitated consultations about the requirements of transitional justice and its impact on the accountability and prosecution process in Palestine. Recommendations of the *United Nations Memorandum on National Consultations on Transitional Justice* were drawn upon in an attempt to link them with the Palestinian political and legal context, and to reach conclusions about the potential impact on any accountability and prosecution process. Following the open workshops, MUSAWA organized more focused consultations with civil society organizations, during which technical and specialized opinions were received from institutions working in the fields of the rule of law, human rights, and victim relief.

Discussion points revolved around key issues: violations committed during the time of the division, the significance of prosecuting the perpetrators, who the perpetrators are, and how prosecutions could take place. Discussions also centred around what would happen in the event of a failure to prosecute, and what the role of civil society organizations would be in ensuring accountability.

This paper conveys the most prominent views, as well as providing commentary on the aforementioned, including drawing conclusions concerning the topic under discussion, or

possible future interventions. It should be noted that the paper is not a detailed or academic paper setting out every aspect of prosecutions, but rather it provides an overview outlining basic key points which need to be considered and addressed in the pursuit of ensuring criminal accountability is implemented in Palestine.

This paper is structure as follows:

**Firstly**, an overview of the historical background to the violations.

**Secondly**, why the violations should be prosecuted.

**Thirdly**, discussion about who are the perpetrators.

**Fourthly**, the Palestinian Reconciliation Agreements.

**Fifthly**, lessons learned from other countries.

**Sixth**, international humanitarian and human rights law.

**Seventh**, a prosecution mechanism for Palestine.

**Eighth**, the role of civil society in ensuring accountability.

Finally, the paper sets out conclusions and recommendations for civil society, the parties (Fatah and Hamas), and the international community.

#### **First: Historical background - the violations**

Two types of violations resulted from the internal Palestinian division: those that were committed during the initial conflict between Fatah and Hamas in 2007, and those that followed as a result of the repercussions of the division, from 2007 until today.

In 2007 there was a military clash between the militants of Fatah and Hamas. Violations that were committed include murder, extra-judicial killings, enforced disappearances, torture, unlawful detention, the destruction and burning of residential homes, the targeting of hospitals and ambulances, medical personnel and civil defence corps, and the assault on peaceful protestors who were calling for an end to hostilities<sup>12</sup>. Perpetrators also stormed public institutions and facilities, attacking civil and media institutions and causing extensive destruction.

The second wave of violations relate to the longer-term repercussions of the division, and also include political detention, torture, excessive use of force by security agencies, further extrajudicial executions, the military trials of civilians, suppression of media freedoms, detention of journalists, the reduction of public officials' salaries in the Gaza Strip, forced retirement, arbitrary dismissals, locking down or restricting the work of associations, and making illegal amendments to legislation.

Many other human rights have been severely undermined, including citizens' health rights, the dire situation of which is not solely attributable to the Israeli blockade. Access

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<sup>12</sup> Internal Fight: Palestinian Abuses in Gaza and the West Bank, Human Rights Watch 2008. Also see Under Cover of War: Hamas Political Violence in Gaza, Human Rights Watch 2009.

of Gaza patients to treatment abroad was limited, while some were denied access to appropriate medicines. Similarly, hospitals in the Gaza Strip have continued to suffer from a major shortage in medical equipment and supplies. The division also resulted in the absence of citizens' political rights, as more than 14 years have passed without elections taking place. Political affiliations have seeped into every facet of civic life, impacting upon Palestinian individuals and families and their right to live in dignity, violating the right of citizens to work free from discrimination, and violations seriously affecting Palestinian youth, which is what pushed many to emigrate. In terms of violations of economic rights, there has been a reduction in the salaries of employees in the governorates of the Gaza Strip, or the cessation of employment altogether. Many Palestinians have not been able to obtain jobs through meritocratic means, and there has been a severe lack of job opportunities for thousands of graduates. This has been exacerbated by social problems such as an increased number of divorce cases in the Gaza Strip. Additionally, there has been closure of a large number of civil institutions that were serving the community. Restrictions on freedom of expression of opinion and the repression of journalists in both parts of the country has been a perennial issue since the division. The continuing violations also affected related rights, such as the right to peaceful assembly and public meetings, and the right to travel and movement, the right of which has largely been based on political affiliation.

There is no doubt that these violations negatively affected the Palestinian cause, contributing to a decline in international and Arab support for the struggle of the Palestinian people.

### **Second: Why violations should be prosecuted.**

The 2004 *report of the UN Secretary-General on strengthening the rule of law and transitional justice in conflict and post-conflict societies* confirmed that the absence of criminal accountability and impunity for past violations threatens international peace and security. The report pointed out that failure to address the legacy of abuses could leave a power vacuum that could be quickly filled by networks of criminal groups or terrorist organizations. This would lead to continued violence, instability and human rights violations. The report called for transitional justice professionals to identify priorities, examining the link between ending impunity and enshrining the principle of criminal accountability as a fundamental principle of transitional justice, as well as assessing the risks of ignoring it. The report also stressed the importance of ending impunity and ensuring accountability for serious human rights violations through legal prosecution in order to provide justice to victims. If accountability is not ensured, oppressed victims will not have faith in the State, and they may resort to other means to seek justice, which could result in unlawful retribution and widespread civil unrest.

Despite the undisputed importance of prosecuting those who commit grave violations, some participants in the workshops believed that instigating prosecutions might impede the reconciliation process, given that both parties to the conflict ( Hamas and Fatah) fear accountability and prosecution. Senior representatives that were in power at the time of

the division are still decision-makers now. Opponents of accountability processes stated there can be no future democracy without reconciliation, thereby emphasising the need for peace at the cost of justice. This rhetoric espouses that the parties to the conflict (Fatah and Hamas) must overcome their differences and forget the past, and it is necessary that reconciliation includes, implicitly or explicitly, the non-punishment of past crimes. Since the two parties are involved in violating human rights, a blanket amnesty would be preferable to further instability and violence, as it would maintain a political status quo.

Although the aforementioned opinion is based on what some might perceive to be a realistic outlook of the Palestinian political situation, there is no justification for deviating from the principles of the rule of law and continued impunity by rewarding and strengthening the influence of serious criminal offenders. It is also important to point out that accountability for human rights violations should not be subject solely to internal disciplinary procedures; firstly, because of the lack of transparency and effectiveness of those processes, and secondly, because the seriousness of such acts deserve to be subject to criminal scrutiny by way of an independent and transparent trial process.

Workshop participants unanimously agreed that accountability acts as a deterrent to the prevention of crimes, as it ensures criminals do not escape punishment. One workshop participant said, "If no prosecution is carried out, corruption will prevail, and crimes will increase. The law of the jungle will prevail." Another said, "If no prosecution is carried out, violations will continue." A third said, "If no prosecution is carried out, the killings and reprisals will return." Many of those interviewed linked accountability and the objectives of the Israeli occupation. One of the participants pointed out "If prosecutions were not carried out, national unity would not be achieved, serving one of the occupation objectives; the continuing geographical division and annexation of the West Bank and Jerusalem". Another participant supported this view, saying, "If the violators were not pursued, the division and its effects will continue, and by this, we would have assisted the occupation in tightening the blockade of the Gaza Strip." In this respect, prosecuting perpetrators of violations will contribute to restoring the status of the moral values and principles upon which the Palestinian cause is based.

### **Third: Who are the perpetrators?**

Workshop participants stated that Fatah and Hamas, their military arms, the security services, successive governments of the Palestinian National Authority in Ramallah, and the *de facto* government in Gaza, are all guilty of committing serious violations against citizens in the West Bank and Gaza Strip.

One participant pointed out that "perpetrators of abuses are decision-makers, whether political, or other decision-makers." This view was also shared by another participant, who said that "perpetrators of abuses, whether in Gaza or the West Bank, are politicians, party leaders, and media officials, who concealed the truth." It was commonly stated that

everyone knows who the perpetrators are, but that some people feared naming individuals in order to avoid being arrested or exposed to forms of abuse. One participant stated “the perpetrators are known, but who could say the word of truth in their face?”

In both Gaza and the West Bank, Palestinian authorities have frequently failed to hold accountable security force members implicated in serious abuse. Neither authority is known to have prosecuted any of its own forces for the serious abuses committed during the heavy fighting in Gaza in June 2007, including summary executions, maiming and torture. Since then, too few security force members or commanders have faced justice for using excessive force, ill-treatment or torture against detainees.<sup>13</sup> This also relates to the principle of command responsibility for gross human rights violations, as these crimes require a level of systemic organization, policy, agreement, supervision, and follow-up in their commission. Under the principle of command responsibility, military and political officials up to the most senior levels of leadership must be held criminally responsible for crimes committed by their subordinate. This is also true even if they did not explicitly order such offences to take place, but if they knew, or ought to have known, that these crimes were being committed, and did not take reasonable measures to prevent them. Responsibility can therefore be attributed to a whole chain of perpetrators who ordered, assisted, or failed to prevent violations.

Members of the elected Legislative Council in 2006, and individuals outside the Legislative, Executive, and Judicial authorities, have also instigated violations. For example, many mosque preachers adopted inflammatory and provocative language and hate speech leading to the commission of human rights violations. In this respect, it is important to ensure that those who are considered perpetrators should include those who have helped, condoned, advocated, encouraged, or promoted the commission of violations.

#### **Fourth: The Palestinian Reconciliation Agreements**

The Palestinian Reconciliation Agreements are prosecution-blind. Whilst the Agreements called for ways to ensure accountability, they also provide a blanket amnesty to the perpetrators, providing them with “immunity from accountability” whenever their crimes were part of the political conflict. This is a gross affront to victims of grave violations, and flies in the face of international standards and national law, in particular Article (32) of the Palestinian Basic Law, which declares that such offences are considered a crime, and are not subject to the statute of limitation.

The Reconciliation Agreements deemed persons who were harmed (dead and wounded) during the period of clashes as “victims of violence,” and the Palestinian National Authority, or the political faction to which they belong, is responsible for addressing their cases, with the facilitation of the National Reconciliation Committee. The only avenue for

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<sup>13</sup> Human Rights Watch, [Palestinian Abuses in Gaza and the West Bank | HRW](#), 2008.

redress for victims is to claim financial compensation. Consequently, the Agreements provide for the payment of blood money (*'diya'*); no justice remedy is available that would bring to account the individual perpetrator by way of trial process. Similarly, every citizen that has had property stolen from him or her can submit a complaint to the Complaints or Grievances Committee to restore his or her full rights. This in effect renders victims voiceless regarding the anger and injustice that they may justifiably feel towards the authorities, and forces them to accept a 'one-fits all' solution to resolving the conflict based on an enforced principle of forgiving and forgetting through the giving of money.

Aside from failing to set out pledges to prosecute those responsible for grave violations, the Agreements also fail to address the issue of apology and guarantees of non-recurrence by the parties, as well as failing to acknowledge mistakes that led to gross violations of human rights, and the prohibition of resorting to the force of arms in the future. Neither do the Agreements mention restorative justice mechanisms such as truth committees, whose importance lies in revealing the nature of gross violations of human rights that occurred during periods of fighting and years of division, providing an opportunity to hear from those who might be responsible, and providing for public recognition of the same. In the context of truth commissions, it is sometimes deemed necessary to invoke amnesties in order that perpetrators will be encouraged to divulge information about the whereabouts of victims, and to promote reconciliation. However, in the Palestinian context, a blanket amnesty has been provided to perpetrators, without even a truth-seeking initiative being proposed. There is therefore no benefit to victims of any amnesty; the only beneficiaries of the amnesty provision are the perpetrators themselves.

Workshop participants provided different views regarding the issue of prosecutions and the need to end the division, with some considering that prosecutions would have to be sacrificed to the greater need of ceasing hostility and division. One participant said, "To hold the perpetrators accountable, we first need to achieve reconciliation, enforce the law, impose deterrent penalties, and activate the oversight role of civil society organizations". It was therefore considered by some that prosecutions and reconciliation were mutually exclusive, and that tolerance and reconciliation prevail over accountability, considering that accountability may lead to the failure of the continued reconciliation process.

In summary, the Reconciliation Agreements are both an anomaly and contradictory to international standards and national law.

#### **Fifth: Lessons learned from other countries**

There is no one model of transitional justice that can be applied unilaterally to all countries. The experiences of other countries differ according to context; factors such as the period of conflict, the scale of violations, and the historical and political characteristics of the country all influence criminal justice processes. Nonetheless, it is important to heed

the experiences of transition in other contexts as it can inform how Palestine might approach the issue of prosecutions. Below are some examples of how other countries in transition have dealt with prosecuting gross violations committed by State entities.

In the **Chilean Republic**, the former dictator Augusto Pinochet, who ruled from 1970 to 1990, enjoyed immunity. In 1990, a Truth and Justice Commission was formed to investigate crimes perpetrated by Pinochet's military regime. Victims of violations called for waiving Pinochet's immunity, and the Chilean government subsequently reviewed the domestic criminal amnesty laws, waiving his immunity in 2004. Pinochet was formally charged for his role in kidnapping and disappearances, although he passed away in 2006 before the conclusion of his trial. However, this did not affect the prosecution of his deputies for committing gross human rights violations.

In the **Argentine Republic**, the military staged a coup in 1976 and ruled the country for six years, during which they tortured dissidents and forcibly disappeared thousands of victims. Following the demise of the military regime and the appointment of President Raúl Alfonsín in 1983, Alfonsín undertook two major measures to ensure accountability and non-impunity. The first was to mandate the National Commission of Inquiry to look into cases of forced disappearances, while the second was to issue an indictment against nine senior security personnel for crimes committed during the military regime. Some military leaders threatened to plunge the country into a civil war if criminal trials of the military continued. Faced with this pressure, the President bowed to military demands by issuing several amnesty laws. Civil society and the families of victims continued to lobby to hold violators accountable, and in 2003 the Supreme Court declared the amnesty laws as unconstitutional. Consequently, hundreds of soldiers and former military leaders have been tried on charges of arrest, torture, deprivation of liberty, and the concealment of corpses.

The **Republic of South Africa** suffered 40 years of apartheid, during which massacres, torture, unlawful imprisonment, forced disappearances and systematic discrimination were commonplace. The introduction of transitional justice mechanisms was first considered after the presidential election of Nelson Mandela in 1994. The following year, the South African Parliament passed a law on promoting National Unity and Reconciliation, and established the Truth and Reconciliation Commission to investigate serious violations committed from 1960 to 1994. The Truth and Reconciliation Commission Act provided amnesty for the perpetrators of human rights violations in exchange for the truth, motivating thousands of people charged with crimes and human rights violations to apply for amnesty. Whilst many heralded the work of the Commission, it was also considered a reason for rendering futile the efforts of achieving criminal accountability and non-impunity in South Africa.

Gross violations committed in the **Kingdom of Morocco** during 1956-1999 include murders, arbitrary detention and physical torture. This period is known as "the years of lead" due to systematic offences committed by State entities. However, the last ten years

of the reign of King Hassan II witnessed internal calm and a trend towards national reconciliation. In 1999, King Mohammed VI was crowned as the King, and has undertaken political reforms, including promoting human rights and supporting transitional justice in Morocco. An independent tribunal was established in 1999 to compensate victims of enforced disappearance and arbitrary detention. In 2003, the tribunal discharged its functions, which were limited to assessing compensation and reparation for victims of enforced disappearance and arbitrary detention. Human rights organizations criticized restricting the Commission's jurisdiction, as it was disallowed from examining criminal accountability and prosecutions. In 2004, the Commission for Equity and Reconciliation was established to reveal the truth and achieve justice in a spirit of tolerance. This played a major role in the success of transitional justice in Morocco. However, the Commission was also criticized for again failing to address accountability for perpetrators of human rights violations, instead being seen as an attempt to improve the image of the regime and avoid discussing the past.

As can be seen from these examples, there is a strong trend for States to veer away from confronting unpleasant truths, instead promoting a strong narrative of forgiveness and reconciliation at the expense of justice. This is not without significant cost. It should be noted that the existence of truth commissions without punitive justice mechanisms could put pressure on victims to accept reparations, thereby planting the seed of dissatisfaction and feeling of omission of justice. Whilst forgiveness is undoubtedly an important component of any transition process, prioritising this over punishment of perpetrators creates an unrealistic foundation for peace efforts. A dysmorphic view favouring reconciliation can never ensure long-term stability. Prioritising reconciliation, with a reluctance to destabilise what is seen as delicate balance of power and status quo, will likely be detrimental to Palestinian society for many decades to come.

#### **Sixth: International Humanitarian and Human Rights Law**

This paper does not enter into detailed discussion of the classification of crimes that occurred during the division from the point of view of international humanitarian law. Whilst Palestine signed the four Geneva Conventions of 1949, and also acceded in 2014 to the International Criminal Court's Rome Statute, the armed infighting in 2007 does not amount for these purposes to a civil war. Rather, it can be viewed as widespread civil unrest, which involves actions that are criminalized in accordance with the internal law recognized and applied by the existing government, whether in the West Bank or Gaza Strip.

According to Article 32 of the Basic Law that was in effect at the time the division, these violations constitute crimes that do not come under the statute of limitation. In addition, these violations could be considered crimes against humanity according to international law if they are part of a 'widespread or systematic attack'. According to the Palestinian Constitutional Court, Palestine does not automatically recognise international law; any

international legislation must first be nationally enacted<sup>14</sup>. Crimes against humanity have not yet been codified in a dedicated treaty (unlike genocide or war crimes), and therefore cannot be passed into national law. However, the prohibition of crimes against humanity constitutes gross violations that are largely covered by multiple international human rights instruments (see below), as well as national law. The prohibition of crimes against humanity could also be considered customary international law, from which no derogation is permitted. On 1 January 2015, the government of Palestine lodged a declaration under Article 12 (3) of the Rome Statute, accepting the jurisdiction of the International Criminal Court over alleged crimes committed ‘in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014’. This time period only partially covers the division and Hamas – Fatah conflict, but it nonetheless demonstrates Palestine’s acceptance of international humanitarian law within its jurisdiction. Because of this, and for the sake of ensuring national sovereignty and State responsibility for the crimes it has committed, this paper does not advocate solely for the indictment of perpetrators by the International Criminal Court.

In terms of international human rights law, Palestine has acceded to various relevant human rights conventions, including the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights, and the Convention on the Prohibition of Torture. In addition, it has most recently acceded to the Convention’s Optional Protocol on the Abolition of the Death Penalty. This reflects Palestine’s supposed commitment to human rights adherence in accordance with Article (10) of the Palestinian Basic Law, which requires acceding to international conventions and treaties that protect human rights. The Basic Law imposes the necessity for the authorities to respect its national and international obligations to combat human rights violations, and put an end to the state of impunity that both the Ramallah government and the Gaza government have enjoyed since the beginning of the division.

### **Seven: A prosecution mechanism for Palestine**

The heart of the Palestinian transitional justice dilemma surrounds the fact there has been no clear ‘winning’ or ‘losing’ side to the division. This makes it complicated and highly challenging to impose any accountability mechanism, which by its very nature determines that one party has been responsible for criminal wrong-doing. In the Palestinian case, both sides have committed gross violations<sup>15</sup>, and yet both are still in power, thus creating a high risk that any prosecution process could be politically controlled and partisan. As a consequence, the Palestinian Reconciliation Agreements are prosecution-blind. They also do not address the issue of official apology or truth-seeking mechanisms. Both of the aforementioned processes would involve admission of culpability and might assist a prosecution process, and are therefore politically undesirable given that many of the same decision-makers who were in power during the

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<sup>14</sup> International law within the Palestinian legal system: a call for granting human rights treaties a special constitutional status, E. Al-Hihi & and A. Khalil, 2019

<sup>15</sup> Two Authorities, One Way, Zero Dissent: Arbitrary Arrest and Torture Under the Palestinian Authority and Hamas, Human Rights watch, October 2018.

division are currently involved in the reconciliation process. Therefore, any prosecution mechanism implemented should take heed of the experiences of other countries, as well as ensuring it is tailored to the unique political and social characteristics of Palestine.

In several post-conflict States, the transitional justice experience has marginalized or ignored human rights violations that were committed during the conflicts. Moreover, the parties involved in the violations have led the reconciliation and transitional justice processes, as is the case in Palestine. Such experiences considered that the basis for reconciliation was to break with the past, viewing reconciliation as the ultimate goal. Unfortunately, this approach sacrifices the rights of victims to know the truth about what happened, and for perpetrators to be punished accordingly. Civil society believes that this is impermissible, as true reconciliation cannot be achieved without redressing the victims, apologizing to them, revealing the truth behind the violations, and invoking punitive justice. Ignoring these requirements undermines all reconciliation efforts and defeats the entire transitional justice process. Thus, national and community reconciliation **must** be linked to criminal accountability and the recognition of crimes and violations. Whilst the realistic prospect of prosecutions may seem weak in the Palestinian context, this does not negate the need to advocate for the same. Neither does it obviate the fact there is a critical need for criminal trials within the framework of the law.

Recommendations for holding perpetrators of violations criminally accountable include adopting the following:

- Requiring **fair and impartial judges** to have jurisdiction over cases. These can consist of impartial judges from inside and outside Palestine to ensure the prosecution of violations committed against the Palestinian people during, and as a consequence of the division. The presence of international expertise would enhance Palestinians' confidence in the process, as a large number of workshop participants called for the establishment of a Palestinian body with international participation to take over the responsibility of accountability for violations. This demand may be attributed to the lack of confidence in the Palestinian judiciary, which claimants considered is highly politicized.
- Establishing a **specialty mandated court** process in Palestine charged with hearing cases relating to the division, supported by relevant international experience. There are a number of prosecution configurations that could be adopted based on the experiences of other countries, including:
  - The creation of **mixed judicial bodies** (in the case of Cambodia and East Timor), or
  - The establishment of a **separate national court** to try people who committed these violations (for example, in Uganda, where the International Crimes Commission was established).
  - All trials should be undertaken through the civilian court process, i.e. there should be no military trials held *in camera*. All trials should take place in public, regardless of whether the perpetrator is a

civilian or member (or former member) of a military or security entity.

- If international engagement or an international hybrid tribunal is not agreed to, or possible, another option is for prosecutions to be carried out by the **Palestinian criminal justice system** established under existing legislation and provisions, in particular article (32) of the Basic Law, with civil society advocating to ensure that these bodies carry out their duties impartially and independently.

Regardless of which of the above prosecution modalities is enacted, a number of processes would need to take place to ensure the integrity of any prosecution process is maintained:

#### **Implementing relevant legislation and policies:**

The role of the State remains essential in prosecuting and punishing the perpetrators of serious violations. In order that it can do this, one of the necessary requirements is that **legislation is enacted** that creates a mechanism and allows for impartial prosecutions. This would require close cooperation among different entities, both within the government and civil society. The issue of gender should also be properly addressed and mainstreamed throughout any policy making process regarding prosecutions. In other words, the type of violations and manner in which women suffered will undoubtedly differ to how men suffered, and will necessitate an appropriately tailored legislative and practical response. The National Committees for the Prosecution and Punishment of Perpetrators of Violations (established by States that have undergone the transitional justice experience) might be of relevance, as they represent inter-ministerial or inter-institutional task forces. They bring together various national bodies with specific responsibilities while focusing on their main purpose, which is to advise and assist the Government in the protection of human rights.

Types of violations and the period of time in which these crimes were committed (2007-2020) must be clearly defined in any legislation, regulation or decree, and the judges who will look into these crimes must be subject to vetting.

As a broader legislative issue that will inevitably affect the on-going dispensation of criminal justice across Palestine, the overall legal framework in Palestine is random and unconstitutional<sup>16</sup>. During the period of division, neither the legal or judicial system were governed by the principles of the rule of law. In the West Bank, laws are still issued by presidential decrees in clear violation of the provisions of the Basic Law that prohibits issuing such laws except in cases of "necessity", and also in a manner that does not contradict constitutional principles and texts. This means that the Executive is not accountable for its actions in any way, usurping the powers of the Legislative since the division. In Gaza, members of the Change and Reform Bloc of Hamas, who were elected to the Palestinian Legislative Council in 2006, are convening in legislative council form and

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<sup>16</sup> Legislative process in Palestine does not always adhere to the requirements of Article 43 of the Basic Law that states.

issuing new laws. Following the imprisonment of several members following the Occupation, Hamas decided to follow a system whereby laws are enacted by proxy voting. This means that the PLC members who were imprisoned and were unable to vote themselves, will be represented by other Hamas members who will vote in their stead. This system has no basis in the Palestinian Basic Law.

### **Judicial appointments and judicial reform:**

It is desirable that national judges are involved with the prosecution of violations that occurred in Palestine. This is not only to ensure national ownership of offences, but it may also mean the prosecution process will act as a catalyst for judicial reform, as well as improving citizens' trust in the judicial process. Whilst individual judges would need to be selected and properly vetted, it is important to note that the entire judiciary in the West Bank and Gaza is in dire need of reform, not just unification. This includes the agreement of and dissemination of a Code of Conduct in line with international standards, protection for judges from undue political interference (for example, whistleblowing procedures), as well as the proper functioning of a transparent accountability process when judges transgress their remit.

The division in 2007 resulted in two separate courts. It is widely considered that neither are independent and impartial, as they are both subject to the influence of the security forces and the leaders of the Executive. The security authorities ignore judicial rulings and orders<sup>17</sup>. Approximately 67% of those surveyed in 2018 by the Palestinian Central Bureau of Statistics stated that the continuing division hinders the work of the judiciary. In 2016, there were only 7.3 judges for every 100,000 people in the West Bank, and two judges for every 100,000 people in Gaza. In the Gaza Strip in particular, many judges do not have the required qualifications for office. The appointment of judges in the West Bank is excessively politicized and subject to security checks. For example, in April 2016, President Abbas formed the Constitutional Court by appointing nine judges in it by presidential decree, based on security recommendations. Most of the judges appointed were Fatah members, or loyal to the party. This inevitably delegitimizes and undermines independence of the court as an institution, its decisions, and any future role it has in the transitional justice process. Many commentators saw this control of the judiciary as another way for the President and Fatah leaders to tighten their grip on power.

### **Rule of Law Unit created under the Social Reconciliation Commission**

It is recommended that civil society lobbies through existing political bodies, rather than calling for the creation of new entities, as the latter might involve further delay and protracted political negotiations. For example, a unit within the **Social Reconciliation Commission** could be created, called the **"Rule of Law Unit"**. This unit could be tasked with the application of the rule of law within the transition context, ensuring that the requirements for prosecution are implemented, legislative reforms are carried out, as well as broader judicial and justice sector reforms in both the Gaza Strip and West Bank.

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<sup>17</sup> Failure to Implement the Judicial Rulings is an Approach and Not a One-off Incident, MUSAWA, November 2020

The proposed Rule of Law Unit could be given powers to identify and select the persons (judges, prosecutors and the judicial police) who will carry out relevant duties regarding division-related prosecutions, in coordination with the departments to which these persons belong. Guarantees and safeguarding should be implemented to ensure they are able to carry out their tasks independently and impartially, without undue political interference.

The Unit could also be mandated to decide which persons from both Fatah and Hamas should be prosecuted. In carrying out this task, this entity must be free from political interference, and could be comprised of, or assisted by, national and international independent judges, prosecutors and investigators, as well as civil society from both Gaza and the West Bank. This body could also investigate crimes referred to it by a Truth and Equality Commission, or by individual citizens. For example, if evidence is available that favours a prosecution, the relevant file can then be referred to the competent authorities in order that they can pursue a case against the alleged perpetrator.

#### **Justice sector reform:**

Institutional reform of justice entities is not a prosecution initiative, although it is intrinsically linked with ensuring there is an effective prosecution process. Institutional reform is considered a form of transitional justice in the *UN Guidance Note*, and is further outlined in the accompanying paper 'Safeguarding Public Positions'. It is long-term in nature, constituting the restructuring of institutions to respect human rights, as well as disrupting the structures and foundations that have allowed such violations to occur. This process ensures standards of integrity among judges, public prosecutors, and practitioners are codified and implemented, ensuring all judicial office holders, prosecutors and police can be held to account by way of transparent and effective processes.

There is widespread agreement that existing criminal justice institutions in their current form - and the partisan way in which they operate - render them incapable of ensuring impartial prosecutions take place. Therefore, if prosecutions were to be carried out by national bodies, it is imperative to ensure that persons within the criminal justice system (police, prosecutors, judges) who are tasked with working on relevant cases are suitably vetted, qualified and capable of carrying out their tasks. Secondly, mechanisms must be in place to ensure these persons can carry out their duties independently and impartially without undue interference from political parties. This can, for example, include the implementation of whistle-blowing procedures.

#### **Eight: The role of civil society in ensuring accountability**

Civil society organizations are well placed to find common ground between divided parties, thereby facilitating any reconciliation process. CSOs are the key player in many

civic change processes, and must therefore be properly organized to develop plans to exert pressure on all responsible parties to hold elections. The role of civil society in ensuring criminal accountability was said by participants to include the following:

- Implementing initiatives that focus on the desired end result, for example, organising seminars, marches or solidarity rallies to demand rights,
- Addressing the division by mobilizing the public against it,
- Raising awareness of accountability related issues, including reviewing court rulings and decisions issued by the government in Ramallah and Gaza, thereby holding the government and security services to account,
- Providing the public prosecution (or any independent entity created and charged with making decisions about who should be prosecuted) with instructions on the initiation of investigations into suspicious legal violations.
- Monitoring and documenting violations.
- Exerting pressure on duty bearers to ensure accountability.
- Liaising with the international community to highlight where technical support and aide is needed to ensure accountability, and facilitating such support and aid to official government bodies.

In addition to the above views outlined during consultation, civil society institutions can carry out consultations, as well as monitor prosecutions of division-related perpetrators. Civil society can also provide support and guidance to the victims of the violations, in particular throughout any court processes. This includes advocating for victim and witness protection programmes, as well as the provision of psycho-social support for victims throughout the judicial process.

In light of the domination of political parties in all aspects of Palestinian civic life, a limited number of participants did not believe civil society institutions would play an effective and impartial role in ensuring accountability. It was stated that the reconciliation initiatives offered by civil society institutions have not so far been adopted or even considered by authorities. Therefore, it was asserted that CSOs are unable to work objectively, but rather they tilt towards either party, causing an imbalance in effectively holding the parties accountable for the political division and its implications.

In light of the above, and the need for civil society to speak in a unified voice from a consolidated platform, it is proposed that Palestinian civil society organizations form a body called the **Coalition for Transitional Justice**. This coalition could coordinate efforts to lobby for the operationalisation of the committees that have been created through the reconciliation agreements, and proper implementation of transitional justice initiatives. The Coalition could also follow up the work of these committees, ensuring accountability for violations committed during the period of division and non-impunity for perpetrators.

## Conclusion and Recommendations

The internal fighting in Palestine in June 2007, and the period of division that followed, resulted in serious human rights violations, some of which may have amounted to crimes against humanity. These violations continue to affect the political, civil, economic, social, and cultural rights of Palestinian citizens. The process of criminal accountability for gross violations cannot be initiated in light of the ongoing division and refusal of Fatah and Hamas to initiate prosecutions and criminal accountability for violations as part of the Reconciliation Agreements.

The following recommendations are made accordingly to **civil society across Gaza and the West Bank**, the **parties to the conflict** (Fatah and Hamas) and the **international community** as follows:

### Recommendations to civil society:

- Form a coalition spanning both the West Bank and Gaza Strip, known as the **Community Coalition for Transitional Justice**. The aim of this Coalition should be to facilitate a consolidated and unified platform to speak with one voice, maximise advocacy efforts, and facilitate the introduction of transitional justice mechanisms in Palestine. This should include calling for the prosecution of perpetrators of grave violations. In order to ensure effective support to the transition process, sub-committees with specific focuses can be formed under the umbrella of the Coalition.
- The **mandate** of the Community Coalition for Transitional Justice can include, amongst other issues, supporting victims through any court process, lobbying for justice sector institutional reform, ensuring that impartiality and independence of the members of the Rule of Law Committee are enacted, and that implementing legislation and policies are enacted that would allow for an effective prosecution mechanism to operate in Palestine. Pending any courts or prosecution processes being created, the Coalition could coordinate the legal documentation and preservation of violations, with the aim of bringing them to justice once accountability mechanisms are adopted.
- Lobby for the formation of an official committee within the Reconciliation Agreement's Community Reconciliation Unit, called the **Rule of Law Unit**. This unit could investigate crimes referred to it by the Truth and Equality Commission, and could implement and monitor all aspects of division-related prosecutions justice sector institutional reforms.
- Lobby for the adoption of a comprehensive **Transitional Justice Strategy** that incorporates all transitional justice mechanisms and recognises that they are not mutually exclusive but rather interdependent, and must be properly sequenced and implemented by way of integrated, multi-sector cooperation. The Strategy should be supported by, or include, an operational and practical **Road Map** that supports the establishment and sequencing of transitional justice mechanisms in Palestine.

### Recommendations to the parties (Fatah and Hamas):

- To properly consider and **address the issue of criminal accountability**, acknowledging that reconciliation cannot be achieved, nor stability sustained, by focusing solely on forgiveness in the absence of punitive justice. Civil society urges the parties to build on the countries' experiences of reconciliation so far, taking into account the experience of other countries, and lessons learned that can be applied to the unique characteristics of Palestinian society.
- Consider prosecution initiatives in line with **other transitional justice initiatives** (vetting, reparations, truth-seeking, guarantees of non-reoccurrence), recognising that they are all necessary and interdependent. Acknowledge the link between criminal accountability and truth commissions, and consider how they might both operate in a complementary manner, for example, the findings of a truth commission might be referred to a prosecution unit.
- To discuss and adopt a comprehensive **Transitional Justice Strategy** with actionable **Road Map**, with tangible milestones and concrete activities that are properly sequenced. The parties should urge cooperation from all relevant justice and security entities across both Gaza and the West Bank.
- Support the establishment of a **civilian court** in Palestine, with the modality to be discussed (i.e. hybrid, national, national with international support), ensuring it is in line with international standards, and that it has a jurisdiction that effectively covers the timescale and extent of violations that occurred.
- Agree that **no prosecution cases will be heard in military courts** or in private, even if the alleged perpetrator is a member of the military or security services, or former member.
- Pledge that any such prosecution mechanism will be **free from undue political interference**, and introduce safeguards and policies that will enable office-holders to be appointed through a transparent and meritocratic process.
- Ensure that **civil society is properly included** in reconciliation discussions between the parties, and that due consideration is given to the recommendations made by civil society.
- Commit to **institutional reform initiatives** for justice entities, namely the judiciary, police and security services.

### Recommendations to the international community:

- **Encourage both Fatah and Hamas** to continue with reconciliation initiatives which acknowledge that the scale and type of violations **justify punitive action** in the form of prosecutions,
- Encourage the parties to provide public acknowledgment of culpability of gross violations,
- Support the creation and adoption of a comprehensive **Transitional Justice Strategy**, ensuring it is properly consulted upon and inclusive of all relevant justice and security entities from Gaza and the West Bank, as well as civil society and other relevant stakeholders.

- Ensure donors enact a **consolidated and strategic approach** in how they provide technical and other assistance to the parties in order that transitional justice efforts are viewed holistically, properly sequenced and not duplicated.
- Support the **creation of a national court** that can prosecute division-related offences, and which benefits from the support of impartial Palestinian and international judges who are competent in the prosecution of crimes against humanity and gross human rights violations.

## THIRD PAPER - Reparations for Victims of the Division

### Executive summary

International standards reiterate that there can be no real reconciliation in a country that has experienced conflict without compensating victims of violations perpetrated by the State. The issue of reparations has a profound effect on the reconciliation process and the possibilities for its success in Palestine. This is particularly important when considering the traditions, tribal justice, and a mindset of revenge that prevails in parts of Gaza and the West Bank. The granting of compensation by official bodies will help repair and strengthen society's confidence in State institutions, moving away from the clan system based on retaliation, towards a more sustainable peaceful society. According to the Palestinian Reconciliation Agreements, both Hamas and Fatah have a responsibility to promote reconciliation and tolerance, as do the various committees that have been established under the Agreements. However, tolerance should not be a substitute for material compensation or other legal remedies and actions (e.g. prosecution) if there is a basis for the pursuance of those remedies.

Reparation includes much more than monetary relief. It refers to various measures, including **firstly, restitution**, which aims to restore the victim to their situation before any violations were committed. This does not necessarily mean financial compensation and could, for example, include the restoration of rights regarding the return of property. **Secondly, compensation**. This refers to financial damage that can be economically assessed, but can also include other types of compensation, including the provision of education and housing. **Thirdly, rehabilitation**, including medical and psychological care. **Fourthly, guarantees of non-recurrence**, which relates to pledges from government and individuals. It can include symbolic reparation such as an official recognition of suffering and an apology for it, memorialization events, and naming areas or streets after victims. It should be noted, however, that if symbolic forms of compensation are provided without any accompanying tangible material benefits, this can be interpreted as meaningless words, devoid of the authorities' serious commitment to future change. It could arguably also include broader measures, for example institutional reforms, as these will help prevent future violations from reoccurring.

Most of the aforementioned types of reparation are absent from the Palestinian Reconciliation Agreements, and there is no provision for compensation for victims of human rights violations relating to the right to freedom of expression or participation in political life. Rather, most compensation measures were limited to focusing on rights associated with physical integrity, and were limited to financial compensation, as indicated above. In addition, despite what was mentioned in the Palestinian Reconciliation Agreements regarding reparations, many victims, especially those of grave violations, have not received any compensation. It has been said that the focus has been on the paying of '*diya*', or blood money, as a way to prevent victims and their families

from achieving justice by pursuing other legal remedies, and as a way for authorities to avoid shouldering blame and acknowledging their wrong-doings.

Under the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, victims have a "right to an effective remedy", consisting of two aspects: the **procedural** right to justice (linked to other transitional justice mechanisms such as prosecutions), and a **substantive** right, which relates to effective and prompt reparation for harm suffered, and access to relevant information.

Although there is no specific definition of 'victims' in the Palestinian reconciliation process, this paper recommends a clear sliding scale of damages and violations is created alongside brackets of allowable compensation, with the most serious violations be considered as requiring compensation. This includes murder, torture, severe physical or psychological harm, enforced disappearances, and arbitrary detention for lengthy periods for political reasons.

## Introduction

This position paper sets out civil society's vision and practical recommendations regarding reparations to victims of the split in Palestine. The proposals set out herein will form part of a comprehensive **Transitional Justice Strategy** that also includes other justice mechanisms, for example safeguarding publicly funded positions, and prosecutions. It is hoped that this Transitional Justice Strategy will be agreed and adopted by the parties, as it will focus all parties on the practical implementation of reconciliation efforts.

The paper is set out as follows: **firstly**, the definition of reparations and international standards. **Secondly**, examples of reparations from other countries. **Thirdly**, the Palestinian context and political will. **Fourthly**, the definition of victim: who should be compensated and for what. **Fifthly**, financing reparations, calculating damages and corruption, and **sixthly**, what a reparations mechanism might look like in the Palestinian context. **Finally**, the paper sets out conclusions and recommendations to civil society, the parties in Palestine and the international community.

This paper is based on civil society consultations and extensive research that took place across both the West Bank and Gaza Strip. Discussions were held with multiple participants across a variety of sectors, the anonymous views of whom are reflected herein and, together with the research, culminate in the recommendations set out.

### First: The definition of reparations and international standards

The triangle of reparations consists of three components: victims, beneficiaries and reparations, with the main aim of reparations being to turn each victim into a beneficiary. This cannot be achieved by the current reparation procedures provided for in the Reconciliation Agreements.

Reparations to victims is not limited to financial compensation, but also extends to returning unfairly dismissed employees to their jobs, restitution of confiscated properties, and providing medical care and rehabilitation of the injured. It also extends to symbolic reparations, such as making a public apology for violations committed against victims, and declaring official recognition of State responsibility for such violations.

According to international standards, reparations refer to various measures, including:

- **Restitution**, which aims to restore the victim to their position before any violations were committed. This could include the return of employment, or the right to recover property.
- **Compensation**. This refers to financial damage that can be economically assessed, but can also other types of compensation, including the provision of education and housing.
- **Rehabilitation**, including medical and psychological care.
- **Guarantees of non-recurrence**, which could relate to pledges from government and individuals that violations will not re-occur. It can include symbolic reparation such as an official recognition of suffering and an apology for it, memorialization events, and naming areas or streets after victims. It should be noted, however, that if only symbolic forms of compensation are provided without any accompanying tangible material benefits, this can be interpreted as meaningless words, devoid of the authorities' serious commitment to future change. Guarantees of non-recurrence could also arguably include more broad measures, such as institutional reforms, as these would ideally implement policy frameworks that would prevent future violations from happening (e.g. safeguarding of public positions).

It should be noted that there should be an holistic consideration of combining both material *and* symbolic compensation as part of a reparations programme, as they both address different needs. Aside from material and symbolic reparations, reparation can be distributed either individually or collectively. Countries with limited resources may confine reparation efforts to collective compensation only, such as an increase in publicly funded health services, improvement of public infrastructure, and the introduction of water and sanitation projects. However, there is a strong argument that this kind of collective reparation actually constitutes development, and is therefore not fitting a fitting response to address the damages suffered by individuals.

Since governments often claim incapability to finance reparations in an attempt to avoid costs, civil society often resorts to advocating for reparations by relying on international standards and instruments. International human rights law has progressively recognized the rights of victims of conflicts and civil wars to justice and redress before the law, both nationally and internationally. As a result, the international legal basis for the right to redress and reparation is enshrined in international covenants to which most States have

signed, including the *Universal Declaration of Human Rights* (article 8), the *International Covenant on Civil and Political Rights* (article 2) and the Human Rights Committee's *Comment No. 31*. The latter states that the duty of States to provide effective remedies is an element of effective domestic justice; thus, the remedy of damage is not only a duty of the State but the right of victims.

In addition, under the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Compensation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, approved by the General Assembly in December 2005, gross violations constitute an affront to human dignity. Victims of these violations have a right to a remedy, which consists of two aspects:

1. The **procedural** right to justice (linked to other transitional justice mechanisms such as prosecutions), and
2. A **substantive** right, which relates to reparations, namely:
  - a. Adequate, effective and prompt reparation for harm suffered, and
  - b. Access to relevant information concerning violations and reparation mechanisms.

Underlining these principles, a participant in the consultation workshops emphasized: "Reparations is of different importance from the rest of the transitional justice procedures, as it is the only measure that gives benefits to the victims of violations committed during the division, while other transitional justice procedures benefit the whole society and not the victims in particular". This point of view reiterates that victims are recognized as individual rights-holders who deserve reparations for the damage they suffered.

## **Second: Lessons learned from other countries**

There is no reparation template suitable for all countries. However, it is useful to learn about international examples and experiences, as these can inform and guide the appropriate mechanisms that can be adopted to the unique context in Palestine.

In Peru, collective compensation programmes comprising of improved public services were implemented, although this was criticized for not meeting or compensating individuals for damages. In addition, civil society did not have a clear consensus on whether collective compensation should form part of the national reparation mechanism. Therefore, advocacy efforts for pursuing individual reparations was arguably not as powerful or focused as it could have been. Peru also exercised poor timing and inefficiency in the disbursement of reparations, in violation of the basic principles of the United Nations. The legislation on reparations was passed in 2005, and two years after the publication of the Truth Commission report, the national registry of victims was not completed until 2011. Legislation dictated that it was not possible to award any compensation until the report was finalized. Not only did this delay reparations to victims,

but it conveyed the message that the government was not committed to the compensation process.

Lessons learned from the Peruvian context include that it is imperative that Palestinian civil society reaches a clear consensus on what constitutes reparations, and whether or not a collective government reparations proposal would be accepted or not. In addition, the timely implementation of disbursement schemes should be enacted if the government is to be trusted on its commitment to fulfilling its obligations.

In Colombia, the government reached an agreement with the militia (FARC) in 2016 on the rights of victims. Reparations was considered by many people to be central to the peace agreements, to the extent that it was indicated in the agreement that peace will not continue in the absence of victims' rights. These rights are clearly reflected in the peace agreement documents. This differs from the Palestinian context where victims are mentioned in some Reconciliation Agreements, although they are not central to the agreements. This reiterates the need for civil society in Palestine to lobby for the prioritisation of the rights of victims, so compensating them is not considered circumstantial to the success of the peace process.

In a situation that resonates with the Palestinian context, in Argentina financial compensation was initially considered "blood money" that would in effect buy the silence of victims. In Libya, the proposed Sexual Offences Commission (not formed due to eruption of the 2014 conflict) set out various reparations offered to victims of sexual violence during the Revolution. These included the offer to fund Hajj trips for victims, education programmes, counselling, and the provision of jobs. Given the stigma and taboos surrounding sexual violence, there would have been logistical challenges in implementing these provisions, as many victims would not want to come forward to claim reparations. Anonymity was offered by the Commission, but it was not clear how this would have been operationalised. Palestinian civil society therefore needs to conceptualise how ideals regarding implementation can work on the ground in a practical way, ensuring that 'do no harm' principle is always observed.

### **Third: the Palestinian context**

Reparations to victims is one of the most important issues to be discussed under the concept of transitional justice in Palestine. A combination of reparations will need to be considered and disbursed, as some victims stated that the psychological damage and torture of their children cannot be compensated by money alone, but they also require rehabilitation and treatment because of the violations they were subjected to.

Most of the reparations described in this paper are absent from the Palestinian Reconciliation Agreements. There is also no provision for compensation for victims of human rights violations relating to the right to freedom of expression or participation in political life. Rather, most compensation measures were limited to focusing on rights

associated with physical integrity, and were limited to financial compensation, as indicated above.

During consultations across Gaza and the West Bank, one participant noted that there can be no real reconciliation without compensating the victims of violations. This is particularly true when considering the culture of Palestinians in Gaza and the West Bank, which is governed by customs and traditions, tribal justice and revenge. Compensation granted through a fair process by official bodies would help enhance community confidence in State institutions and move away from the clan system mindset that is based on retaliation. Conversely, neglecting to compensate victims will have dire social and political consequences, not only for reconciliation but also for the health of Palestinian society as a whole. There were broadly three different views about the political will to provide reparations in Palestine. The first was that the two parties lack any political will to achieve reconciliation and redress. The second view was that both parties are motivated to provide it, but only confined to physical assaults (murder and disability), as mentioned in the Reconciliation Agreements. The third point of view emphasised the need to link reparations to accountability and prosecution processes, in that prosecutions should follow any decision about damages. However, given that this would equate to admission of culpability, this might lead to an absence of political will to disburse reparations. It was also said that the commission of violations by both parties has continued, especially violations against political and social rights, which provides proof of the parties' lack of seriousness to achieve reconciliation and sustainable peace.

#### **Fourth: The definition of victim: who should be compensated and for which violations?**

##### **Who is a victim?**

Before being able to properly implement a reparations process, there needs to be a unilateral understanding of what constitutes a 'victim' in the Palestinian context. Any failure to agree on a precise definition will lead to an increase in the number and types of victims expecting compensation, which may become operationally unviable and lead to raised expectations, large-scale dissatisfaction and possibly civil disturbance. In addition, the larger the number of victims that are able to apply for reparations, the lower the budgetary amount that will be available to compensate those who suffered the gravest violations. Therefore, civil society believes it is necessary to identify the violations that will be compensated, while leaving the door open for other victims of less grave violations to resort to judicial processes in pursuit of justice.

Other issues were raised during consultations regarding who might be exempt from claiming reparations. Some participants suggested that uniformed soldiers should not be compensated since relevant laws already regulate the issue of reparations to security personnel and the payment of their pensions. In addition, the issue of those who participated in the violations but who claim they were victims of torture or other grave violations should also be exempt, as has been the case in other countries.

### **Which violations should be covered?**

In terms of which violations should be covered, any policy decision will have to take into account the reality of budgetary considerations against the scale and extent of victims and damages inflicted across Palestine. There will obviously need to be further consultation on this issue which civil society can support, including by the provision of documentation of evidence.

Regardless of further consultations, it is clear that the most serious violations should be covered by any reparations programme; i.e. murder, torture, long periods of unlawful detention due to political reasons, severe injury and the extensive destruction of property. However, this in no way minimises the very real and damaging effect of violations that in comparison may seem less serious, but are nonetheless debilitating to victims, such as arbitrary arrest (for short periods), minor assaults and threats towards those who exercised their civil liberties lawfully. Therefore, whilst the Reconciliation Agreements appear to cover only the most serious physical assaults, civil society believes this is a reductive and incomplete approach to the damage, both physical and psychological, that was inflicted on Palestinians during the split.

### **Fifth: Financing reparations, calculating damages and corruption**

#### **Financing reparations.**

Several theories were espoused during consultations regarding how reparations would be financed. It was asserted that the UAE has committed to pay the entire costs of the reconciliation process. Others believed many countries, such as Turkey, Qatar, and Saudi Arabia are willing to contribute financially towards the reconciliation. Another point of view was that the government alone should bear the financial burden. Whilst it is accepted that the authorities may not have the funds to properly recompense victims of violations, civil society supports the view that the State needs to pay as much as possible towards reparations. This is in order to ensure avoidance of duty, and a situation where the burden of paying for the State's own actions is shouldered by a third party. Paying for its own mistakes would also encourage the authorities towards efforts to ensure there are no incidences of reoccurrence, as violations not only damage Palestinian society but they also damage the public purse. Lastly, if the State pays for reparations, it would also reflect a level of genuine remorse on the part of the parties that would help improve citizen-State relations.

#### **Calculating damages**

After securing and earmarking funds for reparations, it is important to agree a calculation process that is consistently applied across all cases. Laws in the West Bank and the Gaza Strip already offer mechanisms to compensate victims of the violations. However, they may not be appropriate to the unique and extreme situation in which the State perpetrates grave violations. This does not in any way imply limiting the ability of victims to resort to judicial processes for redress.

The compensation awarded for physical injuries will obviously differ from that relating to death, as injuries and disabilities have financial and psychological consequences that require long-term support. Reparations in injury cases involve calculating the costs of rehabilitation, health care, and loss of income. In cases involving severe injuries, civil society proposes that an interim reparation payment should be paid promptly, pending the completion of determining the full calculation for damages.

The payment of '*diyya*' or blood money by way of a lump sum is a quick, low-cost solution for the government, which victims often feel compelled to accept under community or political pressure. Giving a fixed sum relieves the government of having to calculate the value of the damage done to each individual victim, and exempts the government from paying the fees of the body that will administer the reparations. It could be argued that this method of reparations achieves the principle of equal access to compensation. However, it violates the concept of natural justice, as all victims will receive the same amount of reparations despite the varying damage done to each of them.

Any policy decision regarding levels of compensation, and which violations should be covered, will inevitably result in a level of dissatisfaction, and should therefore be thoughtfully handled and communicated. This is why it is imperative that consultations take place on this topic supported by technical expertise and headed by the proposed Reparations Commission (see below). This can result in an agreed sliding scale of violations that will be covered, paired with a bracket of damage amounts that can be applied to each violation. A bracket of compensation (i.e. an allowable minimum and maximum monetary amount for each violation) allows for decision-makers to exercise flexibility in recognition that each case will be different and the effects of the damage on each victim will vary. Again, this bracket should be unilaterally agreed and guidelines to decision-makers provided on how each amount will be awarded in order to ensure consistency.

Lastly, any funding for a reparations programme will attract the risk of it being misappropriated, as well as related corrupt practices occurring. This not only includes theft of the money itself, but also bribery and blackmail of any persons charged in a reparations decision-making capacity. It is therefore imperative that any reparations mechanism instils **fiduciary safeguarding practices** to minimise the opportunity to misappropriate funds or corrupt the decision-making process. Advice and support from the international community and the United Nations can inform which fiduciary safeguarding practices would be appropriate, alongside lessons learned from other contexts. For example, multi-partner trust funds operate in some contexts where large sums of money are held on public trust for development programmes. Consideration needs to be given to whether this could be appropriate for the Palestinian context. If a multi-partner trust fund is decided upon, discussion will need to take place regarding who should be on the Board (e.g. representatives from bi-lateral or international entities, and / or persons from across the political divide), and how and at which levels any Board agreements about disbursing the money from the fund would work. In addition, a **Code**

**of Ethics** for reparations decision-makers should be created and disseminated alongside the provision of training in order to ensure the process maintains the highest possible integrity.

#### **Sixth: A reparations model for Palestine**

Many operational and logistical issues require in-depth discussion regarding how a reparations scheme might function in the Palestinian context. These include issues such as:

- The **type of reparations** that will be offered (material and symbolic, individual and collective).
- The **types of violations** that will be covered.
- The **temporal jurisdiction** of any reparations programme, i.e. which dates will be covered regarding when damages were inflicted.
- How financial redress would be **calculated**, and ensuring an appropriate budget is earmarked and shared across both Gaza and the West Bank authorities.
- Consideration regarding whether all victims, or just those who have been subjected to the most serious violations are compensated with money only.
- Creating a **table of calculations**. This would help answer queries such as issues regarding multiple violations, i.e. would victims receive double / triple compensation, or would there be a financial limit to what they would receive?
- Who would be the reparations **decision-makers** and how will they be appointed?
- How would the reparations mechanism be **sequenced** with other transitional justice mechanisms? In other words, should a Truth Commission process refer cases to be compensated? If so, this may severely delay redress for victims. Also, what would happen if victims don't wish to appear before a Truth Commission but are still eligible for compensation?
- **Policies and Rules of Procedure** that would be needed to ensure the mechanism operates effectively and fairly, including setting out any appeals process.
- **Proportional representation** across Gaza and the West Bank would need to be implemented, both in terms of those charged with disbursing the reparations, and as well as for those receiving it.
- Ensuring the mechanism is **not buying the silence or cooperation of victims**.
- Ensuring that **fiduciary safeguards** are put in place so that money and other forms of quantifiable redress are not misappropriated.
- With regard to cases of death and murder, who will receive reparations? Will it be distributed according to the estate as provided by law, or will the first-class relatives receive the reparations directly?
- How will cases be dealt with involving children?

With regard to compensation for violations of the right to hold public office, some of those consulted felt that both parties have acted to remove the other party's members from public positions. In the West Bank, the government created what is known as a

Security Safety requirement, depriving some individuals of jobs. Moreover, it referred members of the security forces in the Gaza Strip to retirement, in addition to taking other measures that affected their salaries. Whilst civil society believes that restitution should be offered in appropriate cases, this should be implemented in conjunction with proposals set out in the accompanying civil society position paper on safeguarding publicly funded positions.

Civil society does not propose creating new bodies that are separate to the Reconciliation Agreements, as these will be time consuming and involve protracted negotiations that may be counterproductive for the victims of violations. Instead, civil society wishes for existing mechanisms to be effective and operational. In order for the reconciliation agreements to include effective mechanisms for reparation, civil society organizations should lobby for the formation of a unit within the National Reconciliation Commission called the **Reparations Commission**, consisting of independent and impartial persons who possess the necessary qualifications and competencies, and who are known for their integrity and honesty. This could include judges who have been subject to vetting procedures and do not have any conflicts of interests.

To complement this, it is proposed that civil society forms a **Community Coalition for Transitional Justice**, one of the aims of which will be to follow the process of selecting members of the **Truth and Equality Commission** in line with best practice and international standards. The **Community Coalition for Transitional Justice** seeks to mobilize international support in implementing reparations, whether relating to technical and legal support or financial support to achieve the goals of transitional justice and redress for victims.

In order to ensure the second requirement of the UN Basic Principles on “access to relevant information on violations and reparation mechanisms,” is implemented, the **Reparations Commission** would be responsible for providing clear and transparent information in both the West Bank and Gaza on the below issues:

- Compensation mechanisms and relevant authorities,
- Who are the persons eligible for compensation?
- Violations covered by compensation,
- Procedures and stages of obtaining compensation and relevant time-frames,
- The required supporting documents and evidence needed, the types and amounts of reparations,
- Whether there is legal or advisory assistance available, and how to access it,
- Information about how to appeal a Committee’s decision.

In addition to the above, information to the public about reparations must reiterate that obtaining compensation is not in exchange for victims not pursuing other legal remedies.

### **The role of civil society**

Given the lack of existing and functional bodies in Palestine that could implement an effective reparations process, the burden of lobbying and monitoring reparation efforts will rest largely on civil society. Community organisations have an important role to play in reparations, including:

- Protecting victims from attempts to prevent them from seeking redress under the pretext of focusing only on reconciliation.
- Providing the proposed Reparations Commission with the necessary information about the victims by providing any records or evidence of violations.
- Monitoring the performance of the proposed authority and helping to receive and facilitate complaints from victims.
- Promoting a culture of applying for, and accepting, compensation without stigma, and resisting efforts for communities to participate in a revenge culture that only perpetuates a cycle of violence.
- Dissemination and publication of information about the reparations process in line with the *United Nations Basic Principles and Guidelines*.
- Facilitating or providing access to justice initiatives by giving advice about the mechanism (e.g. the application process, timelines, and appeals) to applicants.

The assistance of international organizations in building momentum, and providing invaluable technical support is also requested to facilitate civil society's efforts and those of the committees under the Reconciliation Agreement.

### **Conclusion and recommendations**

Transitional justice procedures are designed to provide a comprehensive solution for victims of violations that occurred during and after a conflict. The large-scale nature of violations and the political backdrop of reconciliation efforts means that the judiciary alone will not be able to implement the full range of transitional justice. There is a global, positive trend to promote an atmosphere of reconciliation and forgiveness in peace processes, but this should not be a substitute for material compensation. Symbolic forms of compensation are important, but must be accompanied by tangible benefits.

Although victims are mentioned in some Palestinian Reconciliation Agreements, they are not central to these agreements. Lessons can be learned from other contexts, and applied when designing the mechanisms that will be utilised in Palestine. Given that sustainable peace and justice cannot be achieved without the State compensating victims for the losses that have been unjustly inflicted on them, civil society must advocate for the restoration of the rights of victims in the existing Agreements, and any future agreements.

### **Recommendations**

Based on all of the above, this paper makes the following recommendations to civil society, the Palestinian authorities and the international community:

- Civil society should form a body / coalition called **the Community Coalition for Transitional Justice**. This Coalition will be responsible, *inter alia*, for lobbying for the implementation and coordination of effective and timely transitional justice mechanisms in Palestine, including the disbursement of reparations in line with UN standards. A unit or committee within the Coalition can be formed that will focus specifically on the reparations process.
- A cross-party **Reparations Commission** should also be formed, supported by both parties, whether under the current Reconciliation Agreement (Cairo Agreement 2011) or any future agreement. This Commission could operate under the existing **Community Reconciliation Committee** without the need for new mechanisms or policy frameworks being created.
- The Community Coalition for Transitional Justice should offer and facilitate technical support to the Reparations Commission, including advising and lobbying on:
  - The criteria for deciding on who will receive reparations and who will be exempt,
  - The calculation of damages ensuring they are consistent and appropriate according to realistic budget constraints,
  - An effective fiduciary safeguarding mechanism is in place that can prevent misappropriation of funds,
  - An equitable selection process of Commissioners,
  - Rules of procedures and standards in line with international standards and best practice.
- Civil society strongly urges the parties to communicate clearly to Palestinians that **obtaining compensation is not in exchange for victims' non-pursuance of other legal remedies**, e.g. criminal prosecution or civil lawsuits, and any reparation will therefore not offer a route of immunity that will enable perpetrators to evade other forms of justice.
- The Community Coalition for Transitional Justice offers its support to the Reparations Commission with ensuring **clear and transparent information** about the Reparations Commission is disseminated in both the West Bank and Gaza.
- The Community Coalition for Transitional Justice also offers its support regarding **access to advice for the public**, and is willing to work with, and facilitate clinics and / or advice services that will help guide applicants through the process.
- Whilst civil society believes it is the responsibility of the State to burden the full cost of reparations of violations they have perpetrated, the reality of the State's financial constraints and consequent hardship suffered by the Palestinian people means that the parties may need outside financial and technical assistance in achieving reparation aims. Civil society calls on **the international community** to join forces in a coordinated effort with the parties and bodies created under the Reconciliation Agreements. This could include the implementation of **cost-sharing initiatives** that prevent the State from completely transferring the fiscal burden

- to other parties, and / or the offering of international **technical assistance** regarding any aspect of the reparation mechanism and disbursement process.
- Civil society states that the recommendations in this paper will form part of a comprehensive **Transitional Justice Strategy / Road Map** applicable in the West Bank and Gaza, which will encompass other transitional justice modalities and set out timelines, aims and other issues such as sequencing of mechanisms. To this end, whilst reparations is an important mechanism in its own right, it should nonetheless be seen as being part of a complementary matrix of critical transitional justice measures. Civil society calls for consultations with the parties to ensure that the Transitional Justice Strategy / Road Map is unilaterally agreed and supported by the international community.

## FOURTH PAPER - Safeguarding publicly funded positions: vetting and institutional reforms

### Executive summary

This paper sets out the history and crisis relating to publicly funded positions in Palestine. It also makes recommendations for the introduction of safeguarding mechanisms to prevent future violations from occurring, and also ensure that those who committed those violations are removed from office. The issue of public appointments is one of the most problematic challenges in the Palestinian reconciliation process. In transition contexts, the principle of vetting refers to laws and provisions that prevent and restrict individual members and collaborators of former regimes from holding a range of public offices or other jobs that have a strong public influence. Lustration is the term commonly used for processes in the Eastern Europe transitional context, relating to a complete purge of personnel from security entities, often accompanied by a dismantling or radical restructure of those entities. Institutional reform, on the other hand, is not limited to transition contexts, but instead refers to longer-term programmatic efforts to professionalise public entities by focusing on improving system frameworks and policies; including the implementation of effective accountability mechanisms and clear job roles and remits. 'Safeguarding public positions' is an umbrella term used in this paper to refer to all the aforementioned processes.

Following the split and declaration of the state of emergency in 2007, the Council of Ministers in the West Bank issued a decision to implement the Security Clearance Procedure as part of the public recruitment process. This procedure subjected the appointment process to political and partisan considerations. However, this decision was nullified by the Supreme Court of Justice in 2012 as it was discriminatory in nature and in violation of the Palestinian Basic Law and international standards. Despite the Supreme Court's decision, the Security Clearance Procedure nonetheless continued to be enforced and is still applied to judicial office appointments in the West Bank.

After Hamas militarily took control of the Gaza Strip, Fatah called for its employees in the Gaza Strip to strike. It stated their salaries would continue to be paid if they remained at home, and that anyone who failed to strike would be punished. Hamas reacted by hastily employing a number of personnel; partly to compensate for employees who had been dismissed and / or not enrolled in their jobs based on government decisions in the West Bank, and also to ensure a balance in numbers compared with Fatah. This brought the number of Hamas employees to approximately 23,000. Since 2017, the Ramallah

government has implemented cuts to the salaries of its civil and military employees in Gaza and has referred a large number of them to early retirement.

According to the Cairo Agreement of 2011, the formation of the Security Committee and the Legal and Administrative Committee were approved. The Security Committee is charged with reforming the security services. The Legal and Administrative Committee is charged with following up on personnel affairs as part of efforts to unify public institutions. Both Fatah and Hamas have been hindering reforms, and neither of these committees have been properly functioning.

Despite the importance of safeguarding or vetting public positions, a core priority for both sides has been to retain as many public jobs as possible. This means that the struggle over public positions is critical to any Palestinian reconciliation agreement. However, the challenge of implementing vetting in the Palestinian context is that there has been no transition, and there is no 'winning' side. This means there will be no political will for certain position-holders to be subject to a screening process, as officials who are taking part in the reconciliation process may be the same people who might also be subject to, and fail, any vetting procedures. The term 'vetting' in and of itself may therefore be inflammatory and cause hindrance to the reconciliation process, as it affects politically powerful and influential personalities who may prevent any transition process from progressing if it negatively affects their own job status. In turn this poses a risk to the success of on-going dialogues and the implementation of related measures.

Whilst civil society calls for the end to impunity for those who committed grave violations, it also advocates for successful reconciliation. This is a complex and fragile process involving many initiatives and efforts across both sides. Ultimately this may involve striking an unpalatable balance between concessions / compromise and justice in order to achieve sustainable stability. Civil society recommends the introduction of vetting procedures for both existing and future holders of public positions, *as well as* the introduction of a strategic, time-mandated programme of public sector institutional reforms in the longer term. However, if the introduction of vetting for existing post-holders severely threatens the success of the reconciliation process, as a second option civil society considers the implementation of institutional reforms as a stand-alone measure.

Institutional reforms are an alternative safeguarding process, although they take place over a much longer period of time and may not have the effect of ensuring those who have committed violations lose their positions in the immediate term. These reforms should transform State entities by de-politicising public positions, introducing a meritocratic recruitment process, setting out clear job descriptions and role remits, and

ensuring transparent accountability mechanisms for those who transgress Codes of Conduct, including those holding senior positions.

## Introduction

This paper sets out discussions on seven key issues: **firstly**, what are safeguarding provisions relating to publicly funded positions and why are they important? **Secondly**, examples from other countries, **thirdly**, historical background to Palestine and its approach to publicly funded positions, **fourthly**, the reconciliation agreements and publicly funded positions, **fifthly**, discussion around which entities and individuals should be vetted in the Palestinian context, **sixthly**, how should a safeguarding process be carried out in Palestine? and **seventhly**, institutional reforms as an alternative to vetting in Palestine.

The paper then makes recommendations to decision-makers (above). These recommendations follow a comprehensive consultation process that took place in the West Bank and Gaza Strip. Any comments set out in this report remain anonymous, but are reflective of those consultations.

### **First: What are safeguarding provisions and why are they important?**

Vetting within the context of transitional justice is a preventive measure referring to an impartial and transparent investigation into the records and histories of government officials (existing post-holders), or those applying for public office (future post-holders), in order to prevent perpetrators of human rights violations from holding State-funded positions. This differs from lustration, which is a term commonly associated with processes that were implemented in Eastern bloc countries after the fall of communist / socialist regimes. Lustration usually involved completely purging public institutions of personnel associated with previous regimes.

Vetting is crucial in post-conflict contexts for several reasons:

- It helps repair the citizen-State relationship that has been severely undermined by the perpetration of violations by State representatives, thus restoring public confidence in the security apparatus and facilitating sustainable stability;
- Vetting embodies the principle that State bodies should be distanced from acts of violence, regardless of whether those violent acts have been criminally prosecuted;
- Vetting facilitates long-term institutional reforms;

- Vetting replaces old elites that have facilitated grave violations with new ones that are aligned with a culture of accountability and a mindset that lends itself towards public service;
- Circumstantially, vetting combats corruption by destroying the network of relationships that prioritise self-protection and loyalty over the rule of law and meritocracy.
- Vetting plays a substitute role for prosecution if, for example, there is a form of amnesty as part of peace agreements. High-ranking officials sometimes cannot be prosecuted because of their influence, but barring them from public office for a period of time may be an acceptable alternative. It therefore achieves the exclusion or removal of prominent officials during critical periods of transition. By the time the bar to employment is removed, institutions may have reformed sufficiently to disallow re-employment.
- Vetting supports international human rights principles by helping facilitate the de-politicisation of access to public services and protection, including Article 2 of the *Universal Declaration of Human Rights*, which provides that everyone is entitled to all the rights and freedoms outlined in the Declaration without distinction of any kind, including ‘political or other opinions’. Articles 8, 21, and 23 of the *Declaration* together also set out the right of equal access to public services. These principles are reiterated in the *International Covenant on Civil and Political Rights* (Article 25), and the *International Covenant on Economic, Social, and Cultural Rights* (Article 2). Vetting also reinforces Article 33 of the *Arab Charter on Human Rights*, which states that every citizen has the right to occupy a public office in his country.

Vetting is not always possible in transition contexts. This can be for a variety of reasons, including lack of political will, absence of technical expertise and funds to implement huge structural changes, the continuance of conflict and political instability, and refusal of those who remain in power to accede to vetting because there has been no official transition, or no clear ‘winning’ and ‘losing’ side. In these contexts, institutional reform can still form part of a peace process agreement. Institutional reform takes effect in the much longer term, often with international programmatic assistance, but is nonetheless effective in ensuring public services are executed in a professional way (see below).

## **Second: Examples of safeguarding procedures from other countries that have undergone transition**

Whilst there is no model or template that is applicable to all countries, it is useful to analyse the experiences of processes that have happened in other contexts, as they could

inform efforts in Palestine. In the Czech Republic, all officers and informants of the Communist security forces and all-party officials were excluded from public service appointment in posts from the provincial level and above. The *Lustration Law* was passed, which stated that anyone who had “consciously collaborated” with the State Security apparatus could not apply for five years for posts including high-ranking governmental, military and judicial positions, but also State-run media, and certain positions in the financial sector and in academic institutions. The law required those who wanted to hold these positions to prove they had not collaborated with the Communist State Security regime. This imposed a burden of proof onto the person wanting to apply for such positions, which can be problematic as people were required to prove a negative, i.e. that they had *not* carried out an act.

In Lithuania, all citizens who cooperated with the secret police were required to appear before a special commission for investigation. In Albania, candidates for public office were required to obtain a clearance certificate before they were eligible for employment, while in Poland admission of previous cooperation with the secret police did not automatically bar an official from assuming of public office. However, concealing any previous cooperation resulted in a 10-year ban from holding public office. This was implemented in an effort to encourage transparency and openness in acknowledging past wrong-doing.

After the collapse of the regime in East Germany, vetting was challenging due to the large number of secret police employees, which reached approximately 90,000, in addition to hundreds of thousands of informers and collaborators. These people were disallowed from re-entering employment in the State sector. In addition, employers were entitled to ask a specialist body about an individual’s involvement with the previous security services.

In the Arab countries, populist procedures were implemented but were ultimately not effective in achieving the purpose of vetting or lustration. For example, in Iraq there was a legal Order in the transitional period that required the eradication of the Ba'ath Party from public institutions. Exceptions were made when it was “in the interest of the people” or when it was “unfair” to bar individuals from re-employment. These exceptions were problematic, however, as the provisions became open to inconsistency, politicization and corruption in their application.

In Libya, safeguarding provisions were central to post-Revolution peace-building efforts. It was initially proposed that no person who had worked with the Gaddafi regime in the ten years preceding the 2011 Revolution could run for public office. However, this was rejected by various political factions, who demanded that the law be amended to go back further, i.e. by preventing anyone from holding office who had worked with the regime since Gaddafi came to power in 1969. The latter version was enshrined in The Political Isolation law, which was passed by force in 2013 when militias surrounded Parliament

and forced politicians to vote on it. Some office holders subsequently lost their jobs, but instead of facilitating reconciliation, this law contributed significantly to the renewed conflict that erupted in 2014. The law was eventually repealed in 2015 by the Libyan government based in Tobruk (one of two Libyan governments). One of the key lessons from Libya is that it might be more constructive and proportionate to target the *behaviour* of a person as opposed to banning an individual simply because of their previous *position*, or because they have been caught in a time bracket espoused by law.

Of all the international examples of vetting, the situation in Northern Ireland perhaps bears the most similar resemblance to the Palestinian context. There was no party-political dominance of any State institution in Northern Ireland that would equate to a 'winner' and 'loser' situation (unlike in Eastern Europe, or Iraq, for example). Unfortunately, vetting was not an issue that was comprehensively addressed in Northern Ireland, and therefore safeguarding mechanisms were not introduced. There was, however, a strong push for institutional reform and transformation of security institutions. The police force, formerly known as the Royal Ulster Constabulary, was replaced by the Police Service of Northern Ireland. As with all institutional reforms, this was a long-term process. Employees that had ruled those institutions during the previous conflict period were eventually pushed to take retirement packages. Similarly, in El Salvador some security personnel were retired off with generous pensions. This could be interpreted by the public as individuals being financially rewarded for their past misconduct. However, this was a sacrifice that ensured the goal of reforming institutions was eventually realised, and that peace process negotiations were kept on track by those who still held significant power during the relevant period.

### **Third: Historical background to Palestine and public positions**

The governing system in Palestine is a product of successive mandates that historically ruled the Territory; beginning with British colonial rule, followed by Jordanian and Egyptian rule, the Israeli occupation accompanied with the emergence of the Palestinian National Authority, and finally the Palestinian infighting followed by recent attempts to reach a reconciliation agreement. Debates have arisen surrounding the reconciliation agreements and how they impact the Palestinian administrative system which is no longer focused on resisting the Israeli occupation, but was envisaged to be comprised of one central party that was predominantly partisan. The failure to assign a neutral party to take over that mandate has paved the way for Fatah to achieve control over the administrative authority and its affiliated governmental organizations. Fatah's approach to establishing the State's administrative bodies was predominantly politically biased, resulting in nepotistic recruitment that was carried out under the absence of clear governing regulations and lack of accountability and monitoring mechanisms.

The weakness of Palestinian administration emerged at the outbreak of the second intifada in 2000, when calls for reforming all governmental organizations and ministries intensified. In response, a ministerial committee, known as “100 days reform plan” was established, although corruption continued to be prevalent<sup>18</sup>. Elections were held in 2006, and Hamas was elected as the tenth Palestinian government, whose cabinet then adopted many resolutions in the interest of appointing new public employees and repealing several administrative resolutions previously adopted on appointing and promoting employees. That period witnessed a conflict between the Cabinet and the Presidency, as both parties had overlapping and unclear jurisdictions which triggered many clashes, ignited infighting on the political and institutional levels, and finally caused a complete split between the West Bank and the Gaza Strip.

Subsequently, the tenth government moved to Gaza, and the Cabinet started to recruit undergraduates (for example, the Chair of the Energy Authority). It also established its Executive, consisting of the Hamas cadre. On 4<sup>th</sup> September 2006, the Hamas Cabinet allowed those who were arbitrarily dismissed from their posts (and those who were deprived of their right to employment because of their political affiliations), to file a claim for redress. Paradoxically, Hamas dismissed several employees and replaced them with others of the same political affiliation with Hamas. Up to the end of 2006, the number of employees appointed by Hamas was 84,000 civilians and 82,000 persons in security agencies that Hamas was soon no longer able to pay the salaries of its employees, and the latter led a strike. This backfired since it paved the way for discriminatory hiring practices that take political affiliation as the sole basis for recruitment. This was a watershed in the history of the Palestinian people, as it led to Hamas seceding from the West Bank and militarily took control of the Gaza Strip, while Fatah invoked the illegitimacy of the Hamas government to invite its employees in the Gaza Strip to strike, pledging to continue to pay their salaries.

Palestinian President Mahmoud Abbas, declared a state of emergency, following which an emergency government under Prime Minister Salam Fayyad was formed. Many resolutions overturned decisions relating to appointments and promotions and blocked temporary employment contracts and civil service contracts. These decisions affected 31,000 security personnel and 8,000 civilians. A committee was mandated to investigate these contracts, and recommended that 70% of salaries be paid, until the number of contract employees decreased to 146,000. Hamas has also recruited employees in the Gaza Strip, mainly to compensate for vacancies of fired and / or non-enrolled employees in compliance with government decisions in the West Bank, and to ensure that the

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<sup>18</sup> By Conviction, Not by Infliction: The Internal Debate over Reforming the Palestinian Authority, M. Klein, *Middle East Journal* Vol. 57, No. 2 (Spring, 2003), pp. 194-212.

government and its employees share the same approach. This brought the number of employees who receive their salaries from Hamas to approximately 23,000.

On 3 September 2007, the Council of Ministers decided at its 18th meeting to consider the Security Clearance Procedure as part of the appointment process, which subjects the recruitment process to political and partisan considerations. Similarly, in the Gaza Strip, Hamas monopolized employment opportunities for its members, particularly in education, health, and leadership of the Executive. This led the unions to announce a full strike. The Security Clearance Procedure remained the basis of the recruitment process, which constitutes a clear violation of the Palestinian Civil Service Act, the Basic Law and constitutionality. Subsequently, on 4 September 2012, the Palestinian Supreme Court decided to abolish the Security Clearance Procedure, given that it violates national and international laws.

#### **Fourth: The reconciliation agreements and public positions**

Mistrust prevails in the relationship between the two parties, as reflected by the Palestinian National Authority's failure to meet its obligations and commitments to reverse the decisions taken before the 2017 Cairo reconciliation agreement. These decisions relate to a commitment to cut 30% of the salaries of employees in the Gaza Strip, and force civilians and security personnel towards early retirement. The Palestinian National Authority did this in an attempt to pressure Hamas to dissolve its Administrative Committee, which Hamas formed in 2017 to govern the Gaza Strip, and which represents a parallel government to the Palestinian National Authority in the West Bank. It is noteworthy that the Cairo talks of 2011 resulted in the establishment of a Committee to follow up the issue of public appointments, which the government of Hamdallah greatly needed. However, the formation of this committee faced difficulties due to partisan recruitment of employees within government agencies and institutions (in West Bank and Gaza). This obviously hindered the effective work of government and management of several functions, including the administration of the crossings of Gaza. However, this Committee has not yet been formed.

Partisanship still remains the basis for recruitment and classification, regardless of scientific and practical qualifications, as appropriate candidates are selected before the completion of legal and administrative selection procedures. This makes it evident that the parties' main disagreement revolves around senior posts, not around prioritising public interests.

### **Fifth: Safeguarding in the Palestinian context: which entities and individuals should be vetted?**

The Legislative Council, whose legitimacy derives from Article 47 of the Palestinian Basic Law, plays an important role in the control of official powers, as it has formed regulatory and legal committees authorized to request information or clarification from institutions, ministers, and officials of the National Authority concerning the matters discussed in the reconciliation talks. The Legislative Council has the power to request files and information about individuals. Civil society does not propose at this stage to specify names of individuals who should be subject to vetting and safeguarding procedures. However, this should not prevent publicly funded entities from carrying out their own investigations and prosecutions relating to serious violations of the law and human rights, including acts of torture, murder, disappearances, and arbitrary detention. Civil society urges State entities to ensure these investigations are not limited to the direct perpetrators, but rather also to those who ordered, assisted and / or reasonably failed to prevent such violations.

In terms of vetting and safeguarding priorities, reform efforts should focus on security agencies, law enforcement institutions and judicial bodies, as they are directly responsible for maintaining stability, basic security and the protection of human rights, thus creating conditions conducive to successful reconciliation and the rapid transition of unity. Some people argued that as a requirement for transitional justice, the public service requires a programme of administrative reform under a constitutional law passed by the Legislative Council. Others stated that reform of the most senior public positions, such as ministers, must be prioritised, after which general elections should be held. This should be followed by a gradual reform of other public positions.

Civil society believes that it is imperative that the judiciary is reformed and all undue interference with the judiciary is ceased, as the issue of public appointments cannot be completed without the judiciary being able to discharge its obligations by restoring rights to citizens and preventing perpetrators from holding positions in the public service, especially in senior positions. Although there are provisions in the Basic Law (and other relevant laws) that criminalize interference in the work of judges, direct interventions are still frequently practiced. Issuing laws that expressly prohibit interference with the work of the judiciary, and the imposition of deterrent penalties is necessary to ensure the judiciary is independent and effective. Judicial accountability mechanisms should also be introduced, which would prevent politicisation of the judiciary and reticence on the part of judges to sit on certain criminal cases, or to pass judgments in a biased manner.

Regarding the security services, some Palestinians that were consulted believe that they must be unified between the West Bank and Gaza, with a work ethic based on transparency and professionalism; becoming de-politicised so that their work focuses

only on maintaining the security of the State and the citizen, and not interfering beyond their powers (as already stipulated in the Security Forces Law). Others stated that they felt the unification of the security services would be a disincentive to the possibility of reconciliation. What remains clear is candidates that are holding or seeking employment in the security services should be subject to safeguarding processes in the same way that other publicly funded employees should be.

#### **Sixth: How should a safeguarding process be carried out in Palestine?**

Civil society recommends that the committees that have been created under the reconciliation agreements should be functional and supported as much as possible, without unnecessarily creating new entities that could duplicate or undermine existing or future efforts. Therefore, this paper proposes the formation of a unit *within* the Legal and Administrative Committee called the '**Job Vetting Committee**' or '**Public Positions Committee**' (whichever is most acceptable politically) charged with unifying the institutions of the Palestinian National Authority, and implementing safeguarding provisions that affect **both existing and future publicly funded post-holders**, including setting standards and Codes of Conduct for public positions.

Members of this Committee should be independent of political factions (as much as is reasonably possible), and independent of State structures and entities. Representation must be equal in terms of population distribution between the West Bank and Gaza. The remit of the Committee should cover the most senior public positions across all publicly funded positions, and positions that have the power to significantly influence the public. This Committee can coordinate with the Supreme Security Committee, which carries out the task of reforming and professionalising the security services, in order that there is a complementarity of efforts.

This paper also moves away from recommending the passing of new legislation, as the creating of new legal instruments will be time consuming, subject to political bargaining and may de-rail the implementation of the reconciliation agreements. Instead, civil society recommends the use of existing international standards and national and international expertise in order to implement a safeguarding mechanism that works in the unique Palestinian context. For example, the UN's "Rule of Law Tools for Post-Conflict States" recommends the creation of an Integrity Data Bank; a database that contains personnel records and information about individuals, such as court decisions, and the employee's role in any human rights violations, whether prosecuted or not.

**Criteria** that should be applied to vet candidates should centre around two principles:

- *Firstly*, whether or not the individual concerned committed a serious breach of the principles contained in the Palestinian Basic Law, and

- *Secondly*, whether that individual ordered, assisted, or reasonably failed to prevent gross human rights violations, including murder, torture, enforced disappearances, or arbitrary detention against citizens exercising their basic rights and freedoms during the conflict phase.

**Jurisdiction** of the Committee should cover all aforementioned publicly funded entities, as well as positions that hold public influence, e.g. heads of academic institutions, and State-run media outlets. Positions under the remit of the Committee should span every level in the organisation, i.e. the senior positions of the civil positions which include, according to the law, senior planning and supervisory positions such as undersecretaries, heads of departments and general managers and the higher positions. In addition, the senior positions in military according to what is stated in the Law of Service in the Palestinian Security Forces, of the ranks of officers starting from lieutenant and above: Lieutenant, First Lieutenant, Captain, Major, Lieutenant Colonel, Brigadier General, Major General and Lieutenant General. For the judicial authority, the positions include judges of first instance and higher. And for the prosecution, the positions include a prosecutor and higher positions.

The **temporal remit** of violations that the vetting should cover will be from June 14<sup>th</sup>, 2007 to date.

### **Seven: Institutional reforms as opposed to vetting.**

The immediacy and threat to position-holders of vetting may be inflammatory and cause hindrance to the reconciliation process. Vetting affects politically powerful and influential personalities who may prevent any transition process from progressing if it negatively affects their own job status. As already mentioned, institutional reform is the longer-term 'relative' of vetting. It acts as a complementary initiative to other safeguarding processes, and covers a broader set of concerns relating to future appointments and ensuring the professional delivery of public services. It may therefore be a more acceptable solution to current decision-makers than other alternatives.

Whilst civil society calls for the end to impunity for those who committed grave violations, it also advocates for successful reconciliation. This is a complex and fragile process involving many initiatives and efforts across both sides. Ultimately, this may involve striking an unpalatable balance between concessions / compromise and justice in order to achieve sustainable stability. This may mean that vetting of existing post-holders may not be possible in the short term, although if institutional reforms are enacted in the longer term, those same people would likely not be employed.

**Civil society recommends, in the first instance, the introduction of vetting procedures for both existing and future holders of public positions, *as well as* the introduction of a strategic, time-mandated programme of public sector institutional reforms.**

**However, if the introduction of vetting for existing post-holders severely threatens the success of the reconciliation process, as a second option, civil society considers the implementation of institutional reforms as a stand-alone measure.**

Institutional reforms that civil society propose, and should be implemented by the Public Positions Committee / Job Vetting Committee include:

- Creating Codes of Conduct with assistance from technical experts for all publicly funded positions / entities in line with international standards. These shall be applicable to all office-holders, including the most senior personnel,
- Creating transparent accountability mechanisms, while ensuring the effectiveness, independence, and credibility of accountability processes,
- Ensuring that punishments for violations must be real and proportionate,
- Appointments should be meritocratic, free from nepotism and political influence. There should be a transparent and clear process for the appointment of publicly funded personnel, including gender equitable processes, and that any appointment should be on the basis of competence and skill in accordance with the principle of equal opportunities.
- Transparency and credibility should be ensured when providing information to the general public, and enabling individuals to access the above-mentioned information,
- Position holders should not benefit personally, directly, or indirectly from their positions,
- There should be disclosure of any perceived or potential conflict of interest that may prevent the employee from carrying out his / her duties in a professional and impartial manner,
- Post-holders should publicly declare any financial interests and assets they have that may affect, or be perceived to affect their position, also declaring any political role or activity.
- Comprehensive anti-corruption measures should be implemented that prevent misuse of public funds,
- Not granting a reward (financial or functional) to any employee who does not provide services to people satisfactorily.

It is imperative that any institutional reforms are unilaterally agreed and implemented across entities on both sides, in accordance with a time-sensitive **Safeguarding Strategy** or **Road Map**, that particularises and focuses on the key reform demands, as set out

above. This should form part of a comprehensive **Transitional Justice Strategy** that also addresses other transitional justice modalities.

## Conclusions and recommendations

A fair Palestinian Reconciliation Agreement will never be sustainable unless the issue of public employment is properly considered. Both parties have become polarised, thereby reinforcing the division and promoting self-serving and corrupt appointments and promotions. This has in turn impeded the embodiment of the rule of the law, facilitating weak organizational structures that are incapable of functioning effectively. Both Fatah and Hamas are implicated in gross human rights violations<sup>19</sup>. It is important to emphasize that as long as there is no clear political transition, job vetting will be very difficult because it affects powerful and influential personalities who are still in office, and these personalities will prevent any process that negatively affects their own job status. However, institutional reform is an alternative to the more immediate and short-term transition-focused vetting process, and should ultimately have the same effect of improving public services and preventing violations.

Failure to implement any safeguarding principles for publicly funded positions will lead to a further erosion of confidence in public bodies, as well as promoting a culture of impunity and corruption. Replacing the old elites that violated public trust with individuals that are subject to the culture of accountability will increase the quality of services provided by public authorities to the Palestinians. This will inevitably affect the life of all Palestinians, ensuring economic growth and a better quality of life. The adoption of a unilaterally agreed comprehensive Strategy or Road Map to implement multiple transitional justice efforts is therefore the only way to ensure long-term stability is realised in Palestine.

**Recommendations** from civil society regarding safeguarding public positions are as follows:

- Civil society institutions must seek to form a "**community coalition for transitional justice**". This coalition should have a fundamental role in mobilizing public support and momentum to call for functional vetting and safeguarding provisions as one of the most important mechanisms of transitional justice.
- Civil society organizations call for the formation of a unit within the legal and administrative committee that undertakes the task of working to unify the institutions of the Palestinian National Authority. This Committee can be called the '**Job Vetting Committee**' or '**Public Positions Committee**' (hereafter known as 'the Committee'). Its function will be to implement job vetting and set relevant

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<sup>19</sup> Two Authorities, One Way, Zero Dissent: Arbitrary Arrest and Torture Under the Palestinian Authority and Hamas, Human Rights watch, October 2018.

- standards for all future appointments, including criteria for validation and vetting or occupational dismissal standards. This Committee can be supported by national and international experts in order to ensure it carries out its functions effectively.
- The jurisdiction of such a Committee should cover not only State-funded senior positions, but also those positions that can influence public thinking, policy or the economy. Positions covered should include (but not be limited to): heads of public universities, banking sector chiefs, academics and State-run media personnel, all police and security sector personnel, military, Executive, Judicial and any other civil servant position funded or part-funded by Hamas or Fatah authorities.
  - Powers of the Committee shall include the authority to bar current post-holders from public funded positions for a period of up to ten years.
  - The members of the Committee must be known for their competence and integrity, and be independent of political factions.
  - The unit can coordinate with the Supreme Security Committee, which undertakes the task of rebuilding the security services on a professional basis.
  - **Vetting criterion** that should be used to determine whether an applicant should be given a public position should include whether the individual has ordered, been involved with, assisted or reasonably failed to prevent serious human rights violations. Consideration should also be given to whether or not the post holder has been charged with, or convicted of, serious criminal offences.
  - There should be a robust strategy and programme of **institutional reform** agreed and enacted by both sides within an agreed period of time. The reforms should include (but not be limited to) transparent appointment processes that include gender equitable recruiting, clear job descriptions for all post-holders (including senior positions), ethical standards and Codes of Professional Conduct that all post-holders must abide by, and transparent and independent accountability processes and disciplinary measures that lead to proportionate and appropriate outcomes for those who breach those standards.
  - A **comprehensive Transitional Justice Strategy** is needed. Various transitional justice modalities should be implemented in parallel, including the prosecution of those who have committed gross violations of human rights, restorative justice processes, and the giving of reparations to victims of the conflict. These should be implemented in a time-sensitive and strategic manner in line with the Strategy proposed by civil society and approved by both sides. It is imperative that the sequencing of these initiatives is carefully considered, and that implementation is not siloed, but that each modality is considered in tandem with the others as complementary measures. Cumulatively, these mechanisms will facilitate reconciliation and stability across Palestine.

## Overall conclusions

The Reconciliation Agreements lack a clear and comprehensive approach or vision regarding how to address human rights violations. For example, there is no advantage in implementing prosecutions if laws are not reformed to prevent further violations or punish past atrocities. Likewise, symbolic guarantees of non-repetition by the authorities would be meaningless if they were not accompanied by tangible reparations to victims of violations. To this end, the entire set of transitional justice tools must be viewed as a matrix consisting of many interdependent parts; each part needs to be carefully considered and informed by the public, properly implemented and sequenced. Any future Palestinian Reconciliation Agreement must include the formation of a committee whose mandate it is to seek the truth, and to disclose the nature of the grave violations and crimes that occurred, as well as determining who is responsible.

Although there is a positive trend in the Reconciliation Agreements regarding the promotion of reconciliation and tolerance, this should not be a substitute for material compensation if there is a basis for it. If symbolic forms of compensation are provided without any associated tangible benefits, then they can be interpreted as meaningless words, and devoid of the authorities' serious commitment to future change. Although victims are mentioned in some of the Agreements, they are not central to these agreements.

### **Recommendations (basic features of the draft transitional justice strategy in Palestine)**

These recommendations aim to help achieve the greatest possible consensus in civil society that can lobby to establish effective transitional justice mechanisms. They constitute a starting point for building a national **Transitional Justice Strategy or Roadmap** that seeks to set general parameters that will guide decision-makers, implementers, the international community and civil society in achieving consolidated and unified goals. This Strategy must set the general policies or foundation that can later be built upon. It is suggested that this Strategy be based on the existing committees in the Reconciliation Agreements, rather than creating new bodies.

The recommendations listed below form part of a comprehensive set of proposals for transitional justice, applicable to the West Bank and Gaza Strip. In the event that there is the will to implement transitional justice mechanisms as recommended in this report, it is hoped that timetables, goals, stages, specific activities and other issues such as the sequencing and complementarity of the mechanisms will be further defined. Together, these mechanisms are supposed to facilitate reconciliation and stability throughout Palestine.

Civil society institutions play a fundamental role in addressing human rights violations, and therefore they must ensure all transitional justice mechanisms are properly considered, national consultations take place, and there is inclusivity regarding the participation of women in the dialogues and on committees. It should not be left to the parties – who caused the violations - to address these issues without proper consultation and consideration, as this may lead to no transitional justice mechanisms being implemented at all. Civil society calls for consultations with the parties to ensure that the international community endorses these recommendations, and supports them in a collaborative manner.

## Overall recommendations

### **First: The role of civil society and the international community in including transitional justice mechanisms in reconciliation agreements**

#### **Recommendations for civil society**

- Civil society institutions must play a central role in addressing human rights violations, and they must coalesce to form a community coalition for transitional justice. This coalition will be formed from non-governmental organizations and relevant institutions that specialize in any of the transitional justice mechanisms. It is also possible to form different sub-committees or units within the alliance in order to focus on the different mechanisms. The goal of this alliance will be:
  - Monitoring the progress of reconciliation agreements, and implementing any transitional justice mechanism provided for in the agreements,
  - Advocating for transitional justice mechanisms in line with international standards and best practices,
  - Serving as a unified platform that would call for the adoption of a transitional justice strategy with one voice (see below).
  - Providing technical advice and guidance to state bodies on issues related to transitional justice mechanisms,
  - Ensuring the achievement of gender equality in all stages of the reconciliation process and implementing transitional justice and fairness measures for victims.
  
- There is a need to form a committee, or to reform the community reconciliation committee, and to be given the authority to form sub-committees such as the Truth and Equity Commission with the authority to request the initiation of prosecutions, job vetting, or compensation, also to propose recommendations regarding other transitional justice requirements, especially Institutional reform requirements.
  
- Civil society should agree on and strengthen the transitional justice strategy, and call on both parties to adopt it in a two-stage process. This will include all relevant transitional justice mechanisms and will serve as a focal point for all parties and bodies to ensure their implementation in an appropriate sequence, in a manner that takes into account the importance of the temporal factor in achieving justice. A transitional justice strategy should consist of:
  - A set of goals and/or a vision statement.

- Once the parties have approved the above, comprehensive consultations must be held with the relevant authorities on both sides, including the justice and security agencies, to decide on a practical roadmap or action plan that defines how to achieve the goals of the strategy: How will the strategy be implemented? What are the challenges? and related timeframes.
- The strategy should also include a commitment to institutional reform as an element of transitional justice, as this is closely related to the Palestinian context. Institutional reforms can be seen as complementing vetting or job audit procedures, as they help reduce corruption and foster a culture of internal accountability.
- Civil society must focus on how best to advocate for women's participation in the transitional justice process. This includes representation and attendance at debates and committees, as well as ensuring that any relevant tools are gender-sensitive.
- Civil society calls on the international community to support these recommendations, and to provide technical and financial support to ensure the achievement of the goals of the transitional justice strategy.
- Reconciliation agreements are usually discussed outside of Palestine (hosted by Egypt), undermining the participation of civil society in the reconciliation process. Civil society calls on the parties to adopt participatory approaches, and to ensure reasonable access to decision-makers in the reconciliation process.

### **Recommendations to the international community**

- Encouraging both Fatah and Hamas to continue reconciliation initiatives that recognize that the extent and type of violations warrant punitive measures in the form of prosecutions,
- Encouraging the parties to make a public admission of guilt for serious violations,
- Support the creation and adoption of a comprehensive transitional justice strategy, and ensure that it is genuinely and comprehensively consulted on all relevant justice and security bodies and mechanisms in Gaza and the West Bank, as well as civil society and other relevant stakeholders.

- Ensure that donors adopt a unified and strategic approach in how to provide technical and other assistance to the parties in order for transitional justice efforts to be viewed holistically, sequentially properly and not replicated.
- Supporting the establishment of a national judicial body that can prosecute crimes related to the division, and support it technically by consulting with impartial Palestinian and international judges qualified to prosecute crimes against humanity and gross violations of human rights.

**Second: Specific recommendations regarding the prosecution of the perpetrators of the division-related violations**

- The Community Coalition for Transitional Justice should lobby for prosecution of perpetrators of grave violations. In order to ensure effective support for the transition process, a subcommittee with a specific focus could be formed under the umbrella of the Community Coalition for Transitional Justice.
- Lobby for the formation of a formal committee within the community reconciliation unit of the reconciliation agreement, called the Rule of Law Committee. This unit can investigate crimes referred to it by the Truth and Equity Commission, and can implement and monitor all aspects of prosecutions related to the institutional reforms of the justice sector.
- The Community Coalition for Transitional Justice's mandate could include, among other things, supporting victims through any judicial process, lobbying for justice sector institutional reform, ensuring that rules for the impartiality and independence of Rule of Law Commission members are defined, and monitoring their implementation. Also, creating policies and rules that would allow an effective prosecution mechanism to operate in Palestine. Pending the approval of any courts or prosecution procedures, the coalition can coordinate legal documentation efforts and preserve evidence of violations, with the goal of bringing it to justice once accountability mechanisms are adopted.
- The two sides of the division should reconsider and properly address the issue of criminal accountability, recognizing that reconciliation cannot be achieved, nor is stability preserved, by focusing solely on tolerance in the absence of punitive justice. Civil society urges the parties to build on the experiences of states that are successful in reconciliation, and also to take into account the lessons learned that can be applied to the unique characteristics of the Palestinian context.

- Prosecution mechanisms must be considered in line with other transitional justice mechanisms (truth-seeking, reparations, job vetting, institutional reform, and guarantees of non-repetition), recognizing that they are all necessary and interrelated. The link between criminal accountability and the truth commission must be recognized, and consideration should be given to how both operate in an integrated manner. For example, the truth-finding commission could be referred to a rule of law commission.
- Support the creation of an independent and impartial judiciary, with the manner in which it will be discussed (i.e. mixed, national, national with international support), and ensure that it is in line with international standards, and that it has jurisdiction that covers the temporal and substantive scope of the violations that occurred.
- The strategy of not hearing any lawsuits in military courts or security courts should be supported, even if the alleged perpetrator is a current or former member of the military wings or security services.
- It is necessary to pledge that any such prosecution mechanism will be free from undue political interference, and to provide policies and guarantees that define the mechanisms for holding positions in it through a transparent process and based on the criteria of neutrality, independence and competence.
- Ensure that civil society is properly involved in reconciliation discussions between the parties, and that due consideration is given to recommendations made by civil society.
- Adherence to institutional reform initiatives for justice bodies and entities, namely the judiciary, the public prosecution, and the judicial enforcement agencies.

### **Third: Specific recommendations related to compensation for victims of violations**

- A joint compensation committee should be formed between the parties, with the support of both parties, whether under the current reconciliation agreement (Cairo Agreement 2011) or any future agreement, called the “Compensation Committee,” and it is proposed that it be formed within the framework of the current community reconciliation committee without the need to establish new mechanisms or additional bodies.

- The Community Coalition for Transitional Justice should provide and facilitate technical support to the Compensation Committee, including providing advice and lobbying on:
  - Criteria for determining who will receive compensation and who will be exempt from it,
  - Calculating of damages while ensuring that they are consistent and appropriate according to realistic budget constraints,
  - Creating effective credit protection mechanisms that can prevent corruption or misappropriation of funds,
  - A fair selection process for delegates,
  - Rules of procedures and standards in line with international standards and best practices.
  
- Civil society strongly urges the parties to communicate clearly with Palestinians that obtaining compensation is not in exchange for victims not pursuing other legal remedies, for example criminal prosecution or civil lawsuits, and therefore any compensation will not provide a path to impunity that would enable perpetrators to evade other forms of justice.
  
- The Community Coalition for Transitional Justice provides its support to the Compensation Committee by ensuring that clear and transparent information is published about it in both the West Bank and the Gaza Strip.
  
- The Community Coalition for Transitional Justice also provides its support regarding public access to consultations, and is ready to work with and facilitate legal clinics and / or consultation services that will help guide applicants through the process.
  
- While civil society believes that it is the state's responsibility to bear the full cost of compensation for the violations committed by its agencies, the reality of the lack of financial resources that the state suffers from and the consequent distress that the Palestinian people suffer means that the parties may need external financial and technical assistance in achieving the compensation goals. Civil society calls on the international community to unify efforts and adopt a strategy based on coordination with the parties and bodies established under the reconciliation agreements. This could include implementing cost-sharing initiatives that prevent the state from shifting the entire financial burden to other parties, and / or providing international technical assistance with respect to any aspect of the compensation mechanism and disbursement process.

#### **Fourth: Specific recommendations regarding protection of holding public offices and institutional reform**

- Civil society organizations call for the formation of a unit within the Legal and Administrative Committee to undertake the task of working to unify the institutions of the Palestinian National Authority. This committee could be called the "Job Vetting Committee", its mission would be to implement job vetting and establish relevant standards for all future appointments, including validation and vetting criteria or dismissal criteria. This committee could be supported by national and international experts in order to ensure that it carries out its functions effectively.
- The jurisdiction of such a commission should not only be limited to high-level positions funded by the state, but must also include positions that could influence public opinion, politics or the economy. The positions covered should include (but not be limited to): presidents of public universities, heads of the banking sector, academics, media professionals run by the state, all members of the police and security sector, judges, prosecutors, and any other civilian position fully or partially funded by Hamas or Fatah.
- The powers of the committee must include the power to prevent current job holders from assuming publicly funded jobs for a certain period that could reach ten years.
- Committee members must be known for their competence and integrity, and be independent from political factions.
- This committee can coordinate with the Supreme Security Committee, which undertakes the task of rebuilding the security services on a professional basis.
- The vetting criterion that is used to determine whether an applicant should be granted public office must include whether an individual has ordered, participated in, helped or reasonably failed to prevent gross human rights violations. It should also be considered whether or not the incumbent has been charged or convicted of committing serious criminal offenses.
- There must be a robust strategy and program of institutional reform that is agreed upon and operationalized by both sides within an agreed period of time. Reforms

should include (but are not limited to) transparent recruitment processes that include gender fair recruitment, clear job descriptions of all position incumbents (including senior positions), ethical standards and codes of professional conduct that all position holders must adhere to, and, Transparent and independent accountability and disciplinary processes that lead to proportionate and appropriate outcomes for those who violate these standards.