

Personal Jurisdiction of Military Courts in the MENA Region

Mr Chair, Excellences, distinguished delegates, ladies and gentlemen,

I am honoured to address you today on behalf of the International commission of Jurists. As a rule of law organization, we believe that the use of military courts raises serious concerns as far as the effective, independent and impartial administration of justice is concerned. These concerns are not only relevant to the independence of the judiciary and respect for the rule of law, they are also relevant to the protection of human rights, including fair trial rights and the rights of victims of human rights violations to effective remedies and to reparation.

In the Middle East and North Africa (MENA) region, the use of military courts is particularly problematic because they have very broad jurisdiction to hear cases involving both civilians and allegations of human rights violations by military and security personnel.

My intervention will highlight certain aspects of this broad jurisdiction, including by referring to a limited number of examples from Egypt, Tunisia and Morocco. These examples are for illustrative purposes only.

In Egypt, the trial of civilians before military courts has been a distinct issue both under the Mubarak regime and in the aftermath of the uprising that toppled him.

Under article 5 of the Military Justice Law No. 25 of 1966 (MJL), military courts have jurisdiction over all crimes where one party, whether the victim or the defendant, is a member of the military. Juveniles may also be tried before military courts under article 8. Furthermore, article 6 of the MJL authorizes the President during a state of emergency to refer any case whatsoever to a military court.

Following the ouster of President Mubarak, more than 12,000 civilians were tried before military courts, including protesters, human rights defenders, journalists, and other persons suspected of opposing the military or the government.

Despite assurances by Egypt's constitution-drafting committees that the jurisdiction of military courts over civilians would be removed, the 2012 and the 2014 Constitutions have both perpetuated such jurisdiction. The 2014 Constitution permits the trial of civilians before military courts for crimes "that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties".

Most recently, a new decree by Egypt's President, Law No. 136 of 27 October 2014 'on securing and protecting public and vital facilities', further extended the jurisdiction of military courts to try civilians. The law places all cases involving attacks against "public and vital facilities" under military jurisdiction for the next two years, and directs civilian prosecutors to refer any crimes at those facilities to their competent military counterparts.

Giving a retroactive effect to this law, the Cairo Criminal Court declared on 14 November 2014 that it was not competent to try five students who were arrested in the context of protests that broke out at Al-Azhar University against the military and the government. The five students were charged with, among other offences, "participating in an unauthorized demonstration" and "damaging public property". The Cairo Criminal Court referred them to the military justice system.

It is particularly noteworthy that, under article 48 of the MJL, the military judiciary itself is exclusively competent to determine what crimes fall within its jurisdiction.

In Tunisia, following the toppling of President Ben Ali, amendments to the Code of Military Justice (CMJ)¹ significantly expanded the scope of the jurisdiction of military tribunals. Article 8 of the CMJ provides that military tribunals have jurisdiction over military personnel, students at military schools, retired officers when they are called to serve, civilian employees of the army in times of war or during a state of war or when the army or armed force is in an area where a state of emergency is declared, prisoners of war and civilians as authors or co-authors of offences. Article 5 of the CMJ further provides that military courts have jurisdiction over both ordinary crimes committed *by* military personnel and ordinary crimes committed *against* military personnel. In addition, article 6 of the CMJ provides that "in case of prosecution for offences under ordinary law committed by military personnel while off-duty and where one party does not belong to the army, the prosecutor or the investigating judge of ordinary courts should defer the charges against the member of the army to the competent military court of first instance".

Under this framework, military tribunals have been processing the majority of cases involving human rights violations committed by security and military personnel in Tunisia, including cases of unlawful killings and torture and other ill-treatment committed before and in the context of the December 2010 to January 2011 uprising. Most of these cases were initially brought before ordinary courts but have been transferred to military tribunals on the basis of the CMJ and Law No. 82-70 'on the General Statute of the Internal Security Forces'. Article 22 of this Law grants military tribunals competence over cases involving "agents of the Internal Security Forces for facts that took place in, or on the occasion of, the exercise of their functions when the alleged facts are related to their responsibility in the areas of internal and external security of the State, or to the maintenance of order on the public roads and in public places and in public or private businesses, and, during or following public meetings, processions, parades, demonstrations and gatherings".

In Morocco, the military court of the armed forces has jurisdiction, in times of peace, over all crimes and infractions concerning all members of the military, including persons defined by royal or regulatory decree as in

¹ Law No. 2011-69, amending the Code of Military Justice.

“active service”.² Jurisdiction also extends to all persons, regardless of whether they are members of the military or not, who commit a crime against a member of the armed forces or equivalent bodies, or who commit a crime involving one or more members of the armed forces as their conspirators or accomplices.³ Misdemeanours committed by civilians and involving members of the military as accomplices or conspirators are heard before ordinary courts, unless there is a specific provision to the contrary.⁴

Civilians can also be tried in military courts where the crime is classified as breaching the “external security of the State”, in particular aiding the enemy and inciting service in hostile armed forces under article 187 of the CMJ.⁵ In addition, military courts have jurisdiction over individuals who were under the age of 18 at the time of the crime if they are members of the military or nationals of an enemy or occupied State.⁶

Ladies and gentlemen,

In many countries in the MENA region, military courts have not only been used to try civilians, including those suspected of opposing the authorities, they have also been used to shield security and military personnel from accountability for allegations of serious human rights violations. When used to address these allegations, military courts have often been a source of impunity.

This impunity takes various forms.

First, when military and security personnel are allegedly responsible for human rights violations, civilian and military prosecutors and investigative judges rarely investigate and prosecute these allegations. In the case of Egypt, following the ousting of President Morsi and as a result of the unlawful and disproportionate use of force, including firing live ammunition into crowds, security and armed forces personnel were responsible for the killings of more than 1,200 people, in particular during the dispersal of the Rabaa Al-Adawya and Annahda pro-Morsi sit-ins on 14 August 2013. Most of these killings appear to be unlawful. However, the Egyptian authorities have failed so far to conduct a thorough, effective, independent and impartial investigation into these killings, establish the truth about them and hold those criminally responsible to account.

Second, in the few cases where investigations, prosecutions and trials are carried out, they have generally failed to address and establish the responsibility of the perpetrators and their superiors, frequently resulting in acquittals. In the very few instances where they resulted in convictions, the sentences were rarely commensurate with the gravity of the offences committed.

² Royal Decree No.1-56-270 of 10 November 1956 on the Code of Military Justice, as amended. Pursuant to article 3, “Active service” includes young soldiers, voluntary recruits, those who have re-enlisted or are on indefinite leave, temporary recruits or reserve members, from the moment they join until they return home. It also includes those on leave or in military hospitals or prisons or under the jurisdiction of the military court, as well as prisoners of war.

³ *Id.*

⁴ *Id.*, article 8.

⁵ *Id.*, article 4.

⁶ Code of Military Justice, article 5.

The Case of ***Barraket Essahel***⁷ in Tunisia is particularly relevant in this regard.

This case involved 244 officers who were arrested in 1991 by the Central Military Administration and accused of plotting to overthrow President Ben Ali. They were transferred to the Directorate of State Security (DSS) of the Ministry of the Interior. Both the DSS and the Central Military investigated the officers, with the Director of the DSS submitting daily and detailed reports to the Director-General of Military Security and to the Minister of Defence.

While in the DDS's custody, the detainees were allegedly subjected to torture and other ill-treatment. Methods of torture and other ill-treatment referred to by the victims include beating, punching, hanging between two tables in a position known as the "grilled chicken," hanging by the feet, and plunging the detainee's head in dirty water until suffocation.

The majority of those detained were released without charge. For years, many of them were subjected to harassment and intimidation by the security services. In some instances, officers were forced to report to the police station up to eight times a day.

On 11 April 2011, following the uprising, some of the victims filed a complaint under articles 101 of the Criminal Code (acts of violence committed by public officials against persons) and 101bis (torture) against: the police officers who allegedly tortured them, former President Ben Ali, former Ministers of Defence and Interior, officials from the Ministries of Defence and Interior and military officials. The complaint was lodged with an investigative judge at the civilian Tribunal of First Instance in Tunis. The investigative judge opened the investigation on 2 May 2011 and was reportedly subject to pressure from military officials to transfer the case to a military court. The investigative judge subsequently transferred the case to the First Instance Military Court of Tunis on 27 October 2011.

The military investigative judge officially charged the officers from the National Security, officials from the Ministry of Interior and former President Ben Ali with committing acts of violence against persons. Officials from the Ministry of Defence and the military were not charged.

The First Instance Military Court of Tunis argued that article 101 bis on torture could not apply retroactively because it was introduced into national legislation on 2 August 1999, after the facts had occurred. The Court also argued that although the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was ratified by the Tunisian state on 11 July 1988, the CAT could not apply to the case because it does not contain provisions spelling out specific penalties that courts can apply in such cases.

On 29 November 2011, the First Instance Military Court of Tunis found the accused guilty and sentenced them to prison sentences

⁷ Case No. 74937, First Instance Permanent Military Court of Tunis, Tunisia; Case No. No.20416, Military Court of Appeal of Tunis, Tunisia.

ranging from four to five years imprisonment. Although the Military Appeal Court upheld the convictions of the four accused who had appealed, it reduced each of their sentences to two years imprisonment on the basis that there was “no obstacle” to doing so. On 23 October 2012, the military chamber at the Cassation Court upheld the decision of the Military Court of Appeal.

Ladies and gentlemen,

As consistently affirmed by the Human Rights Committee, article 14 of the ICCPR applies to all courts and tribunals, regardless of whether they are ordinary or specialized, civilian or military.

However, in countries where military courts continue to operate, including in the MENA region, serious concerns continue to be raised about the failure of these courts to comply with and implement international fair trial standards and guarantees in their procedures.

A cornerstone of a fair trial is one’s right to have his or her case heard before an independent and impartial tribunal. The independence and impartiality of a tribunal can be appreciated in light of a number of elements, including those relating to the management of the career of its members, in particular the procedure of their appointment, their security of tenure, and the disciplinary system they are subject to. In the case of military judges, attention has also to be paid to their statutory independence from the military chain of command in the course of carrying out their judicial functions.

In many countries in the MENA region, military judges are subject to military disciplinary rules, which are largely based on the concept of subordination to superior commanders, and their careers are effectively under the control of the executive.

In Morocco, under article 5 of Royal Decree No. 1-77-56 of 12 July 1977 setting out the statute of military judges, military judges are appointed by a royal decree on the proposal of the Minister of Defence. Under article 7, they are subject to the general disciplinary requirements of the armed forces. Similarly, under article 7, although military investigating judges are to exercise their functions “subject to the absolute independence of investigating judges”, they are subordinate to their hierarchical superiors and the Minister of Defence.

In Tunisia, under Law-Decree No. 2011-70, military judges are appointed by decree following a proposition by the Minister of Defence and a decision by the Military Judicial Council (MJC). The MJC is itself presided over by the Minister of Defence. Under article 19 of this law, military judges are subject to “general disciplinary rules”.

In Egypt, both the 2014 Constitution (article 204) and the MJL (article 1) describe the military court system as an independent judiciary. The new Constitution further guarantees the independence and irremovability of military judges and provides that they “share the security, rights and duties stipulated for members of other judiciaries”. However, under article 1 of the MJL, military courts operate under the direct supervision of the Ministry of Defence. Under article 54, military judges are appointed by the Minister of Defence based on the recommendation of the Director of the Military Judiciary.

Under international law and standards, not only must courts be independent and impartial, they must also be seen by the public to be independent and impartial. This appearance is undermined when cases involving human rights violations by military and security forces are investigated, prosecuted and tried by those who are institutionally linked or otherwise subordinated to the alleged perpetrators. In both Egypt and Tunisia, military and security personnel have been responsible for serious violations of international human rights law, including torture and other ill-treatment, arbitrary detention, unlawful killings and enforced disappearances. These violations have been widely documented, including by domestic investigation mechanisms established following the 2010 and 2011 uprisings in both countries.

Under international law and standards, respect for the right to a fair trial also requires ensuring and safeguarding the rights of defence, including the right of individuals arrested or detained to have prompt access to a lawyer, to consult with their lawyer in full confidentiality, and to have adequate time and facilities to prepare their defence.

However, in many countries in the MENA region, proceedings before military courts generally fail to meet these requirements and the rights of defence are largely undermined. This includes denying or severely limiting detainees' access to legal counsel, denying or severely limiting detainees' right to communicate with their lawyers confidentially, and restricting the accused and their legal counsel's access to the case file, including the formal charges and evidence against the accused.

In Morocco, for example, the accused is guaranteed only five days' notice before the first hearing of the charges, the applicable legal provision under which he or she is charged and the details of witnesses that will be called. Under article 80 of the CMJ, the accused must also notify the military court before the first session of the witnesses they intend to call.

In Egypt, under article 68 of the MJL, a person charged with a criminal offence is given a minimum of 24 hours' notice before appearing before the court.

In General Comment No. 32, the Human Rights Committee stated that what counts as "adequate time" to prepare one's defence depends on the circumstances of each case. "If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed."

In addition, "adequate facilities" must include access to "all materials that the prosecution plans to offer in court against the accused or that are exculpatory". In the case of Egypt, the accused or his or her representative may review the case file but may not copy any documents considered classified (article 67 of the MJL). In Morocco, the prosecutor cannot share secret classified documents with the defence counsel (article 80 of the CMJ). The Prosecutor has discretionary powers to decide which documents cannot be shared with the defence because they are secret.

Such provisions run counter to international standards on the rights of defence and the principle of equality of arms. Under this principle, the

defence should be able to prepare and present its case on a footing equal to that of the prosecution. As the European Court of Human Rights has recognised, "a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage".⁸

Ladies and gentlemen,

I would like now to emphasize two further points that I think are important to the debate about the administration of justice through military courts, in particular their jurisdiction over civilians as well as over allegations of human rights violations and ordinary crimes committed by military personnel.

First, in countries where military courts continue to exist and to have this broad jurisdiction, authorities, including in the MENA region, argue that such practices are not prohibited by international law, often referring to General Comment No. 32 of the Human Rights Committee. However, General Comment No. 32 does not give, and should not be interpreted or understood to give, governments a blanket authorization to try civilians before military courts. The Committee stated that while the ICCPR "does not prohibit the trial of civilians in military courts or special courts, it requires that such trials are in full conformity with the requirements of article 14", and that military trials of civilians should be "exceptional" and "limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials". In most cases, States fail to meet these requirements and military justice systems run in parallel, often to the detriment of the ordinary justice systems.

Furthermore, General Comment No. 32 should be read in conjunction with relevant decisions from the Human Rights Committee where it has consistently called on states to prohibit trials of civilians by military courts.⁹

Indeed, there is a growing consensus, attested to by UN treaty bodies, special rapporteurs and working groups to limit the jurisdiction of military courts to military personnel for military offences only. This consensus is supported by numerous regional courts and mechanisms, including the Inter-American Court of Human Rights, the Inter-American Commission of Human Rights, the European Court of Human Rights, and the African Commission on Human and Peoples' Rights. National courts, including supreme courts, as we heard today from the speaker from Uganda, are also part of this growing consensus.

My second point is about the very nature of the jurisdiction of military courts: whether it is exceptional or specialized.

So often, military courts are referred to as specialized courts. However, when military courts have broad personal and subject matter jurisdiction, when the jurisdiction of ordinary courts is curtailed to the benefit of

⁸ *Delcourt v. Belgium*, Application No. 2689/65, European Court of Human Rights, Judgment of 17 January 1970, para. 34.

⁹ HRC Concluding Observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997), para. 20; HRC Lebanon, UN Doc. CCPR/C/79/Add.78 (1997), para. 14; Chile, UN Doc. CCPR/C/CHL/CO/5 (2007) §12; Tajikistan, UN Doc. CCPR/CO/84/TJK (2004), para. 18; and Ecuador, UN Doc. CCPR/C/ECU/CO/5 (2009), para. 5.

military courts and when military courts have the competence to determine what crimes fall within their jurisdiction, I think that the jurisdiction exercised by these courts is exceptional rather than specialized.

Military courts can be considered specialized to the extent, and only to the extent, that their jurisdiction is limited to military personnel for military offences, and that these offences are narrowly defined to include alleged breaches of military discipline only.

In this regard, recent developments relating to the jurisdiction of military courts in both Tunisia and Morocco are a source of satisfaction. In Tunisia, the 2014 Constitution restricts the jurisdiction of military courts to military offences. In Morocco, a new law, Law No. 108-13 on military justice, has been approved by the first chamber of the Parliament, limiting the jurisdiction of military courts to military personnel for military offences.

In both countries, however, efforts should continue to be undertaken to ensure that these military offences are clearly defined in the law and are limited to alleged breaches of military discipline only, to the exclusion of human rights violations and ordinary crimes by military and security personnel.

I thank you.

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