The Jurisdiction and Independence of the Military Courts System in Lebanon in Light of International Standards

A Briefing Paper

May 2018

International Commission of Jurists

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The administration of justice by military tribunals has at times served to undermine justice and the rule of law in a number of States around the world. The improper use of military tribunals has impeded access to justice, facilitating impunity for human rights abuses; and led to violations of fair trial rights of the accused and to an independent and impartial hearing.[1] Military tribunals exist to try military personnel for military offences. The extension of the jurisdiction of military courts to try civilians, including children, as well as offences which should properly fall within the remit of civilian courts, undermines the independence of the judiciary.[2]

The former UN Special Rapporteur on the independence of judges and lawyers has observed that in certain States, military tribunals operate to serve the self-perceived interests of the military rather than the ends of justice. The Special Rapporteur underlined that "recent history provides several examples of abusive military regimes that have used military tribunals as an instrument to victimize their own population and grant themselves amnesties to avoid accountability for their actions".[3]

Such concerns have also been addressed in respect of the Lebanese military court system – established by Law No. 24 of 13 April 1968 (Code of Military Justice) – which is an exceptional court system that falls under the jurisdiction of the Minister of National Defence. Indeed, this court system has been the object of protest by some members of the Lebanese public and civil society. Most recently, the cases of 14 civilian protestors, who took to the streets to denounce alleged government corruption and its inability to resolve a waste management crisis in 2015, were brought before the military courts on charges that made these protestors face up to three years in prison. In a recent report on this issue, Human Rights Watch highlighted that, among other things, the Lebanese military courts were used to "intimidate individuals or retaliate against critical speech or activism. Children have also reported being tortured while awaiting prosecution in these courts".[4]

In positive recent developments, the military courts finally determined that they did not have jurisdiction over the cases of these protestors. However, the inadequate legal framework, and more particularly the gaps and inconsistencies with international law and standards that are contained in the Code of Military Justice, carry the risk of having civilians prosecuted in the military courts and make these situations all too common in Lebanon. In fact, 24 other protestors are still awaiting charges before the Lebanese military courts.[5]

As highlighted in this memorandum, the Lebanese Code of Military Justice and military justice system are inconsistent with international standards, including the right to a fair trial before an independent and impartial judiciary, as they extend to Lebanese military courts a wide scope of jurisdiction, which enables the trial of civilians by courts that are neither independent nor impartial and in accordance with procedures that do not comply with the required standards of justice and due process.

The right to a fair trial before an independent and impartial tribunal is a fundamental component of the rule of law and human rights. It is enshrined in the Universal Declaration of Human Rights (article 10) and article 14 of the International Covenant on Civil and Political Rights (ICCPR),[6] as well as in regional instruments, including the Arab Charter on Human

[1] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013), para. 14.

[2] See ICJ, *Legal Commentary to the ICJ Berlin Declaration: Counter-Terrorism, Human Rights and the Rule of Law*, Geneva, 2008, p. 13. See also, African Commission on Human and Peoples' Rights, *Media Rights Agenda v. Nigeria*, Communication 224/98, Decision of 6 November 2000, para. 63.

[3] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013), para. 24, which refers to the Report by the UN Secretary-General, *Civil and political rights, including the questions of the judiciary, administration of justice, impunity*, UN Doc. A/61/384 (2006), paras. 18-47.

[4] Human Rights Watch, "Lebanon: Civilians Tried in Military Courts", 26 January 2017, available at: https://www.hrw.org/news/2017/01/26/lebanon-civilians-tried-military-courts.

[5] Human Rights Watch, "Lebanon Military Court Backs Down on Waste Protestors", 20 March 2017, available at: https://www.hrw.org/news/2017/03/20/lebanon-military-court-backs-down-waste-protesters.

[6] Lebanon has been a party to the ICCPR since 1972.

Rights (article 13).[7] The Human Rights Committee, the independent expert body established by the ICCPR to monitor its implementation by States Parties, has clarified that the guarantees of article 14 apply regardless of whether the court is "ordinary or specialized, civilian or military".[8] Therefore, the guarantees of Article 14 of the ICCPR apply to all courts, including military courts.

In order to significantly reinforce judicial independence in Lebanon in conformity with international standards, the ICJ calls on the Lebanese authorities to ensure that the jurisdiction of its military courts be restricted to cover only military-related offences committed by members of the military. In addition, in order to comply with Lebanon's obligations under the ICCPR and the Arab Charter on Human Rights, the Code of Military Justice must be amended so as to ensure that the proceedings before military tribunals respect fair trial guarantees. These include the protection of the rights to defence and equality of arms, the right to a public hearing and to a fully reasoned judgment, and the right to appeal of any conviction and sentence to a higher independent and impartial tribunal. Implementation of these recommendations for reform are key steps to bringing the Lebanese military justice system more in line with Lebanon's obligations under the ICCPR and will enhance respect for the rule of law in the country.

I. Jurisdiction of the Lebanese military courts

The wide jurisdiction of the military courts in Lebanon has been a cause of serious concern for decades. In 1997, the Human Rights Committee highlighted these concerns, when it reported on the "broad scope of the jurisdiction of military courts in Lebanon, especially its extension beyond disciplinary matters and its application to civilians", and recommended that the country "review the jurisdiction of the military courts and transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military to the ordinary courts".[9]

While these recommendations were made 20 years ago, the Lebanese authorities have yet to bring their legislation in compliance with the ICCPR and other international standards. As highlighted below, the fact that the military courts have jurisdiction over a wide range of criminal offences that go far beyond military matters, as well as over civilians including individuals under the age of 18, is inconsistent with the consensus reached in international standards according to which military courts should only have jurisdiction over military-related offences committed by members of the military.

Indeed, concerns about the purpose of military courts and their lack of independence and impartiality have led a range of human rights authorities to conclude that military courts should be used only to try members of the military and only for military-related offences. Furthermore, there is a growing consensus that military courts should not have jurisdiction to try members of the military charged in relation to the commission of ordinary crimes, human rights violations or crimes under international law, such as torture, enforced disappearance, and extrajudicial and summary execution. The law should also prohibit military courts from exercising jurisdiction over civilians, even where the target or victim of the offence is military, as well as over all persons under the age of 18, with no exceptions.

i. Subject matter jurisdiction (rationae materiae): limitation to trial of military offences

Subject matter jurisdiction (*rationae materiae*) refers to a court's authority to hear and decide a particular type of case. Under international standards, the subject matter jurisdiction of military courts should be strictly limited to military-related offences.

[7] Lebanon ratified the Arab Charter on Human Rights in 2011.
[8] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007) [General Comment No. 32], para. 22.
[9] Human Rights Committee, Concluding observations on Lebanon, UN Doc. CCPR/C/79/Add.78 (1997), para. 14

The Draft Principles Governing the Administration of Justice Through Military Tribunals ("Decaux Principles")[10] were adopted by the former UN Sub-Commission on the Promotion and Protection of Human Rights in 2006 and have been invoked as authoritative by bodies such as the European Court of Human Rights.[11] The Decaux Principles focus exclusively on military courts and provide that the jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel: "Military courts may try persons treated as military personnel for infractions strictly related to their military status".[12]This is consistent with other sources of international law and standards. The UN Special Rapporteur on the independence of judges and lawyers has also highlighted that "the only purpose of military tribunals should be to investigate, prosecute and try matters of a purely military nature committed by military personnel".[13] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also state, "the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel".[14]

While there is no definition as to what exactly constitutes a "military offence", some international instruments do provide indications. The commentary to the Decaux Principles specifies that the jurisdiction of the military courts should remain exceptional and apply only to the requirements of military service, and that this is the "nexus" of military justice, "particularly as regards field operations, when the territorial court cannot exercise its jurisdiction. Only such a functional necessity can justify the limited but irreducible existence of military justice", i.e. situations where national courts are prevented from exercising jurisdiction for practical reasons, such as the remoteness of the action in the case of field operations.[15] Similarly, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights developed the "principle of functionality", according to which military jurisdiction should be limited to offences committed in relation to military functions, thereby automatically restricting it to military offences committed by military officers and members of the armed forces.[16]

In addition, the Human Rights Committee and the Committee against Torture have both repeatedly expressed concern where the jurisdiction of military tribunals extended to human rights offences committed by members of the military, and have recommended that those suspected of human rights violations be tried by civilian courts.[17]

In this regard, the UN Commission on Human Rights (the precursor to the Human Rights Council), as well as the Inter-American Court of Human Rights and Inter-American Commission on Human Rights, have concluded that bringing military personnel accused of

[10] Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 (2006) at 4 ["Decaux Principles"]. These principles are the result of years of research and consultation among experts, jurists and military personnel from all over the world, as well as representatives of diplomatic missions and non-governmental organizations, and are based on the extensive jurisprudence developed by various United Nations bodies. Moreover, in her report on military tribunals, the UN Special Rapporteur on the independence of judges and lawyers recommended that the Decaux Principles be considered and adopted by the Human Rights Council and endorsed by the General Assembly. See Report of the Special Rapporteur on the independence of judges and lawyers – Military tribunals, UN Doc. A/68/285 (2013), para. 92.

[11] See European Court of Human Rights, *Ergin v. Turkey*, Application No. 47533/99, Judgment of 4 May 2006; and *Maszni v. Romania*, Application No. 59892/00, Judgment of 21 September 2006.

[12] Decaux Principles, principle 8.

[13] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013), para. 34.

[14]See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights in 2003 [ACHPR Principles on Fair Trial Rights in Africa], Principle L.a.

[15] Decaux Principles, para. 29.

[16] Report by the UN Secretary-General, *Civil and political rights, including the questions of the judiciary, administration of justice, impunity*, UN Doc. A/61/384 (2006), para. 26.

[17] Human Rights Committee, Concluding Observations on Venezuela, UN Doc. CCPR/C/79/Add.13, para. 10; Brazil, UN Doc. CCPR/C/79/Add. 66, para. 315; Colombia, UN Doc. CCPR/C/79/Add.2, para. 393; and Democratic Republic of the Congo, UN Doc. CCPR/C/COD/CO/3, para. 21. See also Committee against Torture, Conclusions and Recommendations on Guatemala, UN Doc. CAT/C/GTM/CO/4, para. 14; Mexico, UN Doc. CAT/C/MEX/CO/4, para. 14; and Peru, UN Doc. CAT/C/PER/CO/4, para. 16.

human rights violations to trial before military courts was incompatible with international human rights law.[18] This is because "gross human rights violations – such as extrajudicial executions, torture and enforced disappearance – carried out by members of the military or police cannot be considered to be military offences, service-related acts, or offences committed in the line of duty".[19] The Inter-American Commission observed that military tribunals may not be "used to try violations of human rights or other crimes that are not related to the functions that the law assigns to military forces and that should therefore be heard by the regular courts".[20]

This is in line with the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, which explicitly provide that the jurisdiction of military tribunals "must be restricted solely to specifically military offences committed by military personnel, *to the exclusion of human rights violations*, which shall come under the jurisdiction of the ordinary domestic courts […]".[21] It is also in line with the Decaux Principles, which stipulate: "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes."[22]

Thus, there is growing consensus that the jurisdiction of military tribunals should be restricted to purely *disciplinary* types of military offences, rather than offences of a criminal nature, and should exclude jurisdiction over human rights violations.

ii. Personal jurisdiction (in personam): no trials of civilians or people under the age of 18

Military courts should not, as a general rule, have jurisdiction over offences committed by civilians.

The Human Rights Committee has stated, "the trial of civilians in military or special courts raise serious problems as far as the equitable, impartial and independent administration of justice is concerned."[23]The Committee clarified that while such trials are not altogether prohibited by the ICCPR, 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".[24] In such cases the respect for article 14 of the ICCPR "requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned".[25]

[18] Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 232.
[19] See Federico Andreu-Guzman, *Military jurisdiction and international law: military courts and gross human rights violations*, Vol. I, International Commission of Jurists, Geneva, 2004, p. 12.The UN Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons both explicitly prohibit the trial of military personnel or other persons accused of committing acts of enforced disappearance: UN Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133 (1992), article 16; Inter-American Convention on the Forced Disappearance of Persons, adopted by the Organization of American States on 9 June 1994, article IX.
[20]Inter-American Commission on Human Rights, Annual Report 1997, OAS Doc. OEA/Ser.L/V/II.98 doc. 6 rev. 13 (1998), Chapter VII, Recommendation I.
[21] Report of the independent expert to update the Set of principles to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 (2005), principle 29.
[22] Decaux Principles, principle 9.
[23] Human Rights Committee, General Comment No. 32, para. 22.
[24]*Id*.
[25]*Id*.

Consequently, the Committee has called on Lebanon and a number of other countries to prohibit trials of civilians by military courts.[26]

The UN Working Group on Arbitrary Detention and the UN Special Rapporteur on the independence of judges and lawyer have also adopted the position that military courts should be incompetent to try civilians.[27] Indeed, as described by the Special Rapporteur on the independence of judges and lawyers, there is a developing consensus in international law towards the prohibition of military trials for civilians.[28]

The Decaux Principles also affirm that the jurisdiction of military courts should be restricted to military personnel in relation to military offences. Principle 5 provides: "Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts". The Decaux Principles emphasize the right to a fair trial, including the right to appeal to civilian courts at all times, and that civilians accused of a criminal offence of any nature shall be tried by civilian courts.[29]

With regard to proceedings against people under the age of 18 at the time of the alleged crime (variously also referred to as children or juveniles), international standards make clear that they have "at least the same guarantees and protection as are accorded to adults" under article 14 of the ICCPR.[30] In its authoritative General Comment on the scope of article 14, the Human Rights Committee underlines that States should establish "an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age".[31] The Human Rights Committee states that juveniles should be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence, be tried as soon as possible in a fair hearing in the presence of legal counsel, taking into account their age and situation.[32] Likewise, the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), adopted by the General Assembly in 1985, stipulate that each national jurisdiction should undertake to establish a "set of laws, rules and provisions specifically applicable to juvenile offenders".[33]

Given the special protection that must be afforded to people under the age of 18 (at the time of the crime), the Committee on the Rights of the Child has urged States to ensure that no children be tried by military tribunals.[34] In the same vein, the Decaux Principles categorically

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[26]See, e.g., Human Rights Committee, Concluding observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997), para. 20; Chile, UN Doc. CCPR/C/CHL/CO/5 (2007), para. 12; Tajikistan, UN Doc. CCPR/CO/84/TJK (2004), para. 18; Ecuador, UN Doc. CCPR/C/ECU/CO/5 (2009), para. 5.

[27] Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63 (1998), para. 8; Report of the Special Rapporteur on the independence of judges and lawyers: Mission to Peru, UN Doc. E/CN.4/1998/39/Add.1 (1998), paras. 78-79.

[28] Report of the Special Rapporteur on the independence of judges and lawyers: Mission to Peru, UN Doc. E/CN.4/1998/39/Add.1 (1998), paras. 78-79. See also Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 36

[29] Decaux Principles, principle 5. This principle has been reaffirmed at the regional level. Principle A.L.c. of the ACHPR Principles on Fair Trial Rights in Africa state that military courts should not "in any circumstances whatsoever have jurisdiction over civilians". Similarly, the Inter-American Commission has denounced the use of military courts to prosecute civilians, stating that "military tribunals by their very nature do not satisfy the requirements of independent and impartial courts applicable to the trial of civilians, because they are not part of the independent civilian judiciary but rather are a part of the executive branch, and because their fundamental purpose is to maintain order and discipline by punishing military offenses committed by members of the military establishment". See Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 231

[30]Human Rights Committee, General Comment No. 32, para. 42.

[31] Human Rights Committee, General Comment No. 32, paras 42-44.

[32]*Id.*

[33]UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Adopted by General Assembly resolution 40/33 of 29 November 1985, Rule 2.3.

[34] See, for example, Committee on the Rights of the Child, Concluding Observations on the Democratic Republic of the Congo, UN Doc. CRC/C/15/Add.153 (2001), para. 75. See also Committee on the Rights of the Child, Concluding observations on the United States of America, UN Doc. CRC/C/OPAC/USA/CO/1

rule out the jurisdiction of military tribunals to try anyone who was under the age of 18 at the time of the crime.[35] As further explained by the Decaux Principles, "*A fortiori* these protective arrangements rule out the jurisdiction of military courts in the case of persons who are minors".[36]

iii. The jurisdiction of the military courts in Lebanon

Under article 24(1) of the Code of Military Justice, the military courts have jurisdiction over offences stipulated in the third volume of the Code. This provision refers to a range of military offences, including evasion of military obligations, violation of obligations and honour, violation of the military order, and more. While the ICJ considers that this is an appropriate exercise of military jurisdiction, the ICJ is concerned that with the exception article 24(1) of the Code of Military Justice, Lebanese law allows the military courts competence to try civilians as well as members of the military and in particular circumstances, children, for a wide array of offences outside the scope of breaches of military discipline.

Indeed, under the laws in force in Lebanon, in particular articles 24 and 27 of the Code of Military Justice, as well as the Law enacted on 11 January 1958 amending certain articles of the Criminal Code, military courts have jurisdiction to try both members of the civilians as well as military personnel for a wide range of offences. Among the offences included are crimes against national security, terrorism-related crimes, crimes affecting the interests or against a person of the Lebanese military or security forces, crimes against the person of a member of the military or a civilian employee of the Ministry of National Defence or military court that is related to the fact of his or her position, and all crimes committed in a military camp institution or barracks. Military courts also have jurisdiction to try juveniles who are accused of committing crimes that fall within the jurisdiction of the military courts in complicity with an adult.

As discussed above, military jurisdiction should be limited to trials of members of the military for military offences. It should not extend to crimes involving human rights violations or trials of civilians or people under the age of 18.

For example, under article 24(2) of the Code of Military Justice, crimes of treason, espionage or illegal connections with the enemy,[37] which are crimes not strictly related to military discipline, are included within the jurisdiction of the military courts. Moreover, the jurisdiction of the military courts over these crimes is not limited to trying members of the military for such offences, but extends also to civilians. For example, four citizens were charged with spying for Israel and monitoring the movements of the head of the General Security, members of the Resistance Brigades, the Army and Hezbollah.[38] The prosecution and trials of persons for these offences should be held within the ordinary (civilian) court system.

In the same vein, the grant to military courts, by virtue of sections 24(3) and (4) of the Code of Military Justice, of jurisdiction over crimes related to arms and ammunitions of war, as well as crimes committed in military camps, institutions and barracks, is much too wide and could give military courts jurisdiction to try members of the military or security forces for alleged human rights violations, including extrajudicial executions, enforced disappearances, torture or other ill-treatment committed on military property, or using arms. Furthermore, this section can and has allowed the prosecution of civilians before military courts for crimes committed on or against military property. For example, in the context of the recent protests that have rocked Lebanon, two men were brought before the military courts on the grounds that they had caused damage to military equipment by bringing down the barbed wire that

(2008), para. 30(g): "The conduct of criminal proceedings against children within the military justice system should be avoided".
[35]Decaux Principles, Principle 7.
[36]Decaux Principles, para. 26.
[37]As stipulated, in particular, in articles 273 to 287 and 290-291 of the Lebanese Criminal Code.
[38] See Daily Star, "Military Tribunal postpones espionage hearing", 5 March 2016, available at: http://www.dailystar.com.lb/News/Lebanon-News/2016/Mar-05/340631-military-tribunal-postpones-espionage-hearing.ashx.

was blocking the path of the protestors.[39] The jurisdiction by military courts over such offences should be strictly limited to those against members of the military that constitute military offences, to the exclusion of human rights violations.

Similarly, under sections 24(5), (6) and (8) of the Code of Military Justice, crimes committed against a military member or member of the Internal Security Forces (ISF)[40]or General Security (GS),[41](except where the crime is committed against a soldier and is not related to the fact of his or her position), as well as crimes of any kind affecting the interests of these institutions, means that crimes that are not of a strictly military nature, whether committed by a member of the military or a civilian, fall within the jurisdiction of military courts. These provisions give the military courts system a wide berth in prosecuting offences that involve a member of the military, including soldiers when it is related to the fact of their position, or a member of the ISF or GS, whether or not it has anything to do with the military, and when the alleged perpetrator is a civilian. Recently these provisions under article 24 of the Code of Military Justice were used to attempt to bring civilian protesters before the military court on charges including of "rioting, *throwing stones at police* and widespread damage of public and private property".[42] These charges brought the protestors before the military court because they involve altercations between civilian and security forces. The European Court of Human Rights has stated that "situations in which a military tribunal has jurisdiction to try a civilian for acts against the armed forces may give rise to reasonable doubts about such a court's objective impartiality".[43]These provisions of article 24 of the Code of Military Justice should be amended to ensure that jurisdiction over such offences by a military court is limited to only those that are of a purely military nature and committed by members of the military, and to the exclusion of human rights violation.

Moreover, in accordance with articles 29 and 30 of the Code of Military Justice, single military judges have jurisdiction over all violations and misdemeanours stipulated in the traffic law committed within a province by persons subjected to the jurisdiction of the military courts in accordance with the Code of Military Justice. They similarly have jurisdiction over all other misdemeanours under the jurisdiction of military courts, if the sanction does not exceed the imposition of a fine or one year of imprisonment, or both of these sanctions. It goes without saying that the same principles apply to these provisions, and that the competence by military judges over violations and misdemeanours of the traffic law that cannot be fairly characterised as breaches of military discipline committed by members of the military should be removed.

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[39]See Equal Times,"Lebanon's prisons: beyond the pale of the law", 10 November 2015, available at: https://www.equaltimes.org/lebanon-s-prisons-beyond-the-pale?lang=en#.WMF-oxLyuu4.

[40] The Internal Security Forces are general armed forces under the competence of the Ministry of Interior and Municipalities whose duties include preserving order and security, protecting the public and property, implementing the law and related decrees, guarding prisons, protecting diplomatic missions, etc. See Decree No. 1157 determining the structural organization of the Internal Security Forces and Law No. 17 of 6 September 1990 organizing the Internal Security Forces, available on the website of the ISC, available at: http://www.isf.gov.lb/en.

[41] The functions of General Security, which is under the supervision of the Ministry of Interior and Municipalities, include the collection of data concerning political, economic and social issues, supervising the preparation and implementation of security measures, combating anything that jeopardizes security (investigating acts of sabotage, anarchy, or any attempt to endanger national security), surveillance of the territorial, maritime and aerial borders. They are also in charge of media censorship, providing the administrative support for foreign services, and delivering passports, visas, and other documents. See the website of the GS, available at: http://www.general-security.gov.lb/Default.aspx?lang=en-us.

[42] NOW., "Lebanon civil society protesters face military trial", 12 October 2015, available at: https://now.mmedia.me/lb/en/NewsReports/566040-lebanon-civil-society-protesters-face-military-trial. See also Human Rights Watch, *"It's Not the Right Place for Us": The Trial of Civilians by Military Courts in Lebanon*, 2017, p. 14: "Fourteen protestors detained by the Internal Security Forces after demonstrating against Lebanon's inability to solve a waste management crisis in 2015, are now facing trial at the Military Tribunal on charges of rioting, the use of force against security personnel during the exercise of their duties, and the destruction of property."

[43] European Court of Human Rights, *Ergin v. Turkey*, Application No. 47533/99, Judgment of 4 May 2006, para. 49.

The provisions of article 27 of the Code of Military Justice, which addresses the jurisdiction *in personam* of Lebanese military courts, are also inconsistent with international standards. They grant military courts jurisdiction over civilians in the absence of exceptional circumstances, i.e. when the civilian courts are unable to undertake such trials and whether or not it is shown in the particular case to be necessary and justified by objective and serious reasons.[44] Instead, article 27 grants military courts jurisdiction over any perpetrator, accomplice, intervener or instigator in a crime falling under the competence of the military courts, including when the individual is a civilian. One example is the case of the Lebanese singer-turned-Islamist Fadel Shaker, who was convicted *in absentia* of insulting an "Arab country and the Lebanese Army and inciting sectarian sedition" through a newspaper interview and sentenced by the military court to five years of imprisonment, a LBP 500,000 fine (about USD 330), and the stripping of his civil rights.[45]

Under article 27(5) of the Code of Military Justice, offences committed by civilian employees of the Ministry of National Defence, army and military courts, or of the ISF or GS in the course of their functions, also fall under the competence of the military courts. Even authorities that allow there might be highly limited cases where trial of civilians by military courts might be acceptable, these would be "only in limited exceptional situations where resort to such trials is necessary and justified by objective and serious reasons such as military occupation of foreign territory where regular civilian courts are unable to undertake the trials".[46]This concept of "necessity" must be interpreted in a very restrictive manner; any justification of the resort to military tribunals to try civilians "presupposes that ordinary courts are *unable* to exercise jurisdiction vis-à-vis certain categories of individuals, such as civilian dependants of military personnel posted abroad and civilian persons accompanying the armed forces, such as contractors, cooks and translators".[47] This is certainly not the case for the civilian employees of the Ministry of National Defence, military courts, army, ISF or GS in Lebanon, where there are ordinary courts that exercise their jurisdiction over criminal matters.[48]The jurisdiction of the military courts over these civilians must therefore be transferred to these ordinary civilian courts.

Moreover, as currently drafted, the provisions of the Code of Military Justice could easily bring violations of human rights under the jurisdiction of the military courts; for example, where the violation in question was committed by a member of the military or of the ISF or GS. Because the practice of using military jurisdiction to try gross human rights violations "is one of the greatest sources of impunity in the world",[49] international standards affirm that those suspected of human rights violations should be tried by civilian courts. The law should be amended to explicitly provide that trials of human rights violations – including for example enforced disappearance, extrajudicial executions and torture or other ill-treatment – are

[44]Human Rights Committee, General Comment No. 32, para. 22.
[45] Daily Star, "Military court sentences Shaker to 5 years over newspaper interview", 26 February 2016, available at : http://www.dailystar.com.lb/News/Lebanon-News/2016/Feb-26/339402-military-court-sentences-shaker-to-5-years-over-newspaper-interview.ashx.
[46] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/63/223 (2008), para. 28.
[47] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013), para. 55.
[48] Furthermore, while the State does have the obligation to guarantee the independence, impartiality, competence and accountability of its ordinary judicial system, failure to do so cannot be used as a justification for the use of military courts to try civilian under exceptional circumstances. As the Special Rapporteur states in clear terms: "Therefore, *in no case* should a military tribunal established within the territory of the State exercise jurisdiction over civilians accused of having committed a criminal offence in that same territory." See Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013), para. 56. Therefore, the fact that the Lebanese ordinary courts lack several guarantees of independence and impartiality (see the three ICJ memoranda pertaining to the High Judicial Council, the Statute for Judges and judicial ethics and accountability in Lebanon, available at: https://www.icj.org/lebanon-the-icj-calls-for-extensive-reforms-to-strengthen-judicial-independence-and-accountability/) cannot be used as an argument that would legitimize the "necessity" of using the military courts.
[49] Federico Andreu-Guzman, *Military jurisdiction and international law: military courts and gross human rights violations*, Vol. I, International Commission of Jurists, Geneva, 2004, p. 8.

heard before independent and impartial civilian courts, in proceedings that are consistent with international standards of fairness.

In addition, the Law enacted on 11 January 1958 amending certain articles of the Criminal Code has had the effect of transferring the jurisdiction over terrorism-related offences and other serious crimes to the military tribunals.[50] In accordance with the provisions of this Law, the Lebanese military courts have the competence to examine and try any act constituting a threat to national security or incitement to conflict, as well as any terrorism-related offence. This allows the authorities to use military jurisdiction, which does not offer the proper guarantees of independence and due process, to prosecute individuals, including civilians, for a wide array of criminal offences. This has been demonstrated time and time again with the cases that have been brought before the military courts in Lebanon.[51] In addition to the issue created by this provision of giving military courts jurisdiction over civilians, the UN Special Rapporteur on human rights has urged caution in allocating terrorism cases to military courts because of the general lack of independence and impartiality of such courts, as well as the lack of guarantees of independence granted to military judges.[52] Even in the case of such grave offences as terrorism-related crimes or crimes against national security, the trial of the accused individuals should conducted with all due fairness before an independent and impartial civilian tribunal.

Finally, in accordance with Law No. 422 of 2002 on the protection juveniles in conflict with the law or at risk,[53] juveniles may be tried by military courts for crimes that fall within the jurisdiction of the military courts in cases where it is alleged that they acted complicity with an adult.[54] In particular, under Article 33 of this law, cases against a juvenile are, as a general rule, to be heard before a single juvenile (court) judge in accordance with the procedure set out the third chapter of the law. However, article 33 sets out an exception: when the crime with which the juvenile is charged was alleged to have been committed in complicity with an adult, then the juvenile is to be prosecuted and tried alongside the adult by the competent court system. In such cases, if the juvenile is found guilty, the sentence and sanctions are to be decided by the juvenile (court) judge.

Article 33 of Law No. 422 of 2002,which allows the prosecution of juveniles alongside adults by the military courts, if the crime was allegedly committed in complicity with an adult and falls under the competence of the military court, must be amended. This article has been used frequently to allow the trial of persons under 18 years of age by the military courts in Lebanon. According to a recent report by Human Rights Watch, 355 children were tried before the military courts in 2016, many of whom were held on terrorism-charges with little or no

[50]This law was adopted during a national security crisis that occurred in 1958 and was intended to temporarily suspend articles 308-313 and 315 of the Criminal Code. However, it is still in force today. It is one of the laws being taken into consideration by the Special Tribunal for Lebanon; available here: http://www.stl-tsl.org/en/documents/relevant-law-and-case-law/applicable-law/341-law-enacted-on-11-january-1958.

[51]For example, in August 2012, six people were charged with "forming an armed gang aimed at carrying out terrorist acts and manufacturing explosive material." The six, five of whom have been captured and detained, were also accused of possessing and transporting arms. See Daily Star, "Lebanon judge indicts six on terrorism charges", 6 August 2012, available at: http://www.dailystar.com.lb/News/Local-News/2012/Aug-06/183595-lebanon-judge-indicts-six-on-terrorism-charges.ashx. In 2013, 38 suspects were charged with "creating an armed gang to terrorize people, undermining state authority, launching an armed rebellion against authorities, murdering and attempting to murder Army officers and soldiers, and planning terrorist attacks". See Daily Star, "Abra trial delayed by absent lawyers", 9 March 2016, available at: http://www.dailystar.com.lb/News/Lebanon-News/2016/Mar-09/341268-abra-trial-delayed-by-absent-lawyers.ashx?utm_source=Magnet&utm_medium=Related%20Articles%20widget&utm_campaign=Magnet%20tools.

[52]Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/63/223 (2008), paras 23-26.

[53]This law is available here (in Arabic): https://bba.org.lb/content/uploads/Institute/141211103338689~loi%20422%20delinquent_arabe.pdf.

[54]In accordance with article 1 of Law No. 422 of 2002, a juvenile is a person under the age of 18.

evidence.[55]While the procedures applicable in ordinary juvenile courts apply to the military prosecution of juveniles, and while the sanction is decided by a juvenile judge, this does not eliminate the fact that juveniles can and have been brought before the military courts, which lack essential guarantees of independence and impartiality. In accordance with the Decaux Principles and the recommendations of the Committee on the Rights of the Child, the Code of Military Justice should explicitly prohibit any and all prosecution and trial of any person under the age of 18 at the time of the alleged crime by the military justice system, and Law No. 422 of 2002 should be amended to provide that cases involving persons alleged to have infringed the penal lawwho were under the age of 18 at the time of the alleged offence may only be handled in the juvenile justice system in the course of proceedings that meet international standards of fairness and safeguard the rights of the child.

In light of the above, the Lebanese authorities should reform the military justice system so at to:

i. **Explicitly restrict the jurisdiction of military courts to cases involving members of the military over the age of 18 at the time of the alleged offence for alleged breaches of military discipline and, to this end:**
   a. **restrict the offences set out in articles 24 and 30 of the Code of Military Justice accordingly, in particular:**
      - **remove from the jurisdiction of the military courts crimes of treason, espionage and illegal connections with the enemy (art. 24 (2));**
      - **restrict the jurisdiction of military courts over crimes related to arms and ammunitions of war, as well as over crimes committed in military camps, institutions and barracks, to those committed by members of the military that are strictly breaches of military discipline (art. 24 (3) and (4));**
      - **similarly, restrict the jurisdiction of the military courts over crimes committed against military members or members of the ISC or GS, as well as crimes affecting the interests of these institutions, to those committed by members of the military that are strictly breaches of military discipline (art. 24 (5), (6) and (8));**
      - **restrict the jurisdiction of single military judges minor breaches of military discipline allegedly committed by members of the military (art. 33):**
   b. **unequivocally remove from the jurisdiction of the military courts all offences against or related to state security and terrorism and, to that end, abrogatethe Law enacted on 11 January 1958, and ensure that competence over these crimes lies exclusively with the ordinary, regularly constituted, civilian courts;**
   c. **explicitly exclude from the jurisdiction of the military courts cases involving acts that constitute violations of human rights including for example enforced disappearance, extrajudicial executions and torture or other ill-treatment.**
ii. **Restrict the personal jurisdiction of the military courts to military personnel and, in this regard:**
   a. **ensure that the law is amended to provide that the jurisdiction of the military courts only applies to military-related offences committed by a member of the military, and never to any person accused of being a perpetrator, accomplice, intervener or instigator who is a civilian (art. 27(6));**
   b. **ensure that military courts do not have jurisdiction over crimes allegedly committed by civilians, even where the crime was committed against a member of the armed forces, ISF or GS, or against one of their civilian employees or on or against military property (article 24(5), (6) and (7);**

[55] Human Rights Watch, *"It's Not the Right Place for Us": The Trial of Civilians by Military Courts in Lebanon*, 2017, pp. 26-27.

c. remove from the jurisdiction of the military courts the civilian employees of the Ministry of National Defence, Army, military courts, ISF or GS (art. 27(5));

iii. Amend article 33 of Law No. 422 of 2002 on the protection of juveniles in conflict with the law or at risk to exclude from the jurisdiction of military courts all individuals under the age of 18 at the time of the alleged crime, without exception.

II. Right to a fair trial before an independent and impartial tribunal

International standards require that any individual who is brought before a military tribunal for a criminal offence has the right to a fair trial before an independent, impartial court, including in accordance with article 14 of the ICCPR.

In this section, the ICJ addresses a range of ways in which the laws which regulate Lebanese military courts fail to ensure that these courts, which adjudicate criminal cases, meet the required standards of independence and impartiality, and how criminal proceedings in military courts otherwise fall short of a range of other fair trial guarantees which Lebanon is bound to respect.

A. Independent and impartial tribunal

As a party to the ICCPR, Lebanon is required to ensure the right of all persons accused of a criminal offence to a fair trial before a independent, impartial and competent tribunal (article 14 of the ICCPR.)The Human Rights Committee has clarified that the term" independent and impartial tribunal", set out in article 14, paragraph 1, of the ICCPR, "designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature".[56]

The requirement of competence, independence and impartiality of a tribunal, applies equally to military as well as civilian courts[57], and "is an absolute right that is not subject to any exception".[58]

The Human Rights Committee has clarified that the requirement of independence:

> refers in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.[59]

The ICJ is concerned that the military court system– which is composed the Military Court of Cassation, the Permanent Military Court (PMC), the single military judges, the investigative judges, and the office of the Government-Commissioner (the military prosecution)[60]– fails to

[56] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013), para. 35, referring to Human Rights Committee, General Comment No. 32, paras. 18-19.
[57] Human Rights Committee, General Comment No. 32, para 22.
[58] Human Rights Committee, General Comment No. 32, para. 19.
[59] Human Rights Committee, General Comment No. 32, para. 19. Moreover, in a number of cases the European Court of Human Rights has examined whether proceedings in military courts, including against military personnel, are consistent with the right to a fair trial before an independent and impartial tribunal guaranteed by article 6 of the European Convention on Human Rights). The independence and impartiality of a court are assessed, among other things with regard to "the manner of the appointment of its members, their terms of office, the existence of guarantees against outside pressures and whether the military criminal courts presented an appearance of independence" (e.g. European Court of Human Rights:*Ibrahim Gurkan v. Turkey*, Application No. 10987/10, (3 July 2012, para. 13); *Martin v. the United Kingdom*, Application No. 40426/98, (24 October 2006), paras 41-51.)
[60] Code of Military Justice, article 1.

meet the standards of independence required under the ICCPR and other international standards.

Indeed, as highlighted in the following sections, the Lebanese military courts do not meet the requisite standards of independence, due to several factors, among which the lack of clear and objective criteria for the appointment of both civilian and military judges to the military courts and the extent, both real and perceived, of executive influence over the process of selection and appointment of these judges. Moreover, the fact that both civilian and military judges' tenure during their posting within the military courts is not secure creates a real doubt about the perceived, if not real, independence of their decision-making. Adding to this, the fact that military judges remain subject to their hierarchical superiors in matters relating to their careers, including discipline, also undermines their independence.

i. Criteria for appointment

Respect for the independence and impartiality of the courts requires that the selection of judges to sit on military courts be based on clear criteria, including legal training or qualifications, ability experience and integrity, to ensure that individuals are chosen on the basis of merit.[61]

However, the Lebanese Code of Military Justice does not establish such clear and objective merit-based criteria for the appointment of the members of the military courts.

The Permanent Military Tribunal (a trial court, known also as the PMC) and the Military Court of Cassation are composed of a combination of military and civilian judges, the latter emanating from Lebanon's ordinary court system. More specifically, depending on the classification of the seriousness of the offence in question, the benches of the PMC and of the Military Court of Cassation will be comprised of a different number of members:

- In cases of felonies, the bench of the PMC will be presided over by a military officer and composed of four other members: a civilian judge from the ordinary court system and three military officers.
- In cases of misdemeanours that exceed the competence of the single military judge, the bench will be presided by a military officer who is assisted by two other members: one civilian judge and one military officer.

As for the Military Court of Cassation, when hearing cases of felonies, the bench will consist of a presiding civilian judge and of four military officers. When hearing cases of misdemeanours, the bench will consist of a presiding civilian judge and of two military officers.[62]

Moreover, single military judges and investigative judges can be either civilian judges or military officers.[63]

Under the Code of Military Justice, there is no requirement that a member of the military appointed as a military judge to sit as an adjudicator be duly qualified with legal qualification or training in law, and proven ability and integrity. Indeed, and puzzlingly, only members of the military who are appointed as investigative judges in the military court system are required to have a licence in law.

[61]Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 [UN Basic Principles on the Independence of the Judiciary], principle 10.

[62]Code of Military Justice, article 5. In accordance with article 9 of the Code of Military Justice, both at the Military Court of Cassation and at the PMC, where the accused is a member of the ISF or GS, the number of judges on the bench remains the same, but there must be an equal number of military judges and judges emanating from the order to which the accused belongs. Thus, if, for example, the accused is an ISF officer who has allegedly committed a felony, the bench of the PMC will be composed of two military officers, including one as president, two ISF officers, and one civilian judge.

[63] Code of Military Justice, articles 7 and 12.

Additionally while civilians appointed to sit as judges on the military courts must be judges, and thus under Lebanese law have legal qualifications, the only other criteria for their appointment is their ranking within the judiciary rather than their training in military law, ability, or integrity.

The criteria for appointment of the civilian judges to the military courts, both at the Military Court of Cassation and at the PMC, are subject only to their having attained a specific ranking: civilian judges appointed to the Military Court of Cassation must have at least attained the 7th grade, whereas the civilian judges of the PMC must have at least attained the 13rd grade.[64] There is no minimum ranking specified within the law for the appointment of civilian judges as single military judges. These rankings are established only in light of the judge's experience: in accordance with article 32 of Decree-Law No. 112 of 12 June 1959 (the Law on civil servants), trainee judges who succeed in their training and continue on to perform their duties as tenured judges are classified in the first grade, then automatically upgraded to the next grade every two years, until retirement at the age of 68.[65]

The same goes for military officers: to be appointed as a military judge on the Military Court of Cassation, under the law, a member of the military must be at least lieutenant; to be appointed as Chamber President of the PMC, a member of the military must be at least lieutenant-colonel; and to be appointed to serve as members of the PMC, members of the military must hold a ranking that is subordinate (lower) than that held by the Chamber President.[66] Moreover, none of these military judges are required to have a training or license in law.

Military officers who are appointed as single military judges must have attained the ranking of lieutenant, and are not required to but may not hold a license in law.[67]

Finally, the investigative judges of the military courts are either investigative judges from the ordinary judiciary or military officers licensed in law.[68] No other criteria are prescribed by law.

The fact that members of the military may be appointed to judicial office on the Military Court of Cassation, the PMC and as a single judge of a military court, based on rank, and without a law license or appropriate legal training is inconsistent with the requirements of independence. Anyone given the power of making judicial decisions must be duly qualified to do so. The UN Basic Principles on the Independence of the Judiciary make clear that "persons selected for judicial office shall [not only] be individuals of integrity of ability [but also] with appropriate training or qualifications in law.[69]

In order to comply with their obligation under the ICCPR to ensure that military courts are independent and impartial, the ICJ is of the view that the authorities in Lebanon must ensure that the Code of Military Justice is amended to set forth clear, transparent and objective merit-based criteria, that include legal qualifications, experience and integrity, for the appointment of *all* judges to the Lebanese military courts.

The legislation governing criteria for and method of appointment of judges sitting on the military courts and practice should also both ensure that the composition of the judiciary is representative, and that it specifically exclude discrimination of any kind, such as race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, in the selection and appointment of judges to military courts. This is particularly important because the military courts, like all other Lebanese institutions are subject, in practice, to a religion-based power-sharing agreement. This agreement impacts the composition of

[64]Code of Military Justice, articles 5 and 6.
[65]See Decree-Law No. 150/83, article 71; Decree-Law No. 2102 of 25 June 1979, article 1. See also ICJ, "The Career of Judges in Lebanon in Light of International Standards", February 2017, p. 12, available at: https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-judges-Advocacy-Analysis-Brief-2017-ENG.pdf.
[66]Code of Military Justice, articles 5 and 6.
[67]Code of Military Justice, article 7.
[68]Code of Military Justice, Article 12.
[69]UN Principles on the Independence of the Judiciary, Principle 10.

Parliament, the Cabinet and the Judiciary.[70] For example, the First President of the Court of Cassation must be a Maronite Christian, the Public Prosecutor at the Court of Cassation a Sunni Muslim, and the Director of the Institute of Judicial Studies a Shia Muslim. Thus, according to information available to the ICJ, there are three civilian judges at the PMC, who are necessarily Maronite, Sunni, and Shiite.

While it is important for the judiciary to be representative of the Lebanese communities, the ICJ nevertheless believes that the selection and appointment of judges should not be based on whether the judge in question belongs to a certain religious group. Rather, judicial selection and appointment should be based on objective criteria clearly prescribed by law, and adhered to in practice. These criteria should refer only to the integrity and ability of the judge, as well as his or her appropriate legal training, and must not include discriminatory considerations on the grounds of race, colour, sex, religion, opinion (including political opinion), national or social origin, etc.[71]

ii. Procedures for appointment

The procedure governing the selection and appointment of judges must ensure the effective independence of the judiciary, both in appearance and in reality.

Although international law does not mandate one procedure for the appointment of judges, certain safeguards must be adopted to protect the independence and impartiality of the judiciary and the appointment process.[72]In particular, international standards are clear that "any method of judicial selection shall safeguard against judicial appointments for improper motives",[73] and that the process of appointment must be "transparent and accountable", as well as "safeguard the independence and impartiality of the judiciary".[74]To these ends the establishment of a body– independent of the executive in both its composition and its work – composed mainly (if not solely) of judges and members of the legal profession, at least half of whom are elected by their peers, has been recommendedfor every decision "affecting the selection, recruitment, appointment, career progress or termination of office of a judge".[75]

In the Lebanese military court system, the civilian judges are all appointed to serve on military courts by Cabinet Decree upon the recommendation of both the Ministers of Justice and of National Defence and with the approval of the High Judicial Council.[76]

Military officers, on the other hand, are appointed as judges in military courts, solely by decision of the Minister of National Defence, upon the recommendation of the Supreme Military Authority, which is composed of army leaders.[77]

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[70]See article 24 of the Lebanese Constitution, as amended by the Taif Agreement of 1990 that put an end to the Lebanese civil war, according to which the distribution of seats within the Chamber of Deputies shall ensure equal representation between Christians and Muslims, as well as proportional representation among the confessional groups within each of the two religious communities (for example, the Maronite, Greek Orthodox and Greek Catholic confessional groups fall under the Christian community, and the Shia, Sunni and Druze fall under the Muslim community).

[71] UN Basic Principles on the Independence of the Judiciary, principle 10.

[72] See generally Decaux Principles, principle 13 and paras 45-47. See also Inter-American Commission on Human Rights, Report on Chile, OAS Doc. OEA/Ser.L/V/II.66 Doc. 17 (1985), Ch. VIII, para. 140.

[73] UN Principles on the Independence of the Judiciary, Principle 10.

[74]ACHPR Principles Fair Trial in Africa, Principle A.4(h).

[75]European Charter on the Statute for Judges, principle 1.3. See also, Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41(2009) §§23-34, 97; and ACHPR Principles Fair Trial in Africa, Principle A.4(h).

[76]Code of Military Justice, article 13.

[77]Code of Military Justice, article 14. While it is general knowledge that the Supreme Military Authority includes the leaders of the Army, its exact composition is unclear. It was reported that the Supreme Military Authority might in fact be the Military Council, as established by the National Defense Act of 1983, and that holds important administrative and regulatory powers within the military (articles 26-27 of the National Defense Act). See Legal Agenda, "Draft law on the military court: legislation without methodology nor principles", 14 February 2014, available at (in Arabic): http://legal-agenda.com/article.php?id=660&lang=ar. In accordance with article 26 of the National Defense Act, the Military Council is composed exclusively of army members, i.e. of the Commander of the Army, the Chief

The ICJ is concerned that the procedure of appointment of both the military and civilian judges in Lebanese military courts impinges on the independence and appearance of independence of judges. The process of appointment of judges to the military courts is not transparent, and as noted above is not based on objective, merit-based criteria that are prescribed by law.

Members of the military are appointed as judges on military courts solely by the executive. Though the Supreme Military Authority makes recommendations to the Minister of National Defence on such appointments, because it is composed of leaders of the military, it does not constitute the type of independent body, composed by a majority of judges, which has been recommended to oversee the appointment and careers of judges. Indeed, there are no safeguards in the system in place to protect against undue influence in the process or appointment for an improper motive, and no accountability.

The High Judicial Council, the body thatis in charge of the selection and appointment of civilian judges, approves recommendations of the Ministers of Justice and National Defense for civilian judges to serve on military courts.While, in contrast to the Supreme Military Authority, this body is composed exclusively of judges, extensive reforms are needed to render the High Judicial Council a truly independent and impartial body. Among other things, the legal framework relating to the HJC must be reformed to ensure that this Council is independent from the executive, including by ensuring that the Minister of Justice is divested of any role in appointing its members and amending its composition to ensure that the at least half of its members are judges elected by their peers and that it is pluralistic and gender representative.[78]

With a view to reinforcing judicial independence, the law should therefore be amended to ensure that the Ministers of Justice and National Defense are divested of their central role in the selection and appointment of judges to the military courts.

Furthermore, the Supreme Military authority should be divested of its role in the appointment of military judges, and instead, either: a)the High Judicial Council - reformed along the lines recommended by the ICJ to ensure its independence, or b) another independent body that is composed mainly if not solely of judges and members of the legal profession, at least half of whom are elected by their peers, should play the predominant, if not exclusive, role in the appointment and oversight of the careers of all judges (both military and civilian) on the military courts.

iii. Security of tenure and irremovability

The Human Rights Committee and other international human rights bodies, mechanisms and standards have clarified that the security of tenure of judges until a mandatory retirement age or expiry of their term of office is a requirement for ensuring the independence of the judiciary.[79]The UN Special Rapporteur on the independence of judges and lawyers makes clear that tenure must be guaranteed through irremovability for the period of time the judge has been appointed, stating that the irremovability of judges is "one of the main pillars guaranteeing the independence of the judiciary".[80]

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of Staff, the Director-General, the General Inspector, Secretary-General of the Supreme Council for Defence, and a general officer appointed by Cabinet Decree upon the recommendation of the Minister of National Defence and consultation with the Commander of the Army.

[78]An analysis of the reforms needed to bolster the independence of the High Judicial Council is set out ICJ, "The Lebanese High Judicial Council in Light of International Standards", February 2017, available at: https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-HJC-Advocacy-Analysis-Brief-2017-ENG.pdf.

[79] Human Rights Committee, General Comment No. 32, para 19; UN Basic Principles on the Independence of the Judiciary, Principle 12.

[80]Report of the Special Rapporteur on the independence of judges and lawyers (2009), UN Doc. A/HRC/11/41, para. 57.

However, the judges of the Lebanese military courts system do not benefit from these guarantees. On the contrary, the provisions of the Code of Military Justice undermine the Lebanese these judges' security of tenure and thus pose a threat to their independence.

For one, the term of appointment of military officers as judges in the military courts is problematic. Indeed, under article 14 of the Code of Military Justice, the appointment of these judges is done at the beginning of each year, and this appointment decision may be modified at any time, except in the course of an on-going case.

This provision – through which military judges are in effect given a maximum of one year, but renewable, term of office and are removable at almost any time – is inconsistent with the duty of the state to ensure and respect the independence of the judiciary, including through guarantees of security of tenure. The Human Rights Committee and the UN Special Rapporteur on the independence of judges and lawyers both have repeatedly expressed concern about short terms of judicial office for the reason that they weaken the judiciary and affect the independence of judges.[81] The UN Special Rapporteur further stated that the use of temporary judges is a cause for concern because the uncertainty of their position makes them "more likely to be corrupted or pressured" and "less likely to report inappropriate behavior or corrupt acts if they witness them".[82]

The Code of Military Justice should therefore be amended to ensure that military judges are appointed to their posts for life, or until a mandatory retirement age, subject to their ability to properly discharge their functions.

Moreover, the power to modify the decision of appointment during a military judge's one year term of office on a military court at almost any time during the term should be entirely revoked. Indeed, judges must feel secure enough in the stability of their office to ensure that they are entirely independent in their decision-making. Thus, in accordance with international standards, including the UN Basic Principles on the Independence of the Judiciary, the suspension or removal of judges should only occur for reasons of incapacity or behavior that renders them unfit to discharge their duties[83], and judges should be held accountable only in accordance with established standards of conduct.[84]

With regard to civilian judges sitting on military courts[85], the Code of Military Justice provides that once they are appointed to the military courts, they can be transferred back to the ordinary courts at any time, through the same procedure according to which they were appointed to the military courts, i.e. by Cabinet Decree upon recommendation of the Ministers of Justice and of National Defence and the approval of the High Judicial Council.[86]

While the law provides that such a transfer cannot occur while a case on which the judge is sitting is on-going, the fact that civilian judges may be transferred back to the ordinary justice system at any time also exposes them to the undue pressure and influence by the executive, and facilitates the possibility of arbitrary transfers.

Indeed, the principle of irremovability extends to the appointment, transfer, assignment or secondment of a judge to a different office or location without his or her consent. To preserve judicial independence, judges must be protected from arbitrary transfers. The UN Special Rapporteur on the independence of judges and lawyers has stated, "the assignment of judges to particular court locations, and their transfer to others, should equally be determined by

[81]See e.g. Human Rights Committee, Concluding observations on Uzbekistan, UN Doc. CCPR/CO/7/UZB, para. 14; Concluding observations on Viet Nam, UN Doc. CCPR/CO/75/VNM (2002), para. 10. See also Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 54.
[82] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/67/305 (2012), para. 52.
[83]UN Basic Principles on the Independence of the Judiciary, Principle 18.
[84]UN Basic Principles on the Independence of the Judiciary, Principle 19.
[85] With regard to the selection, appointment, and conditions of tenure of civilian judges in general, the ICJ refers to its memorandum on the career of judges in Lebanon in light of international standards.
[86]Code of Military Justice, article 13.

objective criteria".[87] In this regard, international standards recommend that transfer decisions be decided by judicial authorities, and that the consent of the judge in question be sought.[88] The Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") states that the assignment of a judge to a post "shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist".[89]This contributes to protection against undue interference such as using transfers as a means of exerting pressure on judges, which can threaten judicial autonomy and independence in decision-making.

The Code of Military Justice should therefore also be amended to bolster the independence and security of tenure of civilian judges sitting on military courts, by providing that the decision to transfer a civilian judge to and from the military courts is subject to the consent of the judge in question. Moreover, any such decision must be made only by an independent judicial authority, such as the High Judicial Council, and the powers in this regard of the Ministers of Justice and National Defence, should be entirely rescinded.

iv. Subordination to military hierarchy

The UN Special Rapporteur on the independence of judges and lawyers underscored that the "principle of the separation of powers requires that military tribunals be institutionally separate from the executive and legislative branches of power so as to avoid any interference, including by the military, in the administration of justice".[90] In this regard, international standards recommend that:

> the statutory independence vis-à-vis the military hierarchy be strictly protected, avoiding any direct or indirect subordination, whether in the organization and operation of the system of justice itself or in terms of career development for military judges.[91]

In Lebanon, however, the military court system falls under the competence of the Ministry of National Defence. In this regard, notwithstanding any contrary provisions in the Code of Military Justice, in relation to the military courts the Ministry of National Defence is granted all the powers that are given to the Ministry of Justice towards the ordinary court system.[92] Moreover, military judges who are military officers remain subject to the authority of the Ministry of National Defence.Military judges may not be referred to a disciplinary council or to any military tribunal, or have disciplinary sanctions imposed on them for something done in the course of their functions, unless ordered so by the Minister of National Defense.[93] Moreover, the military judges of the PMC are doubly subordinated to a higher military authority, as they also must be hierarchically lower in rank than the President of the Chamber in which they are members.

The fact that military judges remain under the command of the Minister of Defence and military hierarchy while exercising judicial functions is inconsistent with international standards safeguarding the guarantee of the independence of the judiciary. Lebanese military judges are under the direct authority of their superiors, and subject to military discipline if so ordered by the Minister of National Defense. This means that they lack independence, or at

[87] Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/67/305 (2012), para. 53.
[88]Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), para. 15. The Singhvi Declaration formed the basis of the UN Basic Principles on the Independence of the Judiciary and was formally recommended to States by the Commission on Human Rights in Resolution 1989/32, UN Doc. E/CN.4/RES/1989/32.
[89] Singhvi Declaration, para. 13.
[90] Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013), para. 38.
[91] Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013), para. 38. See also Decaux Principles, Principle 12.
[92]Code of Military Justice, article 1. These powers include substantial competences over the careers of judges through, selection, appointment and discipline, for example. On this, see the ICJ memoranda on the High Judicial Council, the management of the careers of judges, and the ethics and accountability of judges in Lebanon, available at:https://www.icj.org/lebanon-the-icj-calls-for-extensive-reforms-to-strengthen-judicial-independence-and-accountability/.
[93]Code of Military Justice, article 14.

the very least the appearance of independence. This is even more flagrant in the case of the chambers of the PMC, where the military members of the court a lower ranking than the Chamber President. Human Rights Watch highlighted this issue in a recent report on the military courts of Lebanon, quoting a lawyer who reported that the military members of a chamber of the PMC, who are lower ranked, are unlikely to disagree with the chief judge.[94]

The Inter-American Court of Human Rights, which has extensive jurisprudence on the independence of military courts in particular, has held that military tribunals made up of active-duty military officers who are hierarchically subordinate to higher-ranked officers and whose appointment is not based on skill and qualifications to exercise judicial functions, do not present sufficient guarantees of independence and impartiality.[95]

Similarly, in *Findlay v. the United Kingdom*, the European Court of Human Rights concluded that the fact that, among other things, members of the court-martial board were subordinate to the convening officer and under his command meant that there had been a violation of the applicant's right to an independent and impartial tribunal.[96] In another case, while the European Court found that the presence of lay judges was permissible under the European Convention, the fact that these lay judges were appointed by their "hierarchical superiors" and "subject to military discipline" led to the finding of a violation.[97]

Moreover, the fact that there are also civilian judges in the military courts is not sufficient to compensate for the lack of independence, either real or perceived, of a tribunal in which military judges are members. In Lebanon, there are military judges who remain subject to military hierarchy while exercising judicial functions in every tribunal of the military court system, i.e. single military judges, the PMC, and the Military Court of Cassation. At the PMC in particular, the bench is presided by a military judge and composed of a majority of military judges.

The European Court of Human Rights has more than once determined that the presence of a military judge lacking the basic guarantees of independence on a tribunal was enough to legitimize a claimant's fear that the his or her right to an independent tribunal had been violated. For example, in *Martin v. the United Kingdom*, the Court concluded that while the participation of civilian judges as ordinary members of a court martial did somewhat contribute to its independence, they did not have enough influence over the proceedings as a whole, including over the military members of the court martial, to ensure that the requirements of independence and impartiality under article 6 of the European Convention had been met.[98]In another case, the hearing of a civilian being tried by a specialized security court composed of three members – two civilian judges and one military judge – was ruled to be in violation of the right to a fair trial before an independent and impartial court because of the legitimate fears of the applicant about the independence and impartiality of the court given that *one* of the judges – the military judge – who was appointed by the executive (including the military) for a limited yet renewable term, and remained subject to military discipline might, unduly influence the tribunal by considerations that had nothing to do with the nature of the case .[99]

In order to comply with the requirements of independence and impartiality, it is therefore incumbent upon the Lebanese authorities to ensure that, in the course of their judicial functions, military judges have statutory independence from the military chain of command

[94]Human Rights Watch, *"It's Not the Right Place for Us": The Trial of Civilians by Military Courts in Lebanon*, 2017, p. 17.
[95] Inter-American Court of Human Rights, *Palamara Iribarne v. Chile,* Judgment of 22 November 2005, Series C No. 135.
[96] European Court of Human Rights, *Findlay v. the United Kingdom*, Application No. 22107/03, Judgment of 25 February 1997, paras 75-80.
[97]European Court of Human Rights, *Ibrahim Gurkan v. Turkey*, Application No. 10987/10, Judgment of 3 July 2012, para. 19.
[98] European Court of Human Rights, *Martin v. the United Kingdom*, Application No. 40426/98, Judgment of 24 October 2006, para. 51.
[99]European Court of Human Rights, *Incal v. Turkey*, Application No. 41/1997/825/1031, Judgment of 9 June 1998, paras 67-68 and 72-73.

and are immune from military discipline.The Code of Military Justice should be thus be amended to remove military judges from the oversight of the Minister of National Defence in the course of their judicial duties.

It is also crucial that the powers of the Minister of National Defenceover the discipline of judges be entirely rescinded. Any allegation of judicial misconduct must be investigated independently, impartially, thoroughly and fairly adjudicated in the context of fair proceedings before a competent, independent and impartial body, in which a judge's rights to due process are respected.[100] To this end, either an independent and impartial body composed exclusively of judges should be established to take charge of disciplinary proceedings against military judges, or this competence should be granted to the disciplinary decision-maker of the ordinary court system. In either case, this should be explicitly addressed in the Code of Military Justice.

v. Office of the Government-Commissioner

A strong, independent and impartial prosecutorial authority in charge of investigating and prosecuting criminal offences is essential to the effective maintenance of the rule of law and of human rights standards. To this end, States must provide resources and safeguards to ensure that prosecutors can conduct investigations impartially and objectively. The UN Guidelines on the Role of Prosecutors clarify States must ensure that prosecutors are able to perform their functions "without intimidation, hindrance, harassment, improper interference".[101]

All prosecutors in Lebanon have the same status as judges; they are part of the judiciary and are selected and appointed in the same manner as judges who preside over proceedings in courts.

In the framework of the Lebanese military justice system, the "Government-Commissioner" acts as the military prosecutor. The office of the Government-Commissioner is composed of a Government-Commissioner at the Military Court of Cassation, a Government-Commissioner at the PMC, and of their assistants. The Government-Commissioner at the Military Court of Cassation is, in fact, the Public Prosecutor of the civilian Court of Cassation, or one of his or her assistants whom or he or she names.[102]At the level of the PMC, the Government-Commissioner is a civilian judge of at least the 11thgrade. He or she is assisted by civilian judges or military officers who have at least attained the rank of captain and who are licensed in law.[103]

The fact that that the Government Commissioners at the Military Court of Cassation and at the PM Care civilian judges rather than members of the military, and that the Government Commissioner at the PMC is subject to the authority of the Public Prosecutor of the Court of Cassation rather than to a member of the military, bolsters the independence of the office of the Government-Commissioner.

However, it is of concern that the prosecutors in the PMC who are appointed to assist the Government Commissioners of the PMC may be military officers. Regardless of the fact that they must be licensed in law, to safeguard their independence and impartiality prosecutors when carrying out their official function, they should not be subject to military structural and hierarchical subordination. Instead, investigations and other prosecutorial functions should be conducted by a prosecutorial authority and prosecutors who are independent and impartial. Investigations by military prosecutors who remain subordinate to their chain of command in

[100]See ICJ, Practitioners Guide No. 13: Judicial Accountability, 2016, pp. 62 to 69
[101]UN Guidelines on the Role of Prosecutors, Guidelines 4 and 1 respectively.
[102]The Public Prosecutor of the ordinary Court of Cassation must be of the 14th grade or above.
[103] Code of Military Justice, article 11. The powers of investigation granted to the Government-Commissioner are the same as those granted to the Public Prosecutor in accordance with the Code of Criminal Procedure (articles 13 and following). With regard to the Office of the Public Prosecution and its independence in light of international standards, see the ICJ memorandum entitled "Lebanon: The role of prosecutors in ensuring independent and impartial investigations and prosecutions, June 2018, available on ICJ's website.

the course of exercising their duties investigating and prosecuting crimes alleged to have been committed by members of the armed forces are unlikely to meet the requisite standards of independence and impartiality required by international standards.

The case *Voiculescu v. Romania*, examined by the European Court of Human Rights is illustrative of this concern. In this case, the Court examined the compliance with the right to life of an investigation into the death of a pedestrian, who was run over by a military vehicle driven by a soldier on active duty. The Court held that the investigation did not meet the requisite standard of effectiveness required because it was neither prompt nor independent and impartial. The Court concluded that the investigation, which was conducted by a military prosecutor, lacked the requisite independence and impartiality on the basis that the military prosecutors and the lorry driver who ran over the pedestrian while on active duty were both members of the military on active duty who, remained part of the military structure and were subject to the principle of hierarchical subordination.[104]

The UN Special Rapporteur on the independence of judges and lawyers has also underlined that where they military prosecution office is subordinate to the Ministry of Defence, and where it is physically located at military bases, this can raise serious doubts about the ability of the prosecutors to act with objectivity and impartiality.[105]

The ICJ is therefore of the view that the office of prosecutor at the military courts should entirely filled by civilian prosecutors. If military officers who are trained in law should be appointed as prosecutors in the Lebanese military courts, it should be ensured that they be removed from the military chain of command in the course of their functions, and that they undergo the same training as their civilian counterparts, in particular in human rights.[106] Moreover, in line with the Human Rights Committee's recommendations, only independent and civilian prosecution authorities should conduct investigations in cases violations of human rights committed by the military or armed forces.[107]

In light of the above, and in order to enhance the independence and impartiality of the judiciary, the ICJ urges the Lebanese authorities to reform the military justice system to:

- **i. Ensure that judges who sit on military tribunals are independent and impartial. To this end, ensure in particular:**
  - **a. that the selection of judges to sit on military courts is based on clear and objective criteria that are based on merit and are relevant to the position and status of a member of the judiciary, including a requirement of qualifications and training in law, experience and integrity, but excluding criteria based on discriminatory grounds. The Code of Military Justice must be amended to include these criteria;**
  - **b. that the role of the Ministers of Justice and of National Defence in the appointment of judges to the military courts are entirely rescinded. The Code of Military Justice should entrust:**
    - **the appointment of the civilian judges entirely to the High Judicial Council – reformed in accordance with the recommendations of the ICJ to bolster its independence)[108], and**

[104] European Court of Human Rights, *Voiculescu v. Romania*, Application No. 5325/03, Judgment of 3 February 2009, para. 35; *Anghelescu v. Romania*, Application No. 46430/99, Judgment of 5 October 2004, paras. 66-70.
[105] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 57.
[106] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 57.
[107] For example, Human Rights Committee, Concluding Observations on Colombia, UN Doc. CCPR/C/79/Add.76 (1997), paras 19, 23, 32, 34.
[108] ICJ, "The Lebanese High Judicial Council in Light of International Standards", February 2017, available at: https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-HJC-Advocacy-Analysis-Brief-2017-ENG.pdf.

- **the appointment of military judges to either the (reformed) High Judicial Council or a comparable body that is mainly composed of judges and members of the legal profession, at least half of whom are elected by their peers, and that is independent from the executive;**

c. that all judges of the military courts benefit from security of tenure and irremovability, and to this end:

- **amend article 14 of the Code of Military Justice to provide that military judges be appointed for life – and not at the beginning of each year – and this decision may be changed only in accordance with international standards on judicial accountability that specify that judges may be removed only for reasons of incapacity or behaviour that renders them unfit to discharge their duties following fair procedures;**
- **amend article 13 of the Code of Military Justice so as to prevent the arbitrary transfer or other interference with the independence of civilian judges sitting on military courts, by providing that transfers must be subject to the consent of the judge in question and that the decision for such a transfer must be made exclusively by an independent judicial authority. The role of the Ministers of Justice and National Defence in decisions of transfer of judges from the military to civilian courts must be rescinded;**

d. that judges sitting on military courts remain outside the military chain of command when performing their judicial functions and are not subject to military authority in respect of matters concerning the exercise of their judicial function.

ii. Ensure that the investigation of offences – including those alleged to have been committed by a member of the military or armed forces –is conducted independently and impartially by the prosecution authority by:

a. amending the law and practice to ensure the independence, thoroughness and impartiality and promptness of investigations of alleged crimes that amount to human rights violations under international law; to this end, the law should require that such crimes are investigated by independent civilian prosecutors;

b. ensuring, ifmilitary officers who are trained in law should be appointed as prosecutors in the Lebanese military courts, that they that they be removed from the military chain of command in the course of their functions and that they undergo the same training as their civilian counterparts, in particular in human rights.

c. ensuring that, in cases of violations of human rights committed by the military or armed forces, only independent and civilian prosecution authorities should conduct the investigation.

B. Right to a fair trial and due process

The Human Rights Committee has clarified that "the provisions of article 14 apply to all courts and tribunal within the scope of that article whether ordinary or specialized, civilian or military."[109] In this regard, Lebanon is obligated to ensure that all criminal court proceedings in military courts are conducted in a manner that meets international standards of fairness, including guarantees under articles 7, 9, 10 and 14 of the ICCPR.

The second volume of the Lebanese Code of Military Justice is dedicated to the criminal procedure applicable to military courts. According to article 33 of the Code of Military Justice, the Code of Criminal Procedure applies to prosecutions, investigations, hearings, the issuance of decisions, judgments, and appeals, unless the provisions of the Code of Military Justice provide otherwise.

[109]Human Rights Committee, General Comment No. 32, para. 22.

In this section of the memorandum, the ICJ focuses on the procedural issues found in the Code of Military Justice and that are specific to the military courts. The ICJ is concerned that provisions of the Code of Military Justice, on their face, significantly curtail the rights of the defence in a manner that is inconsistent with international standards in several respects. In particular, aspects of the Code may not accord with the right to protection from arbitrary detention, the right to adequate time and facilities, the right to a public hearing, the right to reasoned decision, and the right to appeal a conviction and sentence before an independent and impartial tribunal. The examples set out below illustrate some of the most prominent of these inconsistencies.

i. Pre-trial detention ordered by the military investigative judge

Lengthy pre-trial detentions are widespread in Lebanon, particularly in the framework of proceedings conducted by the military courts. According to a 2017 report by Human Rights Watch, bail is "often not granted to defendants before the first [military] court session, which in some cases could take a year".[110]The Lebanese NGO ALEF shared its findings regarding a multitude of lengthy and arbitrary cases of pre-trial detention, including as ordered by the military courts, for periods ranging from six months to three years.[111]

Such practices are contrary to Lebanon's obligations under international law, particularly under article 9 of the ICCPR and article 14 of the Arab Charter on Human Rights, which require States parties to respect and protect the liberty and security of persons and prohibits arbitrary arrest and detention.[112]

The ICJ considers that the recourse to such lengthy and arbitrary pre-trial detention in Lebanon is facilitated by the inadequacy of the legal framework regarding pre-trial detention, including in proceedings before the military courts. The procedure followed by the military investigative judges to order pre-trial detention is inconsistent with international standards related to the right to liberty and protection from arbitrary detention in three respects: First, it allows defendants to be placed in pre-trial detention as a matter of practice, rather than only in exceptional circumstances, particularly because the grounds on which pre-trial detention can be ordered are much too broad; secondly, it does not allow the defendant to duly challenge his or her detention through habeas corpus or similar processes; and thirdly, the appeals that may be submitted to challenge orders of release are not heard by an independent and impartial judicial authority.

Overly broad grounds make detention the rule, rather than the exception

First, in the framework of criminal proceedings in Lebanon, during the investigation and after questioning of the defendant, the investigative judge has the power to issue arrest orders: a)if the offence in question is punishable by more than one year's imprisonment; b)if the defendant was previously convicted of a criminal offence; or c)if the defendant was previously sentenced to more than three months' imprisonment.[113]The investigative judge must state the legal and material grounds supporting the arrest order. In cases of misdemeanours carrying a minimum penalty of a year, detention may be ordered for up to two months, renewable once by the investigative judge where "absolutely necessary". As for felonies – with the exception of homicides, felonies involving attacks against State security, felonies representing a global danger, offences of terrorism, and cases where the detained person had a previous criminal conviction – the period of detention in cases of felonies may not exceed six months. This period may be renewed once on the basis of a reasoned decision of the investigative judge.[114]

[110]Human Rights Watch, *"It's Not the Right Place for Us": The Trial of Civilians by Military Courts in Lebanon*, 2017, p. 31.
[111]Alef – Act for Human Rights, *Guilty until Proven Innocent: Report on the causes of arbitrary arrest, lengthy pre-trial detention and long delays in trial*, 2013, pp. 63-65, available at: https://alefliban.org/wp-content/uploads/2016/10/ALEF-Arbitrary-Detention-2013.pdf.
[112] See also Universal Declaration of Human Rights, article 3; African Charter on Human and Peoples' Rights, article 6; Arab Charter on Human Rights, article 14.
[113]Code of Criminal Procedure, article 107.
[114]Code of Criminal Procedure, article 108.

In the other cases of felonies just mentioned, the Code of Criminal Procedure does not appear to set a limit to the period of detention.

Article 39 of the Code of Military Justice provides that the procedure prescribed in the Code of Criminal Procedure applies to the investigative judge of the military court, notwithstanding contrary provisions in the Code of Military Justice. Moreover, certain provisions of the Code of Military Justice suggest that pre-trial custody is ordered systematically by the military investigative judge. Articles43 and 44 of the Code of Criminal Justice provide that, upon completing the investigation, the military investigative judge either must either issue an indictment, or else prohibit the pursuit of a prosecution, in the following cases:

1- the act attributed to the individual does not constitute a felony, misdemeanour or violation;
2- there is not enough evidence for suspicion or accusation to lay a formal charge;
3- the perpetrator remains unknown.

Article 43 of the Code of Military Justice goes on to say that, in respect of the first two cases, the military investigative judge is to issue an order to release the defendant. However, the defendant remains in custody until the period of time allowed for the Government-Commissioner to challenge the decision of the investigative judge has elapsed. This appears to signify that defendants are automatically placed in detention, until an order of release by the military investigative judge has been issued.

According to information available to the ICJ, pre-trial detention in Lebanon appears to be the rule and not the exception, particularly in proceedings before the military courts. This is in part explained by the fact that the legal framework provides the military investigative judge with the impetus to impose detention as a matter of course, rather than exceptionally or even in a modest proportion of cases.

The ICJ is concerned that the grounds for ordering pre-trial detention in Lebanon are overly broad, and they lack precision, particularly when it comes to the power of the investigative judge to renew the period of detention "where absolutely necessary" or "on the basis of a reasoned decision". In the case of homicides, felonies involving attacks against State security, felonies representing a global danger, offences of terrorism, and cases where the detained person had a previous criminal conviction – which can all fall under the jurisdiction of the military court – no maximum period of detention is provided.

The ICCPR requires that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody".[115]Similarly, under article 14(5) of the Arab Charter, "Pre-trial detention shall in no case be the general rule."International standards provide that, to justify detaining an individual pending trial, several conditions must be met: there must be reasonable suspicion that the individual committed an offence that is punishable by imprisonment; a genuine public interest which outweighs the right to personal liberty; and substantial reasons for believing that otherwise the individual would abscond, commit a serious offence, interfere with the investigation, or pose a serious threat to public order. The Human Rights Committee has clarified that, to accord with the ICCPR, detention pending trial can be ordered only pursuant to an "individualized determination that it is reasonable and necessary in all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime,"[116] or "influencing victims."[117]The Human Rights Committee has further pointed out that: "pre-trial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pre-trial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity".[118]

[115]ICCPR, article 9(3).
[116]General Comment No. 35: Article 9 (Liberty and security of persons), UN Doc. CCPR/C/GC/35 (2014) [General Comment No. 35], para. 38.
[117] Human Rights Committee, *Michael and Brian Hill v. Spain*, U.N. Doc. CCPR/C/59/D/526/1993 (1997), para. 12.3.
[118] Human Rights Committee, General Comment No. 35, para. 38.

Therefore, it is essential for the provisions of the Code of Criminal Procedure and of the Code of Military Justice allowing recourse to pre-trial detention to be amended with a view to ensuring full compliance with international law and standards. Amendments should further restrict the grounds of pre-trial detention such that it is made the exception rather than the rule. To do so, each case must be considered separately and individually to determine whether it is appropriate and lawful under national law and international standards, meaning, for example, that thereis clear evidence to indicate that is both necessary and reasonable in the circumstances of the individual case.Furthermore, the burden of proof should be on the State to show that detention is lawful, necessary and proportionate in the circumstances of the particular case, and that release would create a risk that cannot be alleviated by other means.[119]

Law does not adequately provide for the right to challenge pre-trial detention

While the Code of Criminal Procedure provides that the decisions of the investigative judge are subject to appeal – including orders of detention or release –the Code of Military Justice appears to limit appeals to the decisions that the military investigative judge issues in accordance with article 43 of the Code of Military Justice (i.e. grounds on which to prohibit the trial) and to orders of release.[120]The Code of Military Justice is silent regarding orders of detention.

This means that persons who are held in detention in the military court system do not have the opportunity to challenge their detention; on the contrary, they must wait for the military investigative judge to issue an order of release. This runs counter to Lebanon's obligation to ensure that everyone deprived of their liberty has the right to take proceedings to challenge the lawfulness of their detention before a court.[121]International law and standards require State authorities to create procedures that enable individuals to challenge the lawfulness of detention and obtain release if the detention is unlawful.[122] Further, the Code of Criminal Procedure does not appear to provide for the right to challenge the lawfulness of detention, as they fail to make such procedures available *throughout* the period of detention.[123]The Code of Criminal Procedure does not make clear that, once an order of detention is initially appealed, the detainee may continue to submit such challenges throughout his or her detention: it only allows the detainee to challenge the order of detention when this order is issued.

It is essential that the Codes of Criminal Procedure and Military Justice be modified to clearly provide for procedures allowing a detainee to challenge the lawfulness of his or her detention throughout his or her time under custody. Such procedures should be simple and expeditious,[124] and the body reviewing the lawfulness of detention must be a court that is independent and impartial.

Appeals court is not an independent body

The ICJ is concernedthat even in the limited instances where decisions of the military investigative judge can be heard, the body that is competent to hear these appeals does not present the required guarantees of independence and impartiality. This issue is exacerbated by the fact that the court that hears appeals of the investigative judge in the ordinary court

[119]European Court of Human Rights, *Ilijkov v. Bulgaria,* Application No.33977/96, Judgment of 26 July 2001, paras 84-85, and*Patsuria v. Georgia*, Application No. 30779/04, Judgment of 6 November 2007, paras 73-77; Special Rapporteur on human rights and counter-terrorism, Australia, UN Doc. A/HRC/4/26/Add.3 (2006), para. 34; See Working Group on Arbitrary Detention: South Africa, UN Doc. E/CN.4/2006/7/Add.3 (2005), para. 65.
[120]Code of Military Justice, articles 45 and 46.
[121]ICCPR, article 9(4); Arab Charter on Human Rights, article 14(6); European Convention on Human Rights, article 5(4); ACHPR Principles on Fair Trial in Africa, Principles M.4 and 5.
[122] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), principle 32(1).
[123] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), principle 32(2).
[124] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173 (1988), principle 32(2).

system – which is distinct from the one in the military courts – are more independent. Indeed, in the ordinary court system, appeals of decisions of the investigative judge are heard by the Indictment Chamber, which is a civil chamber of the Court of Appeal assigned to perform the functions attributed to it by the Code of Criminal Procedure.[125]

In the case of the military tribunals, appeals of the orders of release of the military investigative judge are brought before the felonies chamber of the Military Court of Cassation.[126] The felonies chamber, as noted above in section II(A)i), is composed of a presiding civilian judge, and of four military officers as members.[127]For the reasons listed above in section II(A) – including the fact that the majority of the members of the Military Court of Cassation are military officers who are do not necessarily have legal training, and who remain subordinated to military hierarchy –the felonies chamber of the Military Court of Cassation cannot be considered a judicial body that is independent and impartial enough to review appeals of the decisions of the investigative judge regarding detention and release.

The ICJ therefore considers that appeals of all decisions made by the military investigative judge should be receivable, either by the Indictment Chamber established through the Code of Criminal Procedure, or before a military Indictment Chamber, created for this purpose and composed of independent and impartial judges.

ii. Rights of defence: right to adequate time and facilities and to counsel

In accordance with the fair trial guarantees in article 14(3)of the ICCPR and article 13 of the Arab Charter,the Lebanese authorities are required to ensure that all persons charged with a criminal offence are informed promptly and in detail of the nature and the causes of the charges against them, that they are given adequate time and facilities for the preparation of their defence, and that they are allowed to communicate in confidence with counsel of their own choosing.[128]These rights apply whether the accused is being tried before a civilian or military court.

According to the Human Rights Committee, the right to be informed "promptly" of the charges requires that the person concerned be given detailed information about the nature and causes of any charges against him or her as soon as he or she is "formally charged with a criminal offence under domestic law, or the individual is publicly named as such".[129]The information must be sufficiently detailed to allow the preparation of the defence.[130]This right applies to all cases where a person is criminally charged, including those who are not in detention.[131]

With regard to the right to adequate time and facilities, the Human Rights Committee clarified that "what counts as 'adequate time' 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."[132] In addition, the Human Rights Committee explained that the duty to ensure that the accused has "adequate facilities" for preparation of their defence must include provision by the authorities of access to "all materials that the prosecution plans to offer in court against the accused or that are exculpatory".[133]The UN Basic Principles on the Role of Lawyers add: "It is the duty of the competent authorities to ensure lawyers' access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide

[125] Code of Criminal Procedure, articles 135 and following.
[126]Code of Military Justice, article 45.
[127] Code of Military Justice, article 72.
[128] Articles 14(3)(a) and 14(3)(b) of the ICCPR, respectively.
[129]Human Rights Committee, General Comment No. 32, para. 31.
[130]Human Rights Committee, General Comment No. 32, para. 21; Human Rights Committee, *McLawrence v. Jamaica*, UN Doc. CCPR/C/60/D/702/1996 (1997), para. 5.9.
[131]This right is distinct, however, from the right to receive the reasons for an arrest, which is guaranteed under article 9(2) of the ICCPR.
[132]Human Rights Committee, General Comment No. 32, para. 32.
[133]Human Rights Committee, General Comment No. 32, para. 33.

effective legal assistance to their clients. Such access should be provided at the earliest appropriate time".[134]

Moreover, the right of the accused to legal representation is of crucial importance and bears particular relevance with regard to proceedings before military tribunals. Article 14(3)(b) of the ICCPR provides that accused persons must have the right to communicate with their lawyers and that this "requires that the accused is granted prompt access to counsel".[135]Principle 15(e) of the Decaux Principles states, "Everyone charged with a criminal offence shall have the right to defend himself or herself or through legal assistance of his or her own choosing […] and to have legal assistance assigned to him or her, in any case where the interests of justice so require […]". Whether this right is assured through the provision of a civilian or military lawyer, the same safeguards and guarantees must be ensured so as to allow the lawyer to act with objectivity, efficiency and independence.[136]

Several provisions of the Code of Military Justice fail to adequately safeguard these rights.

For one, article 49 of the Code of Military Justice provides that a person charged with a crime must be notified with the act of accusation issued against them, as well as with the list of prosecution witnesses, "at least three days before the start of the trial". The accused then has three days to present to the President of the court his or her list of witnesses, and to notify the Government-Commissioner of this list.[137]

Thus, rather than requiring that an accused person be given prompt notice of the nature and cause of the charges against him or her, as well as access to the necessary information to prepare the case against him or her to allow adequate time for the preparation of the defence, the Code of Military Justice permits that such information be withheld until up to three days before the start of the trial against the accused. This provision does not adequately safeguard the rights of an accused to be informed promptly of the charges, as it does not require that such notification be given in all cases as soon as the formal charge has been laid. In cases where an individual is formally charged more than three days before the start of trial, but has only been informed three days prior to the trial, this would be permissible under article 39 of the Code of Military Justice, but violates the promptness requirement under article 14(3)(a) of the ICCPR.

Similarly this provision does not adequately safeguard the right to adequate time and facilities to prepare a defence. What constitutes adequate time and facilities will necessarily vary depending on the circumstances of the case. However, article 49 would permit the prosecution to withhold disclosure of the prosecution witnesses until three days before the start of a trial. Particularly serious and complex cases will inevitably require more preparation by the defence. It thus does not adequately safeguard the right under article 14(3)(b).

Article 49 of the Code of Military Justice should therefore be amended to provide that a person charged with a crime must be notified with the act of accusation issued against them, which should include all the necessary information for the preparation of the defence, as well as with the list of prosecution witnesses, as soon as the charges are formally laid.

In addition, article 58 of the Code of Military Justice only requires that the case file be placed at the disposal of the defence lawyer "at least 24 hours before the hearing". Furthermore, rather than being guaranteed access to the whole file or and being provided with a copy of the file, the defence lawyer is given "access" to the file and may make photocopies. The defence lawyer's access to "confidential" documents is even further restricted: a defence lawyer may view such documents, only in the presence of the President of the court or a judge delegated by the President of the Court for this purpose, but may not make copies of

[134]Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 [UN Basic Principles on the Role of Lawyers], Principle 21.
[135]Human Rights Committee, General Comment No. 32, para. 34.
[136] Decaux principles, principle 15, para. 53. See also Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/68/285 (2013), para. 77.
[137] Code of Military Justice, article 50.

them. Thus this provision does not adequately safeguard the right of an accused to adequate time and facilities to prepare a defence as it neither guarantees that the defence will have adequate time to consult or access to the full case. If the crime charged is particularly serious in nature and the case file is large or involves complex evidentiary or legal issues, possibly involving multiple witnesses, it will not be adequate to provide this information only 24 hours in advance. Such limited notice and provision of information would be unlikely to be sufficient to ensure respect for the accused's right to adequate time and facilities to prepare his or her defence.

Furthermore, with respect to the restriction of access to "confidential materials" it is unclear as to who is authorized to make decisions that materials are "confidential", nor is the procedure and basis (criteria) for such decisions evident. In addition, it is not clear that the broad constraints imposed on the defence's access to such information would be sufficient to guarantee the right of the defence to adequate time and facilities to prepare the defence: the fact that the lawyer may only see, and not photocopy, such documents, and that the defence may only examine such material in the presence of the President of the court or his or her designate, may impair the adequacy of access. International standards clarify that decisions on disclosure of evidence to the defence in a criminal case should be exceptional and made by a judge, rather than a prosecutor, in the course of a fair and adversarial procedure.[138] Any such restriction must be strictly necessary and proportionate to protecting the rights of another individual, or to safeguard an important public interest (such as national security). Restrictions based on military secrecy cannot be invoked to keep the identity or whereabouts of a detained person secret or to obstruct the exercise of *habeas corpus* or other similar judicial remedies. Further it may not obstruct the initiation or conduct of inquiries, proceedings or trials.[139] The Human Rights Committee has clarified that the right to adequate time and facilities to prepare a defence must be understood as a guarantee that individuals must not be convicted on the basis of evidence to which the accused or their counsel do not have full access.[140] If restrictions on disclosure or the non-disclosure of material would impact the overall fairness of proceedings, the proceedings may need to be dismissed.

Therefore, article 58 of the Code of Military Justice should be amended to ensure that: the defence lawyer is given prompt access to the case file in order to have adequate time to prepare the defence; the defence lawyer is given full access to the case file, and not only the right to make photocopies; and any decision to restrict access to "confidential" materials is exceptional, and strictly necessary and proportionate to protecting the rights of another individual or to safeguard an important public interest, made only by a judge and on the basis of clear criteria.

The provisions of the Code of Military Justice are not compliant with the obligations on Lebanon to ensure the right to legal counsel to persons charged with a criminal offence without discrimination, under the ICCPR. According to article 57 of the Code of Military Justice, an accused brought before the military court shall have a lawyer to defend him or her. Under article 59,if the accused does not choose a lawyer, or if it is impossible for the accused's lawyer to defend him or her, the president of the court will appoint a lawyer from among the officers or lawyers mentioned in article 21 of the Code of Military Justice. Article 21 provides that if the individuals referred to the military justice system do not choose their own lawyer, a lawyer or an officer who is preferably licensed in law is entrusted with their

[138]European Court of Human Rights, *Rowe and Davis v. United Kingdom*, Application No. 28901/95, Judgment of 16 February 2000, paras 53-67; Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, (2003), para 179.

[139] Decaux Principles, principle 10. See also Principles 1, 2, and 15 of the Johannesburg Principles on National Security Feedom of Expression and Access to Information, adopted on 1 October 1995 by a group of experts in international law, national security and human rights, endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, and referred to by the UN Commission on Human Rights in their annual resolutions on freedom of expression every year since 1996.

[140] Human Rights Committee, *Onoufriou v. Cypress*, UN Doc. CCPR/C/100/D/1636/2007 (2010) para. 6.11.

defence. It is not mandatory that the officer have a law degree.[141] The ICJ is concerned that articles 59 and 21 of the Code of Military Justice are not fully consistent with the right of all persons charged with a criminal offence who do not have their own lawyer to be appointed counsel if the interest of justice require it and free of charge if the individual lacks sufficient resources to pay.

Article 21 would permit military officers with no qualifications in law to be assigned to defend a person accused of a criminal offence. This is inconsistent with international standards. As clarified by the UN Principles on the Role of Lawyers, the right to counsel includes the right for any person arrested, detained or charged with a criminal offence to be represented by a lawyer of experience and competence commensurate with the nature of the offence assigned to them, when they do not have their own counsel, in cases in which the interest of justice so require it.[142] As the Human Rights Committee has clarified, when an accused is represented by assigned counsel, the authorities must ensure that the lawyer assigned has the requisite training, skills, experience and competence for the case.[143] Article 21 must thus be amended to reflect this right, i.e. to provide that only fully qualified lawyers with the requisite training be assigned to represent an accused before the military courts.

In addition, article 59 of the Code of Military judges provides that a lawyer can be denied access to his or her clients for up to three months if so ordered by the President of the Court on "serious disciplinary grounds"; such grounds are not defined by the law.[144]

This provision, which appears to permit the military court to decide to deny a lawyer access to his or her clients on grounds of misconduct that are not clearly defined in law, is inconsistent with the duty of the authorities to respect the independence of lawyers. The UN Basic Principles on the Role of Lawyers clarify that lawyers be subject to discipline only on the basis of accepted standards of professional conduct that are consistent with international standards, following a fair procedure which respects the lawyers right to due process and a defence.[145] In its present form, this provision may also facilitate violations of the right to a fair trial, as without such detail it could be unduly impede the right of an accused to be represented by counsel of choice. This would further contravene the UN Basic Principles on the Role of Lawyers which clarify: "No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles".[146]

Article 59 of the Code of Military Justice should be modified to ensure that any disciplinary action against lawyers be initiated only on the basis of clearly defined standards of conduct and following a fair procedure. To this end, the law should clearly prescribe the "serious disciplinary grounds" according to which a lawyer may be denied access to his or her client. Moreover, in such cases, the law should provide that if access between a lawyer and his or her client is denied, the accused person in question must be able to benefit from other effective counsel to ensure the full defence of his or her rights.

iii. Right to be present at trial

All persons charged with criminal offences have the right to be tried in their presence and to an oral hearing so that they can hear and challenge the prosecution case and present a defence.[147] This is an integral part of the right to defend oneself and to equality of arms.

[141] For this purpose, the Supreme Military Authority comes to an agreement with lawyers from the bar association. The Minister of National Defence, upon the proposal of the Supreme Military Authority, appoints the officers who are entrusted with this role of defence at the beginning of each year.
[142] UN Basic Principles of the Role of Lawyers, principle 6.
[143] Human Rights Committee, General Comment No. 32, para. 38.
[144] Code of Military Justice, article 59.
[145] UN Basic Principles on the Role of Lawyers, Principles 26-29.
[146] UN Basic Principles on the Role of Lawyers, Principle 19.
[147] ICCPR, article 14(3)d).

Article 61 of the Code of Military Justice contributes to this practice that is inconsistent with the right to be present at trial. In accordance with this provision, if the accused acts in a way that might cause noise or trouble, or commits an act that troubles security or obstructs justice during the hearing, it is up to the president of the court to order his or her expulsion from the courtroom and his or her return to prison or placement under the guard of the public forces and at the disposal of the court. Not only is this behaviour punishable by up to one year of imprisonment, but in such cases, the hearing continues and the court's decisions taken as if the accused was still in the courtroom.

Under international law, while the right to be present at trial is subject to temporary and proportionate restrictions, such a restriction can only be done in exceptional circumstances. The disruption caused by an accused in the courtroom must be to such an extent that the court would deem it impractical for the trial to continue in his or her presence. As currently written, article 61 would appear to set a much lower bar for the threshold of what would be considered to be "disruptive behaviour". This could allow the court to expulse an accused during the hearing for any conduct that it may deem noisy or troubling.

Moreover, while article 61, provides that, following each hearing, the court clerk must read out the minutes to the accused, provide him or her with the Government-Commissioner's report, and inform him or her of any decision (which the accused has the right to contest), this does not constitute adequate replacement of the right to be present at one's trial. Even where an accused proves to be disruptive during a hearing, all reasonable measures must be taken to ensure his or her continued presence at trial.[148]The accused's absence can only be justified for as long as is strictly required, and reasonable alternatives must be found. Only where such alternatives have proven to be inadequate can the court then attempt to take other measures to preserve the rights of the defence, such as ensuring that the accused can observe the trial and instruct counsel confidentially from outside the courtroom.[149]

Article 61 should be amended to provide that an accused may be ordered out of the courtroom only in exceptional cases where his or her behaviour would render the continuation of the trial impractical. It should also provide that even in such cases, all reasonable measures be taken to ensure his or her continued presence at trial. Moreover, article 61 should explicitly state that the accused's lawyer in such cases must remain present in the courtroom.

In addition, article 62 of the Code of Military Justice also poses a great risk to the right to be present at trial. This provision stipulates that if the accused is present during the hearing, then stops attending the hearing for whatever reason, or if he or she absents him or herself from the trial after having attended a hearing, the trial is considered as being held in the presence of the accused, unless it is proven that he or she was prevented from attending by a situation of *force majeure*.[150]

Trials in the absence of the accused (*in absentia*) may only be permissible in strictly limited cases, following the refusal of the accused to be present, after being informed sufficiently in advance of the charges, date and place of the proceedings.[151]While the presence of the accused at a first hearing will necessarily mean that he or she is aware of the charges against him or her and that proceedings have been initiated, this does not cancel out the requirement that the accused must have clearly refused to attend the subsequent hearings. The European Court of Human Rights has clarified that an accused's waiver to the right to appear and defend himself must "be established in an unequivocal manner and be attended by minimum

[148] Human Rights Committee, *Victor P. Domukosvky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze v. Georgia*, Communications No. 623/1995, 624/1995, 626/1995, 627/1995, UN Doc. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/625/1995, CCPR/C/62/D/626/1995, CCPR/C/62/D/627/1995 (1998), para. 18.9.
[149]Rome Statute of the International Criminal Court, article 63.
[150]Code of Military Justice, article 62.
[151] Human Rights Committee, *Mbenge v. Zaire*, Communication No. 16/1977, UN Doc. CCPR/C/OP/2, 25 March 1983, para. 14.1.

safeguards to commensurate to its importance."[152] The European Court of Human Rights specified that a defendant's silence after attempted notice does not constitute a waiver and that sufficient efforts should be made to trace the defendant in question.[153]

Article 62 of the Code of Military Justice must therefore be amended to reflect these concerns and prohibit the holding of trials *in absentia*, unless the accused explicitly waives his or her right to be present, by way of counsel. Even in the very circumscribed circumstances where a trials *in absentia* is justified, the Code of Military Justice should make clear that the rights of a fair trial must be respected, including the accused's rights to counsel and rights to defend against the charges.

iv. Right to a public hearing

The right to a fair trial, as enshrined in article 14,(1), of the ICCPR, and article 13(2) of the Arab Charter requires as a general rule that hearings be held in public. This right means that not only the parties in the case, but also the general public and the media, are entitled to be present. The right to a public hearing is crucial to the protection of the public's right to know and monitor how justice is administered, as well as to have knowledge of the decisions that are reached by the judicial system.[154] This right is also fundamental to the work of human rights defenders, and is explicitly included in the Declaration of Human Rights Defenders in the following terms:

> To the same end, everyone has the right, individually and in association with others, *inter alia:*
> *[…] (b)* To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments.

Only in a limited number of narrowly defined and specific circumstances may this right be restricted. The ICCPR provides that the only legitimate restrictions to this principle are those laid down in law and related to "reasons of morals, public order (*ordre public*), or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice […]".[155] However, these circumstances refer to exceptional cases, and not the norm in the administration of justice. Under Article 13(2) of the Arab Charter the permissible basis for restriction to public trials is even narrower: "Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights."With specific regard to military justice, Principle 14 of the Decaux Principles states that "public hearings must be the rule, and the holding of sessions *in camera* should be altogether exceptional and be authorized by a specific, well-grounded decision the legality of which is subject to review".

The ICJ considers that the Code of Military Justice does not adequately guarantee the right to a public hearing in military tribunals. In accordance with article 55 of the Code of Military Justice, while the trial is in principle public, the military courts may decide, in accordance with ordinary law, to hold its procedures *in camera*. The only legal criteria according to which the court may decide to hold a trial behind closed doors is provided under article 249 of the Criminal Code: "Proceedings before the Criminal Court shall be held in public unless the Presiding Judge decides to hold them *in camera* in order to preserve security or public morals".

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[152]European Court of Human Rights, *Poitrimol v. France*, Application no. 14032/88, 23 November 1993, para. 31.
[153]European Court of Human Rights, *Colozza v. Italy*, Application no. 9024/80, 12 February 1985, para. 28. In the same vein, in the ICTY case of *Prosecutor v. Delalic*, the defendant failed to attend a hearing one morning for unknown reasons and had not explicitly waived his right to be present through counsel. While the prosecution proposed tendering documents as a group and allowing the defence to object at a later time, the court rejected this idea on the grounds that the right to be present at trial is virtually absolute in the absence of a clear waiver. See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Delalic*, Case No. IT-96-21, Transcript, 4 November 1997, T. 8967-8976.
[154]Human Rights Committee, General Comment No. 32, para. 28.
[155]ICCPR, article 14(1).

These provisions appear to allow overbroad discretion to the military courts to hold proceedings *in camera*. Indeed, according to a 2017 report by Human Rights Watch, proceedings before the military courts in Lebanon are restricted, "because the court is located within a military area, meaning that human rights organizations in Lebanon are not able to enter freely and monitor military trials without the prior approval of the presiding judge."[156]

Article 55 of the Code of Military Justice should be modified to ensure that trials are public and accessible to the general public, including human rights defenders, unless one of the specific grounds for excluding the public or the press from all or part of the proceedings applies.[157]To this end, the grounds for exclusion should be specifically stated in the law, and should be limited to: morals (for example, some hearings involving sexual offences);[158] public order, which relates primarily to order within the courtroom;[159] national security in a democratic society;[160] instances where the interests of the private lives of the parties so require (such as to protect the identity of victims of sexual violence);[161] Any restriction should be necessary and proportionate, ie, they must be to the extent strictly necessary, in the opinion of the court, in special circumstances where publicity would prejudice the interest of justice.[162] Where it may be necessary to exclude the public from a portion of a particular trial, for example, in relation to the testimony of single witness, this should not mean that the entire trial will need to be closed. While there is also a possible exception regarding the protection of the interests and privacy of children, this should not apply in the case of military proceedings because, as stated above, the jurisdiction of military courts should in no circumstances extend to persons under 18 of age. Finally, it should be stated in the law that these listed circumstances are to be strictly construed and should in no way constitute the norm.

v. Right to a reasoned decision

The timely issuance by the Court of a duly reasoned and written judgment, which includes the essential findings, evidence and legal reasoning behind the decision, is an essential component of a fair trial, pursuant to State obligations under the ICCPR and other international standards.[163] As specified in the ICCPR, the judgment in criminal cases must also be made public, except where it is otherwise required by the interest of juveniles.[164] Indeed, the Decaux Principles explicitly recognize that "a statement of the grounds for a court ruling is a condition *sine qua non* for any possibility of a remedy and any effective supervision" and further clarify that "military secrecy may not be invoked […] to obstruct the publication of court sentences".[165]

Lebanese military courts are not required under domestic law to explain the grounds for their decisions. Judgments are based on a printed questionnaire relating to the charges, aggravating circumstances, exculpatory pleas and extenuating circumstances,[166] which the members of the tribunal fill out with basic and brief answers.

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[156] Human Rights Watch, *"It's Not the Right Place for Us": The Trial of Civilians by Military Courts in Lebanon*, 2017, p. 11.
[157] ICCPR, Article 14(1).
[158] ICCPR, article 14(1). See also, Human Rights Committee, *Z.P. v. Canada*, UN Doc. CCPR/C/41/D/341/1988 (1991), para. 4.6.
[159] ICCPR, article 14(1). See also, Human Rights Committee, *Gridin v. Russian Federation*, UN Doc. CCPR/C/69/D/770/1997 (2000), para. 8.2.
[160] ICCPR, article 14(1); European Convention on Human Rights, article 6(1); ACHPR Principles on Fair Trial in Africa, Principle A(3)(f)(ii).
[161] ICCPR, article 14(1); European Convention on Human Rights, article 6(1); ACHPR Principles on Fair Trial in Africa, Principle A(3)(f)(i).
[162] ICCPR, article 14(1); ECHR, article 6(1); Arab Charter on Human Rights, article 13(2); ACHPR Principles on Fair Trial in Africa,A(3)(f)(i).
[163] Human Rights Committee, General Comment No. 32, para. 22.
[164] ICCPR, Article 14(1).
[165] Decaux Principles, para. 50 and Principle 10(d).
[166] Code of Military Justice, article 63.

Moreover, article 70 of the Code of Military Justice lists the mandatory information that a decision must include in order to be valid. According to the article, it is sufficient for the decision to include such things as "the questions raised and the decisions taken, by consensus or majority, in relation to these questions" and "the sentences handed down and the legal provisions applied". There is no obligation to explain the reasoning behind the decision.[167]

In order to comply with its obligations under the ICCPR, Lebanon should amend article 70 ofthe Code of Military Justice to ensure that military courts are obligated to provide sufficiently detailed reasons for their judgments, which describe the evidence and legal reasoning behind the decision.

vi. Right to appeal and review by an independent higher tribunal

The right of a person convicted of a criminal offence to appeal is another fundamental aspect of a fair trial guaranteed under international law. Article 14(5) of the ICCPR, as well as article 16(7) of the Arab Charter, provides that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to the law.[168]The higher court which reviews the case must be independent and impartial.[169]

In this regard, the Human Rights Committee has affirmed that the right to have one's conviction and sentence reviewed "imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant".[170]This principle is also reflected in the jurisprudence of regional courts.[171]

The ICJ considers that the provisions of the Code of Military Justice do not fully incorporate and guarantee the right of people convicted in the military court system to appeal their conviction and sentence to a higher independent and impartial tribunal.

Articles 71 – 91of the Code of Military Justice pertain to the methods of review of the decisions of the various military instances. Under article 72, the PMC hears the appeals of the decisions issued by the single military judges.

However, the law does not provide for the possibility to appeal the decisions issued by the PMC. In accordance with article 74, upon the issuance of the final judgment of the PMC, the Government-Commissioner and the defendant only have the right to submit a "motion of cassation" of the judgments issued by the PMC in the following cases:

1. contesting the competence of the court;
2. alleging neglect of one of the essential procedures that must be fulfilled, under penalty of annulment;
3. alleging an error in the application of legal provisions.[172]

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[167] To illustrate, the decision of the Samaha case can be viewed here (in Arabic): http://legal-agenda.com/images/legalnews/1460128695-%D8%AD%D9%83%D9%85.pdf.

[168] ICCPR, article 14(5); Decaux Principles, principle 15. For example, the European Court of Human Rights found appellate review lacking where the Court of Cassation did not have full jurisdiction. See European Court of Human Rights, *Incal v. Turkey*, Application No. 41/1997/825/1031, Judgment of 9 June 1998, para. 72.

[169]Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 239.

[170]Human Rights Committee, General Comment No. 32, para. 48.

[171] For example, with regard to this right, which is also set out in the American Convention on Human Rights (article 8(2)(h)), the Inter-American Commission explained: "For a lawful and valid review of the judgment in compliance with human rights standards, the higher court must have the jurisdictional authority to take up the merits of the particular case in question and must satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law". See Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights,* OAS Doc. OEA/Ser.L/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 239.

[172]In comparison, under article 296 of the Code of Criminal Procedure, appeals/cassation of judgments at the ordinary Court of Cassation are receivable in a wider range of cases. These are: a) Delivery of the

These provisions are inconsistent with the right to appeal a conviction and sentence in two general respects. First, because the higher tribunal competent to hear these appeals cannot be considered independent and impartial. The ICJ recalls that the PMC is composed of a presiding military judge and three or two other members, depending on whether the case is a felony or misdemeanour, among which only one member is a civilian judge. In the case of the military Court of Cassation, the bench is composed of a presiding civilian judge and of four or two military officers as members. The fact that military appellate courts include individuals who are not judges, are not required to have any legal training, and continue to be subjected to the military chain of command violates the right of an appeal before an independent and impartial tribunal, guaranteed under international standards. For these reasons and the other reasons listed in detail in section II of this memorandum, both the PMC and the Military Court of Cassation lack a wide range of guarantees of independence and impartiality, and thus cannot be considered an independent and impartial higher tribunal for the purposes of article 14(5) of the ICCPR.

In fact, the Decaux Principles state that, where military tribunals exist, "their authority should be limited to ruling in first instance", and that all appeals should be brought before the civil courts.[173] Both the Decaux Principles and the UN Special Rapporteur on the Independence of Judges make clear that military tribunals should be integrated to the general justice system in order to avoid a parallel hierarchy of military tribunals separate from ordinary law. In the words of the commentary to the Decaux Principles: "the requirements of proper administration of justice by military courts dictate that remedies, especially those involving challenges to legality, are heard in civil courts."[174]

There is a second reason why the provisions do not accord with the right to appeal. While appeals of the decisions of the single military judges are possible – including on factual grounds – this possibility is not available at the level of the decisions of the PMC. Only "motions of cassation" can be submitted to review the decisions of the PMC, and the grounds for such a motion are significantly restricted. In fact, Human Rights Watch reported that motions of cassation are often not pursued "because of the limited grounds for a challenge and because challenges are rarely successful". A lawyer who was interviewed in the framework of this report stated that most appeals were sent back for the lack of grounds for appeal, and that torture, for example, was not considered grounds for appeal.[175] This is inconsistent with the ICCPR, in accordance to which the nature of the review of a conviction or sentence must not be limited to only the formal or legal aspects, but must also allow for consideration of the underlying facts.

In accordance with Lebanon's international obligations, the Code of Military Justice should therefore be amended to provide that individuals convicted by military courts have the right to appeal their conviction and sentence to the civilian courts of the ordinary court system, and that the nature of the review be substantive and based both on sufficiency of the evidence and of the law and allow for due consideration of the nature of the case.

In light of the above, and in order to enhance the independence and impartiality of the judiciary and ensure respect for the right to fair trial in cases heard by the

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judgment by a body that was not legally constituted; b) A breach of law or an error in the interpretation or application of the law; c) A breach of rules of jurisdiction; d) Non-compliance with the applicable procedures entailing nullity, or infringement of fundamental rules during the trial; e) A judgment concerning an offence that was not mentioned in the indictment, or against a person who was not charged therein; f) Failure to rule on a motion or ground of defence or an application filed by a party to the case, or a judgment exceeding the content of the application; g) A non-reasoned judgment or a discrepancy between the reasoning and the judgment clause or a discrepancy within the judgment clause itself; h) **Distortion of the facts or of the clear content of the documents presented in the case file**; i) **Lack of a legal basis**; j) Judgments imposing the death penalty.

[173] Decaux Principles, principle 17.

[174] Decaux Principles, para. 56.

[175] Human Rights Watch, *"It's Not the Right Place for Us": The Trial of Civilians by Military Courts in Lebanon*, 2017, p. 33.

military courts of Lebanon, the ICJ urges the Lebanese authorities to reform the military justice system so as to:

i. **Ensure that the Code of Criminal Procedure and the Code of Military Justice provide for adequate safeguards to protect individuals from lengthy and arbitrary pre-trial detention, more particularly:**
   a. **ensure that recourse to pre-trial detention is exceptional and not the rule and, to that end, restrict the legal grounds for ordering pre-trial detention to those permissible under Lebanon's legal obligations and international standards (that it is both necessary and reasonable in the circumstances of the individual case), as opposed to basing pre-trial detention on the potential sentence for the crime charged;**
   b. **impose the burden of proof on the Prosecution to show that detention is lawful, necessary and proportionate in the circumstances of the case on the authorities, rather than the individual in question;**
   c. **provide for the right to challenge the lawfulness of the detention throughout the time of this detention through accessible and expeditious procedures before an independent and impartial judicial body;**
ii. **Ensure the protection of the right to adequate time and facilities to prepare a defence, in particular by:**
   a. **Amending article 49 of the Code of Military Justice to provide that a person charged with a crime must be notified with the act of accusation issued against them, which should include all the necessary information for the preparation of the defence, as well as with the list of prosecution witnesses, as soon as the charges are formally laid;**
   b. **Amending article 58 of the Code of Military Justice to ensure that defence lawyers are given prompt and full access to the case file in order to have adequate time to prepare the defence; and that any decision to restrict access to "confidential" materials is exceptional, strictly necessary, and made only by a judge and on the basis of clear criteria;**
   c. **Amending articles 21 and 59 of the Code of Military Justice to ensure that only fully qualified lawyers with the requisite legal training are assigned to represent an accused before the military courts;**
   d. **Amending article 59 of the Code of Military Justice to ensure that any disciplinary action against lawyers be initiated only on the basis of clearly defined standards of conduct and following a fair procedure. Even in such cases, the law should provide that if access between a lawyer and his or her client is denied, the accused person in question must be able to benefit from other effective counsel to ensure the full defence of his or her rights.**
iii. **Ensure that the right to be present at trial is upheld by providing that an accused may be ordered out of the courtroom only in exceptional cases where his or her behaviour would render the continuation of the trial impractical; that even in such cases, all reasonable measures should be taken to ensure his or her continued presence at trial; and that the accused's lawyer in such cases must remain present in the courtroom (article 61 of the Code of Military Justice).**
iv. **Provide that trials may only be held *in absentia* if the accused has explicitly waived his or her right to be present, by way of counsel (article 62 of the Code of Military Justice);**
v. **Provide that, in the rare cases where trials *in absentia* are permitted, the right of the accused to a fair trial shall be respected, including but not limited to the right to be represented by counsel;**
vi. **Ensure respect for the right to a public hearing by amending article 55 of the Code of Military Justice to make trials public and accessible to the general public, unless one of the specific and restricted grounds for excluding the public or the press from all or part of the proceedings apply;**

vii. **Amend article 70 of the Code of Military Justice with a view to ensuring that military courts are obligated to provide sufficiently detailed reasons for their judgments, which describe the evidence and legal reasoning behind the decision;**

viii. **Amend the provisions of the Code of Military Justice to ensure that individuals convicted by military courts have the right to appeal their conviction and sentence to an independent and impartial higher civilian tribunal, and that the nature of the review be substantive and based both on sufficiency of the evidence and of the law and allow for due consideration of the nature of the case.**

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February 2018 (for an updated list, please visit www.icj.org/commission)

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