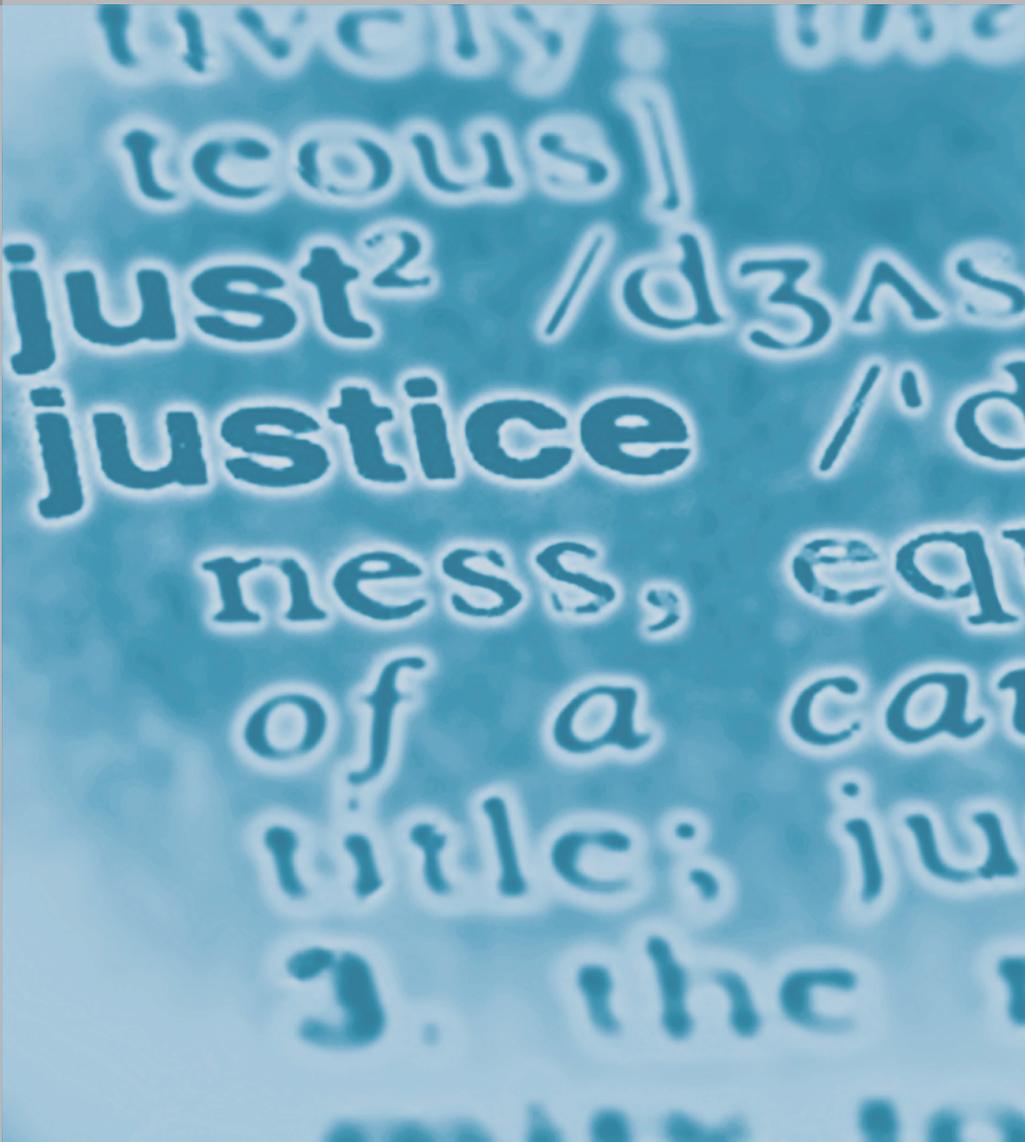


Military Tribunal

a breach in the integrity of the judicial system



foreword

The following contextual analysis is part of a series of publications prepared within the scope of the Human Rights Violations Monitoring Unit (HRVMU) project. The rationale behind this project emanates from oÁef's strategic goal to build the individual and collective capacity of civil society organizations in Lebanon to monitor human rights violations and hold stakeholders accountable for their obligations under International Human Rights Law.

The HRVMU project during the years 2009-2010 has produced four research outputs:

- The Right to Health
- Military Tribunal
- The Special Tribunal for Lebanon
- Delays in Reporting by the State of Lebanon to UN Treaty Bodies

These publications aim to provide a preliminary contextual analysis and to bring the issues at hand to the forefront of governmental and non-governmental priorities. oÁef presents the positions outlined in the four publications with the objective of triggering a nation-wide debate. oÁef sought to identify the main achievements, gaps, and challenges with regards to each focus-area through desk-based research combined with field interviews (phone interviews, personal interviews at ministries, governmental agencies and the relevant United Nations organizations).

oÁef would like to thank all those who contributed, especially IKV PAX CHRISTI.

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abstract

The underlying assumption adopted by the following contextual analysis is a rejection of a particular judicial form that has been for a long time practiced in Lebanon, and which tends to make military justice a separate, expedient, and expeditious form of justice. It is a form of justice that is outside the scope of ordinary law, allowing for a Judiciary that is sanctified and placed above the basic principles of the rule of law. Based on several cases, the paper presents arguments to reject the tendency that makes the military judiciary a separate system without checks or, thereby opening the door to all kinds of abuses. A normalization of this system according to the principles of the proper administration of justice is recommended so that it becomes a form of justice like any other:

Legality and Legitimacy

The military tribunal and the military judiciary are organized by a set of legislative decrees that dictate the structure of the military courts, the sentences applied, criminal military procedures, and the mandate of the military judiciary.¹

Article 1 of the decree No. 24/68 of 13/4/1968 – also known as the Military Sentences Law – provides that the military judiciary is composed of (1) **a military court of cassation**, (2) **permanent military court**, (3) **sole military judges** (4) **judges of instruction** and the Government's commissioner to the Military Court who plays the role of the **Military Prosecutor**.² According to the same article, military courts are part of the Ministry of Defense and not the Ministry of Justice. Articles 23 till 27 of the same decree provide the conditions *ratione personae* of the permanent military tribunal. Article 24 sets the crimes that this tribunal is competent to try, inter alia, spying, treason, illegal connections with the enemy,³ while the court is competent to try military personnel, including the Army, Internal Security Forces (ISF), General Security and officials of the Ministry of Defense and military courts, if they committed their crime during working hours.⁴ The Military Court has jurisdiction over cases involving civilians in espionage, treason, weapons possession, and draft evasion cases, as well any conflict between a civilian and military personnel. Civilians may be tried for security issues, and military personnel may be tried for civil issues.⁵

Articles 29 till 32 provide the competency of the sole military judges to review, inter alia, all kinds of infringements, breaches against the

1 Legislative decree No. 24/68 of 13/4/1968 amended by the decrees No.1460 of 8/7/1971; 110 of 30/6/1977; and 306 of 3/4/2001.

2 Article 34

3 See articles 273, 287, 290 and 291 of the criminal law.

4 Article 27

5 See articles 273 till 294 of the criminal law and article 50 of the military sentences law.

Traffic Law, breaches of the rules of civil defense committed during the war and petty crimes committed by the persons subject to the military judiciary⁶. Articles 33 till 97 are related to the Criminal Military Procedures. The provisions of the Criminal Procedures Law of the Law No.328 of 2/8/2001 are only applied when they are compatible with the provisions of the above decree.⁷ According to article 55, the trial before military courts is public, regardless of its degree; however, it may be conducted in secret based on a normal decree. The presence of a defense Lawyer at the Military Court is mandatory; however, it is optional before sole military judges.⁸ With regard to recourses against the decisions rendered, article 71 allows the objection against the decisions rendered *in absentia* by the sole military judges, military court and the military court of Cassation. Recourse to Appeal against the decisions of the sole military judges is also allowed, based on strict conditions.⁹ As for the recourse to Cassation, it is allowed against the decisions rendered by the military court.¹⁰

oLeF considers that the Lebanese Military Court should only be related to military affairs¹¹ and become an integral part of the general judicial system. The principle of ***trias politica***, the separation of powers, goes together with the requirement of statutory guarantees provided at the highest level of the hierarchy of norms, by the constitution or by the law, preventing any interference by the executive or the military in the administration

“ PLACING THE
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6 Article 30; see supra with regard to the *ratione personae* of the sole military judges

7 Article 33

8 Article 57

9 Decisions rendered in cases of a petty crime sentencing the perpetrator with a fine, seizure, or imprisonment; see article 72

10 Decisions rendered in cases of a petty crime sentencing the perpetrator with a fine, seizure, or imprisonment; see article 72

11 Strictly related to internal/organizational/disciplinary affairs, i.e. non respect of leave days, missing weapons, non compliance with orders/instructions

of justice. Apart from the doctrinal issue of legitimacy of the military tribunals, placing the Lebanese Military Court under the governance of the Ministry of Defense is placing it outside the scope of ordinary law and apart from the principles of the rule of law, beginning with those concerning the separation of powers and the hierarchy of norms. The Military Court in Lebanon is a judicial organ, yet mandated by the Ministry of Defense and the Executive, which violates the first basic principle of the separation of powers,¹² the hierarchy of norms,¹³ as well as the preamble of the Lebanese Constitution.¹⁴ Therefore, the Military Court in Lebanon is **unconstitutional**.

Jurisdiction and International Standards

Non-derogable principles

As detailed above, the military court has jurisdiction over crimes of spying, treason and illegal connections with the enemy. Those crimes, on the basis of which the Military Court can try civilians,¹⁵ have a security aspect and are dealt with in complete secrecy by the Executive, mainly the High Defense Council composed of military personnel. Consequently, such cases brought to the Military Court against civilians are investigated confidentially, and the authorities often wield the issue of “national security” to cover the conduct of the trials, hence violating the principles of fair and public trial.

Apart from the issue of trying civilians,¹⁶ *aléf* believes that the Military Court must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law. This is a provision of minimum guarantees, necessary even in times of crisis, particularly with regards to the provisions of article 4 of the

12 Charles-Louis de Secondat, Baron de Montesquieu: *La défense de «L'Esprit des Lois»* 1750

13 See article 2 of the Lebanese Law of Civil Procedures

14 See the preamble of the Lebanese Constitution, (e): *The System is based on the principle of separation of powers*

15 See *Supra* 5

16 See *infra*

International Covenant on Civil and Political Rights, where States Parties may take measures derogating from ordinary law, provided that such measures are not inconsistent with their obligations under international law.¹⁷ Article 14 of the ICCPR provides the minimum guarantees that should be respected before the Court, including “a fair and public hearing by a competent, independent and impartial tribunal”. Without such guarantees, suspects before the Military Court will face a denial of justice. *aléf* considers that the abovementioned rights of military personnel should be respected at all times.

“ THE INVOCATION
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DETENTION ”

Moreover, *aléf* considers that military secrecy should not be diverted from its original purpose in order to obstruct the course of justice or to violate the principle of fair trial and human rights, but to be used strictly when it is necessary to protect information concerning national defense. The invocation of military secrecy should not lead to incommunicado detention of a person who is the subject of judicial proceedings.¹⁸ It should also be stressed that persons deprived of their liberty should be held in official places of detention and the authorities should keep a register of detained persons. As far as communication between persons deprived of their liberty and their lawyers is concerned, it should be recalled that all detainees should be allowed to be visited by and to communicate and consult with a lawyer,¹⁹ even before sole military judges, without delay, or interception and in full confidentiality. Nevertheless, *aléf* notes that those principles are frequently violated in most cases before the military judiciary.²⁰

17 Lebanon ratified the ICCPR on 3 November 1972.

18 The Human Rights Committee, in its general comment No. 29 concerning states of emergency (article 4 of the ICCPR), considered that “States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages [...], through arbitrary deprivations of liberty [...]” (para. 11), and “the prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law” (para. 13).

19 See supra 8

20 See infra

Promoting a restrictive jurisdiction

In addition, *aléf* considers that the Military Court should have no jurisdiction to try civilians, since the reason for the establishment of such courts is to enable exceptional procedures to be applied. These procedures do not comply with normal standards of justice, as they compromise the principle of fair trial and decrease the possibilities of challenging the decision.²¹ *aléf* advocates for adopting conditions that restrict the jurisdiction of the Military Court to offenses of a strictly military nature committed by military personnel. This is to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts. In the case of serious crimes under international law, this should be under

“ THE MILITARY COURT SHOULD HAVE NO JURISDICTION TO TRY CIVILIANS ”

the jurisdiction of an international or internationalized criminal court, insofar as such acts would by their very nature not practically fall within the scope of the duties performed by such persons.²² This concept constitutes the nexus of military justice, particularly with regards to field operations, when the territorial court cannot exercise its jurisdiction. Only such a functional necessity can justify the limited existence of military justice. However, the Lebanese Government has exceeded on many instances the principles called upon by the UN Commission on Human Rights,²³ allowing the Military Court to continue adopting a non-military task and try civilian individuals who are not related in any sort of way to the military sector, knowing that among its members are civil judges, lieutenants, military officers and sole military judges based in all the Lebanese departments and are in charge of reviewing infringements and petty crimes.

21 See supra 10

22 Even though in times of war, the Government is obliged to respect the provisions of IHL, namely the Geneva conventions.

23 See the report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux adopted by the Commission on Human Rights in its 62 session.

A brief sample of the violations committed

1. One of the most appalling cases is the one of Dr. Muhamad Mugarby, a human rights lawyer and defender, who was accused in 2006 of slandering the country's military establishment and prosecuted in the military court for dissent. The state initially attempted to prosecute Mugarby for criminal slander before a military court, but the Military Court of Cassation threw out the case on 15 April 2006 for lack of jurisdiction. The charges had arisen from a speech that Muhammad Mugarby gave to a European Parliament delegation in Brussels on 4 November 2003, which criticized the Lebanese government for using the judiciary, in particularly the Military Court, to suppress dissent. On 27 November 2008, a Criminal Court in Beirut dismissed the charges of criminal slander brought against him. However, numerous other legal actions remain pending against Mugarby.²⁴

2. On 7 June 2006 Mahmoud Rafeh was arrested by the Intelligence Services of the Lebanese Army and subsequently detained at the ministry of Defense. In the weeks following his arrest, Rafeh is alleged to have been subjected to torture at the detention center of the Defense Ministry in order to force him to sign documents he was not allowed to read. Yet, every time Mr. Rafeh has tried to complain about the torture, he suffered harsh reprisals by the Army's Intelligence Services. In its response, the Lebanese government also indicates that "the premises where people are held in custody for questioning at the National Defense Ministry provide very satisfactory sanitary conditions. Detainee Rafeh takes a daily walk in fresh air and in the sunlight, unhindered. Moreover, he is provided, at his request, with religious books and books on social issues, as well as cultural magazines. Detainee Mahmoud Rafeh receives regular visits from his parents".²⁵ Mr. Rafeh has been for a total of two years and nine months in detention in isolation in the basement of the Defense Ministry. He allegedly was first held in a

²⁴ See [OHCHR press release of 4 December 2008](#), including cases filed by the Higher Judicial Council, former and current judges, and the Beirut Bar Association.

²⁵ Letter of the Lebanese Government to the Special Rapporteur on Torture, January 7, 2008 (cf. A/HRC/10/44/Add.4).

tiny isolation cell deprived of a toilet with only a bottle to relieve himself. It is only after a year and a half of detention that he was allowed to go outside, once or several times a week, for 10 minutes, while handcuffed to a guard. Family visits did take place under the strict control of the Army's Intelligence Services that denied him any communication with his family. He was able to see an attorney only after two years, in the presence of an officer of the Army's Intelligence Services.²⁶

3. Faysal Ghazi Moqalled appeared before the Military Court on 5 August 2006. Moqalled had no legal representation and has reportedly suffered serious reprisals from prison officers. He is charged of treason and cooperation with the Mossad. On 31 July 2009, the Military Court sentenced him to life imprisonment.²⁷

The above cases reveal the frequent violations against the internationally recognized principles of fair, expeditious and public trial; not to mention the violations committed against the decree No. 24/68 of 13/4/1968 itself, namely with regard to legal representation, physical integrity and security of detainees.

Since its creation in 1967, the Military Court has been used as a political tool on many instances for suppressing the public opinion and promoting a Police State. Such abuse of power was practiced from one regime to another, especially during the 1990s to suppress any rebellion targeting the Syrian Army,²⁸ but also after the retreat of the Syrian troops in 2005. All the subsequent governments unrightfully justified such abuses by the need to preserve **“national security”**.

 26 See joint communiqué Justice: The “confessions” Mr. Mahmoud Qassem Rafah was forced to sign under torture should not be used against him – CLDH (Lebanese Center for Human Rights), ALEF (Lebanese Association for Education and Training) and Al Karama for Human Rights, 14 August 2009.

27 See joint communiqué: Allegations of illegal detention and torture in the case of Mr. Moqalled – CLDH, ACAT France (Action by Christians Against Torture), AEDH (Agir Ensemble pour les Droits de l'Homme).

28 i.e. the case brought against the retired brigadier Nadim Lteif for slandering the Syrian Army in 2001. Brigadier Lteif was declared innocent by the Military Court, but 5 others were considered guilty for the same crime. They were all arrested with several others following the students' demonstration against the Syrian occupation in August 2001.

oAef believes that the current jurisdiction of the military court and the nature of the cases that are being heard,²⁹ in addition to the interference of the executive power, places the Court above the basic principles of the rule of law and allow its military investigators to practice all kinds of violations, including torture, protracted and arbitrary detention, absence of contact with family members or appropriate legal representation, violation of the right of due process, etc. During the Nahr el Bared conflict in 2007 between the Lebanese Armed Forces and the criminal organization Fateh el Islam, the Military Court allegedly committed several human rights' abuses against the Palestinian refugees that were detained following the evacuation of the camp.³⁰ In all the abovementioned cases of treason, espionage and defamation, the military court appears to have a double function: in the first the Court holds a judiciary position, the cover position, while in the second it is a political tool in the hands of the executive and security institutions. This allows the Court's investigators to commit violations against its detainees with total impunity.

“ THE MILITARY COURT WAS USED AS A POLITICAL TOOL ON MANY INSTANCES FOR SUPPRESSING THE PUBLIC OPINION AND PROMOTING A POLICE STATE ”

oAef considers that the Military Court's jurisdiction should be limited to trying military officers to what concerns internal military issues without any competence over civilians.

Everyone has the right to be tried by ordinary courts or tribunals using established legal procedures.

oAef also considers that the Military Court should be an integral part of

29 Mainly cases of treason and espionage

30 Lebanon: The painful whereabouts of detention, oAef June 2008

the general judicial system and that such courts apply due process procedures that are recognized according to international law as guarantees of a fair trial, including the right to appeal a conviction and a sentence. Using those duly established procedures of the legal process will prevent the Military Court from displacing the jurisdiction belonging to the ordinary courts or judicial tribunals. Without those guarantees, military justice would become a repressive tool serving the political agenda of the executive and intelligence services.

**“ WITHOUT THOSE
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Recommendations

To the Lebanese Parliament

- Ensure that the Military Court is an integral part of the general judicial system and that such courts apply due process procedures that are recognized according to international law as guarantees of a fair trial.
- Pass a law amending article I of the decree No. 24/68 of 13/4/1968, transferring the Military Court from the Ministry of Defense to the Ministry of Justice.
- Pass a law to abolish the application of the death penalty.
- Pass a law adopting a restrictive jurisdiction for the Military Court to appropriate military matters, based on which the court will be allowed to try military officers only, and transfer to ordinary courts the jurisdiction of trying civilians for security issues.
- Establish a parliamentary commission to review past trials where allegations of human rights abuses, especially allegations of torture, arbitrary detention and denial of justice, have been made to restrict the jurisdiction of military tribunals to appropriate military matters, and to become a party to the International Criminal Court.

To the Lebanese Government

- Adopt the provisions of the European Neighborhood Policy, EU-Lebanon Action Plan in January 2007, which involves major commitments for the improvement of the human rights situation in Lebanon, especially with regard to developing an independent and impartial judiciary and to further reinforce the administrative capacity of the judiciary.

- Ensure the implementation of the human rights conventions, namely the ICCPR, the UN Convention against Torture and its Optional Protocol, recently ratified by Lebanon, with regard to the respect of fair trial and the prohibition of torture.
- Transfer the cases currently pending before the Military Court and involving civilians to ordinary courts where their cases can be settled expeditiously.

To the Civil Society Organizations

- As far as possible, put in place a clear and public mechanism for regular monitoring of the judicial military process, a detailed calendar for the reforms to be achieved, a regular evaluation of the implementation and regular and systematic consultations with human rights NGOs.

