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Rights of the Accused of Terrorism: A Comparative Analysis of Criminal Procedure before the Special Tribunal for Lebanon and the Lebanese Permanent Military Court

Abstract: The Rights of those accused of terrorism have seen important controversies, whether to grant these individuals fundamental rights, such as the presumption of innocence and the right to a lawyer in criminal proceedings. Studying the rights of those accused before the Special Tribunal for Lebanon ("STL") is interesting as, for the first time, an ad hoc criminal tribunal of an international character has been established to try terrorism committed in Lebanon. In accordance

with international law and international human rights law, the STL was able to ensure the application of fundamental rights of the accused in criminal proceedings, although its jurisdiction *ratione materiae* consists exclusively of criminal offences under the Lebanese Law. On the other hand, the Lebanese Permanent Military Tribunal, which is a special domestic court entrusted with trying the crime of terrorism in Lebanon at the national level is in breach of some fair trial rights.

Introduction

“Abandoning human rights in times of crisis is shortsighted and self-defeating. A “war on terrorism” waged without respect for the rule of law undermines the very values that it presumes to protect. We must restore the balance between liberty and security by reasserting the human rights framework, which provides for legitimate and effective efforts to respond to terrorist attacks.”

(Hoffman, 2004: 932).

Since the 11 September 2001 attacks, the “war on crime” became a major concern for governments all around the world (Vagts, 2003; Hoffman, 2004). The need to prevent and respond to terrorist attacks by enhancing security measures, has been high on the political agenda, thereby putting the achievements of human rights at risk (Hoffman, 2004). The protection of fair trial rights has been of big concern before International Tribunals, especially with regard to the rights of the accused. Those rights must be respected as to ensure a fair and impartial trial. Fair trial rights are designed to attain equality of arms - which is a fundamental principle in criminal proceedings in common law systems giving the accused an equal right of access to justice as the prosecution - ensuring the impartiality, independence and lawfulness of the court, and avoiding any bias or external interference (Croquet, 2016).

For this reasons, several international instruments provide safeguards in international law regarding the rights of an accused person, notably the presumption of innocence, the right not to incriminate one’s self, and the right to access to a lawyer - among many others - under the Universal Declaration of Human Rights (Article 11), the European Convention on Human Rights

(Article 6), the EU Charter (Articles 47, 48 49 and 50), as well as before International Tribunals such as the International Criminal Court's Statute or the Special Tribunal for Lebanon's Statute and Rules of Procedure and Evidence. It has been expressed that the primary goal of criminal procedure is to achieve a "finding of guilt or innocence whilst protecting at the highest level the rights of those subjected to the proceedings" (Zappala, 2010: 140).

In this respect, the STL, an ad hoc tribunal established by Resolution 1757 (2007) of the United Nations Security Council entrusted with investigating and trying those accused of terrorism committed in Lebanon which resulted in inter alia, the death of former Lebanese Prime Minister Rafiq Hariri has played an important role in safeguarding the rights of the accused. The commitment of the STL to respect fundamental principles of international law and international human rights law has emphasized attention on the practical differences between trials and proceedings before the Lebanese Domestic Special Courts and those before the STL. The scope of this research will be limited to one of the two Lebanese Special Courts - that of the Military Tribunal - because this domestic Lebanese court has exclusive jurisdiction over the crime of terrorism in Lebanon. Some have opposed the wide power given to the Special Courts in Lebanon and criticized it for undermining the Special Courts' neutrality, as we will discuss later in this paper. On the other hand, others have recognized the effectiveness, legitimacy and fairness of those special courts entrusted with trying severe crimes like terrorism, and trust the courts' capacity and competence to safeguard national security. The research question will be as such: *To what extent does the practice of the Lebanese Military Tribunal meet international standards on the rights of the accused of terrorism?*

To answer this question, in Section I, I will state the fundamental principles which guarantee the rights of the accused in international law. In Section II, I will introduce the STL and the Lebanese Military Tribunal, their jurisdictions and the applicable law. In Section III, I will carefully analyze the rights guaranteed for a person accused of terrorism before the Special Tribunal for Lebanon and before the Permanent Military Court in Lebanon, as those two courts apply substantive Lebanese Criminal Law, while they comply differently with international standards on fair trial rights. In this section I will also discuss the limitations to the rights of the accused before the STL, which are important to shed light on since it is an international jurisdiction.

SECTION I- RIGHTS OF THE ACCUSED IN INTERNATIONAL LAW

Immediately after the attacks of 11 September 2001, the application of international law in terrorist cases was actively discussed. Indeed, its application with regard to the safeguard of core human rights norms and the correct application of international humanitarian law has been questioned (Maloney-Dunn, 2010). Regarding the rights of the accused before international criminal tribunals, the best way to safeguard the rights of both the accused and the victims is by setting out specific provisions in a Tribunal's Statute, specifying which rights are specifically guaranteed and which might be subject to limitations (Zappala, 2010). In this respect, it is the duty of this Court to ensure the respect of fair trial and due process principles, which have been set forward to benefit the accused in several international human rights instruments (Delmas-Marty and Spencer, 2002). According to Zappala (2010), ensuring the respect of the rights of the accused is crucial for the fact-finding mechanism in criminal proceedings. In fact, the criminal process entails establishing the truth about criminal conduct and imposing a penalty on a defendant proved guilty only after the evidence has been studied with accuracy.

Thus, if any of the accused's rights have been violated by the Court, it engenders a loss in the credibility of the whole process (Zappala, 2010). Contrary to what has long been argued in the context of the 'war on terror', there are specific rules of international law which shed light on the rights of suspects of terrorism and their right to a fair trial (Schmid, 2009). In international human rights law, the primary groundwork for ensuring the right to a fair trial comes under Article 14 of the International Covenant on Civil and Political Rights (hereafter "ICCPR"). Article 14(1) of the ICCPR states that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, [...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". As such, the principle of Equality of Arms is expressly stated in Article 14 (1) as a standard of fair trial. Ensuring equality before tribunals entails the equal access to justice by both parties, which is a fundamental protection of human rights and a necessary way to safeguard the Rule of law (Inter-American Commission on Human Rights, Report, 2002).

Additionally, Article 14 (2) -(3) and (5), points out that fair trial rights are applicable to criminal proceedings: "(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law", "(3) in the determination of any criminal charge against him in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the

same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt”, “(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

Another important right is to be tried by an impartial, competent and independent tribunal established by law. Fair trial standards are also found in the Universal Declaration of Human Rights in Article 11, in Article 6 of the European Convention on Human Rights, and in Article 8 of the American Convention on Human Rights.

In international humanitarian law, the Additional Protocols of the Geneva Convention, Protocol I under Article 75 (4) and Protocol II under Article 6, ensure fair trial guarantees. In the context of international criminal law, the Rome Statute of the ICC includes in its Article 67 (1) the guarantees of the right to a fair trial. These rights are: the presumption of innocence; the right of freely and confidently communicating with a legal representative; the right not to incriminate one's self; the right of remaining silent without considering this silence as a determination of guilt or innocence; the right not to make an unsworn oral or written statement in the accused's defense; and the right guaranteeing that the reversal of the burden of proof is not imposed on the accused. After briefly exploring the rights of the accused under international law, it is important for this study to detail the rights guaranteed under Lebanese Law.

SECTION II - RIGHTS OF THE ACCUSED BEFORE LEBANESE COURTS

For the purpose of this research, it is essential to study two courts which have been entrusted with trying the crime of terrorism committed on Lebanese soil: the Special Tribunal for Lebanon (on an international level) and the Lebanese Permanent Military Court (on a national level).

A- BRIEF OVERVIEW OF THE SPECIAL TRIBUNAL FOR LEBANON

The STL is an *ad hoc* tribunal of an international character that was established to try the terrorist attack that killed the former Lebanese Prime Minister Rafiq Hariri on the 14 February 2005, as well as other attacks connected to it. The creation of the STL was the result of the failure of the Lebanese Government –due to political pressure- to agree on the prosecution of potential suspects of this criminal act before a domestic court. Since Lebanon adopted a system of 'consociational democracy' based on power-sharing between different factions, the decision-making process at the governmental level has been very susceptible to political disputes (Yun,

2009). Following the assassination of Mr Hariri, clashes among the different political and religious factions within the country highlighted the Lebanese political scene, especially with regard to external influence by neighbouring countries (mostly Syria) and other foreign states (Yun, 2009). After long debates, the STL was created on May the 30th, 2007 by the United Nations Security Council Resolution (“UNSC”) 1757 under Chapter VII of its Charter (Jurdi, 2007; Wetzel and Mitri, 2008; Yun, 2009). The said Resolution was passed as a last resort, since there was an impasse in the Lebanese Parliament in passing the law necessary to domestically incorporate the treaty agreed to between the UN and Lebanon to create the STL.

In fact, Lebanon was given a deadline – 10 June 2007 – by which the said law should be passed. Only after this date passed without Lebanon having passed the mentioned law, that the STL was created on the basis of the UNSC’s Chapter VII powers. This Tribunal was the first ad hoc criminal court established to try the crime of terrorism on an international level, by solely re-lying on the substantive Lebanese Criminal Law, while also applying its own rules of Procedure and Evidence. Thus, the latter Tribunal had to exclusively rely on domestic law to define terrorist acts (Wetzel and Mitri, 2008; Yun, 2009). However, in a Decision on the Applicable Law of 16 February 2011, the STL held that it does also have the possibility to refer to international law in its interpretation of Lebanese law to define some criminal acts, as well as to prosecute and punish the perpetrators (Jurdi, 2007; Wetzel and Mitri, 2008; Yun, 2009).

Here again, and because the STL is an international criminal tribunal, it is nonetheless bound by international law that prohibits for instance the death penalty punishment, and for that, it does not apply this sanction that is authorized under Lebanese law. Since international hybrid tribunals usually use both national and international crimes as a possible basis for indictments and prosecutions (Wetzel and Mitri, 2008), this Tribunal is unique in that it only prosecutes crimes under Lebanese law (Yun, 2009). Accordingly, since the applicable substantive law before this Tribunal is limited to Lebanese criminal law - with the possibility of interpreting it under international law - and since the Lebanese Penal Code has only been slightly amended since its creation in 1943 excluding articles 314, 315 and 316 which mostly concern the crime of terrorism, it is crucial to study in the following paragraphs how this tribunal is complying with international standards on an accused’s right to a fair trial.

Before critically analyzing the rights of the accused before the STL, it is interesting to give an overview of one Lebanese domestic court which is initially entitled with trying the crime of terrorism on a national level, before comparing its practice to that of the STL.

B- BRIEF OVERVIEW OF THE LEBANESE PERMANENT MILITARY COURT

Following Lebanon's declaration of independence in 1943, the Lebanese Military Tribunal was established in October 1945 as a Special Court in the Lebanese judicial system. Previously, France had established military courts under the French colonization of Lebanon and Syria, which had jurisdiction over crimes committed by and on its army that was present on colonized soil (Al Hajj, 2017). The establishment of the Lebanese Military Tribunal was necessary to try national and foreign army personnel. Ever since, laws and regulations related to the Military Tribunal and its functioning were put in place, giving this tribunal a wide power.

For this reason, on 12th January 1946, the Military Penal Code entered into force, and was later amended in 1948 to widen the power of the Military Tribunal (Al Hajj, 2017). Due to the events between 1957-1958 in Lebanon – the first Lebanese civil war - Law of 11/1/1958 related to crimes of disorder and terrorism provided the Military Tribunal with the competence to try such crimes (Yafawi, 2017; Al Hajj, 2017). Finally, the Code of Military Justice entered into force in April 1968, and has been amended in 2001 by Law No. 306. This created the Permanent Military Court as a special judicial organ within the Lebanese judicial system, and not part of the Ministry of Justice. Rather, it is part of the Ministry of Defence (Yafawi, 2017; Alef, Report, 2016). This tribunal's jurisdiction is not only limited to army personnel, but extends to civilians who have committed certain types of serious crimes. In decision No. 183/2000 of 16/11/2000, the Court of Cassation, Criminal Chamber No.6, clearly expressed the views that if military personnel were accused of a crime alongside civilians, then the Permanent Military Court will be competent in trying civilians for the same crime. It is also a special organ because its functioning and the proceedings before it are unique (Al Hajj, 2017).

According to Article 24 of the Code of Military Justice, this Tribunal is entrusted to try crimes of treason, spying, as well as illegal connection of military personnel or civilians with the only enemy (Israel). This is also stated in Articles 273 – 287, 290 and 291 of the Lebanese Criminal Code. The Court has also jurisdiction over crimes committed by the personnel of the General Security and the Internal Security Forces (AlKarama, Report, 2018; Al Hajj, 2017). In addition, other laws which sanction criminal acts affecting national security, such as terrorism give competence to the Military Tribunal to try such crimes (Al Hajj, 2017). The Tribunal has also jurisdiction over crimes related to weapons and ammunition, as well as any other personal conflict between military personnel and civilians (Yafawi, 2017).

Under Article 27 of the Code of Military Justice, the Tribunal is competent to try any crime committed by military personnel which is not listed in Article 24 of the same code. In decision No. 119/2000 of 1/8/2000, Court of Cassation, Criminal Chamber No.6, the Court of Cassation points out that the Military Tribunal has jurisdiction over the crime of forgery carried out by a General in the Army, even if this crime is not listed in Article 24 of the above-mentioned code. Finally, the Tribunal can also try juveniles if they have committed a crime together with military personnel. This shows that the Tribunal's jurisdiction is very wide, which grants it important powers that

might call into question its enforcement of fundamental human rights in the context of a military court setting.

Accordingly, it is essential to critically analyze the procedural rights and safeguards of the accused before the STL, to assess how far behind international standards the Lebanese Permanent Military Court stands with regard to the fair trial rights of the accused.

SECTION III- FUNDAMENTAL RIGHTS OF THE ACCUSED BEFORE THE SPECIAL TRIBUNAL FOR LEBANON AND THE LEBANESE PERMANENT MILITARY COURT ENTRUSTED WITH TRYING THE CRIME OF TERRORISM

For the purpose of correctly distinguishing between a suspect and an accused before a court, it is essential to mention that the legal texts of the STL give a clear definition regarding who is a suspect and who is an accused, and to shed light on the rights of each before the Tribunal. Under Rule 2 of the Rules of Procedure and Evidence of the STL (hereafter the Rules), a suspect is defined as “a person who the Prosecutor has reasonable ground to believe has committed a crime.” Additionally, Article 15 of the Statute of the STL states that “A suspect who is to be questioned by the Prosecutor shall not incriminate himself or herself or to confess guilt.” It adds that the suspect has the “right to be informed” of the existence of grounds that support the plausibility of him or her committing a crime that falls within the jurisdiction of the Tribunal (article 15(a) of the Statute). A suspect has the “right to remain silent” without considering his silence as a proof neither of guilt nor of innocence (article 15 (b)). Article 15 (c) also grants the suspect “the right to have legal assistance of his or her own choosing” or to legal aid “provided by the Defence Office.” Article 15 (d) provides the suspect with the right to obtain free interpretation assistance, and according to Article 15 (e), the suspect benefits from the right to be questioned in the presence of the defense counsel, unless he/she decides to waive this right (Croquet, 2016).

Once the indictment has been confirmed in the pre-trial phase, as a result of the Prosecution’s investigations, a suspect becomes an accused. Thus, Rule 2 of the Rules defines the accused as “a person against whom one or more counts in an indictment have been confirmed”. Article 16 of the Statute confers rights to the accused person before the Tribunal, that will be critically analyzed in the following section while being compared to those of an accused before the Lebanese Permanent Military Court. Thereafter, this section will cover all aspects of the rights of the accused before the STL and before the Lebanese Permanent Military Court in order to highlight breaches when they occur and compare the practices and application of human rights standards before both courts.

A-THE RIGHT TO A FAIR AND EQUAL TREATMENT BEFORE THE COURT

The right to a fair trial is ensured by the principle of equality of arms, which is a fundamental principle in adversarial systems, when it comes to criminal proceedings. “This principle underpins the equal opportunity of the parties in criminal proceedings” (Akhter and Binti Nordin, 2014: 15). This statement is confirmed by Article 14 (1) - (5) of the ICCPR. It allows the accused person to have the same opportunity as the Prosecutor to present his/her case during the proceedings at trial. This principle is crucial, especially in international law, because the aim of international tribunals is not only to punish the offender for the crime committed and ensure an effective criminal justice system, but also, to impose a fair sentence while ensuring that the accused has been granted all the necessary rights to a fair trial (Akhter and Binti Nordin, 2014). Thus, every accused should have the right to a level of fairness, as well as to an equal treatment before the Tribunal.

Further, Rules 24 and 25 of the Rules of the STL grant the accused the right to be tried by an impartial judge, as judges should perform their duties “[...] honourably, faithfully, impartially and conscientiously.” According to Cassese (2013), it is impossible for fundamental principles of human rights to be safeguarded without judicial impartiality. This principle prevents bias from any source against the accused. For this reason, it is important for the judge or the chamber, for instance, to decide carefully upon the admission of victims to participate in the proceedings, especially before international tribunals which tend to somehow be politicized. That said, many victims might want to participate, and this could cause a rupture in the equal treatment of the defence before the Tribunal (Hobbs, 2014). This rupture can be explained by the fact that the defence will have to face both the charges of the prosecutor, and the allegations of the victims (Hobbs, 2014). Therefore, before the STL, victims’ participation is limited, and only occurs after an indictment has been confirmed. Another fundamental right of the accused in international law is the right to a fair and public hearing, which is stipulated under article 16 (2) of the Statute of the STL. It guarantees due process and the right to have the hearing and trial conducted openly and not in secrecy.

In addition, the right to a fair trial also entails “the right to an expeditious one” (Hobbs, 2014: 15). This means that the proceedings should not be unjustifiably delayed or extended. This guarantees the right to be tried without undue delay as stated in Article 16(4)(c) of the Statute of the STL. However, a threat to such expeditious trial can occur because of victims’ participation in the proceedings. This is not always the case. Sometimes delays occur as a normal and justified consequence of victims’ participation in the proceedings. In this case, it will not be considered as affecting the interests of the accused. For that, Rule 86(B)(viii) of the Rules states that victims’ participation in the proceedings (hereafter VPPs) should not “cause unnecessary delay or

inefficiency in the proceedings.” In addition, Rule 86(D)(iii) stipulates that VPPs should be in compliance with “the rights of the accused and the interests of a fair and expeditious trial.” Similarly, Article 14(3)(c) of the ICCPR guarantees the right of the accused to be “tried without undue delay”.

Thus, as it has been explained, the right to a fair trial essentially means that an accused shall have the right to be tried by a competent, independent and impartial judge, without undue delay. However, before the Lebanese Permanent Military Court, this is not the case. In fact, according to Article 3 of the Code of Military Justice, the composition of the Military Tribunal varies depending on the crime, namely, whether it constitutes a felony or a misdemeanor. The Military Tribunal is mainly composed of military officers: the head of the tribunal is an officer with a rank of Colonel or higher, assisted by two or three lower ranked officers as well as one judicial judge (Yafawi, 2017; Alef, Report, 2016). Moreover, the Ministry of Defence appoints military judges, as they are political appointees (Chalhoub, 2004). Since the Court is composed in this way, and since there is no requirement that military judges have a law degree, and since Antonio Cassese (2013: 349) has explained that for a court to be impartial and independent it should also be “independent of any political or governmental authority”, the right of the accused to be tried by a competent court is thus compromised before this Permanent Military Court (Alkarama, Report, 2018; Yafawi, 2017; Alef, Report, 2016).

In addition, Article 4 of the Code of Military Justice explicitly mentions that the Minister of National Defence is entrusted with appointing the military judges. Cassese (2013: 349) also specified that judges should be prohibited from “seeking or receiving instructions from outside authorities”. However, noting that the military tribunal cannot be impartial, especially that it is part of the Ministry of Defence, this entails a breach of the right of the accused to be tried by an independent and impartial court when before the Lebanese Permanent Military Court. Additionally, there are no articles guaranteeing the right to be tried without undue delay in the Lebanese Code of Military Justice. In fact, often when a case brought before the court concerns the crime of terrorism or other crimes affecting national security, suspects can be held in detention for years without facing any charge or before being brought before a military judge (Yafawi, 2017). In such cases, there is a violation of the right to be tried without undue delay.

On the other hand, the right to a public hearing is a general principle of law which is ensured before the Military Tribunal as confirmed by Article 250 of the Lebanese Code of Criminal Procedure and Article 55 of the Code of Military Justice. However, an exception to the application of this Principle exists. In fact, when the Court believes that by conducting a public hearing, there are reasons that could endanger public order, it can order that the trial be held in secret (Alkarama, Report, 2018;

Alef, Report, 2016). This is expressly mentioned in the second paragraph of Article 55 of the Military Code as such: “Trials shall take place in public before the Military Courts of different instances; However it may be conducted in secret in accordance with the normal law. Nevertheless judgments should be always issued in public”.

This is also expressed in Article 178 of the Lebanese Code of Criminal Procedure which explicitly confirms that trials should be public but can be held in secret when “affecting public order”. This clause takes into consideration the reactions that some important trials might trigger in society, and for this reason, it is considered better for the trial to be conducted in secrecy. Notwithstanding, prohibiting public hearings is a serious breach of fair trial standards.

B-THE PRESUMPTION OF INNOCENCE

The presumption of innocence is a fundamental international principle and right of defendants. For this reason, all international criminal tribunals provide this guarantee in their Statutes to every accused. Just as the International Criminal Court (ICC) under Article 66 ensures the right to be presumed innocent until proven guilty, the STL’s Statute also guarantees the application of this right to every defendant, under article 16(3)(a) of its Statute. This right thus guarantees that the burden of proof is imposed on the Prosecution. Additionally, the right not to incriminate one’s self - that is linked to the presumption of innocence - is stated under Article 16(4)(h) of the STL’s Statute and guarantees that the accused is to be “[...] compelled to testify against himself or herself or to confess guilt”. As there are no legal provisions in the Lebanese Code of Military Justice regarding this right, the provisions of the Lebanese Code of Criminal Procedure shall apply - to cover the lack of legislation in this regard - in trials before the Lebanese Permanent Military Court.

In fact, Article 77 (2) of this Code that protects from self-incrimination, stipulates that the judge should guarantee the defendant “ [...] that his testimony is given without any external pressure [...]”. This article adds that if the accused refuses to answer questions of the investigative judge or decides to remain silent, the judge cannot coerce him or her to answer. Accordingly, one can deduce that this right is codified and should thus be respected by the Military Court. However, the latter has been criticized for allowing the use of degrading treatment with accused persons who refuse to divulge information to the military intelligence, which conducts the investigation in the name of national security. This undermines the aforementioned right because if a detainee is subject to degrading treatment, he or she can be tempted to confess to guilt as there are no mechanisms that can monitor such interrogations (Yafawi, 2017). It also violates the presumption of innocence which is a general principle of law and a fundamental rule in Lebanese law guaranteed by the Lebanese Constitution.

C- THE RIGHT TO LEGAL REPRESENTATION

The right to have access to legal counsel is an important right for the accused under international law, especially since the *Salduz* case before the European Court of Human Rights, where the right to legal assistance has been considered a fundamental right for both the suspect and the accused. Accordingly, Article 16(4)(d) of the Statute of the STL guarantees the right to self-representation and the right to legal assistance of one's choosing or to legal aid. In fact, an accused should have the right to have counsel present during interrogation and at every step of the proceedings, to ensure adequate defence. This right is also ensured before the Military Tribunal, as a counsel should be present to represent the interests of the accused and to ensure the rights of the defence (AL Hajj, 2017).

Article 47 of the Lebanese Code of Criminal Procedure grants the accused the right to have a lawyer present at trial, but the attorney's presence at the investigative stage at the police station was not required by law, until the last legal reform in 2020 making it mandatory. On another hand, Article 78 of the Lebanese Code of Criminal Procedure stipulates that if the "accused refuses to hire an attorney, the investigative judge does not force him to [...]", despite Article 57(1) of the Code of Military Justice expressly granting the accused the right to have a lawyer present at all stages of the proceeding. Notwithstanding, Articles 43 and 44 of the Military Penal Code grant the accused the right to have counsel, and if he or she did not appoint one, the Court can decide to appoint defence counsel who can be either military personnel or a lawyer chosen by the President of the Bar Association. Also, Article 59 of the Code of Military Justice requires the military judge to ask the President of the Bar Association to provide legal aid to the accused who does not have funds or did not appoint a lawyer.

Although such provisions ensure the right to have a counsel present, other provisions of the military code limit this presence. In fact, counsels are not allowed to meet privately with the detainees or the accused, but instead, all their meetings are supervised by military intelligence personnel. Further, the detainee and the lawyer cannot be present in the same room, and all their discussions take place with a glass separating them (Yafawi, 2017). In some circumstances, the legal representative of the defendant is not granted access to interrogations, which entails a prejudice to the right of the accused, as acts of torture might take place in order to get the defendant to talk (Zaiter, 2017; Human Rights Watch, Report, 2016). Article 47 of the Military Penal Code adds that the military judge can "prohibit the defence counsel from entering the Military Tribunal for a duration of maximum 3 months if he [the counsel] had committed a misconduct" in a prior hearing. This measure can prejudice the right of the accused to have a lawyer present.

D- THE RIGHT TO INFORMATION

The right to information is essential for the accused, as it allows the latter to understand on what ground the trial is held and for what reasons. Additionally, it allows the accused and his/her counsel to effectively prepare a defence. Before the STL, the right to be informed promptly and in a comprehensible language about the nature and cause of the charge is guaranteed under Article 16(4)(a) and (d). Moreover, the right to enjoy adequate time and facilities for the preparation of one's defense and to communicate with a counsel of one's choosing is also guaranteed. Counsel representing the accused should have enough time to prepare for the trial to be able to defend his/her client properly, according to article 14(3)(b) of the ICCPR. This is expressly confirmed by article 16(4)(b) of the Statute of the STL. The right to interpretation follows from the right to information, especially before international tribunals because its procedure is governed by an international environment: the Court is composed of international judges, and the lawyers, prosecutor, victims and witnesses might not all speak the same language as the defendant. Accordingly, a defendant needs to know what crimes he/she is being accused of and therefore, should have the right to interpretation as ensured by the STL's Statute under article 16(4)(g).

The right to be informed before the Lebanese Permanent Military Court is guaranteed under Article 76 of the Lebanese Code of Criminal Procedure. This provision states that the judge should inform the accused of the charges against him or her. As the Military Court applied the rules of the above-mentioned code, it applies this rule too. Additionally, Article 58 of the Code of Military Justice states that the "[...] defence counsel should have access to all documents, and files, excluding confidential ones [...]". Thus, the exception in this article can prejudice the accused by not disclosing relevant information or evidence, as counsel will not be able to prepare a good defence. Notwithstanding, the right to interpretation is applied before the Military Court. Article 39 of the Code of Military Justice states that the Military Tribunal applies the provisions of the Lebanese Code of Criminal Procedure when the military codes lack provisions on a specific right. According to Article 81 (3) of this code, if the accused does not understand the Arabic language, the judge should appoint him a sworn translator. This right is guaranteed to allow the accused to understand the charges he/she is being accused of. Therefore, the right to interpretation is ensured before the Military Tribunal. However, the right to information is also not fully ensured before the Lebanese Military tribunal.

E- THE RIGHT TO BE PRESENT DURING THE TRIAL PROCEEDINGS

The right to be present during the trial proceedings is a fundamental right in common law systems. However, the STL adopted a civil law principle - that of “trial in absentia”. This exception is applicable before the STL because the Tribunal takes, in its Rules of Procedure and Evidence, from the Lebanese Law. The latter allows trials in absentia under the Lebanese Code of Criminal Procedure (Riachy, 2010), when the investigation by the relevant authority has been completed and there is enough evidence to convict the accused (Alef, Report, 2016). As much as some consider that trials in absentia prejudice the rights of the accused, the Vice-President of the STL Judge Riachy believes that “there are several possibilities of reconciling fair trial rights with provisions for in absentia trials. [...] the STL procedural rules [...] provide for an appropriate procedural setting for fair trials” (Riachy, 2010: 1296).

Article 22 of the Statute stipulates that: “The Special Tribunal for Lebanon shall conduct trial proceedings in the absence of the accused, if he or she: (a) has expressly and in writing waived his or her right to be present; (b) he has not been handed over to the Tribunal by the State authorities concerned; (c) has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.” Additionally, Rule 107 of the Rules of Procedure and Evidence of the STL stipulates that “The rules on pre-trial, trial, and appellate proceedings shall apply *mutatis mutandis* to proceedings in absentia.”

This right to be present at trial - as a general rule - is applied before the Lebanese Permanent Military Tribunal. Article 56 of the Code of Military Justice clearly states that an accused should appear before the Court and be present at trial. Hence, the accused has the right to be present at all stages of the proceedings accompanied by his/her legal counsel. According to Article 85 of the Code of Military Justice, if the suspect was present at the first hearing and then missed the rest of the hearings, the trial shall continue and be considered as occurring in his/her presence. On the other hand, the Military Tribunal also applies the trial in absentia Principle of Civil Law as an exception to the principle that an accused should be present at his/her trial.

Articles 165 and 166 of the Lebanese Code of Criminal Procedure expressly allow the initiation of a trial in absentia. Article 166 states that if an accused was detained and refused to appear before the judge after being informed of the time and date of the hearing, the Court can initiate ‘*in absentia* proceedings’. Additionally, according to Article 95 of the Code of Military Justice when the suspect or accused does not present himself/herself before the Court or is considered a fugitive, the Court can issue an in absentia judgment. As in absentia trials are allowed in civil law systems, a hearing conducted in the absence of the accused does not prejudice his right to a fair trial under Lebanese Law, before both the STL and the Lebanese domestic military court.

The right of an accused to examine witnesses under the same conditions as the prosecution and the right to cross-examine witnesses ensure the equality of arms principle in criminal proceedings. In addition, an accused has the right to know who is giving a statement incriminating him/her, and should have the right to cross-examine any of the prosecution's witnesses, in accordance with the presumption of innocence. These rights guarantee the accused's right to defend himself/herself against wrongful statements under Article 16(4)(e) and (f) of the Statute of the STL. However, some restrictions to this right are stipulated in Rule 93 of the Rules, which will be examined later in this paper. On another hand, before the Lebanese Permanent Military Court, Article 181(2) of the Lebanese Code of Criminal Procedure applies. This states that after the judge has finished examining witnesses, both parties - the Prosecutor and the Defendant- are allowed to examine witnesses. Moreover, according to Article 187 of the same code, none of the parties is allowed to refuse to listen to a witness that is under oath. However, this article does not prohibit judges from listening to witnesses.

Regarding the right to examine all inculpatory evidence in the course of the trial proceedings, no evidence can be used against the defendant if it was not obtained lawfully and if there was any doubt about its reliability (Croquet, 2016). This is confirmed by the text of Rule 162(A) of the Rules which states that "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." According to Croquet (2016: 367), the accused benefits from this right by opposing "the admission of inculpatory evidence that was collected in breach of a human right despite the overall integrity of the proceedings not being affected by the underlying breach of human rights." Croquet (2016) adds that the adoption by the STL of Rule 162(B) in its Rules of Evidence and Procedure has marked for the first time in the history of international criminal justice the accused's right regarding the inadmissibility of evidence obtained over a breach of any international human right (Croquet, 2016), by embracing the "strict exclusionary rule" (Ormerod, 2003: 61). As such, one can say that the STL was able to upraise specific human rights, and making these rights "qualified rights" (Croquet, 2016: 403). However, one can question this inadmissibility of evidence collected in violation of a human right, since Rules 116, 118 and 158 of the Rules allow for the admission of evidence without the disclosure of the identity of the witness or person giving such statement or information. Such Rules studied in Section III can prejudice that right of the accused.

On a domestic level, before the Lebanese Permanent Military Tribunal, Article 58 of the Code of Military Justice stipulates an exception on the disclosure of documents that might bear evidence as "[...] defence counsel should have access to all documents and files, excluding confidential ones

[...]”. This exception can prejudice the right of the accused to examine evidence because the non-disclosure of relevant information or evidence violates the right to prepare a good defense. In fact, an accused’s counsel should have access to all evidence and any other information relevant to the case, that might incriminate the defendant, in order to prepare for an effective defense.

G- THE RIGHT TO APPEAL

The right to appeal is guaranteed before the STL. Rules 176 to 189 of the Rules of Procedure and Evidence explain the appeal procedure. In addition, Article 26 of the Statute states that:

“(1) The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor [...] ; (2) The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.”

On another hand, according to Article 208 of the Lebanese Code of Criminal Procedure, the accused has the right to appeal against the decision of the investigative judge. However, in practice, the structure of the Military Tribunal excludes an appeal chamber. The structure of the Court was initially formed this way because the goal of the military tribunal was to issue final judgments that are directly applicable ipso facto. Nonetheless, there is a Military Supreme Court which is a second-degree jurisdiction. Article 74 of the Code of Military Justice states that decisions of the Military Tribunal can be appealed before the Military Supreme Court by both the Prosecutor and the Accused. Further, Article 44 of the Code of Military Justice stipulates that the decisions of the Military Investigative Judge are directly sent to the Government’s Commissioner before the Military Court (Al Hajj, 2017) who is entrusted with capturing the accused and transferring him/her before the competent judge (depending on the crime, whether it is a felony or a misdemeanor). Article 45 of the Code of Military Justice states that appeals against the Investigative Judge’s decisions are only allowed to be filed by the Prosecutor.

Nonetheless, the Military Supreme Court is entrusted with a limited jurisdiction over specific cases to look into infringements of the law by the decisions of the Military Tribunal (Yafawi, 2017). Articles 71 and 72 of the Code of Military Justice, Decree No. 24/68 of 13/4/1968, respectively grant the accused the right to lodge an opposition to the judgment of the Military Single Judge or the Military Court before the regular Court of Cassation, and the right to appeal against the decisions of the Military Single Judge in the case of a misdemeanor or if it concerns the incompetency of the tribunal. In this regard, The Court of Cassation, ruled in Decision No. 133/2003 of 27/5/2003, Criminal Chamber No.3, that according to Article 72 of the Code of Military Justice, decisions issued by the Military Investigative Judge cannot be appealed against “[...] unless it concerns the judge’s incompetency”. This proves that there is an unequal access to

a second-degree jurisdiction between the Prosecution and the accused which breaches the principle of equality of arms.

Regarding the latter Principle, Article 78 of the Military Penal Code gives the Government's Commissioner the right to request a reversal of the decisions of release of the defendant, issued by the Investigative Judge, as well as those related to the incompetency of the Military Tribunal and all other decisions contrary to his opinions and readings, before the regular Court of Cassation (Al Hajj, 2017). Only when the Government's Commissioner wants to appeal against a decision of release of the accused that he is allowed to go before the Military Supreme Court, according to Article 45 of the Code of Military Justice. However, the accused can only request a reversal of the decisions of the Military Investigative Judge when the defendant believes that the Military Tribunal does not have jurisdiction over the crime(s) committed - issues of incompetency - but can only do that before the regular Court of Cassation (Al Hajj, 2017).

Decision No. 179/97, dated 25/11/1997, Court of Cassation, Criminal Chamber No.6, confirms this position by ruling that according to Article 78 of Law 24/68, the accused cannot request a reversal of the Military Investigative Judge's decision, unless it concerns the incompetency of the Tribunal. The Court of Cassation has since reaffirmed this holding in its rulings in Decision No. 156/98, dated 6/10/1998, Criminal Chamber No. 6, and Decision No. 133/2003, dated 27/5/2003, Criminal Chamber No.3. In its 2009 Decision, No. 35 of 19/3/2009, the Court of Cassation, Criminal Chamber No.6 also ruled the same.

This procedure violates Article 20 of the Lebanese Constitution which states that "The judicial power shall be exercised by courts of various degrees and jurisdictions. It shall function within the limits of an order established by law and offering accordingly the necessary guarantees to judges and litigants [...]." Thus, the principle of equality of arms is seriously breached when it comes to the right to appeal.

Accordingly, it has been demonstrated that both the Code of Military Justice as well as the Military Penal Code lack crucial provisions that guarantee fundamental principles of international human rights law, more specifically the ones related to the right to a fair trial of an accused in criminal proceedings. On the other hand, proceedings before the STL ensure the safeguards of fundamental fair trial rights of the accused. Notwithstanding the procedural rights guaranteed before the STL - and when it comes to international tribunals in general - risks of prejudice to the rights of the accused can often manifest, due to several reasons that will be analyzed in the following paragraph.

SECTION IV- LIMITATIONS TO THE RIGHTS OF THE ACCUSED BEFORE THE SPECIAL TRIBUNAL FOR LEBANON

According to Zappala (2010), rights of the accused have primacy over victims' rights in international criminal procedure. Therefore, judges in international criminal tribunals must assert the respect for fair trial and due process rights which protect the defendants (Chiavario, 2002; Zappala, 2010). In international criminal tribunals, the rights of the accused can be prejudiced by victims' participation in the proceedings. For this reason, the Statute of the ICC, under Article 68(3) expressly states that the participation of victims in the proceedings should occur "in a manner not prejudicial to or inconsistent with the rights of the accused." Additionally, the rights of the defendant can be influenced and inappropriately applied due to limitations in the texts of the international tribunals. For the reasons stated above, threats to the rights of the accused will be examined in light of victims' participation in the proceedings (thereafter VPPs), as well as witness protection rules.

A- DIVERGING INTERESTS BETWEEN THE PROSECUTOR AND THE VICTIMS

As the notion of victims' participation in the proceedings before an international tribunal might overlap with the rights of the accused, it is correct to briefly examine what threats the former may entail on the latter. Rule 86(B)(iv) of the Rules states that victims' participation in the proceedings should not be "prejudicial or inconsistent with the rights of the accused and a fair and impartial trial." In fact, it is known that the Prosecutor's task is to restore balance in society by bringing criminals to trial and uplifting the criminal justice system. On the other hand, the interests of victims are to ensure the offenders get sanctioned, and to obtain reparation for what they endured. Hence, a victim might be seeking revenge, which does not meet with the objectives of the Prosecutor, which are to "objectively and impartially" conduct an investigation and to have justice served (Hobbs, 2014: 16). Accordingly, victims' participation in the proceedings might undermine the objectivity of the prosecution and its ability to conduct an impartial investigation. Nonetheless, it is important to note that both interests should be taken into account: the interests of the international community in prosecuting the accused, but also the interests of victims of international or transnational crimes, such as terrorism in the case of the STL.

To ensure the good administration of justice, the STL has put in place several rules and articles restricting the rights of the accused in the proceedings.

B-LIMITATION CLAUSE IN THE SPECIAL TRIBUNAL FOR LEBANON'S TEXTS

Article 16(2) of the Statute states that: “The accused shall be entitled to a fair and public hearing subject to measures ordered by the Special Tribunal for the protection of victims and witnesses.”

This limitation clause set forth by Article 16(2) concerning the right to a public hearing is enshrined in Rules 133 and 137 of the Rules. Rule 133 of the Rules lists the protective measures that the Trial Chamber is entitled to order “(i) the removal of names and information concerning a witness' or a victim's identity from the public records; (ii) the non-disclosure of any records revealing the witness' or the victim's identity to the public; (iii) recourse to image- or voice altering devices; (iv) use of closed circuit television or video-conference link; (v) assignment of a pseudonym to the witness or the victim; (vi) in camera hearings; and (vii) protective measures specific to vulnerable witnesses and victims such as the shielding of the accused from their direct view” (Croquet, 2016: 363). In addition, Rule 137 of the Rules gives the Trial Chamber the power “to exclude the press and the public from, all or part of the proceedings on grounds other than witness and victim protection: (i) in the interests of justice; (ii) on public order and/or mortality grounds; and (iii) on (national) security grounds” (Croquet, 2016: 363). Such limitation clauses restrict some of the rights guaranteed by the STL to the accused when the interests of justice are at risk. This shows that the STL ensures the primacy of the truth and that of justice over the rights of the accused persons.

On another hand, Rule 93 of the Rules allows the Pre-Trial Judge to question witnesses without disclosing their identity. In fact, this Rule states that if there is an imminent risk, at any stage of the proceedings, whereby the witness or his/her family would be endangered or caused harm after divulging his identity, and when the guarantees of witness protection offered in Rule 133 (explained above) is not enough to guarantee the safety of the witness, the Pre-Trial Judge has, under Rule 93(A)(i), the right to question the witness in secret. This questioning will occur in the absence of any of the parties as well as their legal representatives and those of the VPPs. The same step can be taken according to Rule 93(A)(ii), when national security interests can be affected by revealing the identity of the witness. Under Rule 93(B)(C), the Prosecution, Defence, and legal representatives of the VPPs are granted the opportunity to “convey questions to the witness without revealing his identity” through the Pre-Trial Judge. The latter has the duty to provide the parties and the legal representatives of the VPPs a transcript of the answers given by the witness, while keeping a discretionary power to retract from those transcripts any part that would reveal the identity of the witness. This restriction is of course in violation with the right of the accused to cross-examine witnesses, however, it is explained by the fact that the STL has jurisdiction, *inter alia*, over the terrorist attack that killed the former Lebanese PM Hariri, which has been labelled as a sensitive political assassination.

Similarly, Rule 116 of the Rules allows the Prosecution not to disclose information obtained by means other than those stated in Rule 110 of the Rules, such as supporting material that lead to the indictment, statements of witnesses, or other information obtained under Rule 118. Rule 118 sets ground for the acceptance of information that can never be disclosed without the consent of its provider if it was “[...] provided on a confidential basis and which affects the security interests of a state or international identity or an agent thereof [...]”. Thus, the information targeted by Rule 116 is the one whose disclosure would affect future investigations, as well as information that would endanger a victim or his family or affect the public interest. The Prosecution shall in such circumstances, under Rule 116 (A) “[...] apply ex parte to the Trial Chamber sitting in camera to be relieved in whole or in part[...]”, of the obligation to disclose information to the accused. This Rule sets forward an important exception to the right of the accused to access information and evidence that might be essential to prepare for a good defense and to see evidence against him/her or in his/her favour. Since the STL is a hybrid tribunal, and since the prosecution of the accused is delicate and would affect public interest and the political scene in Lebanon, restrictions like these can be explained. However, this is still a violation of the right of the accused to examine witnesses and inculpatory evidence.

Finally, Rule 158 of the Rules allows for the admission of the statement of a person “[...]who has died, who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally [...]”. This can be considered a breach of the right of the accused, since the latter cannot examine the witness or person who has provided such statement. Since the admission of such statements can prejudice the accused especially if the statements provide incriminatory evidence against him/her, the right guaranteed in Article 16 (4) (e) and (f) of the Statute of the STL (already examined above) would be breached. This rule probably exists due to the fact that a witness -Al Siddiq- has given his statement to the UNIIIC before the creation of the STL in 2007, and has been missing since. Notwithstanding, one can question the legality of such evidence’s admission, in the context of Lebanese politics.

Conclusion

This research proves that two courts applying Lebanese law, trying the same type of crimes, do not apply international human rights standards the same way. The STL, which is a mixed hybrid tribunal of an international character applying both common law and civil law principles and guarantees of criminal procedure respects fundamental rights of the accused, with some exceptions allowing some limitations of such rights in specific circumstances. It has thus been

proved that notwithstanding the efforts of the STL to comply with international standards on the rights of the accused while applying Lebanese Law, it has turned out that victim participation in the proceedings as well as witness protection guarantees can prejudice the rights of the accused before this international tribunal. On the other hand, the Lebanese Permanent Military Tribunal is breaching many of the accused's fundamental rights that should be respected in criminal proceedings, mainly the right to be tried by an independent, competent and impartial tribunal, the right to be tried without undue delay, the right to a public hearing, the right to appeal and subsequently the principle of equality of arms. For this reason, it is essential that both codes regulating the functioning of the Military Tribunal and governing the criminal procedure before it be amended in light of international law in general, as to ensure the enforcement of effective fair trial standards before an extraordinary domestic court that has been functioning not only in time of war but also in time of peace.

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