

# Lebanon: The Role of Prosecutors in Ensuring Independent and Impartial Investigations and Prosecutions

A Briefing Paper

June 2018

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Published in June 2018

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This document has been produced in the frame of the Action entitled "The independence of the judiciary in Lebanon: a social priority" funded by the European Union and implemented by The Legal Agenda in partnership with the International Commission of Jurists, and the Siracusa International Institute for Criminal Justice and Human Rights. The contents of this document are the sole responsibility of the Consortium Partners and can under no circumstances be regarded as reflecting the position of the European Union.



Project funded by  
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# **Lebanon: The Role of Prosecutors in Ensuring Independent and Impartial Investigations and Prosecutions**

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Prosecutors play a crucial role in the administration of justice. Respect for human rights and the rule of law requires a prosecutorial authority that is able to investigate and prosecute criminal offences with objectivity and impartiality. Ensuring that prosecutors are independent in the conduct of their functions can increase the public's confidence in the prosecution's ability to investigate and prosecute crime – whether committed by private persons or public officials – thoroughly and fairly. Prosecutorial independence is a matter of public interest that ensures the possibility of prosecutors to work without undue or other inappropriate influence or obstruction, including when investigating and prosecuting cases of criminal abuse of power and human rights violations.

The international community and professional bodies of prosecutors have adopted international standards relating to the role and functioning of prosecutors, which are intended to be applicable regardless of any differences between national legal systems. The UN Guidelines on the Role of Prosecutors is the main such instrument at global level.<sup>1</sup> The UN Guidelines aim to ensure that prosecutors play an effective role in the administration of justice in a manner that is consistent with the right to a fair trial, as well as the protection of the rule of law and human rights more broadly.

In Lebanon, public prosecutors play a central role in the course of criminal proceedings, from the preliminary phase to the investigation, initiation of prosecution, and trial. However, given recurrent reports that indicate that the rights of suspects and accused persons are frequently violated in the course of criminal proceedings, it appears that prosecutors are not fulfilling their obligation to “perform their duty fairly, consistently and expeditiously and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system”, as set out in Principle 12 of the UN Guidelines on the Role of Prosecutors.

Indeed, reports by the media and civil society organizations indicate that people are being placed into police custody for long periods, followed by much longer periods of pre-trial detention. It has been reported that “Lebanon’s criminal justice system is blighted by arbitrary detention, arbitrary arrest, lengthy pre-trial detention and long delays in trial.”<sup>2</sup> Many sources also report overcrowding in Lebanese prisons, where a high percentage of detainees await their trials for months.<sup>3</sup> In addition, the Committee against Torture (CAT) –the body of independent experts established by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to monitor the implementation by States Parties of their obligations under the treaty – reported receiving information according to which torture and other ill-treatment in Lebanon took place “mainly during arrest and interrogation in certain police stations as well as in detention facilities under the responsibility of [Internal Security Forces (ISF)] and the military intelligence services”.<sup>4</sup> The CAT also reported “receiving numerous and consistent allegations of torture and ill-treatment of inmates

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<sup>1</sup> UN Guidelines on the Role of Prosecutors, 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 Doc. A/CONF.144/28/Rev.1, para. 189, welcomed by UN General Assembly Resolution 45/166 (1990) [UN Guidelines on the Role of Prosecutors].

<sup>2</sup> See Daily Star, “Human rights group urges end to arbitrary detention”, 5 April 2014, available at: <http://www.dailystar.com.lb/News/Lebanon-News/2014/Apr-05/252385-human-rights-group-urges-end-to-arbitrary-detention.ashx>.

<sup>3</sup> See 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”, Lebanon, January 2013, pp. 56 and following.

<sup>4</sup> Report of the Committee against Torture, UN Doc. A/69/44 (2014), Annex XIII, “Summary account of the results of the proceedings concerning the inquiry on Lebanon” (CAT Report), para. 10.

by Internal Security Forces officers, either upon arrest or later, in police custody during interrogation".<sup>5</sup>

Given their role as initiators and overseers of criminal investigations, and as the authority responsible for the prosecution of persons charged with criminal offences, public prosecutors are directly concerned with these issues. In order to ensure respect for the rule of law and human rights in the criminal justice system in Lebanon, public prosecutors should be enabled to carry out their functions independently, impartially, with objectivity, and in a manner that respects and defends human rights. Any improper influence or interference from any source outside the Prosecutor's Office and any attempts to undermine the independence and impartiality of prosecutors should be prohibited.

In Lebanon, the structure of the Office of the Public Prosecutor (OPP), and the role, status and functions of its prosecutors, are set out in large part in the Lebanese Code of Criminal Procedure<sup>6</sup>, as well as in Legislative Decree No. 150 of 16 September 1983 on the organization of the judiciary (Decree-Law No. 150/83). In this memorandum, the ICJ assesses the relevant provisions regulating the Lebanese OPP, in light of the international standards that aim to ensure the independent and impartial functioning of prosecutors. The ICJ first addresses the role that should be held by the OPP which, given its role in investigations and prosecutions, should not include judicial functions, and then addresses the main issues that may undermine the OPP's effective, independent and impartial conduct of investigations and prosecutions. Following on from such analysis, the ICJ makes recommendations for amendment and reform of law and practice with a view to contributing to efforts to enhance the independence and impartiality of the OPP and the administration of criminal justice in a manner that respects and protects human rights, due process and the rule of law.

## **I. Separation of the judicial and prosecutorial functions**

To ensure the proper administration of justice and to uphold the rule of law, right to fair trial, and procedural guarantees for the right to liberty, judges and prosecutors must exercise their respective key roles independently of one another. To this end, prosecutors should not be given the power to exercise judicial functions. Moreover, the prosecution services and the judiciary must not only act independently, but also be seen to do so. Thus, Guideline 10 of the UN Guidelines on the Role of Prosecutors provides that the "office of prosecutors shall be strictly separated from judicial functions".<sup>7</sup>

### *i. The role and position of prosecutors in relation to investigation and prosecution precludes them from also fulfilling judicial functions*

Even when acting fairly and impartially in investigating and prosecuting crime, the role of prosecutors in the criminal process inherently places them in an adversarial position with suspects and accused persons. Such a role is incompatible with the prosecutor simultaneously taking on judicial functions that would require impartiality between the interests of the prosecution and the interests of the suspect or accused; prosecutors cannot reasonably be expected or perceived to be impartial about any potential conflict between their own interest in investigation and prosecution and the interests of the suspect or accused.

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<sup>5</sup>Report of the Committee against Torture, UN Doc. A/69/44 (2014), Annex XIII, "Summary account of the results of the proceedings concerning the inquiry on Lebanon", para. 13.

<sup>6</sup> Law No. 328 of 7 August 2001 [Code of Criminal Procedure].

<sup>7</sup>See also Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE), Opinion on Judges and Prosecutors in a Democratic Society, CM(2009)192 [known as the "Bordeaux Declaration"], para. 3: judges and prosecutors "must both enjoy independence in respect of their functions and also be and appear independent from each other".

Under the provisions of the Code of Criminal Procedure, the Lebanese OPP's main function is to initiate public action in criminal matters, that is to say, to bring and prosecute criminal charges against the alleged author of an offence.<sup>8</sup> The OPP is also granted investigative powers. In particular, one of the main duties of the OPP is to investigate offences characterized as misdemeanours or felonies in order to prosecute those who participated in their commission.<sup>9</sup> The OPP may undertake any investigative measure it deems necessary to gather useful information to investigate the felony, collect evidence and identify the perpetrator or accomplices, within the bounds of the law and as long as such measures are not vitiated by moral or material coercion.<sup>10</sup>

The ICJ is concerned, however, that in addition to the powers granted to them in the course of investigations, Lebanese prosecutors are also granted the power to take decisions of *ajudicial* character. In particular, Lebanese prosecutors are given authority to supervise the custody of suspects during *garde-à-vue*, to the exclusion of any other judicial authority.

More particularly, where a felony is discovered *in flagrante* (i.e. in the process of being perpetrated)<sup>11</sup>, a prosecutor (either a public prosecutor or an attorney-general) must proceed to the scene of the offence as soon as it is notified,<sup>12</sup> and is empowered by Lebanese law to order the apprehension and interrogation of any person who is present at the scene of the felony and against whom there are "strong suspicions" that he/she was involved in the commission of the felony.<sup>13</sup> The Code of Criminal Procedure includes no explicit requirement that a person, once arrested, be brought promptly before a judge or other judicial power. To the contrary, in Lebanon a person arrested at the scene of a felony can be held in custody without being brought before a judge, for an initial period of 48 hours, which can be renewed once by decision of the prosecutor if the latter considers that additional time is required for the investigation (i.e. 96 hours in total).<sup>14</sup>

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<sup>8</sup> Code of Criminal Procedure, article 5. Notwithstanding a few exceptions – notably in cases heard by the Court of Cassation, the Justice Council, or in cases of prosecution of judges – the Public Prosecutor at the Court of Cassation does not himself/herself prosecute, but rather refers cases to the appropriate prosecutors for them to initiate the requisite public prosecution (article 13). Article 17 of the Code of Criminal Procedure prescribes the duties of the Public Prosecutor at the Court of Cassation, while article 24 prescribes the duties of the Public Prosecutor at the Court of Appeal.

<sup>9</sup> Code of Criminal Procedure, article 24(a).

<sup>10</sup> Code of Criminal Procedure, article 35. To obtain information regarding offences, the OPP can use one or more of the following means:

- a) Investigations conducted by the OPP itself;
- b) Reports from the official or officer who obtained knowledge of an offence during the performance of his or her duties;
- c) Preliminary inquiries conducted by the Judicial Police when the Judicial Police has been tasked to investigate an offence, and the records it submits when it learns that an offence has occurred;
- d) Complaints or denunciations filed either directly by an individual or individuals or through the OPP of the Court of Cassation;
- e) Any lawful means that enables the OPP to obtain information regarding an offence.

<sup>11</sup> The definitions of offences discovered *in flagrante* are found in articles 29 and 30 of the Code of Criminal Procedure.

<sup>12</sup> Code of Criminal Procedure, article 31. However, the public prosecutor must cease his or her investigations once the Investigative Judge arrives and provide the Investigative Judge with any information, records or impounded items he or she has gathered. If the prosecutor completes his or her investigation before the arrival of the Investigative Judge, he or she must then forward the case file and any statement of charges to the Investigative Judge. See Code of Criminal Procedure, article 36.

<sup>13</sup> Code of Criminal Procedure, article 32.

<sup>14</sup> Code of Criminal Procedure, article 32. Before the 2001 amendments to the Code of Criminal Procedure, this form of detention was limited to 24 hours, renewable once by the OPP.

Judicial Police officers<sup>15</sup> are also empowered to order the arrest of a suspect. In cases of *in flagrante* felonies where the prosecutor was not able to proceed to the scene of the crime, the Judicial Police are authorized to proceed and carry out the investigation.<sup>16</sup> In such cases, if the Judicial Police officer considers that the investigation requires that the suspect be held in custody, the Judicial Police on their own authority can arrest and detain the person; the period of custody may be continued up to a maximum period of four days, upon reasoned and written decision of the Public Prosecutor at the Court of Appeal, who is to issue it after examining the file and verifying the justifications for the extension.<sup>17</sup>

When the offence allegedly committed falls outside the *in flagrante* category, either the Judicial Police, tasked by the OPP, or the OPP itself<sup>18</sup>, investigates offences that are the subject of complaints or denunciations and that were referred to the OPP.<sup>19</sup> Judicial Police officers, acting as assistants to the OPP, perform the duties assigned to them by the OPP in the investigation of offences, collection of information, and making of inquiries aimed at identifying the perpetrators and participants, and at gathering of evidence.<sup>20</sup> In such cases, Judicial Police officers may only detain a suspect in police custody with a decision of the OPP. The period of detention shall not exceed 48 hours, but may be extended by another 48-hour period upon the consent of the OPP.<sup>21</sup> The Code of Criminal Procedure does not prescribe the reasons or grounds according to which a person may lawfully be held in custody, nor does it require that the OPP issue a reasoned and written decision when extending the initial period of custody.

International standards are clear that prosecutors cannot fulfill requirements under international human rights law for judicial supervision over arrest, custody, detention or other deprivation of liberty of suspects or accused persons in criminal proceedings. Article 9(3) of the ICCPR, for instance, requires: "Anyone arrested or detained on a criminal charge" must be "brought promptly before a judge or other officer authorized by law to exercise judicial power". This requirement applies even before formal charges have been laid, i.e. whenever a person in question is arrested or detained on suspicion of criminal activity.<sup>22</sup> The requirement in article 9(3) is in addition to the right, for instance under article 9(4) of the ICCPR, of anyone who is deprived of his liberty by arrest or detention "to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

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<sup>15</sup> In accordance with article 38 of the Code of Criminal Procedure, the Judicial Police works under the supervision of the Public Prosecutor at the Court of Cassation. The Public Prosecutor at the Court of Cassation may supervise Judicial Police officers in the performance of their duties and make observations as he/she sees fit to his/her supervisor (article 15). The functions of the Judicial Police are performed by the Public Prosecutors and Attorneys-General, with the assistance of, among others, the governors and district commissioners; the Director-General and officers of the Internal Security Forces, the Judicial Police (*al-shurta al qadaiyya*), non-commissioned officers serving in the regional sectors, and the heads of the Internal Security Forces police stations; the Director-General, officers and non-commissioned investigators of General Security; village *mukhtars*; captains of ships, aeroplanes and aircrafts (article 38).

<sup>16</sup> Code of Criminal Procedure, article 41. In such cases, the Judicial Officer(s) must inform the competent Public Prosecutor of having proceeded under this authority, and comply with his or her instructions. If a member of the OPP or an investigative judge arrives on the scene, the Judicial Police officer must cease investigative activities unless he/she receives written instructions to continue from either the prosecutor or the Investigative Judge (article 44)

<sup>17</sup> Code of Criminal Procedure, article 42.

<sup>18</sup> Code of Criminal Procedure, article 49.

<sup>19</sup> Code of Criminal Procedure, article 40.

<sup>20</sup> Code of Criminal Procedure, article 47.

<sup>21</sup> Code of Criminal Procedure, article 47.

<sup>22</sup> Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of persons), UN Doc. CCPR/C/GC/35 (2014) [General Comment No. 35], para. 32. See also, Human Rights Committee, *Marques de Morais v. Angola*, UN Doc. CCPR/C/83/D/1128/2002 (2005), para. 6.4.

To satisfy the requirements for judicial control under article 9 (3) of the ICCPR, the authority in question must enjoy judicial independence, objectivity and impartiality. It is especially important that the judicial authority be impartial between, on the one hand, the interests of the investigating and prosecuting authorities who seek to detain the individual, and on the other hand, the interests of the individual who is being detained. This principle is inherent to the proper exercise of judicial power.<sup>23</sup> To this end, Human Rights Committee jurisprudence has consistently found that public prosecutors cannot satisfy the requirement for "a judge or other [...] judicial power" under article 9(3) of the ICCPR.<sup>24</sup>

The European Court of Human Rights (ECtHR) has similarly held that prosecutors do not meet the requirements of independence and impartiality inherent to the autonomous notion of "a judge or other officer authorized by law to exercise judicial power" under article 5(3) of the European Convention on Human Rights, which includes requirements essentially identical to those in article 9(3) ICCPR.<sup>25</sup> In *Moulin v. France*, for instance, while prosecutors in France were considered by the national legal system to be magistrates, they did not benefit from the same guarantees of irremovability and security of tenure as active sitting judges, nor were they sufficiently independent from the executive, to be considered as independent and impartial in the senses required for article 5(3).<sup>26</sup>

According to the ECtHR, "a judge or other officer authorized by law to exercise judicial power":

must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority, and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention.<sup>27</sup>

The ICJ is of the opinion that the Lebanese OPP, like the prosecution authorities addressed by the Human Rights Committee and the ECtHR, cannot constitute the judicial authority contemplated by article 9(3) of the ICCPR as a result of the OPP's essential role in criminal investigations and prosecutions, as well as the lack of sufficient institutional guarantees for the OPP in terms of irremovability and security of tenure, similar to those required by international law for sitting judges, and in terms of independence from the executive. The "judge or other officer authorized by law to exercise judicial power" required by article 9(3) ICCPR is inherently a "judicial function" and insofar as the Lebanese legal system currently relies on the OPP to fulfill this function, the legal system does not comply with Article 10 of the UN Guidelines on the Role of Prosecutors ("The office of prosecutors shall be strictly separated from judicial functions").

The ICJ therefore strongly recommends that the power of judicial review over custody be transferred to an independent and impartial judicial authority or court, whether the *juge d'instruction* (investigative judge) or another judge independent of the prosecution and with full guarantees of independence and impartiality, and this authority should have the power to order the release of the detainee after hearing the

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<sup>23</sup> Human Rights Committee, *Musaev v. Uzbekistan*, UN Doc. CCPR/C/104/D/1914,1915&1916/2009 (2012), para. 9.3

<sup>24</sup> See e.g. Human Rights Committee, *Torobekov v. Kyrgyzstan*, UN Doc. CCPR/C/103/D/1547/2007 (2011), para. 6.2; *Ashurov v. Tajikistan*, UN Doc. CCPR/C/89/D/1348/2005 (2007), para. 6.5; *Platonov v. Russian Federation*, UN Doc. CCPR/C/85/D/1218/2003 (2005), para. 7.2; *Kulomin v. Hungary*, UN Doc. CCPR/C/50/D/521/1992 (1996), para. 11.3.

<sup>25</sup> ECtHR, *Moulin v. France*, Application No. 37104/06, Judgment of 23 November 2010, para. 57.

<sup>26</sup> The ECtHR later upheld this decision in *Vassis and others v. France*, Application No. 62736/09, Judgment of 27 June 2013, para. 53.

<sup>27</sup> ECtHR (Grand Chamber), *Medvedyev and others v. France*, Application No. 3394/03, Judgment of 29 March 2010, para. 124.



individual and reviewing the lawfulness of the arrest and detention.<sup>28</sup> Such a reform would in effect be similar to the approach ultimately adopted by France to implement the judgment of the ECtHR in *Moulin v. France*.<sup>29</sup>

While there are a number of aspects of the Code of Criminal Procedure, not necessarily exclusively related to the role of prosecutors, that should be reviewed for consistency with international standards, the above discussion also makes opportune a brief comment on the requirement of “promptness” in article 9(3) ICCPR in relation to Lebanese law and practice. The ICJ accordingly observes that the length of the *garde-à-vue* that is made possible under the provisions of the Code of Criminal Procedure is inconsistent with Lebanon’s obligations under Article 9(3) of the ICCPR, according to which persons who are arrested or detained in connection with a criminal offence have the right to be brought “promptly” before the judicial authority.

In interpreting the “promptness” requirement, international human rights monitoring mechanisms have, as a general rule, considered delays of more than 48 hours following an arrest to be excessive.<sup>30</sup> Under the current framework, in cases of felonies, both *in flagrante* and outside of this category, a person can be placed under *garde-à-vue* for up to 96 hours without being brought before a judge (articles 32, 42 and 47 of the Code of Criminal Procedure). The authorization for suspects to be detained in custody beyond an initial period of 48 hours can be made by prosecutors without any requirement to provide a reasoned decision for the extension or to take into account the objective circumstances of the individual case. As described above, the detention in *garde-à-vue* is not subject to the review or supervision of an independent and impartial judge that meets the requirements of article 9(3) ICCPR. As such, these *garde-à-vue* provisions appear to run counter to Lebanon’s obligations under international law, including those relating to the right to liberty and to be promptly brought before a judge.<sup>31</sup>

The Code of Criminal Procedure also does not expressly require that the arrested or detained individual be physically brought before the authority reviewing his or her detention in custody. The physical presence of the detained or arrested person before a judge, as is required by the article 9(3) ICCPR reference to being “brought before” the judge, is important for a number of reasons, including in so far as it gives the opportunity for independent observation and inquiry into the treatment that he or she received in custody.<sup>32</sup> It thus serves as a safeguard for the right to security of person

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<sup>28</sup> In this regard, the ICJ recalls its recommendations made in its memoranda on the independence of the Lebanese ordinary court system – i.e. on the High Judicial Council, the management of the careers of judges, and judicial ethics and accountability – which aim to ensure that the independence of the Lebanese courts and its judges is reinforced. See, ICJ, “Lebanon: the ICJ calls for extensive reforms to strengthen judicial independence and impartiality”, 28 February 2017, available at: <https://www.icj.org/lebanon-the-icj-calls-for-extensive-reforms-to-strengthen-judicial-independence-and-accountability/>. It is possible that, even with transferring judicial control over custody to another judicial authority, that authority itself may require improvements to its institutional arrangements or practices in order to satisfy the requirements of article 9 ICCPR.

<sup>29</sup> See Council of Europe, Secretariat of the Committee of Ministers, Doc DH-DD(2013)1144, *Communication de la France concernant l’affaire Moulin contre France* (“Bilan d’action révisé”), 22 October 2013, and the subsequent resolution of the Committee of Ministers, Resolution CM/ResDH(2013)240, 5 December 2013. See also for example, ECtHR, *Kiril Zlatkov Nikolov v. France*, Applications nos 70474/11 et 68038/12, Judgment of 10 November 2016, paras 43 to 49.

<sup>30</sup> See, for example, Human Rights Committee, Concluding observations on El Salvador, UN Doc. CCPR/C/SLV/CO/6 (2010), para. 14; Special Rapporteur on torture, UN Doc. E/CN.4/2003/68 (2002), para. 26(g); ECtHR, *Kandzhov v. Bulgaria*, Application No. 68294/01 (2008), paras 66-67.

<sup>31</sup> See Human Rights Committee, General Comment 35, para. 38. See also, African Commission on Human and Peoples’ Rights (ACHPR), Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial, adopted in 2014, Principle 7.b.ii.

<sup>32</sup> See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, approved by the General Assembly in its resolution 43/173 of 9 December 1988, principle 37.

and the prohibition against torture and other cruel, inhuman or degrading treatment. Even leaving aside the concern that a prosecutor cannot constitute an appropriate judicial authority for purposes of article 9(3) ICCPR, then, the procedure for review and renewal of police custody or release also falls short of international standards by failing to expressly require the physical presence of the detainee before the decision-maker.

*ii. Establishing a clear distinction between the judiciary and the prosecution*

In line with Guideline 10 of the UN Guidelines on the Role of Prosecutors, the Bordeaux Declaration on the Relations between Judges and Prosecutors in a Democratic Society [Bordeaux Declaration], adopted by the Consultative Council of European Judges and the Consultative Council of European Prosecutors in 2009, provides that the “proper performance of the distinct but complementary roles of judges and public prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice” and that judges and prosecutors “must both enjoy independence in respect of their functions and also be and appear independent from each other”.<sup>33</sup>

The Explanatory Note to the Bordeaux Declaration acknowledges that in continental law systems both judges and prosecutors may be considered to be part of the judicial corps, and that the public prosecution’s autonomy from the executive may be limited. Nevertheless it states that there must be a guarantee of separation of functions.<sup>34</sup> The Explanatory Note clarifies that:

The independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary. The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and *where the distinct role of judges and prosecutors is correctly observed*.<sup>35</sup>

One particular manifestation of this principle is the requirement for judicial control of arrest and detention, mentioned in the previous section.

More generally, the ICJ is of the view that the functions of the judge and of the prosecutor must be separated and made clearly distinct, in order to ensure the proper and effective performance of both.

In this regard, the ICJ recommends that the body in charge of overseeing the careers of prosecutors should be different than the one overseeing the careers of judges. In Lebanon, the High Judicial Council is the body in charge of managing the careers of both “sitting” and “standing” magistrates, i.e. judges and prosecutors respectively. While the Public Prosecutor at the Court of Cassation is an *ex officio* member of the High Judicial Council, the nine other members are judges.<sup>36</sup>

The ICJ is of the view that a new independent body should be established to oversee the careers of prosecutors. In accordance with the recommendations of the UN Special Rapporteur on the independence of judges and lawyers, recruitment bodies for prosecutors “should be composed by a majority of members from within the profession in order to avoid any possible political or other external interference”.<sup>37</sup> At

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<sup>33</sup> Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE), Opinion on Judges and Prosecutors in a Democratic Society, CM(2009)192 [“Bordeaux Declaration”], para. 3.

<sup>34</sup> Bordeaux Declaration, Explanatory Note, paras 6-9.

<sup>35</sup> Bordeaux Declaration, Explanatory Note, para. 10.

<sup>36</sup> Decree-Law No. 150/83, article 2.

<sup>37</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 62

the very least, a distinct body, composed of a majority of prosecutors, could be established within the High Judicial Council.

Moreover, as will be seen in section II(i) below on the criteria for the selection of prosecutors, Lebanese prosecutors are themselves judges who are part of the judicial corps. The training and selection procedure for prosecutors is the same as that of judges; this gives them the possibility of switching careers between the judiciary and the prosecution. As a safeguard of the independence of both judges and prosecutors, Recommendation (2000)19 on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers of the Council of Europe (CoM Recommendation (2000)19), provides:

States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states should guarantee that *a person cannot at the same time perform duties as a public prosecutor and as a court judge.*<sup>38</sup>

In *Piersack v. Belgium*, the European Court of Human Rights determined that cases where "an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality".<sup>39</sup>

The law should therefore clearly prohibit the possibility of a prosecutor simultaneously serving as a court judge or being appointed as a judge in a case where he or she was previously involved as a prosecutor.

**In light of the above, the ICJ calls on the Lebanese authorities to amend the Code of Criminal Procedure and Decree-Law No. 150/83, as appropriate, with a view to ensuring that the office of prosecutors is strictly separated from the judiciary and judicial functions. To this end, the authorities should:**

- i) **Amend articles 32, 42 and 47 of the Code of Criminal Procedure with a view to ensuring, in line with international standards, that prosecutors are not granted the power to exercise judicial functions. To this end, the authorities should:**
  - a) **Transfer decision-making authority on whether or not to renew police custody, including particularly the current authority of prosecutors to extend *garde-à-vue*, to a judge or other judicial officer that meets the requirements of independence, impartiality and objectivity for such judicial functions under international law;**
  - b) **Ensure effective and independent judicial oversight over *garde-à-vue* facilities, periods and conditions;**
  - c) **Ensure that any person under *garde-à-vue* is promptly and physically brought before a judge, and in any case no later than 48 hours from the time of arrest.**
- ii) **Ensure that the functions of judges and prosecutors are clearly separated and distinct and, to this end:**
  - a) **Establish an independent body, composed of a majority of prosecutors, that would be in charge of selecting and appointing prosecutors and of overseeing their careers;**
  - b) **Clearly provide, by law, that a person cannot at the same time perform duties as a public prosecutor and as a court judge and**

<sup>38</sup>Council of Europe, Recommendation (2000)19 on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000, [CoE CM Recommendation (2000)19], para. 17.

<sup>39</sup>ECTHR, *Piersack v. Belgium*, Application no. 8692/79, Judgment of 1 October 1982, para. 30(d).

**prohibit the possibility of a prosecutor being appointed as a judge in a case where he or she was previously involved in the investigation.**

## **II. Independence and impartiality of the prosecution services**

The organization and structure of prosecution services vary from country to country. Some prosecution services are a part of the executive branch, while others are regarded as part of the judiciary, or form an independent structure. The UN Special Rapporteur on the independence of judges and lawyers reported on the growing tendency to move towards an institutionally independent prosecution model, in terms of its relationship with other powers, in particular the executive.<sup>40</sup>

Regardless of the organization and structure of the prosecution service in a country, the independence, impartiality and objectivity of prosecutors carrying out their prosecutorial function must be maintained, respected and protected, so that prosecutors can conduct investigations impartially and objectively.<sup>41</sup> This is critical to ensuring the fair administration of justice, respect for human rights and the rule of law.

The UN Guidelines on the Role of Prosecutors for example, provide that:

4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.[...]

13. In the performance of their duties, prosecutors shall:  
(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;  
(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;[...]

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

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<sup>40</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 27.

<sup>41</sup> As discussed above, prosecutors are not in a position to be, or to be perceived to be, entirely impartial as between their own interests in the investigation and prosecution and the interests of the suspects or accused. However, international standards do require that prosecutors be impartial in the terms described here: they must approach the question of the guilt or innocence of particular persons and whether to proceed with prosecution, on the basis only of the available and properly-collected reliable evidence. They must not act on the basis of bias or prejudices such as those based on discrimination, or personal preferences or relationships, or a bias in favour of state authorities versus the individual.

The *Standards of professional responsibility and statement of the essential duties and rights of prosecutors* ("IAP Professional Standards")<sup>42</sup> further elaborate as follows:

### 1. PROFESSIONAL CONDUCT

Prosecutors shall: [...]

e) strive to be, and to be seen to be, consistent, independent and impartial; [...]

### 2. INDEPENDENCE

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

[...]

### 3. IMPARTIALITY

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

a) carry out their functions impartially;

b) remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;

c) act with objectivity;

d) have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

e) in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;

f) always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

The UN Guidelines and IAP Professional Standards also set out additional specific measures for the independence and impartiality of prosecutors, and further technical guidance on their implementation is contained in the UN publication, *The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide*.<sup>43</sup>

Many elements can affect the capacity of prosecutors to perform their duties in an independent and impartial manner, emanating both from within the prosecutorial system, its structure and organization, as well as from external factors. In this section, the ICJ examines some of the main elements that affect, or may affect, the independence and impartiality of Lebanese prosecutors in the exercise of their functions. These include: the criteria for the selection and appointment of prosecutors, including the Public Prosecutor; the rights of prosecutors to freedom of expression and of association; the hierarchy within the OPP and power to instruct prosecutors; and the lack of adequate resources.

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<sup>42</sup> Standards of professional responsibility and statement of the essential duties and rights of prosecutors, adopted by the International Association of Prosecutors (IAP) 23 April 1999 and endorsed by the UN Commission on Crime Prevention and Criminal Justice, resolution 17/2 (2008) "Strengthening the rule of law through improved integrity and capacity of prosecution services".

<sup>43</sup> Published by the United Nations, 2014, available at: [https://www.unodc.org/documents/justice-and-prison-reform/14-07304\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf).

*i. Criteria for the selection of prosecutors, qualifications, and appropriate training*

In line with the UN Guidelines on the Role of Prosecutors and the IAP Professional Standards, prosecutors should be selected on the basis of objective criteria, and recruitment should be decided on the basis of a fair and impartial decision-making procedure.<sup>44</sup>

In Lebanon, prosecutors are magistrates and integrated into the judiciary. The selection and appointment procedures for prosecutors are accordingly the same as for judges; as the ICJ has previously reported, neither Decree-Law No. 150/83, nor the Code of Criminal Procedure prescribe specific, clear and objective criteria for selection and appointment.<sup>45</sup> Neither is there any specific training provided for judges entering the prosecutorial function: judges who have succeeded in their training at the Institute of Judicial Studies can be appointed either as judges or prosecutors by Cabinet Decree upon the agreement of the High Judicial Council and of the Minister of Justice.<sup>46</sup>

The only other specified criterion applies only to appointment as the Public Prosecutor at the Court of Cassation, where the person must have achieved the required seniority in the ranking structure (14<sup>th</sup> grade)<sup>47</sup>; otherwise, the selection and appointment of all other prosecutors is not done on the basis of any legally-established or otherwise publicly-specified criteria.

The ICJ is of the view that Lebanese law should, in accordance with international standards, provide for clear and objective criteria for the selection and appointment of prosecutors. In conformity with the UN Guidelines on the Role of Prosecutors, these criteria should be based on integrity and ability, and appropriate training and qualifications.<sup>48</sup> Moreover, the criteria should “embody safeguards against appointments based on impartiality or prejudice, excluding any discrimination”.<sup>49</sup> Therefore, the criteria should also ensure that no discrimination in the selection of prosecutors on grounds other than nationality is accepted; a general anti-discrimination provision, covering at least all the prohibited grounds of discrimination covered by the ICCPR (i.e. articles 25 (access to public service) and 26 (protection against discrimination) and by the UN Guidelines on the Role of Prosecutors, should be included.

Furthermore, the ICJ considers, in line with the view of the UN Special Rapporteur on the independence of judges and lawyers, that “a public competitive selection process

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<sup>44</sup> See UN Guidelines on the Role of Prosecutors, Articles 1 and 2; IAP Professional Standards, Article 6(e); Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 59.

<sup>45</sup> The ICJ addressed the criteria for the selection and appointment of judges in its memorandum entitled “The Career of Judges in Lebanon in Light of International Standards: Judicial selection, appointment, promotion and security of tenure”, available at <https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-judges-Advocacy-Analysis-Brief-2017-ENG.pdf>.

<sup>46</sup> Decree-Law No. 150/83, article 5(b).

<sup>47</sup> The ICJ addressed the judicial ranking system in its memorandum entitled “The Career of Judges in Lebanon in Light of International Standards: Judicial selection, appointment, promotion and security of tenure”, p.12, available at <https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-judges-Advocacy-Analysis-Brief-2017-ENG.pdf>:

“The career of judges in Lebanon is organized in accordance with a ranking system. 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.” See article 71 of Decree-Law No. 150/83.

<sup>48</sup> UN Guidelines on the Role of Prosecutors, Guideline 1. See also CoE CM Recommendation (2000)19, paras 5(a) and (b); ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle F(c).

<sup>49</sup> UN Guidelines on the Role of Prosecutors, Guideline 2(a); IAP Professional Standards, para. 6(e).

(an examination) is an objective way to ensure the appointment of qualified candidates to the profession".<sup>50</sup> The ICJ therefore recommends that entrance into prosecution services be subject to a transparent, competitive and consistent selection process that is specific to the profession, and that includes an examination that takes into account the highly skilled, important and sensitive nature of the role and work of prosecutors, and that prosecutors receive training that is specific to the nature of this work.

Indeed, prosecutors should be given adequate and appropriate training, particularly in the field of international standards on human rights and the administration of justice. As specified by the UN Guidelines on the Role of Prosecutors, Lebanon should particularly ensure that, "[p]rosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law".<sup>51</sup>

This should include, among other things, initial and regular periodic training in the fields of law, forensics, ethics and human rights. In the light of their authority to conduct and supervise criminal investigations, they should also receive initial and regular periodic training in investigation techniques, methodology, and equipment and reporting.

*ii. Appointment of the Public Prosecutor at the Court of Cassation*

In practice, the method of selection and appointment of the head of the prosecution service (which in different countries may be named Prosecutor General, Public Prosecutor, or other titles) may vary – e.g. the Prosecutor General may be appointed by the Head of State, the Minister of Justice, a judicial council, or Parliament. While recognizing this diversity, the UN Special Rapporteur for the independence of judges and lawyers has underlined that whatever the national system, "it is important that the method of selection maintains public confidence and the respect of the judiciary and the legal profession".<sup>52</sup>

In Lebanon, under articles 31 of Decree-Law No. 150/83 and 13 of the Code of Criminal Procedure, the Public Prosecutor at the Court of Cassation is appointed Cabinet Decree upon the recommendation of the Minister of Justice.

While international standards do not prohibit a public prosecution office that is affiliated to the executive, the manner and qualifications for appointment – including for appointment at the highest levels – should be transparent and be tailored to safeguard – in practice and perception – functional independence, impartiality, and objectivity. Thus, the law and practice on the appointment of the Public Prosecutor at the Court of Cassation should be amended to ensure that appointments are made in transparent process, that safeguards functional independence and is based on specific objective and merit-based criteria.

To this end, the ICJ is of the view – in line with the general view of the UN Special Rapporteur on the independence of judges and lawyers – that the appointment of the Public Prosecutor at the Court of Cassation should result from cooperation among different governmental bodies, rather than from a single body.<sup>53</sup> At the very least, the law should provide that expert advice be sought to ensure that an objective,

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<sup>50</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 62.

<sup>51</sup> UN Guidelines on the Role of Prosecutors, Guideline 2(b); CoE CM Recommendation (2000)19, para. 7.

<sup>52</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 63.

<sup>53</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 63.

transparent and appropriate choice is made in the selection and appointment of the head of the prosecution services.

*iii. Freedoms of expression and association*

The ICJ has previously reported on the gaps and inconsistencies that are contained in Lebanese Law and that result in the severe restriction of Lebanese judges' right to form and join professional organizations. In particular, according to article 15 of Decree-Law No. 112 of 12 June 1959 on the General Status of Civil Servants, civil servants – including judges, to whom this law applies – are prohibited from carrying out any action prohibited by the laws and regulations in force, in particular from "striking or inciting others to go on strike", "joining a professional organization or trade union", or from launching collective petitions related to the public sector. As under current Lebanese law prosecutors are considered to be a part of the judiciary, the restrictions contained in this article apply equally to prosecutors.

Prosecutors, like judges, are entitled to the rights to freedoms of expression and association, as provided for instance in articles 19 and 22 of the ICCPR. No restrictions to these rights may be imposed other than those permitted by the corresponding Articles 18 to 22 of the ICCPR.<sup>54</sup> Such limitations must among other things be lawful, proportionate, and demonstrably justified in a free and democratic society.

Indeed, given the difference in the role of prosecutors and role of judges, it may be even more difficult to justify restrictions on the freedom of expression and association of prosecutors, than for judges. The UN Guidelines on the Role of Prosecutors state:

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

The law should therefore explicitly guarantee the right of prosecutors to freedom of association, subject only to any specific limitations demonstrably "necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others".<sup>55</sup> In particular, and subject only to any such specific limitations, the law should also recognize the right of prosecutors to form, join and act through professional associations without being subjected to disciplinary or

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<sup>54</sup> See e.g. Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (2011). This is apart from the exceptional possibility for States to implement certain specific temporary derogating measures, "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" under article 4 of the ICCPR. See General Comment No. 29, Article 4: States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).

<sup>55</sup> ICCPR, article 22(2). See similarly International Covenant on Economic, Social and Cultural Rights, article 8(1)(a).



criminal procedures for so doing.<sup>56</sup> Similar recognition and protection should be included in Lebanese law for prosecutors' rights to freedom of belief, expression and assembly.

*iv. Instructions and guidelines*

With a view to ensuring a fair and consistent approach in criminal justice policy, it is common for guidelines or instructions to be issued to prosecutors both by the prosecution service itself (internally) and by non-prosecutorial authorities (externally). International standards contemplate the possibility of such instructions, but subject them to a number of conditions and limits to ensure that these instructions are not politically motivated and to safeguard the rule of law and the functional independence of prosecutors.

The ICJ is concerned that Lebanese law does not provide for appropriate safeguards and limitations on internal and external instructions to prosecutors, and that this may result in opening the door to abuse of power, both from within the prosecution services and from non-prosecutorial authorities, in particular the Minister of Justice.

*Internal instructions*

Lebanese prosecutors operate within a vertical structure, governed by a very strict hierarchy, at the top of which is the Public Prosecutor at the Court of Cassation.

Article 13 of the Code of Criminal Procedure provides that the authority of the Public Prosecutor at the Court of Cassation extends to all prosecutors and that he or she may give them written or oral instructions for the conduct of a prosecution.<sup>57</sup> This is reiterated in article 31 of Decree-Law No. 150/83, according to which the Public Prosecutor has authority over all prosecutors of the OPP (including the Government-Commissioner of the Military Court), and may direct them in public prosecutions, including through written instructions "if necessary".<sup>58</sup> The law however does not impose an obligation that these instructions be communicated in writing, and the specificity of the instructions does not appear to be subject to any limits.

Furthermore, where it obtains knowledge of the occurrence of a serious offence, the OPP at the Court of Appeal must immediately inform the Public Prosecutor at the Court of Cassation and carry out his or her instructions.<sup>59</sup> Here, too, the law does not provide that the instructions of the Public Prosecutors be transmitted in writing, nor does it prescribe any limits to their specificity.

The independence of prosecutors must be safeguarded even from the potential for undue or improper interference to emanate from within the OPP itself. To this end, instructions given by prosecutorial authorities to prosecutors of an inferior grade must be subjected to conditions of transparency, legality, respect for human rights and equity. Indeed, while the Bordeaux Declaration recognizes that, in some States, the structure of the prosecution service is hierarchical and that prosecutors of a lower rank might be subjected to the instructions of their superiors, it recommends that transparent lines of authority, accountability, and responsibility be established. In any case, instructions should always be substantiated and open to scrutiny.

In this regard, and in order to "ensure their accountability and prevent proceedings being instituted in an arbitrary or inconsistent manner, public prosecutors must

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<sup>56</sup>With regard to the accountability of judges in Lebanon, in terms of ethics and discipline, see ICJ, "Judicial accountability in Lebanon: international standards on the ethics and discipline of judges", February 2017, available at: <https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-accountability-Advocacy-Analysis-Brief-2017-ENG.pdf>.

<sup>57</sup> Code of Criminal Procedure, article 13. In such cases, the prosecutors nevertheless retain their freedom of speech at trial hearings.

<sup>58</sup> Decree-Law No. 150/83, article 31.

<sup>59</sup> Code of Criminal Procedure, article 24(a).

provide clear and transparent guidelines as regards the exercise of their prosecution powers”.<sup>60</sup> Directions to individual public prosecutors, including from within the OPP, should therefore “be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria.”<sup>61</sup>

The ICJ therefore recommends that the provisions of the Code of Criminal Procedure and of Decree-Law No. 150/83 be amended to provide that, where the Public Prosecutor, or other hierarchical superior, may issue instructions to individual prosecutors regarding the conduct of a prosecution, these instructions must be issued in writing, be in compliance with publicly available prosecution guidelines and criteria, where applicable, be consistent with human rights, and aim to enhance fairness and consistency of approach in the prosecution process.<sup>62</sup>

### External guidelines

Article 45 of Legislative Decree No. 150/83 provides that “judges of the Public Prosecution Office shall be subject to the management and oversight of their superiors and to the authority of the Minister of Justice”. The Code of Criminal Procedure adds that the Minister of Justice may request a Public Prosecutor to proceed with the prosecution of any offence of which he/she has knowledge.<sup>63</sup> However, neither Legislative Decree No. 150/83 nor the Code of Criminal Procedure specify how the authority of the Minister of Justice is exercised, or in which manner the instruction to prosecute a specific offence should be issued.

The ICJ is concerned that these provisions may allow the executive to interfere in the conduct of a prosecution because they do not adequately limit the power of the Minister of Justice, and therefore do not safeguard the real and perceived independence of the prosecution services.

As the Special Rapporteur on the independence of judges and lawyers cautioned, “case-specific instructions to prosecutors from external organs are not desirable”.<sup>64</sup> However, where such instructions are deemed necessary, “they should be in writing and formally recorded and carefully circumscribed to avoid undue interference or pressure”.<sup>65</sup>

In the same vein, the IAP Professional Standards state as follows:

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

Recommendation (2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system contains specific guidance

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<sup>60</sup> Bordeaux Declaration, Explanatory Note, para. 29.

<sup>61</sup> Bordeaux Declaration, para. 9.

<sup>62</sup> UN Guidelines on the Role of Prosecutors, Guideline 17.

<sup>63</sup> Code of Criminal Procedure, article 14. In such cases, the Public Prosecutor may undertake the investigation directly or through his assistants, but may not prosecute himself.

<sup>64</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 75.

<sup>65</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 116.

in relation to the issuance of instructions by the executive to prosecutor by providing that States should take effective measures to guarantee, *inter alia*, that:

- the nature and scope of the powers of the government with respect to the public prosecution are established by law;
- the government exercises these powers in a transparent way and in accordance with national and international law;
- if the government has the power to give instructions to prosecute a case, such instructions should be in writing and must respect principles of transparency and equity; the government should be under a duty to:
  - o seek prior written advice from either the public prosecutor or the body that is carrying out the public prosecution;
  - o explain its written instructions, especially when they deviate from the public prosecutor's advice, and to transmit them through hierarchical channels; and
  - o see to it that, before trial, the advice and instructions become part of the public case file;
- prosecutors remain free to make any legal argument of their choice to a court; and
- instructions not to prosecute a case are either prohibited or are exceptional.<sup>66</sup>

The ICJ therefore urges the Lebanese authorities to ensure that, if not entirely rescinded, the power of the Minister of Justice over the prosecution is, at a minimum, regulated in a manner that is consistent with these standards.<sup>67</sup>

In particular, clear rules for the giving of instructions that are consistent with international standards must be clearly established by law. These should provide that instructions by the executive to the OPP must be in writing and respect the principles of transparency and equity, as well as human rights and take into account established prosecution guidelines, the interest of the victim and other interested parties. There should be a requirement that such instructions become part of the public case file. Moreover, the law should provide that instructions not to prosecute a case are either prohibited or exceptional. In the latter case, such an instruction should be substantiated.

#### *Right to challenge instructions on the basis of professional or ethical duties*

The ICJ is concerned that neither Decree-Law No. 150/83 nor the Code of Criminal Procedure provide for the possibility for prosecutors to challenge or contest instructions received from their hierarchical superiors or the Minister of Justice in cases where such instructions might be contrary to professional ethics or standards, including because the instruction is inconsistent with the human rights of suspects/accused or other persons.

IAP Professional Standard 6(i) affirms that, in order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with professional standards, prosecutors in general should be entitled "to relief from compliance with an unlawful order or an order that is contrary to professional standards or ethics."

Indeed, the ICJ is of the view that no instruction can be permitted that would force a prosecutor to contravene international standards or professional or ethical duties, particularly as regards for instance obligations:

- to perform duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights (UN Guideline 12);

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<sup>66</sup> CoE CM Recommendation (2000)19, para. 13(a)-(f).

<sup>67</sup> IAP Standards, article 2.3.

- to carry out functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination (UN Guideline 13(a));
- to protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect (UN Guideline 13(b));
- to keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise (UN Guideline 13(c));
- to consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights (UN Guideline 13(d));
- to not initiate or continue prosecution, or to make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded (UN Guideline 14);
- to give due attention to the investigation and prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law (UN Guideline 15);
- to refuse to use evidence that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, and to take all necessary steps to ensure that those responsible for using such methods are brought to justice (UN Guideline 16).<sup>68</sup>

As a safeguard of independence and legality, the UN Special Rapporteur on the independence of judges and lawyers also recommends that prosecutors should have the right to challenge instructions received, especially when they deem the instructions unlawful or contrary to professional standards or ethics.<sup>69</sup> A mechanism should also be established to properly and duly investigate any allegation of improper interference.<sup>70</sup>

It is particularly important that any disciplinary measure or other professional consequences taken against an individual prosecutor for failing to follow an instruction that he or she has considered to be unlawful or contrary to professional standards or ethics, fully comply with international standards. The UN Guidelines on the Role of Prosecutors, for instance, provide that in terms of the process for disciplinary proceedings:

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.<sup>71</sup>

<sup>68</sup> See also the relevant similar provisions of the IAP Professional Standards.

<sup>69</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 116.

<sup>70</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 75.

<sup>71</sup> See also IAP Professional Standards, 6(f), (g), and (i).

It would be incompatible with Article 22 of the Guidelines, in particular, for a prosecutor to be subjected to disciplinary consequences for refusing to follow an instruction that would have conflicted with the Guidelines or other professional or ethical standards.

Lebanese law should therefore explicitly provide that prosecutors may plead a defence of good faith belief that acting in accordance with a certain instruction would have conflicted with ethical or professional standards in the framework of any disciplinary action initiated against them for refusing to follow this instruction. In addition, any disciplinary measure against prosecutors should be grounded on clearly established disciplinary offences and adopted following fair and transparent disciplinary procedures.

v. *Lack of adequate resources*

States must ensure appropriate laws are in place and that adequate human and financial resources are allocated to ensure that public prosecutors can effectively and carry out their functions.<sup>72</sup>The Explanatory Memorandum to Committee of Ministers of the Council of Europe's Recommendation (2000)19 on the role of public prosecution in the criminal justice system, emphasizes that public prosecutors, like judges, must be given the appropriate resources to conduct their functions adequately, including for example, "personnel, premises, means of transport or simply an adequate budget".<sup>73</sup>

The ICJ is concerned that, on the contrary, the Lebanese OPP appears to have insufficient human and financial resources to deal with their cases and carry out their functions effectively.

The budget of the OPP, and the budget for the judiciary generally, is part of the budget of the Ministry of Justice, which is set exclusively by the Ministry itself; the Minister of Justice is, in fact, responsible for the entirety of the Lebanese judiciary's financial matters.<sup>74</sup>According to a 2013 report by ALEF (Act for Human Rights), a civil society organization based in Beirut:

The budget for the Ministry of Justice [MoJ] in 2011 was LBP 115, 821 673 (around USD\$77 million); this included LBP 47, 000 000 (USD\$31 million) allocated to the funding of the Special Tribunal for Lebanon. On the ground, the abovementioned insufficient budget translates into the following: [...] In Beirut, there are approximately 15,000 to 20,000 complaints lodged for approximately seven public prosecutors. Mount Lebanon records between 60,000 to 80,000 complaints for approximately seven public prosecutors. [...]<sup>75</sup>

Even with the work carried out to investigate crimes by the judicial police and by the investigative judges, given the number of criminal complaints as compared to the number of prosecutors, it is unrealistic to believe that the OPP can appropriately and effectively assess all such complaints and prosecute all cases that warrant it. Indeed, it is thus not surprising that delays in bringing cases to trial is a significant problem in Lebanon.<sup>76</sup>Such delays are prejudicial to the interests of victims, and can violate the rights of accused.

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<sup>72</sup> CoE CM Recommendation (2000)19, para. 4.

<sup>73</sup> Explanatory Memorandum to the CoE CM Recommendation (2000)19, para. 4.

<sup>74</sup>For more details on the judiciary's budget, see ICJ, "The Lebanese High Judicial Council in Light of International Standards", February 2017, pp. 10-11, available at: <https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-HJC-Advocacy-Analysis-Brief-2017-ENG.pdf>.

<sup>75</sup> 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", Lebanon, January 2013, p. 51.

<sup>76</sup> 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", Lebanon, January 2013, p. 56.

The UN Special Rapporteur on the independence of judges and lawyers has recommended that prosecutors be provided with "adequate infrastructure and physical conditions of work, as well as with the necessary human and technical resources to effectively perform their tasks".<sup>77</sup> The ICJ similarly urges the Lebanese authorities to take measures to increase the number of suitably trained and qualified prosecutors and ensure that they are provided with the necessary human, financial and material resources in order for them to be able to effectively fulfill their statutory role in the administration of justice in Lebanon in a manner that respects and protects human rights. In this regard, representatives of the prosecution services should be consulted in order to assess and determine what the real needs are.

**In light of the above, the ICJ calls on the Lebanese authorities to amend the Code of Criminal Procedure and Decree-Law No. 150/83, as appropriate, in order to reform the framework regulating the OPP in order to enhance its independence and impartiality. To that end, the authorities should:**

- i) Provide for clear and objective criteria for the selection and appointment of prosecutors, in particular:
  - a) These criteria should be based on integrity and ability, appropriate training and qualifications;**
  - b) They should exclude any discrimination. To this end, a general anti-discrimination provision, covering at least all the prohibited grounds of discrimination covered by the ICCPR and the UN Guidelines on the Role of Prosecutors, should be included;****
- ii) Ensure that entrance into the prosecution services is subject to a transparent, competitive and consistent selection process that is specific to the profession. This should include an examination that takes into account that highly skilled, important and sensitive nature of the role and work of prosecutors;**
- iii) Ensure that prosecutors are given adequate and appropriate training, particularly in the field of human rights, and including initial and regular periodic training in the fields of law, forensics, ethics and human rights, as well as investigation techniques, methodology, equipment and reporting;**
- iv) Amend articles 31 of Decree-Law No. 150/83 and 13 of the Code of Criminal Procedure to provide that the procedure for the appointment of the Public Prosecutor at the Court of Cassation require cooperation and consultation among different governmental bodies, rather than only the Minister of Justice. At the very least, the law should require that the Minister of Justice seek expert advice from other authorities to ensure that an objective, transparent and appropriate choice is made in the selection and appointment of the Public Prosecutor at the Court of Cassation;**
- v) Ensure by law the right of prosecutors to exercise their human rights, including their rights to freedom of expression, association, and assembly, subject only to any restrictions that are in accordance with international law and standards, lawful, proportionate, and justified in a free and democratic society; any disciplinary proceedings must be consistent with this presumption of enjoyment of the rights and limited scope for restrictions;**
- vi) Remove the blanket prohibition to join or form professional associations or trade unions in article 15 of Decree-Law No. 112 of 12 June 1959 on the General Status of Civil Servants;**
- vii) Require that any power of the Public Prosecutor at the Court of Cassation, or any other hierarchical superior, to issue instructions**

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<sup>77</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), para. 117.

- to individual prosecutors regarding the conduct of a prosecution, be exercised transparently, in accordance with international and national law, and that any such instructions be in writing, in compliance with publicly available prosecution and guideline criteria (where applicable), consistent with human rights, and aiming to enhance fairness and consistency of approach in the prosecution process;
- viii) Define in law the nature and scope of any power of the Minister of Justice or other non-prosecutorial authorities to issue instructions to the Public Prosecutor, in particular:
    - a) Provide that the issuance of such instructions must be in writing, be included in the case file where they related to a specific case and be made available to other parties;
    - b) These instructions must respect human rights, the principles of transparency and equity, take into account established prosecution guidelines, and the interests of victims and other interested parties;
    - c) Include a prohibition on the executive issuing instructions not to prosecute or requiring prosecution in a specific case;
  - ix) Grant prosecutors the right to challenge any instructions received that they deem to be unlawful or contrary to professional standards of ethics, and establish a mechanism to duly investigate any allegation of improper interference;
  - x) Ensure that in any disciplinary measures against a prosecutor for having refused to follow an instruction, the prosecutor can raise as a defence a good faith belief that acting in accordance with the instruction would have conflicted with the Guidelines or other professional or ethical standards. Disciplinary action against prosecutors should only be initiated on the basis of clearly established disciplinary offences and disciplinary measures should only be adopted following a fair and transparent process;
  - xi) Take measures to ensure that the OPP is granted the adequate and necessary human, financial and material resources to be able to effectively fulfill their statutory role in the administration of justice in Lebanon. In this regard, representatives of the prosecution services should be consulted in order to assess and determine what the real needs are.





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

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