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ICJ Submission to the Universal Periodic Review of Egypt

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Introduction

The International Commission of Jurists (ICJ) welcomes this opportunity to contribute to the Human Rights Council's (HRC) Universal Periodic Review of Egypt. Egypt was elected to HRC in May 2007 after pledging to fully promote and protect human rights, including by lifting the current state of emergency and preserving the independence of the judiciary. Despite these commitments, numerous serious human rights violations continued to be committed with impunity in Egypt. These violations have been largely committed under the decades-old state of emergency and the "war on terror" paradigm.

In this submission, the ICJ points to the breaches by the Egyptian Government of its obligations under international law, which amount to human rights violations. Those include continuing practice of arbitrary detention, including secret and incommunicado detention; use of security courts and military courts to exercise jurisdiction over civilians; and the failure to investigate, promptly and impartially by an independent body, the consistent reports of torture, ill-treatment and other abuses of the rights of detainees. The ICJ also wishes to draw the Council's attention to the failure of the Egyptian judicial system to fulfil the rights of victims of human rights violations to an effective remedy and to reparation through access to justice and ending the impunity of officials and law enforcement officers responsible for such violations. This is true in particular with regard to the role of the Military Courts and State Security Courts, which mandates contravene international standards of judicial independence and impartiality and has further exacerbated the impunity of those responsible for many of the human rights violations in Egypt.

I. State of emergency and human rights violations

Emergency Law No. 162 was first passed in 1958 but not implemented until 1967¹. Since that date, Egypt has been ruled predominantly under a state of emergency imposed initially in response to the Arab-Israeli war launched that year. In May 1980, the state of emergency was lifted and following the assassination of President Anwar Al-Sadat re-imposed on October 6, 1981. Since this date, it has been renewed regularly. In May 2008, the state of emergency was extended for another two-year period although State officials, including President Hosni Mubarak, had repeatedly said that they would not seek to renew the state of emergency beyond its expiration on May 31, 2008.

¹ Emergency Law n°162/1952: Official Gazette of 28 September 1958, N°28, Bis.

Under international law and jurisprudence, states of emergency, and limitations or derogations of rights in times of emergency, must be of an exceptional and temporary nature. It is by definition a temporary legal response to an exceptional and grave threat to the nation. Article 4 of International Covenant on Civil and Political Rights (ICCPR), to which Egypt is a party, states: *"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law."*

However, in the case of Egypt, the almost three decades state of emergency, which was supposed to be a temporary measure to deal with extraordinary circumstances, has become over the years a permanent measure that violates the requirements of international standards. In its General Comment 29 on the States of emergency (Article 4), the Human Rights Committee stated: *"Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency."*² In its Concluding Observations on Egypt, the Committee was *"disturbed by the fact that the state of emergency proclaimed by Egypt in 1981 is still in effect, meaning that the State party has been in a semi- permanent state of emergency ever since."*³

Serious human rights violations have been committed under the state of emergency in Egypt. It has resulted in thousands of suspected political opponents and human rights defenders been detained, ill-treated and held incommunicado without charge or trial, some for several years. Others have been convicted and sentenced, under the emergency law, to lengthy prison terms after grossly unfair trials before military or state security courts.

Indeed, Article 3 of the 1958 emergency law allows the Egyptian President or his deputy to impose restrictions, upon verbal or written orders, on the freedoms of movement and association, and residence. It also allows them to order the prolonged detention without charge or trial of anyone suspected of being a threat to national security and public order. Article 3 also grants the President or his deputy a wide range of powers of censorship, confiscation and closing of newspapers on the grounds of public safety and national security. In addition, under Article 7 of the emergency law, the President establishes the State Security Courts and appoints its judges, including military judges. Article 9 allows him to refer to the State Security Courts civilians accused of ordinary crimes.

As such, the emergency law violates Egypt's obligations under the provisions of the ICCPR, including the prohibition of arbitrary detention under Article 9: *"everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."* Articles 7 and 9 of the emergency law also violate Egypt's obligations under Article 14 of the ICCPR which states: *"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his*

² Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, CCPR/C/21/Rev.1/Add.11 (2001), paragraph 2.

³ *Concluding observations of the Human Rights Committee: Egypt*, 28 November 2002, CCPR/CO/76/EGY, paragraph 6

rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Egyptian authorities have argued that Egypt is still vulnerable to terrorist attacks and that the emergency law and measures are the appropriate answer to face threats imposed by terrorism. The ICJ is aware that throughout the 1990s and early 2000s, armed Islamic groups' attacks have resulted in the death and injuries of hundreds of civilians and security officers. However, the Egyptian Authorities response to these attacks has, under the emergency law, undermined the rule of law and broken the most basic principles and norms of international law, including through the continuing use of the policy of secret and incommunicado detentions, and the use of special and military courts to try civilians.

Although Article 4 of the ICCPR recognize that States may take measures derogating from their obligations under the Covenant, it also explicitly prescribes that no derogation from the following articles may be made: Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), Article 8 (prohibition of slavery, the slave-trade and servitude), Article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), Article 15 (the principle of legality), Article 16 (the recognition of everyone as a person before the law), and Article 18 (freedom of thought, conscience and religion). Furthermore, according to the Human Rights Committee, *"the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."*⁴

A number of other rights, while not explicitly designated under conventions as non-derogable, have attained that status. In particular, the right to challenge the lawfulness of a detention, *habeas corpus*, is widely regarded as non-derogable.⁵ The Human Rights Committee has also said that the right to be tried by an independent and impartial tribunal *"is an absolute right that may suffer no exception,"*⁶ and most components of the right to a fair trial are widely regarded as non-derogable.⁷

The Egyptian authorities have failed to comply with these obligations under the state of emergency, especially with regard to the continued and widespread use of torture and other ill-treatment in Egyptian prisons and detention facilities. In its Concluding Observations on Egypt, the Committee Against Torture was concerned about *"the persistence of the phenomenon of torture and ill-treatment of detainees by law enforcement officials, and the absence of measures to ensure effective protection and prompt and impartial investigations."*⁸

⁴ Human Rights Committee, General Comment No. 29, *op. cit.* para.11

⁵ Human Rights Committee, General Comment No. 29, *op. cit.* 32, paras.15-16

⁶ Views of 28 October 1992, Communication No. 263/1987, *M. Gonzalez del Río v. Peru*, CCPR/C/46/D/263/1987, para. 5.2.

⁷ Human Rights Committee, General Comment No. 29, *op. cit.* 32.

⁸ Conclusions and recommendations of the Committee against Torture: Egypt. 23 December 2002 CAT/C/CR/29/4 para.5.

Article 126 of the Egyptian Penal Code⁹ falls short from the international standards, including Article 7 of the ICCPR, as it restricts torture to any act committed by a law enforcement officer in order to extract a confession. The absence of a specific crime of torture in the domestic legislation, in accordance with Article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, to which Egypt is Party, and the minor sanctions, which are not commensurate with the gravity of the offences, have exacerbated the use of torture in Egyptian prisons and detention facilities.

Furthermore, the prevalence of torture and impunity of its perpetrators has been compounded by maintaining a policy of incommunicado and secret detention, as suspects are commonly held without charge or access to their lawyers for months or even years.¹⁰ Such practices are in breach of Egypt's obligations under international law which preclude it, absolutely, from engaging in the practice of secret or unacknowledged detention, which itself constitutes a form of torture or other proscribed ill-treatment. The United Nations Human Rights Committee has pointed out that "[t]he absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law,"¹¹ and called on States to "immediately cease [the] practice of secret detention and close all secret detention facilities".¹²

The widespread use of torture and other ill-treatment in prisons and detention facilities breach Egypt's obligations under international law and cannot be justified by the needs of the state of emergency or the measures combating "terror". Under international law the prohibition of torture is absolute and a peremptory norm from which no derogation is permitted (*jus cogens*). The Human Rights Committee reaffirmed that "*the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment [...] in no circumstances can be derogated from. [...] No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment*".¹³

The ICJ therefore calls on the Working Group and the Council to urge the Government of Egypt to:

- i) End immediately the state of emergency and restore the rule of law and human rights;**
- ii) Bring the definition of torture in the Penal Code into accordance with Article 1 of the Convention against Torture, with penalties commensurate with the gravity of torture;**
- iii) Investigate in a prompt, transparent and independent manner the allegations of torture and ill-treatment of convicted prisoners and detainees and bring to justice military and civilian state officials and**

⁹ Published at the official journal no.71 of 5 August 1973.

¹⁰ Amnesty International, Annual report of 2009, available at: <http://report2009.amnesty.org/en/regions/middle-east-north-africa/egypt>

¹¹ Human Rights Committee, *General Comment No.29, States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 13 (b).

¹² See the *Concluding Observations of the Human Rights Committee on the United States of America*, CCPR/C/USA/CO/3/ Rev.1, 18 December 2006, para. 12.

¹³ *Concluding observations of the Human Rights Committee: Canada*, 20 April 2006, CCPR/C/CAN/CO/5, 20 April 2006, para. 15.

- law enforcement officers who carried out, ordered or acquiesced such practices;
- iv) End the practice of prolonged incommunicado detention that can in itself constitute a form of cruel, inhuman or degrading treatment or even torture;
 - v) Ensure that the process leading to criminal prosecution of those arrested and detained on criminal charges meet the international standards of the transparency of investigation, fairness of procedures in prosecution and fundamental standards of fair trial, including access to a legal counsel or other representatives;
 - vi) Provide adequate guarantees against torture or ill-treatment to detainees, including the right to legal counsel from the moment of arrest and the right to challenge the lawfulness of detention before an independent and civilian court;
 - vii) Ensure that officials and law enforcement officers are aware that torture and cruel, inhuman or degrading treatment or punishment are serious crimes which they are responsible to prevent and investigate, and that those suspected of engaging in torture or other ill-treatment must be held accountable, regardless of their official capacity;
 - viii) Accept independent monitoring of the detention facilities, allow independent observers immediate access to the detainees and prisoners;
 - ix) Provide full reparation, including compensation and rehabilitation, to all victims of torture and ill-treatment;

3. Military and State Security Courts

In addition to the ordinary judicial system, an elaborate exceptional court system continues to exist and undermine the jurisdiction of the ordinary courts, particularly in cases of political opponents, human rights defenders and other cases related to the "security" of the State. This exceptional system operates within the framework of the state of emergency and emergency laws. It includes State Security Courts, which are composed of the Emergency Security Courts and the Permanent State Security Courts, and Military Courts.

The Emergency State Security Courts were established under the 1958 Emergency Law. As mentioned above, under Article 7 of the emergency law, the President can establish these Courts and appoints its judges, including military judges. Article 9 allows him to refer civilians accused of ordinary crimes to these courts.

The Egyptian Constitution of 1971 provides the legal basis for the establishment of the Permanent State Security Courts. Article 171 states "*the law shall regulate the organisation of State Security Courts and shall prescribe their competence*". Law No. 105 of 1980 confers State Security jurisdiction over cases involving crimes which constitute a threat to internal and external security of the State, the crime of possessing and using arms and explosives, bribery and embezzlement of public funds. The law permits the President of the Republic to appoint military officers to these courts. Article 183 of the Constitution also states that "*the law shall organize military judicature, prescribe its competences within the limits of the principles prescribed by the Constitution.*" Indeed, according to Article 6 (2) of Law No. 25 of 1966 on the Military Judiciary, the President of the Republic, during a state of emergency, has the right to refer to the military courts any crime punishable under the Penal Code or under any other law. A new constitutional amendment (Article 179) adopted in 2007 also allows the Egyptian president to bypass ordinary courts and

refer people suspected of terrorism to military courts, in which they would be unlikely to receive fair trials. Both the Military judiciary law and the 2007 constitutional amendment shows that military courts are under the control of the Executive, and that there is no separation between the military judicial system and the Executive branch of Government.

In its Concluding Observations on Egypt, the Human Rights Committee noted with alarm that “military courts and State security courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts’ independence and their decisions are not subject to appeal before a higher court (article 14 of the Covenant)”¹⁴

In April 2009, twenty-five members of the Muslim Brotherhood were sentenced to up to 10 years in prison by the Haikstep military court, including seven who were tried *in absentia*.¹⁵ Their trial was blatantly unfair and international observers were denied access to it.

Under international law and jurisprudence, military officers who assume the role of judges while at the same time remaining subordinate to their superiors cannot be considered independent and impartial because they are subject to the command structure of the armed forces. The Human Rights Committee has stated that “trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.”¹⁶

The European Court of Human Rights has also stated that “the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis.”¹⁷

Civilian, independent, and impartial courts using international fair trial standards and procedures are a necessary guarantee to the right to a fair trial and provide the necessary independence and impartiality to ensure that victims of human rights violations are protected, and that those responsible of such violations, including security forces’ officials, are held accountable. The jurisdiction of military courts should be limited to offences of a strictly internal, military nature committed by military personnel, such as disciplinary offences. Indeed, under international standards and jurisprudence, the jurisdiction of military justice must not have competence to try civilians or cases of gross human rights violations committed by military personnel. Both of these categories of cases should be subject to trial only by competent, ordinary civilian courts.¹⁸

Furthermore, concerns continue to be raised about the objective and reasonable justification for the existence of the State Security Courts, not only with regard to the principle of equality before the law and the courts, but also with regard to the courts’ independence and impartiality. The Human Rights Committee has recently stressed that

¹⁴ Concluding observations on Egypt, *op.cit.*, para. 16.b.

¹⁵ Amnesty International, Annual report of 2009, available at: <http://report2009.amnesty.org/en/regions/middle-east-north-africa/egypt>

¹⁶ General Comment No. 32, “Article 14: Right to equality before courts and tribunals and to a fair trial”, 2007, CCPR/C/GC/32, 23 August 2007, para. 22.

¹⁷ Judgment of 4 May 2006, Case of *Ergin v. Turkey*, Application No. 47533/99, paras. 46-49.

¹⁸ Principle No. 8, Draft Principles Governing the Administration of Justice through Military Tribunals (the “Military Justice Principles”), adopted by the Former United Nations Sub-Commission on Human Rights and forwarded to the Commission on Human Rights, E/CN.4/2006/58.

*“the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.”*¹⁹ It has repeatedly expressed its concern at the use of special courts and has, on several occasions, recommended that such courts be abolished. The Committee is also of the view that the abolition of special courts is a positive step in achieving national implementation of the ICCPR.²⁰

The ICJ is concerned that the Military and State Security Courts have been set up to shield state officials, particularly military and security personnel alleged to be responsible for human rights violations from legal accountability, with the effect of entrenching systematic impunity.

The ICJ therefore calls on the Working Group and the Council to urge the Government of Egypt to:

- i) Abolish the State Security Court and other special courts, except for military courts with jurisdiction over exclusively military offences, and make sure that ordinary, i.e. civilian crimes, including those that amount to human rights violations committed by military and law enforcement officers and officials, are tried in ordinary civilian courts using established procedures in line with international standards;**
- ii) Ensure that the Egyptian judiciary acts with deference for human rights, and that the courts are not manipulated for political reasons.**

¹⁹ Human Rights Committee, *General Comment No. 32, Right to equality before courts and tribunals and to a fair trial*, CCPR/V/GC/2 (2007).

²⁰ See e.g. the *Concluding Observations of the Human Rights Committee on Guinea*, CCPR/C/79/Add.20, 29 April 1993, para. 3, and *Concluding Observations of the Human Rights Committee on Senegal*, CCPR/C/79/Add.10, 28 December 1992, para. 3.