

The use of military and security courts in light of international standards and experiences

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Excellencies, ladies and gentlemen,

I am honored to address such an esteemed gathering of senior Egyptian judges, lawyers, and human rights advocates on behalf of the International Commission of Jurists. As a rule of law Organization, we believe that under a constitutional democracy, courts are not charged solely with the adjudication of individual cases. They are also responsible for upholding the rule of law and enforcing human rights. Only independent courts can discharge these functions effectively and impartially.

We believe, based on our experience, that military and other exceptional courts, including emergency and security courts, when controlled or overseen by the executive or the military, cannot be considered independent. In addition, the control exercised by the military and/or executive means that military and special courts are often a source of impunity, when used to hear cases involving law enforcement and security officials accused of gross human rights violations.

Furthermore, where military and exceptional courts are granted broad jurisdiction and, in effect, run in parallel to the ordinary civilian justice system, these courts undermine the independence of the judiciary and the administration of justice as a whole. It is therefore of the utmost importance that the jurisdiction of these Courts are restricted to their proper scope.

I shall look first at the issue of independence (or lack of independence) of military and exceptional courts and the trials of civilians before such courts, before turning to the use of these courts to try cases involving gross human rights violations. I shall

frequently refer to comparative perspectives originating in international law and tribunals or other international bodies.

Military and Exceptional Courts and the Guarantees of Independence

Military Courts are part of the military hierarchy. In the vast majority of cases they do not meet the necessary guarantees of independence and impartiality. This lack of independence has several forms. First, military judges are generally, including in Egypt, appointed by decree at the initiative of the Minister of Defence. Second, military judges are subject to military disciplinary rules. These rules are largely based on the concept of subordination to superior commanders. Third, the Executive and the army can generally exercise comprehensive control over proceedings before these courts, thus undermining the proper administration of justice.

Each of these concerns was highlighted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in relation to the “military commissions” set up by the United States for suspects held at Guantanamo: “As to the composition of military commissions, the Special Rapporteur has serious concerns about their independence and impartiality, their potential use to try civilians, and the lack of appearance of impartiality... Whereas, in this regard, military judges in courts martial are appointed from a panel of judges by lottery, judges and members in a military commission are selected for each trial. Furthermore, although the current convening authority is a civilian and former judge, she is employed by the Department of Defense, so that, as a result, the appearance of impartial selection by the convening authority of members of individual commissions is undermined. Moreover, there is no prohibition against the selection of members of a commission who fall within the same chain of command; more junior members of a military commission, despite any advice to the contrary, may be directly or indirectly influenced in their consideration of the facts. The ability of the convening authority to intervene in the conduct of trials before a military

commission is also troubling...The involvement of the executive in such matters further adds to an appearance that military commissions are not independent.”¹

In Egypt, 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 which is punishable under the Penal Code or under any other law. The jurisdiction of Military Courts to try civilians has further been endorsed by the Supreme Constitutional Court, which ruled that the President may invoke the Emergency Law to refer any crime to a military court.

Other exceptional courts, including emergency and special security courts, frequently also do not meet the requisite standards of independence in that they are generally overseen or controlled by the executive. This is the case in Egypt where the State Security Courts are formed by judges appointed by Presidential Decree, upon the recommendation of the Minister of Justice. Furthermore, the Emergency Law allows the President to appoint military officers to this court.

The above highlights the challenges related to military and exceptional tribunals and the principles of an independent judiciary. In this regard, the European Court of Human Rights and the Inter-American Commission on Human Rights have both stressed the fact that military judges cannot be considered independent and impartial because they are part of the hierarchy of the army.²

The lack of guarantees of independence of the military justice system is also apparent in relation to the military prosecutor. Indeed, for an investigation to be effective, it must be conducted by an independent and impartial prosecutor. This independence may be compromised where the investigation of violations allegedly committed by members of the armed forces or security forces is carried out by those responsible for the violations. The European Court of Human Rights in its case law in a case related to Romania affirmed that “military prosecutors were active military

¹ A/HRC/6/17/Add.3, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Schein, November 2007, Mission to the United States, paras. 23-25

² European Court of Human Rights, *Findlay v. United Kingdom*, Judgment of 25 February 1997, and *Incal v. Turkey*, Judgment of 9 June 1998. Inter-American Commission of Human Rights, Annual Report 1997, OAS Document OEA/Ser.L/V/II.98/Doc.6, Chapter VII, Recommendation 1.

personnel and they were members of the military structure based on the principle of hierarchical subordination” and that “this institutional link has resulted in a lack of independence and impartiality of the military prosecutor in the carrying out of the investigation”.³ The Court has been consistent in ruling that investigations by military prosecutors involving the armed forces or security forces have not shown the independence and impartiality required by the procedural obligation under Article 3 of the European Convention on Human Rights. For its part, the Human Rights Committee, in the case of Colombia, noted its concern that: “the military exercise the functions of investigation, arrest, detention and interrogation” and recommended “that the jurisdiction of the military courts with respect to human rights violations be transferred to civilian courts and that investigations of such cases be carried out by the Office of the Attorney-General and the Public Prosecutor”, as opposed to the military prosecutor.”⁴

In the case of Egypt, the Special Rapporteur on extrajudicial, summary or arbitrary executions stated in his 1994 annual report that the military courts in Egypt did not fulfil the requirements of the relevant international standards on the administration of justice.⁵ In concluding his report, the Special Rapporteur noted, in the context of all States, that: “In the vast majority of alleged extrajudicial, summary or arbitrary executions brought to the attention of the Special Rapporteur... sources report that either no investigation at all has been initiated, or that investigations do not lead to the punishment of those responsible. In many countries where perpetrators of human rights violations are tried before military courts, security forces personnel escape punishment due to an ill-conceived esprit de corps. [...] The reports and allegations received indicate that breaches of the obligation to investigate alleged violations of the right to life and punish those responsible occur in most of the countries the Special Rapporteur is dealing with in the framework of his mandate. The Special Rapporteur reiterates his appeal to all Governments concerned to provide for an independent civilian justice system with an independent and competent judiciary and full guarantees for all those involved in the proceedings. Where national legislation provides for the competence of military tribunals to deal

³ *Case Voiculescu c. Roumanie*, Request No. 5325/03, Judgement of 3 February 2009. Also see, *mutatis mutandis*, *Barbu Angheliescu c. Roumanie*, n° 46430/99, § 67, 5 October 2004 ; *Bursuc c. Roumanie*, n° 42066/98, § 107, 12 October 2004 ; et *Mantog c. Roumanie*, n° 2893/02, § 69-70, 11 October 2007

⁴ Concluding Observations on Colombia, CCPR/C/79/Add.76, 5 May 1997, paras 19 and 34

⁵ United Nations document E/CN.4/1995/61, 4 December 1994, paragraphs 125 and 183 respectively.

with cases involving violations of the right to life by members of the security forces, such tribunals must conform to the highest standards required by the pertinent international instruments as concerns their independence, impartiality and competence. The rights of defendants must be fully guaranteed before such tribunals, and provision must be made to allow victims or their families to participate in the proceedings”.⁶

Trial of Civilians in Military/Special courts: International Law and Standards

Principle 5 of the UN Basic Principles on the Independence of the Judiciary states: “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”⁷ This principle is particularly applicable to the use of military or special courts to try civilians in parallel with, or in place of, the ordinary justice system.

As early as 1984, in its General Comment No.13, the Human Rights Committee examined the use of military and special courts in the context of Article 14 of the ICCPR, which guarantees the right to a fair trial. The Committee noted that: “The provisions of Article 14 apply to all courts and tribunals within the scope of that Article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional.”⁸

In its Report on Terrorism and Human Rights, the Inter-American Commission identified the reason for excluding civilians from special and military courts: “The

⁶ *Ibid.* para. 402-403

⁷ United Nations Basic Principles on the Independence of the Judiciary, Adopted by the Seventh Congress on the Prevention of Crime and Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

⁸ CCPR General Comment No. 13, 04/13/1984, para.4

basis for this criticism has related in large part to the lack of independence of such tribunals from the Executive and the absence of minimal due process and fair trial guarantees in their processes.”⁹ Similarly, the Human Rights Committee, when examining the right to a fair trial, has stressed that “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.”¹⁰

The jurisprudence of the European Court of Human Rights has confirmed this view.¹¹ For example, in *Ergin v. Turkey*,¹² the European Court held: “when a court is composed solely of military judges, [it] leads the Court to affirm that only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6.”¹³

Therefore, international law confines the jurisdiction of military courts to military offences involving military personnel only and prohibits the trial of civilians before military and special courts. For example, the African Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, specifically include at section L, “The Right of Civilians not to be Tried by Military Courts”.¹⁴ In this regard, the Principles state:

“(a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.

(b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.

(c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.”

⁹ *Report on Terrorism and Human Rights*, Inter-American Commission on Human Rights, para. 230, available at <http://www.cidh.org/terrorism/eng/part.i.htm>, last accessed 6 May 2012.

¹⁰ Human Rights Committee, General Comment No. 32, Right to equality before courts and tribunals and to a fair trial, CCPR/V/GC/2 (2007).

¹¹ *Findlay v. The United Kingdom*, judgment of the European Court of Human Rights of 25 February 1997, Series 1997-I and *Incal v. Turkey*, judgment of 9 June 1998, Series 1998-IV.

¹² *Ergin v. Turkey* (No. 6) (*Application no. 47533/99*), para.24

¹³ *Ergin v. Turkey* (No. 6), *Application no. 47533/99*, Judgment of 4 May 2006.

¹⁴ Adopted by the African Union in July 2003

The African Commission on Human and Peoples' Rights has regularly held that military courts violate the right to a fair trial and undermine the independence of the judiciary. For example, in *Centre for Speech v Nigeria*, the Commission held "it could not be said that the trial and conviction of the four journalists by a Special Military tribunal presided over by a serving military officer who is also a member of the PRC, the body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in Article 7 of the African Charter and the act is also a contravention of Article 26 of the African Charter"¹⁵

Further, the African Commission has expressly demonstrated, in a case relating to Mauritania, how military courts undermine the independence of the judiciary as a whole: "Special Military Tribunals...constituted a violation of Article 7 (1) (d) of the Charter by the very virtue of their composition, which is reserved to the discretion of the executive organ. Withdrawing criminal procedures from the competence of the courts established within the judicial order and conferring onto an extension of the executive necessarily compromises the impartiality of the Courts, to which the African Charter refers. Independently of the qualities of the persons sitting in such jurisdictions, their very existence constitutes a violation of the principle of impartiality and independence of the judiciary and, thereby of Article 7 (1) (d)."

It is as a result of the lack of guarantees of independence and the general harm done to the independence of the judiciary that, in the case of *Durand and Ugarte v. Peru*, the Inter-American Court found that "in a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction."¹⁶

To provide some guidance for States on military tribunals in particular, the UN Commission of Human Rights started debating principles governing the

¹⁵ Communication 206/97. 13th Activity Report

¹⁶Inter-American Court of Human Rights, *Durand and Ugarte v. Peru*, 16 August 2000, ¶ 117.

administration of justice through military courts. These principles are currently being considered by the Human Rights Council and represent the most advanced stage of the debate. There is therefore an interest in setting out some of the most relevant principles.¹⁷

1. Military tribunals may be established only by the constitution or the law, and must respect the principle of separation of powers. They must be an integral part of the general judicial system.
2. In times of crisis, recourse to martial law or special regimes should not compromise the guarantees of a fair trial. Any derogation should be consistent with the principles of the proper administration of justice. In particular, military tribunals should not be substituted for ordinary courts, in derogation from ordinary law.
3. Military courts should have no jurisdiction to try civilians. Therefore, in all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.
4. The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel.

Trial of Civilians in Military and Exceptional Courts: the Case of Egypt

The Constitution and law in Egypt has historically provided for an array of military and special courts by virtue of:

- Article 148 of the 1971 Constitution, which allowed the President to declare a state of emergency and was used to maintain a near perpetual state of emergency from 1981 until May 2012
- Article 171 of the 1971 Constitution, which provided for State Security Courts
- Article 179 of the 1971 Constitution, which allowed the President to “*refer any terror crime to any judiciary body stipulated in the Constitution or the law*”
- Article 183 of the 1971 Constitution, which provides for military courts
- Emergency Law No.162 of 1958, which details the jurisdiction and procedures of numerous types of special courts composed of military or civilian judges or both

¹⁷Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006).

- The Military Code of Justice, Law No.25 of 1966, which details the jurisdiction and functioning of military courts

This vast array of special courts led the Human Rights Committee in 1993 to express its concern over “the multitude of special courts in Egypt,” and the resulting need for “consistency in the judicial procedure and procedural guarantees.” The committee also criticized the Emergency law in the following terms: “the President of the Republic is entitled to refer cases to the State security courts, to ratify judgments and to pardon. The President's role as both part of the executive and part of the judiciary system is noted with concern by the Committee.”¹⁸

In its 2002 Concluding Observations, after the examination of Egypt's periodic report, the 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.”¹⁹

More recently, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, following a visit to Egypt in 2009, reiterated the view of the Human Rights Committee in 1993 that, “military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties.”²⁰

Despite these repeated calls to limit the scope of special and military courts and to ensure civilians are guaranteed fair trial rights, these courts were used extensively under the Mubarak regime to try civilians, including human rights defenders and political opponents.

¹⁸ Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, Comments of the Human Rights Committee, Egypt, 9 August 1993, available at <http://www1.umn.edu/humanrts/hrcommittee/G9318243.htm>, last accessed 8 April 2012.

¹⁹ Concluding Observations of the Human Rights Committee: Egypt, CCPR/CO/76/EGY, 28 November 2002.

²⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Human Rights Council, para. 32, 14 October 2009, A/HRC/13/37/Add.2, quoting the Human Rights Committee CCPR/C/79/Add.23, para. 9

Following the overthrow of Mubarak, the use of military and special courts to try civilians has not ended and, indeed, likely increased during the transitional period. The recent reviews initiated by President Morsi, and the release of a number of civilians tried by military courts, are an important first step and bring hope that this serious situation may be eventually corrected, by bringing Egyptian legislation fully in compliance with international standards. However, we understand that the use of military and special courts continues today.

We hear frequent allegations that trials before military courts in Egypt fail to meet international standards of fairness and due process. We have received repeated and consistent allegations that in practice lawyers do not have full access to their clients or important case files, as the trials are generally held within a week, and in some cases 48 hours, from the time of arrest.

The above is a matter of utmost concern and must be addressed in the new Constitution and through broader legal reforms. In particular, the Emergency Law should be repealed and the Military Code of Justice should be reformed to confine the scope of military courts to military personnel and Military offences only. These restrictions on military courts should be reinforced through Constitutional guarantees, as should the rights of the accused to a fair trial.

Cases Involving Human Rights Violations in Military/Special Courts: International Law and Standards

The trial of those alleged to have committed human rights violations by military courts is also an important issue. Crimes involving serious violations of international human rights law, including torture, arbitrary detention, extrajudicial executions and enforced disappearances, should be heard in ordinary courts and not military or other special security courts. Again, there is ample authority here among human rights instruments and bodies.²¹

²¹ UN Special Rapporteur on extrajudicial, summary or arbitrary executions surveyed a number of states where trials before military courts allowed accused to evade punishment because of 'an ill-conceived *esprit de corps* which generally results in impunity', UN Doc.: A/51/457, at para. 125, 6 October 1996. Report of the UN Working Group on Enforced or Involuntary Disappearance, UN Doc.:

Of particular relevance in this regard is the 2005 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, of the late UN Commission on Human Rights. These clearly state at Principle 29: “The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in case of serious crimes under international law, of an international or internationalized criminal court.”²²

Similarly, the Human Rights Committee’s Draft Principles Governing the Administration of Justice Through Military Tribunals, referred to earlier, specifically excludes cases involving serious human rights violations from military courts: “In all circumstances, the jurisdiction of military courts should be set aside in favor of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations and to prosecute and try persons accused of such crimes.”

The reason for the exclusion is that the lack of independence increases the likelihood of impunity. For example, the UN Working Group on Enforced or Involuntary Disappearances has noted, that once criminal jurisdiction has been assumed by the armed forces, the risk of impunity for serious human rights abuses increases markedly. It has therefore stated that “the prosecution and punishment of offences involving gross violations of human rights such as disappearances should be dealt with in civilian courts, even if those under prosecution have been or are members of the armed forces.”²³

The link between impunity and military or special courts, was also noted in the context of Peru, where the Human Rights Committee referred in its concluding observations to: “the absence of civilian control over the military and para-military groups, especially in the zones under their control, which in some cases amounts to impunity. In particular, the Committee regrets that they can be tried for acts of violence only under military law.”²⁴

²² <http://www.derechos.org/nizkor/impu/principles.html>

²³ E/CN.4/1992/18, para.46 (i)

²⁴ UN Doc.: CCPR/C/79/Add.8, 25 September 1992, para. 8

In Colombia, the Inter-American Commission on Human Rights left no doubt as regards the role of military tribunals in the investigations of human rights violations. It stated: “[t]he problem of impunity is aggravated by the fact that the majority of cases involving human rights violations by members of the State’s public security forces are processed by the military justice system. The Commission has repeatedly condemned the military jurisdiction in Colombia... for failing to provide an effective and impartial judicial remedy for violations of Convention-based rights, thereby insuring impunity and a denial of justice in such cases.”²⁵

The reason why military courts exacerbate impunity is equally true for special tribunals set up within other security agencies.

Cases Involving Human Rights Violations in Military/Special Courts: Situation in Egypt

Under the Mubarak regime, numerous gross human rights violations were committed by law enforcement officers and other State officials. These violations included: torture and other ill-treatment; extra judicial killings; arbitrary detention; and enforced disappearances. Most of these violations continued to occur during the protests that led to the toppling of Mubarak and have continued during the transitional period.

The 1971 Constitution contained no specific restriction on the use of military and special courts in cases involving human rights violations. In addition, neither the Military Code of Justice nor the Emergency Law limits the jurisdiction of special and military courts in such cases. No such restriction has been introduced following the 2011 uprising in the Constitutional Declarations or the law.

As a result, cases involving such violations can be heard in military or special courts. Indeed, on 9 March 2012 a military doctor alleged to have carried out “virginity tests” on female protestors, was acquitted by a military court.

²⁵ Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, Administration of Justice and the Rule of Law, ¶ 17, doc. 9 rev. 1 OEA/Ser.L/V/II.102, 26 February 1999.

Constitutional guarantees are therefore required to ensure the rights of victims of human rights violations to a remedy and to reparation. In addition, urgent reforms are needed to the Military Code of Justice to exclude all cases involving human rights violations.

Conclusion

In closing, I would like to reiterate briefly that it is our strong belief that Egyptian authorities should limit, including through the constitution, the jurisdiction of military tribunals only to military offences and military personnel. They should also end the jurisdiction of military courts and military prosecutors to investigate and rule on cases involving violations of human rights, including those involving members of the army and the security forces and, to this end, transfer all cases relating to such violations that are currently before the military courts to the ordinary civilian courts. The Egyptian authorities should also order retrials, conducted in accordance with international standards of fair trial, in ordinary civilian courts for those cases involving serious violations of human rights previously tried before military tribunals. I am looking forward to hearing about the other important elements related to the independence of the judiciary in Egypt. Without a doubt, we will have a very productive and enlightening discussion.

Thank you very much for your kind attention.