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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION  
TO THE UNIVERSAL PERIODIC REVIEW OF EGYPT**

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*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

## **ICJ SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF EGYPT**

1. The International Commission of Jurists (ICJ) welcomes this opportunity to contribute to the Human Rights Council's (HRC) Universal Periodic Review (UPR) of Egypt. Egypt was elected to the HRC in May 2007 after pledging to introduce reforms "*anchored in the promotion and protection of human rights*"<sup>1</sup> and to "*strengthen the national redress mechanisms available to all citizens with a view to enable them to report any complaints and to guard against impunity of any kind.*"<sup>2</sup> Both under and since the rule of President Mubarak, the Egyptian authorities have failed to live up to these commitments.
2. In this submission, the ICJ wishes to draw the attention of the Working Group on the UPR to issues concerning (I) the rule of law and civilian oversight of the armed forces; (II) the independence of the judiciary and the use and jurisdiction of military courts; and (III) the effective impunity of the security and armed forces for past and present human rights violations.<sup>3</sup>

### **I. The rule of law and civilian oversight of the armed forces**

3. In order to establish and preserve the rule of law, the armed forces must remain subordinate to legally constituted civilian authorities. In Egypt, the military not only enjoys effective and comprehensive autonomy over its own affairs, it also plays a determinant role in shaping Egypt's policies.
4. The military's dominant role has increased further since the toppling of President Mubarak. Since this time, the Supreme Council of the Armed Forces (SCAF) has unilaterally adopted and enforced constitutional frameworks,<sup>4</sup> exercised far-reaching legislative and executive powers, and expanded the use and jurisdiction of military courts to the detriment of the ordinary judicial system.<sup>5</sup> These actions have gone beyond the scope of its constitutional authority and thus contravened basic rule of law principles. Its control culminated on 3 July 2013, with its ouster of President Mohamed Morsi and suspension of the 2012 Constitution.<sup>6</sup>
5. The Egyptian military's exercise of arbitrary authority outside of the framework of the rule of law is long-standing and is underpinned by various provisions and omissions in the Egyptian legal and constitutional framework. Under the 2014 Constitution, the "*Minister of Defence is the Commander in Chief of the Armed Forces, appointed from among its officers.*"<sup>7</sup>
6. Also under the new Constitution, more than half the members of the National Defence Council (NDC) are from the armed forces.<sup>8</sup> The NDC is responsible for "*matters pertaining to the methods of ensuring the safety and security of the country, for discussing the armed forces' budget, which is incorporated as a single figure in the state budget. Its opinion must be sought in relation to draft laws on the armed forces.*"<sup>9</sup> The NDC's discussions on budget only need include the "*the heads of the Planning and Budgeting Committee and the National Security Committee at the House of Representatives*"<sup>10</sup>; accordingly the budget need not be thoroughly discussed in the House of Representatives.
7. These and other Constitutional provisions fail to ensure effective civilian oversight of the armed forces and enshrine practices that reinforce the unaccountability of the military. They preclude civilians from serving as Minister of Defence and permit the circumvention of full discussion, review, and decision-making by Parliament over the armed forces' budget and scrutiny by the legislative branch over the military's economic interests.

8. Not only does the Constitution fail to ensure that the armed forces are accountable to legally constituted civilian authorities, it also requires that certain decisions by the government to be approved by the SCAF.<sup>11</sup> For example, Article 234 provides that the Minister of Defence "*is appointed upon the approval of the Supreme Council of the Armed Forces. The provisions of this article shall remain in force for two full presidential terms starting from the date on which this Constitution comes into effect.*"
9. This framework is in clear conflict with rule of law principles. The Human Rights Committee has emphasized that civilian authorities must have "*full and effective control*" over military and security forces;<sup>12</sup> it has called for legislation and regulations that provide a clear legal framework for such effective civilian control and for limitations on the role of security forces.<sup>13</sup>

## **II. The independence of the judiciary and the use and jurisdiction of military courts**

10. An independent judiciary is an indispensable component of the rule of law.<sup>14</sup> In times of crisis and transition, the judiciary serves as an essential check on the other branches of the State and ensures that any laws and measures adopted to address the crisis comply with human rights norms and rule of law principles.<sup>15</sup>
11. In Egypt, judicial independence has been undermined by the executive branch's effective control of the courts, the careers of judges and the Office of the Public Prosecutor (OPP) as well as by the expansion of the use and jurisdiction of military courts.
12. Instead of enshrining enhanced guarantees of judicial independence and ending executive interference in judicial matters, the new 2014 Constitution reproduces the deficiencies of the past. Its guarantees<sup>16</sup> are undermined by the fact that all questions relating to the functioning of the judiciary and the career of judges remain subject to deficient legislation. Under the Judicial Authority Law, No.46/1972, (the JAL), the Minister of Justice has wide powers in terms of administering and financing the court system and influencing the careers of judges. The Minister of Justice can establish summary courts and determine their jurisdiction;<sup>17</sup> object to decisions taken by the general assemblies of courts;<sup>18</sup> transfer judges to another judicial or legal post, and request the Prosecutor-General to initiate disciplinary proceedings against judges, which can lead to a judge's dismissal.<sup>19</sup> Further, the JAL establishes a Judicial Inspection Directorate administered by the Ministry of Justice.<sup>20</sup>
13. This framework is inconsistent with international standards on judicial independence. The UN Human Rights Committee, in addressing similar arrangements elsewhere, has indicated that the exercise of power by the Ministry of Justice over judicial matters, including the disciplinary appeal process and inspection of the courts, constitutes interference by the executive.<sup>21</sup>
14. Furthermore, under the current framework, executive control over the judiciary extends to the OPP.<sup>22</sup> The 2014 Constitution deems the OPP as an "*an integral part of the judiciary.*" This provision is inconsistent with the UN Guidelines on the role of Prosecutors which specifically provide that the "*office of prosecutors shall be strictly separated from judicial functions.*"<sup>23</sup> While Article 189 of the 2014

Constitution provides that the Prosecutor-General is to be appointed by a Presidential Decree upon a selection by “*the Supreme Judicial Council*”,<sup>24</sup> the Minister of Justice retains powers under the JAL to exercise control and administrative supervision over the OPP.<sup>25</sup>

15. The ICJ is also concerned that the 2014 Constitution has failed to adequately limit the jurisdiction of military courts in a manner that is consistent with international standards. While it provides that the military justice system is “independent”, it continues to permit the use of military courts to try civilians.<sup>26</sup> It also worryingly grants powers to law making authorities, through laws to “*determine the other competencies of the military justice system.*”<sup>27</sup>
16. This provision is inconsistent with international standards that provide that the jurisdiction of military courts should be limited to conduct involving alleged breaches of military discipline; and should have no jurisdiction over crimes under international law and human rights violations. The Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles) affirm that ordinary courts, not military courts, should be used to “*conduct inquiries into serious human rights violations...and to prosecute and try persons accused of such crimes.*”<sup>28</sup> In addition, a consensus in international law is also developing towards prohibiting the use of military courts to try civilians.<sup>29</sup> These standards are affirmed, *inter alia*, in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>30</sup> and the Decaux Principles. The UN Special Rapporteur on the Independence of judges and lawyers has emphasized the importance of implementing these principles in her most recent report to the UN General Assembly.<sup>31</sup>

### **III. The effective impunity of the security and armed forces for past and present human rights violations**

17. The responsibility of and impunity enjoyed by the Egyptian security forces, including the Central Security Forces (*Al-Amn Al-Markazi*), General Investigations Police (*Al-Mabahet Alamma*), and the State Security Investigations Services (SSIS) (*Mabahet Amn Al-Dawla*), for widespread and systematic human rights violations, including unlawful killings, arbitrary detention, enforced disappearance, and torture and other ill-treatment, was a main trigger engendering the popular uprising in 2011.
18. Since the toppling of President Mubarak, however, the Egyptian authorities have failed to meaningfully<sup>32</sup> reform the security sector, ensure that the security services respect the rule of law and human rights, and ensure accountability for past human rights abuses by the armed and security forces.
19. A Fact-Finding Commission established by the ousted President Mohamed Morsi to investigate the murder and attempted murder of protestors from 25 January 2011 until 30 June 2012 documented many such instances of abuse.<sup>33</sup> The Commission’s report underlined, among other things, cases of individuals: “arrested at military checkpoints across Egypt and subjected to enforced disappearances”; “arrested by military police and intelligence officers and subjected to torture and other ill-treatment in military prisons”; “who died from torture while in military custody”; and “who died from torture while in military prisons and were then buried as “unknown” after the authorisation of the public prosecution services.”<sup>34</sup>

20. The Commission submitted its report to the Prosecutor General with a view to the investigation of all cases documented in the report.<sup>35</sup> So far, neither the OPP nor the Minister of Justice have investigated, ordered the investigation or commenced criminal proceedings in relation to the human rights violations documented in the Commission's report. Instead, the few trials of military and security officers that have taken place since the toppling of President Mubarak resulted in acquittals or sentences that were not commensurate with the gravity of the crimes committed.<sup>36</sup>
21. The impunity of police and other security and military officials responsible for human rights violations in Egypt is underpinned by provisions of law, which grant law enforcement officials sweeping powers to arrest and detain people as well as to use lethal force in policing demonstrations. The Police Act permits police officers to use firearms to disperse gatherings or demonstrations of at least five people when public order is under threat and after warning the protesters to disperse.<sup>37</sup> Following the ouster of President Morsi, new repressive laws and policies on policing demonstrations were introduced. On 15 August 2013, the Ministry of Interior issued instructions to all security forces to *"to use live ammunition in self-defence and in fighting any attack on government buildings, vital facilities and public establishments."*<sup>38</sup> Law no. 107 of 2013 also gives security forces sweeping powers to use lethal force in dispersing protests, including when it is not strictly necessary to protect lives.<sup>39</sup>
22. This framework is incompatible with Egypt's obligations under international human rights law, including those relating to the right to life, to be free from torture and other ill-treatment, and the rights to freedom of expression, association and assembly. It is similarly incompatible to international standards on the use of force and firearms by law enforcement officials. Under these standards, law enforcement officials *"shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives."*<sup>40</sup>
23. Following the ousting of President Morsi, and as a result of the unlawful and disproportionate use of force, including firing with live ammunition into crowds, security officials and armed forces personnel were responsible for the killings of more than 1200 people, in particular during the dispersal of the Rabaa Al-Adawya and Annahda pro-Morsi sit-ins on 14 August. Most of these killings appear to be unlawful. In meetings with government authorities in Egypt in August 2013, including the Minister of Justice, the ICJ was told that the Rabaa and Nahda sit-ins were not peaceful because some protestors were armed, and therefore international standards regarding the right to the freedom of assembly were not applicable. Under international law and standards, however, law enforcement officers should not have blanket authorization to use live ammunition against protesters. The use of such force, in each individual instance, is necessarily constrained by the principles of necessity and proportionality. As one international court has noted, "an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour."<sup>41</sup> In sum, "The right to life...and the right to be free from torture or cruel, inhuman or degrading

treatment or punishment...should be the overarching principles governing the policing of public assemblies."<sup>42</sup>

24. The Egyptian authorities, including the OPP, have failed so far to conduct a thorough, effective, independent and impartial investigation into the involvement of police, security, and military forces in the killings of protestors; establish the truth about these killings, and bring those responsible for the unlawful killings to justice in the course of proceedings that meet international standards of fairness.
25. The ICJ is deeply concerned that instead of breaking the cycle of impunity of human rights violations that has prevailed, the courts and the OPP have both been used, not only to shield the perpetrators from accountability, but also to arrest, prosecute, convict and imprison opponents of the current authorities. In particular, on the basis of some vague, ill-defined grounds, such as "opposing authorities" and "causing disorder", the OPP has charged thousands of individuals who were arrested following the ouster of president Morsi and the dispersal of the sit-ins. Most of them have been denied their rights under international standards to access to a lawyer and to challenge the lawfulness of their detention, leaving them vulnerable to prolonged arbitrary detention and to unfair trial.<sup>43</sup>

### **Recommendations**

26. The ICJ therefore calls on the Working Group and the Council to urge the Egyptian authorities to:

#### *Concerning the rule of law and civilian oversight of the armed forces*

- i) Ensure the role of the armed forces is adequately defined and specifically limited to matters of national defence, including through providing for legislative and other mechanisms of civilian oversight and control over the armed forces and its finances and budget.
- ii) Ensure the full and effective control and accountability of the armed forces to legally constituted civilian authorities.

#### *Concerning the independence of the judiciary and the use and jurisdiction of military courts*

- i) End executive control and undue influence over the judiciary, including by removing the executive's powers over the career of judges and the functioning of the judiciary, and by prohibiting any improper influence and interference in judicial decision-making.
- ii) Ensure that the functions of the Office of the Public Prosecutor and prosecutors are separated from judicial functions and, to this end, include safeguards to ensure the independence of prosecutors from the judiciary.
- iii) Restrict the jurisdiction of military courts to military personnel over alleged breaches of military discipline and ensure that military courts do not have jurisdiction over cases involving human rights violations, crimes under international law and or over civilians.

#### *Concerning the effective impunity of the security and armed forces for past and present human rights violations*

- i) Conduct a thorough, effective, independent and impartial investigation into the use of force by police, security, and military forces, including the use of live ammunition, against anti-government protestors and to disperse sit-ins, with a view to establishing the truth about these events and bring those responsible for the unlawful use of force and firearms, including resulting in unlawful killings, to justice in fair proceedings.

- ii)** Break the cycle of impunity that continues to prevail over past human rights violations carried out by members of the armed forces and security services and, to this end, ensure that the violations documented in the report of the Fact-Finding Commission established by the ousted President Mohamed Morsi are fully investigated and those allegedly responsible are held to account.
- iii)** Ensure access to an effective remedy and reparation to victims of human rights violations.
- iv)** Undertake meaningful reforms of police and security forces in line with international law and standards, including by ensuring law, policies, and practice on the use of force that is consistent with international human rights standards on the use of force and firearms.

ENDNOTES:

<sup>1</sup> Note verbale dated 18 April 2007 from the Permanent Mission of Egypt to the United Nations addressed to the President of the General Assembly, A/61/878, Section II.B(2), available at [http://www.upr-info.org/IMG/pdf/hrc\\_pledges\\_egypt\\_2007.pdf](http://www.upr-info.org/IMG/pdf/hrc_pledges_egypt_2007.pdf)

<sup>2</sup> *Id.* at Section II.B (4).

<sup>3</sup> Information provided in this submission is based on analysis of the 2014 Constitution and Egyptian legislation and regulations. It is also based on field research, including a high level mission conducted by the ICJ in August 2013 to assess the human rights situation following the ouster of President Morsi.

<sup>4</sup> For example see: Constitutional Declaration of 13 February 2011, Constitutional Declaration 30 March 2011, Constitutional Declaration of 25 September 2011, and Constitutional Declaration of 17 June 2012.

<sup>5</sup> For further details see: ICJ report *Egypt : a flawed constitutional reform process*, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/11/EGYPT-CONSTITUTION-REPORT-w-COVER.pdf>

<sup>6</sup> Statement of the General Command of the Armed Forces, 3 July 2013.

<sup>7</sup> Article 201 of the 2014 Constitution

<sup>8</sup> Article 203 of the 2014 Constitution provides the composition of the NDC as "presided over by the President of the Republic and including in its membership the Prime Minister, the Speaker of the House of Representatives, the Minister of Defense, the Minister of Foreign Affairs, the Minister of Finance, the Minister of Interior, the Chief of the General Intelligence Service, the Chief of Staff of the Armed Forces, the Commanders of the Navy, the Air Forces and Air Defense, the Chief of Operations for the Armed Forces and the Head of Military Intelligence."

<sup>9</sup> Article 203 of 2014 Constitution.

<sup>10</sup> *Id.*

<sup>11</sup> Under Article 146 of the 2014 Constitution, the Prime Minister should form the government. However, as noted under Article 234, the appointment of the Minister of Defense is subject to the approval of SCAF.

<sup>12</sup> Concluding Observations of the Human Rights Committee: El Salvador, 4/18/1994, CCPR/C/79/Add.34, para. 8.

<sup>13</sup> Human Rights Committee, Concluding Observations of the Human Rights Committee: Romania, 7/28/1999, CCPR/C/79/Add.111, para. 9

<sup>14</sup> This principle is affirmed in the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), which provide that it is the responsibility of all institutions, governmental and otherwise, to respect the independence of the judiciary. Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the 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, Principle 1

<sup>15</sup> Principle 1, Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (The Geneva Declaration), International Commission of Jurists, December 2008

<sup>16</sup> *Id.*

<sup>17</sup> Judicial Authority Law, No. 46 of year 1972, at Articles 11 and 13

<sup>18</sup> *Id.* at Article 36

<sup>19</sup> *Id.* at Articles 55-58 and 62.

<sup>20</sup> The Inspection Directorate is responsible for inspecting the work of judges and the presidents of the Courts of First Instance.

<sup>21</sup> *Concluding Observations of the Human Rights Committee on Romania*, CCPR/C/79/Add.111, para. 10

<sup>22</sup> In Egypt, prosecutors are considered members of the judiciary, and may move between judicial and prosecutorial appointments.

<sup>23</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, para. 10.

<sup>24</sup> Previously and under the JAL, the president appointed the Prosecutor General.

<sup>25</sup> *Id.* at Article 125.

<sup>26</sup> Article 204 of the Constitution of 2014

<sup>27</sup> *Id.*

<sup>28</sup> Draft Principles Governing the Administration of Justice through Military Tribunals ("Decaux Principles"), adopted by the then UN Sub-Commission on the Promotion and Protection of Human

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Rights in 2005, UN Doc. E/CN.4/2006/58, Principle 9. See also, Concluding Observations of the Human Rights Committee on Venezuela, UN Doc. CCPR/C/79/Add.14, para. 10; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/79/Add.66, para. 315; Concluding Observations of the Human Rights Committee on Colombia, UN Doc. CCPR/C/79/Add.2, para. 393; Conclusions and Recommendations of the Committee against Torture on Guatemala, UN Doc. CAT/C/GTM/CO/4, para. 14; Concluding Observations of the Human Rights Committee on the Democratic Republic

<sup>29</sup> The Working Group on Arbitrary Detention has taken the position that military courts are incompetent to try civilians. Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, para. 8

<sup>30</sup> See Section A, principles 2(a) and 4(e) and section L of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

<sup>31</sup> See Report of the Special Rapporteur on the independence of judges and lawyers, 7 August 2013, A/68/285.

<sup>32</sup> On March 5, 2012, it was announced by the Minister of Interior that SSIS would be replaced by the Homeland Security Sector (HSS), which would be responsible for counterterrorism and national security.

<sup>33</sup> Presidential Decree 10 of 2012

<sup>34</sup> Report of the Fact-Finding Commission, available in part at, <http://www.theguardian.com/world/interactive/2013/apr/10/egyptian-army-torture-disappearances-document> last accessed 26 August 2013

<sup>35</sup> *Id.*

<sup>36</sup> See: ICJ report "*Egypt's new Constitution: a flawed process uncertain outcomes*, November 2012, *supra*, p.29-32

<sup>37</sup> Police Authority Law, No.109 of year 1971, Article 102

<sup>38</sup> Interior Ministry: Police will use live ammunition in self defense and to deter any attack on government buildings, Egypt State Information Service, 16 August 2013, available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticleNews.aspx?ArtID=69368>

<sup>39</sup> Article 13 of Law no. 107 of year 2013

<sup>40</sup> Principle 9 of United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 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

<sup>41</sup> *Zilliberberg v Moldova*, (Application no. 61821/00) Decision on Admissibility of by of the European Court of Human Rights (2004), The Law, para. 2

<sup>42</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 21 May 2012, A/HRC/20/27, *supra* at para. 35

<sup>43</sup> Egypt: investigate and address human rights abuses following the ouster of President Morsi, at <http://www.icj.org/egypt-investigate-and-address-human-rights-abuses-following-the-ouster-of-president-morsi/>