

**United Nations Human Rights Council
34th Session of the Working Group on the Universal Periodic Review
November 2019**

**ICJ and Adalah Submission to the Universal Periodic Review of Egypt
March 2019**

Introduction

1. The International Commission of Jurists (ICJ) and Adalah for Rights and Freedoms (Adalah)¹ welcome 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*",² and to "*strengthen the national redress mechanisms available to all citizens with a view to enable [sic] them to report any complaints and to guard against impunity of any kind.*"³ Both before and since the rule of President Sisi, the Egyptian authorities have failed to live up to these commitments.

2. In this submission, the ICJ and Adalah wish to draw the attention of the Working Group on the UPR to the following concerns

- (i) arbitrary arrests and detentions and systematic use of pre-trial detention;
- (ii) the systematic use of torture, ill-treatment and enforced disappearance;
- (iii) the imposition of death penalty following unfair trials; and
- (iv) the politicization of the judiciary and the use of courts as a tool of repression.

3. Information provided in this submission is based on an analysis of the 2014 Constitution and Egyptian laws, in particular the Criminal Code and the Code of Criminal Procedure (CCP), trial observations, documentation of human rights violations in Egypt, and field research and reports by the ICJ and Adalah on the death penalty, torture and ill-treatment, the state of emergency and the use of the judiciary as a tool of repression.

I) Arbitrary arrests and detentions and systematic use of pre-trial detention

4. Following the ouster of President Morsi in July 2013 and the crackdown against perceived opponents of the regime, thousands of individuals have been arbitrarily detained, including many who were held incommunicado. The ICJ and Adalah have documented numerous such cases, including cases where hundreds of individuals were denied access to legal counsel, and held incommunicado for between four and six months.⁴ As early as 2002, the United Nations (UN) Committee against Torture had recommended that Egypt abolish incommunicado detention.⁵ In 2009, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism reiterated this recommendation.⁶ Furthermore, as early as 2002, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment recommended that security personnel who do not respect provisions protecting the right to liberty and guarding against incommunicado detention should be disciplined.⁷ However, recent cases demonstrate that individuals

continue to be systematically held incommunicado, sometimes for months.⁸ Under international law, including article 9(3) of the International Covenant on Civil and Political Rights (ICCPR), to which Egypt is a State party, individuals arrested or detained in connection with a criminal offence must be “brought promptly before a judge or other officer authorized by law to exercise judicial power.”⁹ The Human Rights Committee has clarified that such a hearing should usually take place within 48 hours from the commencement of detention and be conducted by a judge or other authority that is independent, objective and impartial,¹⁰ and that a public prosecutor is not considered to meet such requirements.¹¹ Article 9(3) of the ICCPR, as well as other international standards, also require States to comply with a presumption that people charged with a criminal offence will not be detained while awaiting trial.¹² Among other things, Article 9(3) states: “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”

5. In the vast majority of cases brought against political opponents, journalists, and human rights defenders since July 2013, most of the accused arrested by the authorities have also been remanded in custody pending trial, initially on the order of the prosecutor and subsequently by judges. In the Raba’a Dispersal Case¹³, which resulted in the mass conviction of some 739 defendants in October 2018, 75 of whom were sentenced to death, all 320 persons arrested -- whether protestors or protest monitors -- were held in pre-trial detention for more than five years, including photo journalist Mahmoud Abu Zeid, known as “Shawkan”, who was arrested while covering the Raba’a dispersal. The Raba’a Dispersal trial was marred by a litany of fair trial rights violations. A presumption in favour of pre-trial detention was routinely applied. The Cairo Criminal Court convicted the defendants without making individual findings of guilt or relying on credible evidence, violating the presumption of innocence.¹⁴ In the State Security case 720/2015, journalist Hicham Jaafar was arrested in October 2015 on charges of “membership of an unlawful organization” and “collaboration with foreign entities”. The charges are related to his work with Mada for Media Development, a legally registered non-governmental organization. As at the date of this submission, Hicham Jaafar is on remand and awaiting trial, some three years and six months after his arrest.¹⁵

6. The abusive use of pre-trial detention in Egypt is in part facilitated by the inadequacy of the legal framework purportedly guaranteeing the right to liberty and freedom from arbitrary detention. Although the 2014 Egyptian Constitution guarantees the right to “personal freedom”, and requires an accused to be brought before the authorities within 24 hours of the imposition of a restriction on his or her freedom, it also states that this hearing is held before the “investigating authority.”¹⁶ The CCP also states that the prosecutor or investigating judge may conduct such hearings. The prosecutor can order detention for a period of four days, after which the accused must be brought before a judge,¹⁷ and the investigative judge can order preventive detention for 15 days, renewable by a further 45 days. Only after the 60 days have elapsed is the accused brought before an independent judge.¹⁸ Article 143 of the CCP further provides that “in any case, pre-trial detention must not exceed ... six months for defendants accused of misdemeanors (offences punished by up to three years in prison), 18 months for felonies and two years for felonies punished by death or life imprisonment.” Under this framework, pre-trial detention can be ordered where the accused is charged with a crime punishable by at least one year’s imprisonment, if the evidence is sufficient and either: i) the crimes were committed in *flagrante delicto*; ii) there is a fear the accused will abscond; iii) there is a fear that the interests of the investigation will be compromised either by interference with the victim or witnesses, tampering with evidence or reaching agreements with the other accused to distort the truth; or iv) to prevent severe disruption of security and public order.¹⁹ The accused can also be placed under preventive detention if he or she does not have a known address in Egypt, and the crime is either a misdemeanour or a felony that is punishable with imprisonment.²⁰ In this regard, the ICJ and Adalah are concerned that the CPP seems to provide for mandatory pre-trial detention in cases of

felonies and misdemeanors punishable by a prison sentence, without giving any consideration to the circumstances of the individual case at hand.

7. These provisions and related practices run counter to Egypt's obligations under international law. The ICCPR requires that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody."²¹ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles on Fair Trial in Africa), adopted by the African Commission on Human and Peoples' Rights, affirm that detention pending trial shall be used only as a measure of last resort,²² and can only be ordered when "there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others."²³ The Human Rights Committee has clarified that, to accord with the ICCPR, detention pending trial can be ordered only pursuant to an "individualized determination that it is reasonable and necessary in all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime,"²⁴ or "influencing victims."²⁵ The Human Rights Committee has further pointed out that: "pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. Neither should pre-trial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case."²⁶

The ICJ and Adalah therefore call on the Working Group and the Council to urge the Egyptian authorities to:

- i) End the practice of holding detainees incommunicado;**
- ii) End all other forms of arbitrary detention;**
- iii) Comprehensively reform the pre-trial detention framework, including by ensuring that resort to it is exceptional, and that such detention may be ordered only when it is determined on the basis of evidence that it is necessary, proportionate and reasonable in the circumstances of the individual case. To this end, the authorities must amend the CCP, including articles 134, 142 and 143, with a view to:**
 - Providing for exhaustive, clear and precise grounds and criteria for pre-trial detention, in accordance with international standards on appropriateness, predictability and due process of law, and to exclude vague and expansive standards such as "severe disruption of security and public order;"**
 - In particular, ensuring that pre-trial detention can only be ordered based on the factual circumstances of each individual case;**
 - Ensuring, in making a determination about such circumstances, that:**
 - Pre-trial detention is based on one or more of the grounds recognized by international law, as well as on objective criteria and on clear evidence;**
 - Each case is individually assessed as to whether the request for detention is reasonable, proportionate and necessary;**
 - the arguments militating for detention cannot be addressed adequately by alternatives to pre-trial detention, such as bail, electronic bracelets or other measures that would render detention unnecessary;**

- **Ensuring that pre-trial detention is not mandatory for all individuals charged with a particular category of felony or misdemeanor, or based on the potential sentences for the offences alleged;**
- iv) **Repeal the Prosecutor's powers to order detention pending trial, and ensure that such decisions are made by judges or other officers authorized by law to exercise judicial power who meet the requirements of judicial independence, impartiality, and objectivity;**
- v) **Ensure that the judicial authority that orders pre-trial detention is distinct from the authority that carries out the prosecution; and**
- vi) **Ensure the right of victims of unlawful arrest or detention to legally-enforceable reparation, including through accessible and simplified procedures.**

II) Torture and enforced disappearances

8. Egypt has a long history of systematic torture of detainees. Between 2012 and 2016, the UN Committee against Torture, which interprets and applies the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), undertook a rare second "Article 20 Inquiry" concerning Egypt.²⁷ Article 20 applies in cases of "well-founded indications that torture is being systematically practised in the territory of a State party". In 2017, the Committee concluded as follows:

Torture appears to occur particularly frequently following arbitrary arrests and is often carried out to obtain a confession or to punish and threaten political dissenters. Torture occurs in police stations, prisons, State security facilities, and Central Security Forces facilities. Torture is perpetrated by police officers, military officers, National Security officers and prison guards. However, prosecutors, judges and prison officials also facilitate torture by failing to curb practices of torture, arbitrary detention and ill-treatment or to act on complaints. Many documented incidents occurred in greater Cairo, but cases have also been reported throughout the country. Perpetrators of torture almost universally enjoy impunity, although Egyptian law prohibits and creates accountability mechanisms for torture and related practices, demonstrating a serious dissonance between law and practice. In the view of the Committee, all the above lead to the inescapable conclusion that torture is a systematic practice in Egypt.²⁸

9. Egypt specifically rejected the Committee's recommendations "to immediately end the use of incommunicado detention; create an independent authority to investigate allegations of torture, enforced disappearance and ill-treatment; restrict the jurisdiction of the military courts to offences of an exclusively military nature; and enforce the prohibition against 'virginity tests' and end the practice of forensic anal examinations for those accused of crimes."²⁹

10. Adalah has monitored 38 trials involving political charges from 2014 to 2018, both before ordinary and military courts. In 27 of these cases, 138 detainees were subjected to enforced disappearances for a period of time ranging from 10 days to 219 days. In 31 of these cases, 212 detainees alleged they were subjected to torture and ill-treatment, including by being: kicked, beaten, punched and hit with sharp objects (132 detainees); subjected to electric shocks (89 detainees); and hung and suspended in mid-air (26 detainees).³⁰ Adalah also documented 32 cases of death as a result of torture while in police custody and in prisons between 2014 and 2018.³¹

11. Such violations are facilitated, in part, by an inadequate framework on the prohibition of torture and enforced disappearances, as well as the prevailing impunity of security and military officers responsible for human rights violations in Egypt. The Egyptian Penal Code does not criminalize enforced disappearances. The definition of torture under article 126 of the Code only establishes liability for torture for the purpose of obtaining a “confession” against a suspect, falling far short of the standard required by the Egyptian Constitution and the CAT, which contemplate torture being undertaken for any number of purposes. In the very few cases where the Egyptian authorities demonstrate some political will to investigate allegations of torture, the inadequate definition provided for by the law makes it very difficult to effectively prosecute cases of torture. For example, on 5 January 2018, Assistant Detective Mohamed Sayed Abdel Halim and Police Officer Mohamed Ahmed Salem arrested Mohamed Abdel-Hakim Mahmoud, otherwise known as “Afroto,” and subjected him to severe beatings and other acts of torture, as a result of which he died. On 11 November 2018, The South Cairo Criminal Court convicted and sentenced the perpetrators to three years and six months’ imprisonment respectively for “beating that led to death” and “light beating.”³² The undue leniency of the sentences imposed by the Court is not commensurate to gravity of the conduct of the perpetrators, which disclosed evidence of torture and homicide in police custody.

12. On 13 May 2018, the Cairo Criminal Court acquitted two national security officers, Omar Mahmoud Hamad and Mohamed El Anwar, of all charges related to torturing lawyer Karim Hamdi to death. Karim Hamdi was arrested on 22 February 2015 and questioned on suspicion of belonging to the Muslim Brotherhood, membership of which has been outlawed, and participating in an unauthorized demonstration against the government. While in police custody in Mataria police station, he was reportedly severely beaten on his neck, chest and abdomen. He died two days later after being transferred to hospital.”³³

The ICJ and Adalah therefore call on the Working Group and the Council to urge the Egyptian authorities to:

- i) Ratify the International Convention for the Protection of All Persons from Enforced Disappearance (CED);**
- ii) Enact a crime of enforced disappearance in the Egyptian Criminal Code consistent with article 2 of the CED, namely, one that includes “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”;**
- iii) Amend article 126 of the Criminal Code with a view to enacting a crime of torture consistent with article 1 of the CAT, which fully incorporates all the purposes of torture set out in that provision. The Criminal Code should also be amended to ensure the criminalization of complicity and participation of public officials in torture, and appropriate sentences commensurate with the gravity of torture and torture-related crimes;**
- iv) Provide for commensurate sanctions against senior officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates;**
- v) Accept independent monitoring of detention facilities by allowing independent observers immediate access to detainees and**

- prisoners, and to that end, accede to the Optional Protocol to the CAT;
- vi) **Promptly, thoroughly and impartially investigate, in accordance with article 12 of the CAT, all allegations of torture and ill-treatment of convicted prisoners and detainees, and bring to justice State officials and law enforcement officers who carried out, ordered, instigated or acquiesced in such practices;**
 - vii) **Break the cycle of impunity that prevails over the involvement of Egypt's security services and armed forces in gross human rights violations, including torture and other ill-treatment, enforced disappearances, and unlawful killings, and, to that end, ensure that all those responsible be brought to justice; and**
 - viii) **Implement all the recommendations of the CAT following its article 20 inquiry.**

III) The imposition of the death penalty following blatantly unfair trials

13. In spite of repeated calls on Egypt to impose a moratorium on the death penalty by the African Commission on Human and Peoples' Rights,³⁴ since the ouster of President Morsi in July 2013, there has been an increase in the imposition of capital punishment by courts in Egypt, and in executions carried out pursuant to such sentences. Many cases in which death sentences have been handed down have been marred by a litany of fair trial rights violations. In some instances, individuals charged with crimes punishable by death were under the age of 18 at the time of the offences they allegedly committed.

14. In 2017, 331 death sentences were issued in Egypt, 260 sentences by civilian courts and 71 sentences by military courts. Forty-nine individuals were executed in the same year. In 2018, 595 death sentences were handed down, 543 by civilian courts and 52 by military courts. Forty-three individuals were executed in 2018. At the date of this submission, 48 individuals were on death row after exhausting all rights to appeal.³⁵

15. This increase in the imposition of the death penalty is at odds with a growing global trend in which the overwhelming majority of States has either abolished the death penalty or abides by a *de facto* moratorium on its use. Egypt's conduct is also at odds with the UN General Assembly's call on States that retain the death penalty to impose a moratorium as a first step towards its abolition, and to reduce the number of offences for which capital punishment may be imposed, and ensure compliance with international standards guaranteeing the rights of persons charged with a capital offence.³⁶ The Human Rights Committee has recently made clear in its General Comment 36 on Right to life that, "it is contrary to the object and purpose of Article 6 [of the ICCPR, which enshrines the right to life] for States parties to take steps to increase *de facto* the rate and extent in which they resort to the death penalty", and that, "States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, *de facto* and *de jure*, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights."³⁷ The ICJ and Adalah oppose the death penalty in all cases as a violation of the right to life, and consider that, *per se*, its imposition amounts to a form of cruel, inhuman and degrading treatment or punishment.

16. As a party to the ICCPR, Egypt must ensure that the death penalty may be imposed only for the most serious crimes.³⁸ As the Special Rapporteur on extrajudicial, summary or arbitrary executions has clarified, this means that "capital punishment may be imposed only for intentional killing, and it may not be mandatory in such cases".³⁹

However, the right to life is not expressly guaranteed in the Egyptian Constitution. Contrary to international standards, under Egypt's Criminal Code, the death penalty is not restricted to cases of intentional killing; it can be imposed for a wide variety of offences, including numerous broad and ill-defined "terrorism-related" offences, rape, kidnap, drug trafficking, drug possession for the purpose of trade, "treason" and "espionage."⁴⁰

17. Furthermore, any person charged with a crime punishable by death is entitled to the strictest observance of fair trial guarantees as well as to additional safeguards.⁴¹ The Human Rights Committee has noted that "[t]he imposition of a sentence of death upon conclusion of a trial, in which the provisions of Article 14 of the [ICCPR] have not been respected constitutes a violation of the right to life [in article 6 of the ICCPR]."⁴² The Special Rapporteur on extrajudicial executions has affirmed that:

[P]roceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, as found in the pertinent international legal instruments. All defendants facing the imposition of capital punishment must benefit from the services of a competent defence counsel at every stage of the proceedings. Defendants must be presumed innocent until their guilt has been proved beyond a reasonable doubt, in strict application of the highest standards for the gathering and assessment of evidence. In addition, all mitigating factors must be taken into account.⁴³

18. Proceedings must also guarantee the right to appeal, which should include review of both the factual and the legal aspects of the case by a higher tribunal. The Human Rights Committee has noted that, "the right of appeal is of particular importance in death penalty cases."⁴⁴ In addition, individuals must also have the right to seek pardon, commutation of sentence (substitution of a lighter penalty) or clemency.⁴⁵

19. Trials of individuals facing charges punishable by the death penalty before Egyptian courts have frequently fallen drastically short of these standards. Far from ensuring "scrupulous respect of the guarantees of fair trial",⁴⁶ in death penalty cases, Egyptian judges have presided over proceedings that have failed to ensure the essential elements of fair trial are met, including the presumption of innocence, defence rights and the obligation to exclude evidence obtained by torture or other ill-treatment.

20. In other numerous cases brought since the ouster of President Morsi, civilians have been sentenced to death and executed following convictions before military courts. Military court judges in Egypt are appointed by the Minister of Defence and are subject to military disciplinary procedures. Consequently, such courts cannot be considered independent and impartial for the purposes of article 14 of the ICCPR, or articles 7(1)(d) and 26 of the African Charter on Human and Peoples' Rights, by both of which Egypt is bound. The African Commission on Human and Peoples' Rights as well as UN independent experts have repeatedly condemned "Egypt's disregard to regional and international fair trial standards", called for an immediate moratorium on death sentences in Egypt, and in specific cases have called for the quashing of death sentences and for re-trials.⁴⁷

21. In addition to the fair trial rights violations outlined above, a particular phenomenon that has emerged since the overthrow of President Morsi in July 2013 is the use of mass trials of individuals on capital charges. In many of these cases, judges have proceeded to impose death sentences or lengthy prison terms on dozens and even hundreds of people convicted following mass trials. Such mass trials have been used frequently to prosecute suspected supporters of the Muslim Brotherhood and Islamist groups.

22. The authorities' obligation to respect the fair trial rights of each individual charged with a criminal offence applies equally when a group of individuals – no matter how large – are tried together. In Raba'a Dispersal Case, on September 2018 the Cairo Criminal Court convicted some 739 defendants, 75 of whom were sentenced to death, in connection with a sit-in protest at Raba'a Al Adaweyya square in August 2013. The accused were convicted of offences including "killing police officers," "taking part in an illegal assembly," "joining an illegal group," and "vandalism and other acts of violence" following dispersal of the sit-in protest. Many accused were arbitrarily detained in the period leading up to their trial, and the convictions followed grossly unfair proceedings in which the rights of the accused to the presumption of innocence and to legal counsel, among others, were violated. The Court convicted the defendants without making individual findings of guilt or relying on credible evidence, violating the presumption of innocence.⁴⁸ Flouting calls from international and regional human rights bodies,⁴⁹ mass trials of individuals in death penalty cases have continued unabated.

The ICJ and Adalah therefore call on the Working Group and the Council to urge the Egyptian authorities to:

- i) Amend Egyptian law and abolish the use of the death penalty;**
- ii) Pending abolition, implement an immediate moratorium on all executions and on the imposition of capital punishment, including in cases of involving intentional killings;**
- iii) Pending abolition, ensure that proceedings in death penalty cases conform to the highest standards of judicial independence, competence and impartiality, and strictly comply with all fair trial rights;**
- iv) Pending abolition, ensure that the right to appeal in death penalty cases include review of both the factual and the legal aspects of the case by a higher ordinary, independent and impartial tribunal;**
- v) Ensure that all convictions in death penalty cases that followed unfair trials are quashed;;**
- vi) Pending abolition, provide for the right of individuals convicted in death penalty cases to seek a pardon, commutation of sentence or clemency.**
- vii) Ensure that those convicted solely for the legitimate and peaceful exercise of their rights to freedom of expression, association and assembly be immediately and unconditionally released;**
- viii) Ensure that respect the fair trial rights applies equally when a group of individuals – no matter how large – are tried together.**

IV) The politicization of the judiciary and the use of courts as a tool of repression

23. Since July 2013, judges and prosecutors in Egypt have been at the forefront of a crackdown on human rights, resulting in the prosecution and conviction of thousands of political opponents, journalists, lawyers, human rights defenders, pro-democracy campaigners and individuals exercising their rights to freedom of expression, assembly and association.

24. Prosecutions have been initiated by prosecutors and, in many instances, continued by judges, where the charges were unfounded. A presumption in favour of pre-trial detention has been routinely applied by both prosecutors and judges. The accused in such cases have not been given adequate time and facilities to prepare a defence.

25. In addition, judges have refused to refer constitutional challenges to laws and decrees to the Supreme Constitutional Court, and have instead applied laws that violate human rights. Judges have also failed to ensure equality of arms and defence rights at

trial, and to ensure public hearings in such trials. Judges have frequently handed down convictions despite a lack of credible evidence of the individualized guilt of each of the accused, and in the absence of proof beyond a reasonable doubt, in violation of the presumption of innocence. Thousands have been convicted following unfair trials, as a result of which hundreds have been sentenced to death in violation of the right to life.

26. A web of ordinary, exceptional, and military courts have been implicated in this crackdown. Military and emergency courts have long-existed in Egypt, and have been used by a succession of regimes as a means to evade many due process guarantees. The Military Justice Law, the Emergency Law and other laws provide for civilians to be tried by military or emergency courts in a wide variety of circumstances. The jurisdiction of these courts has expanded over the past six years to encompass crimes committed on public property or at public facilities, resulting in the committal of thousands more civilians to military courts.

27. Despite article 97 of the 2014 Constitution, which now provides that “[i]ndividuals may only be tried before their natural judge”, and “[e]xtraordinary courts are forbidden,” Emergency State Security Courts (ESSC), created under State of Emergency Law No. 162 of 1958, remain.⁵⁰ On 7 October 2017, Decree No. 2165/2017 was issued by Prime Minister Sherif Ismail for the public prosecution to refer crimes under law No.107 of 2013 on “the right to organize public meetings, processions and peaceful demonstrations”, and Counter-Terrorism law No.107 of 2015, and other crimes that are related to labour strikes and protests in general, such as the crime of “thuggery” (which is heavily used against protesters), to the ESSC.⁵¹

28. In addition, despite assurances by constitutional drafters, the 2014 Constitution authorizes trials of civilians before military courts⁵² for crimes “that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties”.⁵³ Law No. 136 of 27 October 2014 “on securing and protecting public and vital facilities,” further extended the jurisdiction of military courts to try civilians. The law places all cases involving attacks against “public and vital facilities” under military jurisdiction for the next two years, and directs civilian prosecutors to refer any crimes at those facilities to their competent military counterparts.

29. The military and State emergency courts are not independent, and flout due process guarantees. Contrary to international standards safeguarding judicial independence, judges of these courts are subject to the control of either military authorities or the Executive. Defence rights guarantees are very limited, including short notice periods for the first trial hearing, and are far from meeting the right under international standards to adequate time and facilities to prepare and present a defence. In practice, confidential access to legal counsel is frequently denied, and reliance on evidence obtained through torture and other ill-treatment is often reported in such cases.⁵⁴

The ICJ and Adalah therefore call on the Working Group and the Council to urge the Egyptian authorities to ensure that:

- i) Executive interference in judicial affairs ends, including by removing the imposition of restrictions on the jurisdiction of ordinary courts;**
- ii) Judges refer challenges to laws on constitutional grounds to the Supreme Constitutional Court, and do not apply laws that are in conflict with the Constitution or with international human rights law by which Egypt is bound;**

- iii) **The ESSC be abolished, and any future establishment of any type of ESCC be precluded, including by repealing relevant provisions of the State of Emergency Law and repealing Decree No. 2165/2017, and ensuring respect for article 97 of the Constitution. Any existing proceedings before the ESSC, if they are not nullified, should be transferred to the ordinary courts;**
- iv) **The jurisdiction of military courts be limited to trials of military personnel only for breaches of military discipline;**
- v) **Military courts do not have jurisdiction over crimes under international law or other human rights violations, such as torture, enforced disappearance or unlawful killing.**
- vi) **Military courts have no jurisdiction to try civilians, even where the victim is a member of the Armed Forces or equivalent body or the conduct is alleged to have occurred on territory controlled by the military.**
- vii) **The convictions and sentences of all civilians tried by military courts and those of individuals convicted following unfair trials in civilian courts be quashed;**
- viii) **Those against whom there is reasonable suspicion that they have committed a recognizably criminal offence (under national and international law) should be afforded a retrial within a reasonable time before an independent and impartial civilian tribunal in proceedings that meet international fair trial standards. Any deprivation of liberty of such persons pending such retrial must be judicially ordered, and be both reasonable and necessary in the circumstances of the particular case, for such purposes as prevention of flight and the protection of the integrity of the investigation or the course of justice, and must be regularly and periodically reviewed;**
- ix) **Prosecutorial guidelines require prosecutors:**
 - a. **To perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights;**
 - b. **Not to initiate or continue prosecutions where an impartial investigation shows the charges are unfounded.**
- x) **A code of judicial conduct and ethics, elaborated by judges, include obligations on judges to:**
 - a. **Ensure that judicial proceedings be conducted fairly and that the rights of the parties be respected; and**
 - b. **Safeguard and uphold human rights.**

ENDNOTES

¹ Founded in 2014, Adalah is a non-governmental, independent legal and human rights organisation led by a group of professionals with a focus on four Programmes: 1) the Criminal Justice Programme 2) the Student Rights and Academic Freedoms Programme; 3) the Refugee Programme; 4) and the Minority Programme. All these Programmes are implemented through legal support and strategic litigation, research, monitoring and documentation, advocacy activities and capacity-building.

² 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.

³ Id at Section II.B(4).

⁴ See for example ICJ, Egypt's Judiciary: A Tool of Repression - Lack of Effective Guarantees of Independence and Accountability (2016), pp. 34-36.

⁵ Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, UN Doc. CAT/C/CR/29/4 (2002), para. 6(h).

- ⁶ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/13/37/Add.2 (2009), para.55.
- ⁷ Report of the Special Rapporteur on the question of torture, UN Doc. E/CN.4/2003/68 (2002), para. 26(g).
- ⁸ See for example, ICJ, Egypt: authorities must end the arbitrary detention of human rights lawyer Mohamed Ramadan (2018), available at <https://www.icj.org/egypt-authorities-must-end-the-arbitrary-detention-of-human-rights-lawyer-mohamed-ramadan/>; ICJ, Egypt: Authorities must release arbitrarily detained individuals (2018), available at <https://www.icj.org/egypt-authorities-must-release-arbitrarily-detained-individuals/>.
- ⁹ ICCPR, art. 9(3); African Charter on Human and Peoples' Rights, art 6. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle M(3).
- ¹⁰ Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35 (16 December 2014) (HRC General Comment No. 35), paras 32 and 33.
- ¹¹ *Id.*, para. 32.
- ¹² ICCPR, art. 9(3); Convention on the Rights of the Child (CRC), at. 37(b). Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle M(1)(e); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 39.
- ¹³ Case 34150/2015, Cairo Criminal Court. The accused were convicted of offences including "killing police officers," "taking part in an illegal assembly," "joining an illegal group," and "vandalism and other acts of violence" following dispersal of a sit-in protest at Raba'a square.
- ¹⁴ ICJ, Egypt: Mass convictions and death sentences in Raba'a Dispersal Case are a gross miscarriage of justice (2018), available at <https://www.icj.org/egypt-mass-convictions-and-death-sentences-in-rabaa-dispersal-case-are-a-gross-miscarriage-of-justice/>.
- ¹⁵ For more information about Hicham Jaafar's case, see Adalah's briefing: Release Hicham Jaafar, available at: <http://www.adalah.org/wp-content/uploads/2016/10/بروفایل-الصحنف-هشام-جعفر.pdf>
- ¹⁶ 2014 Constitution, art. 54. Article 54 also guarantees the right to challenge any detention before a court and to a determination of this claim within one week or to release.
- ¹⁷ Code of Criminal Procedure, arts 201 and 202.
- ¹⁸ Code of Criminal Procedure, arts 134, 142 and 143.
- ¹⁹ Code of Criminal Procedure, art. 134.
- ²⁰ Code of Criminal Procedure, art. 134.
- ²¹ See, for example, ICCPR, art. 9(3).
- ²² African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted in 2003, principle M.1.e.
- ²³ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted in 2003, section M(1)(e).
- ²⁴ HRC General Comment No. 35, para. 38.
- ²⁵ *Michael and Brian Hill v. Spain*, Human Rights Committee Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997), para. 12.3.
- ²⁶ HRC General Comment No. 35, para 38.
- ²⁷ The first inquiry occurred in 1996. See UN Committee Against Torture, Report of the Committee against Torture, U.N. Doc A/51/44 (1996), available at [http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f51%2f44\(SU PP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f51%2f44(SU PP)&Lang=en).
- ²⁸ UN Committee Against Torture, Report of the Committee Against Torture, U.N. Doc A/72/74 (2017) (UNCAT Annual Report 2017), para. 69, available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f72%2f44&Lang=en.
- ²⁹ UNCAT Annual Report 2017, para. 71.
- ³⁰ See Adalah, Second annual report on the death penalty in Egypt: In the Name of the People (March 2019) (Adalah's Second Annual Report), pp. 20-29, available (in Arabic) at: <http://www.adalah.org/wp-content/uploads/2019/03/1-2018-باسم-الشعب.pdf>.
- ³¹ See Adalah's Report: Tortured until Death (June 2018), available (in Arabic) at: http://www.adalah.org/wp-content/uploads/2018/06/1_تقرير_تعذيب_أفضى_موت.pdf
- ³² ICJ, Egypt: verdict in case of police who tortured and killed detainee reinforces limited justice for crimes by state officials (2018), available at <https://www.icj.org/egypt-verdict-in-case-of-police-who-tortured-and-killed-detainee-reinforces-limited-justice-for-crimes-by-state-officials/>.
- ³³ ICJ, Egypt: authorities must effectively investigate deaths of lawyers in custody (2015), available at <https://www.icj.org/egypt-authorities-must-effectively-investigate-deaths-of-lawyers-in-custody/>
- ³⁴ African Commission on Human and Peoples' Rights, Resolution 297 on the Deteriorating Human Rights Situation in the Arab Republic of Egypt (2015) (African Commission Resolution 297), paras 4-5, available at <http://www.achpr.org/sessions/17th-eo/resolutions/297/>; African Commission on Human and Peoples' Rights, Resolution 287 on Human Rights Abuses in Egypt (2014), paras 5-6, available at <http://www.achpr.org/sessions/16th-eo/resolutions/287/>.
- ³⁵ See Adalah's Second Annual, pp. 11-18.
- ³⁶ UN General Assembly, Resolution adopted by the General Assembly on 20 December 2012, 67/176: Moratorium on the use of the Death Penalty, UN Doc. A/RES/67/176 (20 March 2013).
- ³⁷ Human Rights Committee General Comment No. 36, CCPR/C/GC/36, 30 October 2018, para. 50.
- ³⁸ ICCPR, art. 6(2). With respect to the expression most serious crimes, in its General Comment No. 36, the Human Rights Committee has affirmed that, "The term "the most serious crimes" must be

read restrictively and appertain only to crimes of extreme gravity, involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty. States parties are under an obligation to review their criminal laws so as to ensure that the death penalty is not imposed for crimes which do not qualify as the most serious crimes. They should also revoke death sentences issued for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to re-sentence those convicted for such crimes", para. 35, footnotes in the original omitted.

"The same standard appears in Principle N(9)(b) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

³⁹ Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/67/275 (2012) para. 67. See also Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/4/20 (2007) paras.53 and 65 and Human Rights Committee, General Comment No. 6 (Article 6), UN Doc. HRI/GEN/1/Rev.1 at 6 (1994), para.7.

⁴⁰ Criminal Code Law No. 58 of 1937, as amended, articles 77-77(C), 78(A)-78(C), 80 (1), 81, 82(B), 83, 83(A) cum. 85-102(2) Bis, 102(B), and 290; Arms and Ammunition Law No. 394 of 1954, as amended by Law No. 165 of 1981, article 26; Narcotics Law, No. 182 of 1960, as amended, articles 33-34.

⁴¹ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007) (HRC General Comment No. 32), para.59. Human Rights Committee, General Comment No. 6 (Article 6), UN Doc. HRI/GEN/1/Rev.1 at 6 (1994), para.7.

⁴² HRC General Comment No. 32, para.59; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, principle N(1)(b).

⁴³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/51/457 (1996), para. 111. See also Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 5.

⁴⁴ HRC General Comment No. 32, para.51.

⁴⁵ ICCPR, art. 6(4). Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, principle N(10)(d); Report of the Special Rapporteur on extrajudicial executions, summary or arbitrary, UN Doc. A/51/457 (1996), para. 111.

⁴⁶ HRC General Comment No. 32, para.59.

⁴⁷ African Commission on Human and Peoples' Rights, Resolution 287 on Human Rights Abuses in Egypt (July 2014); African Commission Resolution 297. See also, Joint Statement of African and UN human rights experts, Egypt: Justice and reconciliation increasingly failing after second wave of mass death sentences (15 May 2014), available at <http://www.achpr.org/press/2014/05/d204/>; African Commission on Human and Peoples' Rights and Working Group on Death Penalty and Extrajudicial, Summary and Arbitrary Killings in Africa ,Press release on the execution of Mahmoud Hassan Abdel-Naby (10 March 2015), available at <http://www.achpr.org/press/2015/03/d252/>; UN Office of the High Commissioner on Human Rights (OHCHR), Mass imposition of death penalty in Egypt outrageous: Pillay (29 April 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14543>.

⁴⁸ ICJ, Mass convictions and death sentences in Raba'a Dispersal Case are a gross miscarriage of justice (2018), available at <https://www.icj.org/egypt-mass-convictions-and-death-sentences-in-rabaa-dispersal-case-are-a-gross-miscarriage-of-justice/>.

⁴⁹ Joint statement of African and UN human rights experts, Egypt: Justice and reconciliation increasingly failing after second wave of mass death sentences (15 May 2014), available at <http://www.achpr.org/press/2014/05/d204/>; and UN OHCHR, Mass imposition of death penalty in Egypt outrageous: Pillay (29 April 2014), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14543>.

⁵⁰ The "State Security Courts" were also established pursuant to Article 171 of the 1971 Constitution and Law No. 105 of 1980, but were later abolished by Law No. 95 of 2003.

⁵¹ Law No. 10/1914 on assembly, crimes under Title 1 and 2 and 2 (bis) of the second book of the Criminal Code, crimes listed in articles 163 to 170 of the Criminal Code concerning the disruption of transportation, crimes in articles 172, 174, 175, 176, 177 and 179 of the Criminal Code, crimes of intimidation, inducing fear and damaging security (thuggery) that is included in Title 16 of the third book of the Criminal Code, crimes that are included in Law No. 95/1945 related to public supply and Law No. 163/1950 on forced pricing and profit determination, crimes in Law No. 394/1954 on weapons and ammunition, crimes in Law No. 113/2008 on protecting places of worship, crimes in Law No. 107/2013 on the right to public assembly and peaceful protest, crimes in Law No. 34/2011 on the prohibition to infringe on the right to work and sabotaging establishments, and crimes in Law No. 94/2015 on counter-terrorism.

⁵² In meetings with the ICJ in 2012, for example, then-president of the Constituent Assembly, Hossam Al Gheriani, asserted that the new Constitution would not allow civilians to be tried before military courts.

⁵³ 2014 Constitution, art. 204.

⁵⁴ See ICJ report, *Egypt's Judiciary: A Tool of Repression - Lack of Effective Guarantees of Independence and Accountability* (2016), pp. 132-152.