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## Towards an Int'l Legal Action on President Morsi's Death

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Six years have passed since Egypt's first elected civilian president was arrested, forcibly disappeared, and subjected to an unfair trial that did not meet the minimum standards of justice. During his detention, President Mohamed Morsi was systematically denied his right to a proper medical treatment, which ultimately led to his death/murder.

After all the sacrifices he has made, the minimum thing that must be done to President Morsi is to reveal the truth about his death, and work to bring those involved in such heinous crime to international criminal justice in all its forms – whether Dr. Morsi's death was the result of a premeditated plan by authorities, which is most likely, or it was a natural result of the deliberate medical negligence he was exposed to during the harsh period of his enforced disappearance.

In this context, there are judicial procedures that can be taken to bring some official figures in the current regime to justice before the international courts, where "medical negligence that may lead to death", as a kind of torture, is a global crime stipulated in many international conventions, including charters ratified by Egypt.

This comes in line with the official statements issued by the Office of the United Nations High Commissioner for Human Rights, which called on the Egyptian government to conduct a thorough and independent investigation into the

circumstances of the death of Dr. Mohamed Morsi as he was held by authorities at the time of his death.

“As former President Mohammed Morsi was in the custody of the Egyptian authorities at the time of his death, the State is responsible for ensuring he was treated humanely and that his right to life and health were respected. Any sudden death in custody must be followed by a prompt, impartial, thorough and transparent investigation carried out by an independent body to clarify the cause of death,” said Rupert Colville, Spokesperson for the Office of the UN High Commissioner for Human Rights.

### Torture and International Law

International Human Rights Law, International Humanitarian Law, and International Criminal Law prohibit torture and other types of ill-treatment and require treating detainees in accordance with their provisions and principles as well as other international standards. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (Article 1) provides a unanimously agreed definition of torture as:

1- For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent

or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2- This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

International Humanitarian Law adopts a slightly different definition, where it does not require involvement of a person acting in an official capacity as a precondition for defining an act intended to inflict severe pain or suffering as torture.

The International Committee of the Red Cross (ICRC) uses the broad term of "ill-treatment" to include torture and other forms of abuse prohibited by the international law, including inhuman, cruel and degrading treatment, and abuses of human dignity and physical or moral coercion.

The severity of the pain or suffering inflicted represents the legal difference between torture and other kinds of ill-treatment. In addition, torture requires existence of a specific purpose, such as obtaining information.

*The different terms used to refer to various forms of ill-treatment or pain can be explained as follows:*

- Torture: the existence of a specific purpose in addition to the intentional infliction of agony or severe pain.
- Cruel or inhuman treatment: Causing great suffering or pain, not necessarily requiring existence of a specific purpose.

Abuses that undermine human dignity: Causing a great deal of humiliation or degradation, not necessarily requiring existence of a specific purpose.

Torture in International Law

### 1- Torture in International Humanitarian Law:

The Geneva Conventions of 1949 and their Additional Protocols of 1977 contain provisions that categorically prohibit cruel or inhuman treatment and undermining personal dignity.

For example, torture is prohibited in accordance with Article 3 of all Geneva Conventions, Article 12 of the First and Second Conventions, Articles 17 and 87 of the Third Convention and Article 32 of the Fourth Convention. Also, Article 75-2: a, e) of Additional Protocol I, and Article 4-2: a, h) of Additional Protocol II, prohibit "Violation of human dignity, in particular the humiliating and degrading treatment".

In international armed conflicts, torture constitutes a grave breach under Articles 50, 51, 130 and 147 respectively contained in these four conventions. According to Article 85 of the Additional Protocol I of 1977, these offenses are considered war crimes. In non-international armed conflicts, torture is considered a serious violation.

Finally, an ICRC study on Customary Law (Article 90) and the International Criminal Tribunal for the Former Yugoslavia classify prohibition of torture, cruel or inhuman treatment; and violation of human dignity, in particular, the humiliating and degrading treatment, as a customary rule.

## 2- Torture in International Human Rights Law:

The prohibition of torture and degrading or inhumane treatment also exists in the field of international, universal, and regional human rights law:

- The Universal Declaration of Human Rights (Article 5):

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

- The International Covenant on Civil and Political Rights (Article 7):

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

- The UN Convention against Torture (Article 2):

"Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

- The European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3): "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

- The Inter-American Convention on Human Rights (Article 2-5): "... No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

- The African Charter on Human and Peoples' Rights (Article 5):

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”,

- The Arab Charter on Human Rights (Article 8):

“Every person has the right to liberty and security of person. No one shall be subjected to arrest or detention or stopped without legal basis and must be brought before the judiciary without delay.”

### 3- Torture in International Criminal Law:

Under the ICC Statute, torture and cruel, inhuman or degrading treatment constitute war crimes under Article 8 (2) (a) (1”) (3”) (11”) and (2) (1”) (2”), and constitute two crimes against humanity under Article 7 (1) (f) and (k) of the Rome Statute of the International Criminal Court.

### 4- Torture in National Laws:

In addition to the above international obligations, the provisions relating to the prohibition of torture and cruel, inhuman or degrading treatment also exist in national legal systems; and national constitutions; penal code, civil law and administrative law reflect or are supposed to reflect these international provisions, and should also include the enforcement of the prohibition and prevention of torture and cruel, inhuman or degrading treatment.

In this context, we present a proposed executive plan for legal and judicial procedures that would enable us to prosecute official political figures in the

Egyptian government before the European courts, in accordance with the principle of universal jurisdiction, the International Criminal Court or according to requests to open an international investigation in the crime of torture through deliberate medical negligence that leads to death.

### Overarching Objective

The overarching objective should be to paralyze / reduce / curtail the violations and crimes of regime figures on the one hand, and boost awareness of the Egyptian society regarding the dangers posed by the regime to everyone, including the regime supporters themselves.

*In this context, the available paths (although difficult and lengthy) are limited to three directions:*

- 1- Activation of the principle of universal jurisdiction.
- 2- Going to the ICC.
- 3- Adoption of a comprehensive international investigation into this crime.

Before starting to identify the available international mechanism, it is important to state the initial list of convicts, which I believe should include:

- General Abdel Fattah Al Sisi – in his capacity and person.
- Maj. Gen. Mohamed Ibrahim – Former Minister of Interior, in person.
- Maj. Gen. Magdi Abdel Ghaffar – Former Minister of Interior, in person.



- Major General Mahmoud Tawfiq Qandil – current Minister of Interior, in his capacity and person.
- Maj. Gen. Zakaria Al-Ghamri – Assistant Minister of Interior for the Prisons Sector, in his capacity and person.
- Counselor Mohamed Sherin Fahmy – Dr. Morsi’s trial judge, in person.

(A) The principle of universal jurisdiction:

The principle of “universal jurisdiction” or “universal principle” is a unique basis of jurisdiction in international law that can allow a State to exercise national jurisdiction over certain crimes in the interest of the international community. There is no single universally accepted definition of this concept but, for practical purposes, It can be described as a jurisdiction based solely on the nature of the offense, regardless of the territory in which it was committed, the nationality of the alleged or convicted offender, the nationality of the victim, or any other relationship with the State exercising such jurisdiction.

This means that the international community is becoming aware that there are crimes of an “international nature”, which are committed in many places and regions without accountability or prosecution of their perpetrators, which represents “impunity”, which the international community and the law sought to prevent and protect its victims.

Torture and its related crimes and abuses, most notably the “deliberate medical negligence that leads to death” require immediate accountability; and the

international law has sought to remedy this, especially in light of the domination of repressive regimes on the political and judicial life.

The principle of universal jurisdiction remains one of the key tools for ensuring the prevention and repression of serious violations of international humanitarian law (IHL).

This obligation demands an active approach. If States are aware that persons who have allegedly committed a serious violation of IHL are present on their territory or in places under their jurisdiction, it is their responsibility to ensure that they are investigated, prosecuted and brought to trial.

The "grave breaches" regime laid down in the four Geneva Conventions of 1949 and their Additional Protocol I of 1977 stipulates that States Parties have a legal obligation to search for persons alleged to have committed, or to have ordered to be committed, those violations of the Conventions and the Protocol defined as grave breaches. States are also required to bring such persons, regardless of their nationality, before their own courts, or hand them over for trial by another State Party concerned.

Other international instruments place a similar obligation on States Parties to vest, in their courts, some form of universal jurisdiction over serious violations of the rules they contain. These instruments include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol of 1999, the 1984 Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment, and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

In this context, we can prepare a legal file including all violations and crimes that were committed against Dr. Mohamed Morsi, since he was arrested and subjected to enforced disappearance, through his politicized trials that lacked the most basic fair trial standards, up to the deliberate medical negligence which ultimately led to his death.

#### (B) International Criminal Court:

ICC Chief Prosecutor Fatou Bensouda had announced that the International Criminal Court was considering an international arbitration application filed in December 2013 by lawyers for President Mohamed Morsi to open an ICC investigation into what happened in Egypt after the military coup d'état on July 3, 2013, in accordance with Article 12, Paragraph 3, of the Rome Statute. However, Bensouda noted that Egypt has not ratified the Rome Statute, on which the ICC was based, and that the mechanisms for opening an investigation by the Court depends on membership and cooperation of actual governments of states. She also stated that it was difficult to accept the request to intervene from the Muslim Brotherhood because they do not represent the current government.

In May 2015, the International Criminal Court decided that "it could not accept the request to investigate alleged crimes because it did not come from the ruling government in Egypt". The court said in a statement that a number of lawyers, "... representing the Muslim Brotherhood and the political party of ousted

Egyptian leader, Mohamed Morsi, requested that the ICC investigate alleged crimes against humanity against civilians since 1 June 2013. Ultimately, the Prosecutor – in consultation with the Court’s registrar – dismissed the request.” The court pointed out that the complaint filed by the Freedom and Justice Party, the political front of the Muslim Brotherhood in Egypt, was not submitted in the name of the “State concerned” i.e. the Arab Republic of Egypt, and therefore it could not be accepted.

*This is the result of a wrong legal path taken by hasty and inexperienced persons.*

Since Egypt has not signed the Rome Statute, an investigation submitted to the ICC without an official request from the government can only pass through the UN Security Council.

The Court accepted intervention in Libya and Sudan although they are not member states. As the ICC chief prosecutor confirmed, the Court’s law allows intervention if the United Nations Security Council so requests. This is what happened in Sudan when ICC officials launched investigations in the Darfur case without going to Sudan, for lack of cooperation of the Sudanese government at the time, but investigations were carried out from outside Sudan after gathering sufficient evidence and information about crimes against humanity there.

*So, there are two paths, albeit difficult, costly and slow - that can be taken to open an investigation into this case:*

a- The investigation request comes from the UN Security Council, which comes through continuous communication with UNSC member states.

b- Seeking activation of Article 15 of the Rome Statute through convincing the ICC chief prosecutor to open investigation into this crime given that the committed crimes are within the Court's competence.

#### (C) International investigation:

On June 18, 2019, OHCHR spokesman Rupert Colville cited concerns about Morsi's detention for several years, and said the investigation should examine whether those conditions factored in his death: "As former President Mohamed Morsi was in the custody of the Egyptian authorities at the time of his death, the state is responsible for ensuring he was treated humanely and that his right to life and health were respected," Colville said in a statement, adding "Any sudden death in custody must be followed by a prompt, impartial, thorough and transparent investigation carried out by an independent body to clarify the cause of death."

"States, including Egypt, that have ratified the International Covenant on Civil and Political Rights, also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty. In the words of the UN Human Rights Committee -- which monitors the implementation of the Covenant -- by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their life and bodily integrity," Colville said, adding "Concerns have been raised regarding the conditions of Mr. Morsi's detention, including access to adequate

medical care, as well as sufficient access to his lawyers and family, during his nearly six years in custody. He also appears to have been held in prolonged solitary confinement. The investigation should therefore also encompass all aspects of the authorities' treatment of Mr. Morsi to examine whether the conditions of his detention had an impact on his death."

In accordance with the relevant international rules and covenants, most notably the Mandela Rules, the UN Standard Minimum Rules for the Treatment of Prisoners, there were serious irregularities and violations, particularly Rule 24, which states that "The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status."

Similarly, Rule 27 which states that "All prisons shall ensure prompt access to medical attention in urgent cases. Prisoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals. Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care."

Also, Rule 71 which states that "Notwithstanding the initiation of an internal investigation, the prison director shall report, without delay, any custodial death, disappearance or serious injury to a judicial or other competent authority that is independent of the prison administration and mandated to conduct

prompt, impartial and effective investigations into the circumstances and causes of such cases.”

In the light of the above, the idea of opening a thorough and independent investigation into the circumstances of the death of Dr. Morsi, including the conditions of his detention, is available despite likely difficulties. Many legal experts stressed that such investigation must be conducted by a competent court independent of the authority that had detained President Morsi, and that it should be authorized to conduct prompt, impartial and effective investigations into the circumstances of his death. In practice, the investigation comes with continuous follow-up and communication with international missions, the Human Rights Council and the Office of the High Commissioner for Human Rights through several individual international complaints authorized by the family of Dr. Mohamed Morsi, and through various human rights organizations, to reach the conviction of one of those mechanisms to open an independent investigation by bodies concerned.