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ICJ Position Paper on the Situation in Egypt

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This paper addresses the deteriorating Rule of Law and human rights situation in Egypt, including the consolidation of the powers of the Supreme Council of Armed Forces (SCAF), free from any civilian oversight, the control of the SCAF over the constitution-making process, the *de facto* extension of the 30-year state of emergency through the expansion of military power and the military justice system, and the continuation of widespread human rights violations under the rule of the SCAF.

The ICJ is deeply concerned about measures taken in relation to the legal and constitutional framework by the Egyptian transitional authorities, in particular the SCAF, which are preventing a genuine transition to democracy in Egypt, including through the adoption of a Constitution that is consistent with and reinforces Rule of Law principles and international human rights standards.

The SCAF and other Egyptian authorities have failed so far to meet the aspirations of the Egyptian people to establish the Rule of Law, guarantee the full enjoyment of human rights, guarantee the independence of the judiciary in all circumstances, and ensure the effectiveness of democratic institutions in Egypt. These aspirations were at the heart of the sweeping popular protest that led to the toppling of former President Mubarak.

In addition, the SCAF and other Egyptian transitional authorities have failed to undertake major reforms of the Egyptian legal system, including by definitively ending the 30 year old state of emergency, repealing the Emergency Law No. 162 of 1958 and dismantling other elements of its legal framework, such as the use of military courts to try civilians.

This position paper examines recent actions and decisions by these authorities in light of international law and standards. These decisions relate to the following key areas:

1. The interim Constitution and the role of the SCAF;
2. Parliamentary elections and the role of the Supreme Constitutional Court (SCC);
3. The Constituent Assembly;
4. The state of emergency; and
5. Impunity in cases of gross human rights violations.

The transition process in Egypt, following the departure of President Mubarak, has been overseen from its inception by the SCAF. Unfortunately, instead of paving the way for a clear and participatory reform process, the SCAF has consistently opted for opaque, rushed and non-consensual policies that have largely served to shield the armed forces from any form of accountability to, or oversight by, a civilian power. The confusion that has prevailed thus far has severely undermined the transition's legitimacy and prevented Egyptians from taking a direct role in the constitution-making process.

The ICJ calls on the Egyptian transitional authorities to comply with their obligations under international law and the principles of democratic participation and transparency, separation of powers, civilian oversight over the armed and security forces, prohibitions on the use of military courts to try civilians, and accountability and reparation in cases of human rights violations.

The Interim Constitution and the Role of the SCAF

In the wake of Hosni Mubarak's ouster in February 2011 due to widespread popular protests, the SCAF took *de facto* control in Egypt. The SCAF, an unelected and unaccountable military body,

suspended the 1971 Constitution and handpicked an eight-man committee to draft a governance document for a transitional period in the space of ten days. The result was a set of amendments to the 1971 Constitution, which was supposed to deal with the requirements of the transitional period. On 19 March 2011, the ten amendments were approved through popular referendum by a sizeable majority, seemingly bringing into force an amended version of the 1971 Constitution, although the precise date it was to come into force was not apparent. The revised Constitution granted no role for the SCAF.

However, eleven days after the referendum, the SCAF promulgated a “Constitutional Declaration”, which revised both the amendments approved by popular vote as well as the 1971 Constitution. The Constitutional Declaration granted the SCAF *de jure* control over the exercise of political power, in particular through extensive legislative, executive and administrative powers. Articles 56 and 57 of the Declaration, which granted the SCAF such powers, were not submitted to the 19 March referendum.

The United Nations International Covenant on Civil and Political Rights (ICCPR), to which Egypt is a party, guarantees in Article 25 the right of every citizen: “(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.” In its General Comment on Article 25, the UN Human Rights Committee, which is the supervisory body providing the authoritative interpretation of the ICCPR’s provisions, affirmed that: “the conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.”¹

The promulgation of the March Constitutional Declaration by the SCAF, with no public consultation or transparent processes requisite for lawmaking, has infringed the right of Egyptians to take part in the conduct of public affairs and to participate in the constitution-making process, in violation of Article 25 of the ICCPR. In particular, the Declaration, both in the manner of its promulgation and its substance as an arrogation of sweeping powers to the SCAF, is at odds with the aspirations of Egyptians, expressed during the uprising, to break with policies and practices of the past and to establish a genuine democracy.

The SCAF has issued other constitutional declarations under similar circumstances. Indeed, the March Constitutional Declaration is one of four such declarations that the SCAF has adopted since February 2011 without any meaningful consultations with political actors and other stakeholders or any form of democratic affirmation.² On 17 June 2012, on the eve of the election of a new President and following the ruling of the SCC regarding parliamentary elections,³ the SCAF promulgated substantial amendments to the March Constitutional Declaration. These amendments consolidate the SCAF’s powers by:

- i) granting comprehensive authority to the SCAF for matters relating to the armed forces;

¹ General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): . 27/8/1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25(57)) Para. 5

² Constitutional Declaration of 13 February 2011, suspending the 1971 Constitution; 30 March Constitutional Declaration; Constitutional Declaration of 25 September 2011 amending Article 38; Constitutional Declaration of 17 June 2012

³ Judgement in Supreme Constitutional Court Case No.20/24, published in the Official Gazette – Issue 24, Appendix A, 14 June 2012

- ii) appointing the head of the SCAF, Field Marshal Tantawi, as the commander-in-chief of the armed forces and minister of defence until a new constitution is drafted;⁴
- iii) granting the SCAF a veto power over any declaration of war;⁵
- iv) providing for the use of the armed forces to maintain security and defend public property, including outside of an armed conflict;⁶
- v) extending the SCAF's legislative powers until after a new parliament is elected, which will not be until a new constitution is approved;⁷ and
- vi) granting the SCAF significant control over the constitution-drafting process.⁸

These June 2012 amendments were also unilaterally drawn up by the SCAF and were neither subject to meaningful consultation nor put to democratic approval. They maintain and extend the extensive legislative and executive powers of the SCAF. The consolidation and extension of such powers lack democratic legitimacy. Under international law and standards, individuals and other stakeholders take part in the conduct of public affairs by choosing or changing the Constitution or deciding public issues through democratic processes.⁹ No constitutional framework can be imposed unilaterally.

In addition, the June 2012 amendments provide a “constitutional framework” that shields the armed forces from accountability and curtails any kind of civilian control or oversight over the armed forces. While the unaccountability of the armed forces has been a long-standing practice in the history of Egypt, enshrining into the constitutional or legislative framework such practices violates the most basic Rule of Law principles.

In a constitutional democracy and under international law, all State institutions should be accountable to a democratically elected power. The UN Human Rights Council recently established in Resolution 19/36 the need to ensure that “*the military remains accountable to relevant national civilian authorities*”.¹⁰ The Inter-American Democratic Charter, the instrument that contains the collective commitment to maintaining and strengthening the democratic systems in the Americas, states in Article 4 that the “*constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the Rule of Law on the part of all institutions and sectors of society are equally essential to democracy*”.¹¹

In this light, the Inter-American Commission on Human Rights has long recognized the importance of placing the armed forces under the control of a democratically accountable authority. For example, in its reports on Venezuela, the Commission expressed “*extreme concern at reports of undue influence of the armed forces in the country's political affairs, as well as excessive involvement by the armed forces in political decision-making*”.¹²

The Egyptian authorities should therefore, including in the process of drafting a new constitution, guarantee the subordination of all armed forces and security services to a democratic, legitimate civilian authority.

⁴ New Article 53

⁵ New Article 53/1

⁶ New Article 53/2

⁷ New Article 56B and 60B

⁸ New Article 60B and 60B1

⁹ General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): . 27/8/1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25(57) para. 6.

¹⁰ Human Rights Council, A/HRC/Res/19/36, 19 April 2012, para.16(j)(vi)

¹¹ The Inter-American Democratic Charter, 11 September 2001

¹² Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela, State Security: The Armed Forces and the Police*, 29 December 2003, OEA/Ser.L/V/II.118, para.280

Parliamentary and Presidential Elections and the Role of the Supreme Constitutional Court

The SCAF has used the March Constitutional Declaration and other mechanisms to exercise comprehensive control over the processes leading to the adoption of a new constitution as well as the parliamentary and presidential elections. The election of parliamentary and presidential bodies before the adoption of a new constitution, which confers specific powers to each of the State institutions, sets out the mandates of these institutions and organises the relationship between them, will, *de facto*, prolong the transitional process for an additional period. Indeed, the President of Egypt was elected on June 2012 without knowing the precise scope and details of his mandate and competencies, how he is supposed to exercise them, and under what safeguards or oversight.

Under the constitutional amendments submitted to referendum and the Constitutional Declaration, candidacy for the People's Assembly was to be governed by the law with oversight by an electoral commission composed of judges.¹³

The electoral law for the People's Assembly was based on Law No.38/1972, as amended. Further amendments to the law were drawn up and passed by Military Decrees issued by the SCAF. The process was highly contentious and resulted in three sets of amendments (Decree Law 108/2011, Decree Law 120/2011 and Decree Law 123/2011). Pursuant to Article 3 of the final text, two thirds of the seats were to be elected through a closed party-list system, while the remaining third was to be elected through the individual system. Article 6 set out the mechanism for individual candidates to put their name forward for nomination and applied these same procedures for party candidates. Article 5 of Decree Law 120/2011 had included provision that prohibited party members from running for individual seats. This article was later repealed by Decree Law 123/2011. Under Article 9bis objections about any candidates could be made to the High Elections Commission. This decision could be appealed to the Administrative Court. Time restrictions for issuing a ruling were strict.

On 21 February 2012, the SCC received a case from the Supreme Administrative Court regarding the constitutionality of Article 3(1), 6(1) and 9bis(a) of Law 38/1972, as amended and Art.1 of Decree Law 120/2011. It was argued by the applicant, a candidate running as an individual, that the revised electoral law violated Article 7 of the Constitutional Declaration. On 14 June 2012, the SCC ruled in favour of the applicant, declaring that these articles of Law 38/1972 and Decree Law 120/2011 were unconstitutional and therefore "*that the formation of the whole Assembly is null and void*".¹⁴

In adopting the decision the SCC refers repeatedly to the sovereignty of the Egyptian people and their "*political rights*", including "*suffrage*". However, the SCC makes no assessment of the legality or the constitutionality of the March Constitutional Declaration itself, assuming that it is valid and binding on the Court. In so doing, the Court has reinforced the SCAF's legitimacy to make and issue Constitutional Declarations unilaterally. Indeed, only a few days after the decision, the SCAF promulgated the 17 June Constitutional Declaration. The Court also reinforced the SCAF's legitimacy to lead the political process in Egypt by referring to it as "*the legislators*" and even the "*constitutionally relevant authority*", without any reference to the fact that the articles that grant the SCAF such powers were not affirmed through democratic procedures. The SCC's decision has also maintained the confusion regarding the applicable Constitutional framework by referring to both the 1971 Constitution and the March Constitutional Declaration to explain Egypt's multi-party system.

¹³ Article 88 of the amendments put to referendum and Articles 38 and 39 of the Constitutional Declaration

¹⁴ Judgement in Supreme Constitutional Court Case No.20/24, published in the Official Gazette – Issue 24, Appendix A, 14 June 2012

In addition, the SCC's decision was based on Article 7 of the March Declaration, which provides for equality before the law and non-discrimination on the basis of "race, origin, language, religion, or creed". Neither Article 7 nor international human rights law prescribe a particular electoral system to guarantee such equality. In numerous election systems individual candidates run against party candidates. Further, while the SCC can declare articles of the law unconstitutional, it remains unclear to what extent the court can, under the law that governs the SCC (Law 48/1979) or under the Constitutional Declaration, declare the Parliament dissolved. Consequently, the Court's decision, adopted with a view to uphold suffrage and political rights, led to the dissolution of the only democratically elected body in Egypt at that time.

In Egypt, the SCC's judgment regarding the parliamentary elections has been subject to severe criticism from various political and civil society actors who have called both the independence and the impartiality of the Court into question.

In times of crisis and transition, the judiciary has to play a particularly important role in safeguarding human rights, including the right to take part in the conduct of public affairs. In carrying out this role, "judicial officials must take care to interpret and apply the law in good faith, independently and with integrity, in conformity with international human rights law and international law".¹⁵

Under international standards, judges should not only actually be independent and impartial, they must also be seen to be independent and impartial. Egyptian authorities should therefore, including through the constitution-making process, reinforce the guarantees of the independence of the SCC including by providing for a mechanism that limits the extensive influence the executive has over the selection of its members. Under the current Egyptian law, the members of the SCC are appointed by the President.¹⁶ The sitting judges in the decision were appointed under former President Mubarak.

The Constituent Assembly and the New Constitution

The March Constitutional Declaration contained numerous ambiguous provisions. This was perhaps as a result of the lack of consultation, participation and time granted for consideration and revision. The ambiguity is particularly apparent as regards the drafting of a new constitution and the election of a Constituent Assembly (CA). Provision for the election of a CA was provided for in the amendments submitted to referendum on 19 March (amended Articles 189 and 189 Bis). The SCAF reproduced an amended version of these provisions in Article 60 of the March Constitutional Declaration. In particular, the SCAF substituted itself for the "President", made the drafting of a new constitution mandatory, as opposed to permissive, and ensured that the SCAF controlled the start of the constitution-drafting process.¹⁷ There was, however, no specification as to: the criteria that should be applied in relation to the selection of candidates; whether these candidates could include parliamentarians; nor any requirement to ensure the inclusive representation of all sectors of Egyptian society on the CA. This led to the SCAF trying to impose a framework for the election of candidates and the substance of the Constitution, including through the so-called Supra Constitutional Principles

¹⁵ Legal Commentary to the ICJ Geneva Declaration, 2011, Principle 2, page 21, citing *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government*, Principle IV.

¹⁶ Article 5 of Law 48/1979

¹⁷ Article 60 states: "Within 6 months of their election of the members of the first People's Assembly and Shura Councils (except the appointed members) the Supreme Council of Armed Forces will call a meeting to elect a provisional assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within six months of the formation of this assembly. The draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter. The constitution will take effect from the date on which the people approve the referendum." (Unofficial translation)

of November 2011. The Principles attempted to remove any kind of civilian control of, or oversight over, the armed forces.

Having rejected the Supra Constitutional Principles, Parliament took control of the process for drawing up the selection criteria. A vote on 17 March 2012 decided that the CA should be composed of an equal number of Parliamentarians and non-Parliamentarians. A list of nominees was submitted to Parliament on 24 March 2012. It is not apparent how this list was compiled and what safeguards, if any, were in place to ensure the CA would be sufficiently representative. As a result, a number of liberal parliamentarians walked out of the vote. Further, following their appointment, over 20 of the CA members resigned, citing lack of equal representation.

Meetings of the CA to replace resigned members were rendered moot by a judgment of the Administrative Court on 10 April 2012.¹⁸ The applicants in the case, a group of activists and constitutional law experts, argued that the 50/50 plan was a violation of Article 60 of the Constitutional Declaration and that putting any cap on the number of non-MPs was a violation of equal opportunity. In assuming jurisdiction, the Court ruled that the decision of the Parliament to elect the CA was an administrative decision, as opposed to a legislative one. This reasoning was on the basis that, in electing the CA, the Parliament was not acting in a legislative capacity (pursuant to Articles 33, 37 and 59 of the Constitutional Declaration), but as members of a committee charged with selecting the members of the CA (pursuant to Article 60 of the Declaration). This selection was held to be an administrative task and therefore justiciable before the Administrative Court. The Court went on to hold that Article 60 does not allow for MPs to be elected to the CA since if that were the intention of the Declaration, it would have stated as such explicitly.¹⁹

The Court's decision referred only to the March Constitutional Declaration, again making no mention of the legality or the constitutionality of this declaration. Further, in choosing the criteria for the Constituent Assembly and electing its members, Parliament was carrying out an inherently legislative function. The lack of explicit reference to legislative powers in Article 60 (as well as in Articles 189 and 189 bis of the amendments put to referendum) will not, *per se*, transform the decision into an administrative one. This is particularly true given the ambiguous wording of Article 60, which remains open to a variety of interpretations in terms of how the members of the People's Assembly should be selected. To assume Parliament requires a permissive power before allowing elected representatives to take part in the constitution-drafting process can be challenged on several grounds, particularly given that the permissive power in this case derives from the unelected SCAF.

The SCAF has tried on several occasions to influence the selection process for members of the CA. When the revised election criteria for the CA, established on the basis of negotiations between the SCAF and political parties, were rejected by Parliament the SCAF delivered a 48-hour ultimatum for Parliament to agree on criteria or face unilateral action by the SCAF. Revised criteria were agreed on 6 June 2012 by the Parliament and a new CA was elected on 12 June, although disputes about the implementation of the criteria resulted in a walk-out by liberal parliamentarians and the resignation by some from the CA.

Once again, the legitimacy of the CA has been brought into question before the Courts, this time due to the ruling of the SCC on 14 June dissolving parliament, which potentially undermines the membership of the 50 MPs who were elected to the CA on that basis. Even more problematic is Article 60B and 60B1 of the amended Constitutional Declaration. These articles pre-empt any "obstacles" that prevent the CA from completing its work and provide that the SCAF will appoint a new CA within a week, to draft a Constitution within the space of three months. Egyptians will have just 15 days to consider the draft text and vote. Once again, no provision has been made for the situation where the referendum results in a "no" vote. Furthermore, the amended Declaration allows

¹⁸ Under the civil law system, the Administrative Court is a judicial body charged with judicial oversight of issues related to public administration

¹⁹ Decision of the State Council, Administrative Court, First Chamber, Tuesday 10 April 2012 Case No.26657

either the President, the head of the SCAF, the Prime Minister, the High Judicial Council (HJC) or one-fifth of the CA to ask the CA to revise any article of the draft text where it is deemed to conflict with the revolution's goals or principles or with any principles in any of Egypt's former Constitutions. Where the CA refuses to do so, the SCC will make a binding decision within seven days.

Under international standards, it is necessary to provide sufficient time, opportunity, and transparent procedures to allow for a comprehensive public dialogue that can include all stakeholders without any exclusion, and which may lead, consequently, to a consensus-based constitution. A constitution resulting from such a process reinforces the population's sense of ownership of the constitution-making process and the Constitution itself. It can also lead to a popular willingness to support and defend the Constitution and achieve its implementation.

In Egypt, only a democratically elected and fully representative CA can allow for such dialogue to take place, and consequently to define constitutional principles and to draft a new constitution. In addition, the drafting process must ensure all Egyptian people, without discrimination or distinction, *"have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government"*.²⁰ This demands sufficient time, transparency and consultation mechanisms to be built into the process. Both the March declaration and the June amendments do not provide for such mechanisms. Instead, the amendments allow, amongst other things, the SCAF to object to any constitutional provision deemed contrary to the perceived interests of the armed forces.

The State of Emergency

Emergency Law No. 162 was first adopted in 1958, during the presidency of Gamal Abdel-Nasser, but not implemented until 1967.²¹ Since that date, Egypt has been ruled predominantly under a state of emergency. The state of emergency was last renewed by Mubarak for two years in June 2010.

Under international law and standards, states of emergency and any derogations to rights pursuant to such emergency must be of an exceptional and temporary nature. It is by definition a temporary legal response to an exceptional and grave threat to the life of the nation. Any measures taken that derogate from or limit other rights are subject to the strict conditions of necessity and proportionality. Thus, Article 4 ICCPR, to which Egypt is a party, provides: *"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law."*

However, in the case of Egypt, the state of emergency, which was supposed to be a temporary measure to deal with extraordinary circumstances, became over the years a permanent measure. In its General Comment 29 on states of emergency (Article 4), the Human Rights Committee stated: *"Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency."*²² In its concluding observations about Egypt, the Committee was *"disturbed by the fact that the state of emergency proclaimed by Egypt in 1981 is*

²⁰ General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25): . 27/8/1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25(57), para.2

²¹ Emergency Law n°162/1952: Official Gazette of 28 September 1958, N°28, Bis.

²² Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 2.

*still in effect, meaning that the State party has been in a semi- permanent state of emergency ever since.*²³

In addition, any measure undertaken that derogates from a provision must not impair the essence of the right. It may only reduce the scope of application of the right to the extent strictly necessary to meet a threat to the life of the nation: *“the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.”*²⁴

The powers of the executive under the state of emergency were extrapolated through the Emergency Law. This law provides for the operation of Special Security Courts to adjudicate over a wide range of crimes, including crimes specifically provided for by the President or cases referred to them by the President (Articles.7 and 9). Further, the President has the ability to alter the composition of the Special Courts from a purely civilian panel to a mixed military/civilian panel (Article 7). The President can also order the formation of Special Courts composed entirely of military officers and which operate under the procedures put in place by the President (Article 8). No right of appeal is permitted under Special Courts and no civil motions can be brought before a Special Court (Articles 11 and 12). The President also exercises extensive control over the judgments and sentences issued by Special Courts (Articles12-15).

In addition to the Special Courts under the Emergency Law, a separate judicial system that was also utilised by the Mubarak regime in Egypt were the military courts set up pursuant to the Military Code of Justice (MCJ).²⁵ The MCJ grants military courts jurisdiction where a crime is committed in a place operated by the military or for the armed forces, or in relation to property owned by the military.²⁶ Further, the President can refer certain crimes to military courts and, where a state of emergency exists, the President can refer any crimes to military courts.²⁷ Under Article 48 of the MCJ, military judges decide whether an offence is within their jurisdiction or not. Based on the above, it is clear that both the Special Security Courts and the military justice system in Egypt lack independence from the armed forces and/or the executive, and fail to meet due process requirements.²⁸ This conclusion has been reaffirmed on numerous occasions by the UN Human Rights Committee and other mechanisms when assessing the administration of justice in Egypt.²⁹ The emergency law and the military court system were used extensively by the Mubarak regime to suppress dissent and crack down on those who spoke out against the regime.

The SCAF maintained the state of emergency and the use of military courts to try civilians, both in

²³ *Concluding observations of the Human Rights Committee: on Egypt*, 28 November 2002, CCPR/CO/76/EGY, para. 6

²⁴ Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para.4

²⁵ Military Code of Justice (Law No 25/1966) as amended by Law No 16/2007

²⁶ Art.5

²⁷ Art.6 states: There shall be referral to the military justice by the President of the Republic: (a) Where the crime is one of the crimes set forth in sections (I and II) the book of the Penal Code and associated crimes (b) When the President has declared a state of emergency, he can transmit to the military justice any of the crimes that are punishable under the Penal Code or any other law.

²⁸ See also *Report on Terrorism and Human Rights*, Inter-American Commission on Human Rights, para. 230, available at <http://www.cidh.org/terrorism/eng/part.i.htm>, last accessed 6 May 2012.

²⁹ Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding observations of the Human Rights Committee, 28 November 2002 *CCPR/CO/76/EGY* para. 16(b), See also: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Human Rights Council, para. 57, 14 October 2009, A/HRC/13/37/Add.2. See also: Comments on Egypt, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Art. 9, 9 August 1993 CCPR/C/78/Add.23

law and in practice.³⁰ Further, through Decree 193 of September 2011, the SCAF increased the scope of crimes falling under emergency provisions to include, “*bullying cases...stopping transports, cutting roads, broadcasting wrong news or rumours intentionally*”.³¹ In January 2012, Field Marshal Tantawi announced a partial lifting of the emergency law except in cases of “*thuggery*”, despite there being no legal basis for such a move. No adequate definition was provided for the crime of “*thuggery*”.

On 31 May 2012 the state of emergency formally came to an end. However, Law 162/1958 has not been abolished. Furthermore, on 14 June 2012 Ministerial Decree No.4991 of 2012, issued by the Minister of Justice, came into force. Article 1 of the Decree states: “*officers and non-commissioned officers of military intelligence and military police are authorized to judicially arrest non-military individuals.*” This power of arrest can be granted by the Minister of Defence, or his authorized representative, for a wide variety of crimes, including “*shouting or singing in order to provoke or cause strife*” (Article 102 of the Penal Code), “*intentionally spreading false information with the purpose of affecting national security or terrorising people or causing prejudice against the general interest*” (Article 102bis of the Penal Code)” and “*publicising in Egypt by any means to change the fundamental principle of the Constitution or the fundamental social systems, or to allow for the domination of social class over others or the destruction of a social class, or changing the state’s fundamental social and economic systems, or the destruction of the basic system of the society whenever the use of force or terror or any other illegal means were observed in such acts*” (Article 98(b) of the Penal Code).³² On 26 June 2012 the Administrative Court suspended the implementation of Decree No.4991, although it has yet to be annulled.

The extension of military jurisdiction over these criminal offences comes in addition to the already extensive jurisdiction granted under the MCJ and the new power inserted by Article 53/2 of the SCAF’s June amendments to the Constitutional Declaration, allowing the armed forces to intervene in law enforcement duties. Taken together, it appears that while Egyptian authorities have ended the declaration of the state of emergency, Egypt remains governed as if under a *de facto* and undeclared state of emergency.

Any provisions in the new Constitution relating to states of emergency must be limited in time and to situations that threaten the life of the nation. Further, measures must not be taken under the state of emergency that derogate from Egypt’s obligations under international law, in particular, among other things, the prohibition of torture and ill-treatment, the prohibition of any kind of discrimination, and the absolute nature of the right to life.

In addition, any emergency provisions contained in the new Constitution must not allow for the derogation from the right to a fair trial before a competent, independent and impartial court or tribunal. This right must be recognised, respected and protected in all circumstances. To this end, military or exceptional courts must not be used to try civilians.³³ They also should not be used to try military or other law enforcement officers accused of serious human rights violations, including cases of torture and ill-treatment and extrajudicial killing.³⁴ Under international law, the jurisdiction of military courts must be limited to military personnel and relate strictly to military offences.³⁵ The invocation of a crisis situation should not be used, under any circumstances, to restrict the competence or capacity of the judiciary, including: the removal of jurisdiction for ordinary tribunals in cases of human rights violations; placing the administration of justice under military authority; or conferring on the military the authority to carry out criminal investigations over matters within the jurisdiction of ordinary

³⁰ Arts. 51 and 59 of the Constitutional Declaration

³¹ Presidential Decree No.126 of 2010 and Decree No. 193, 10 September 2011, Egypt’s Supreme Council of the Armed Forces Decrees

³² (Unofficial translations)

³³ The Draft Principles Governing the Administration of Justice through Military Tribunals, Emmanuel Decaux, 13 January 2006 E/CN.4/2006/58, Principle No.5

³⁴ *Id.*, Principle No.9

³⁵ *Id.*, Principle No.8

justice.³⁶

Impunity for Gross Human Rights Violations

Not only should the new Constitution provide for the end of the use of military courts to try civilians and law enforcement officers responsible for human rights violations, it should also bring the whole judicial system in line with international standards of independence. Only independent courts can properly address the legacy of human rights violations by ensuring accountability, remedy and reparation for these violations, thereby breaking the cycle of impunity that prevails in Egypt.

Under the Mubarak regime, numerous gross human rights violations were committed by law enforcement officers and other State officials. These violations included: torture and other ill-treatment; extra judicial killings; arbitrary detention; and unfair trials before military and exceptional courts. Most of these violations continued to occur during the protests that led to the toppling of Mubarak and continue today under the rule of the SCAF.

While former President Hosni Mubarak and former Minister of Interior Habib Al Adly were convicted on 2 June 2012 for some of the unlawful killings committed during the uprising, six high-ranking security officials were acquitted in the same trial. These acquittals came amid claims by the prosecution that some State institutions did not fully cooperate with investigations, in particular the Ministry of Interior and the National Security Council. There have also been broader allegations of the suppression of witness testimony and evidence tampering. The acquittal of these individuals perpetuates what is in effect a long-standing policy of impunity for law enforcement and security officials in Egypt, which existed under the Mubarak regime and has continued to exist under the SCAF. For example, on 9 March 2012 a military doctor alleged to have carried out “virginity tests” on female protestors, was acquitted by a military court on the basis of inconsistencies in witness testimony. The Court also found that the tests never took place. However, in June 2011, Major General Abdel Fattah al-Sisi of the SCAF admitted that ‘virginity tests’ had been carried out on female detainees in March, on the basis of protecting the army against possible allegations of rape.³⁷ Further, on 27 December 2011, the Cairo Administrative Court issued a ruling halting the use of “virginity tests” on female detainees in military detention facilities.

In addition, convictions that have been secured often result in inadequate sentences. For example, on 20 March 2012, the Cairo Criminal Court acquitted three police officers of the unlawful killing of protestors. In the same case the Court found 11 officers guilty of the unlawful killings but handed down a one year suspended sentence for each of them. Numerous other cases have been repeatedly adjourned.

The SCAF has failed so far to take any effective measure to address the serious human rights violations that took place before the revolution and continue to take place in Egypt, or to break the cycle of impunity that has prevailed over these crimes. Egyptian authorities must address the legacy of widespread and systematic human rights violations in Egypt by effectively investigating and prosecuting cases of gross human rights violations committed during and after the rule of former President Mubarak. The rights of the victims of these violations to truth, to a remedy and to reparation must be ensured.

³⁶ ICJ Geneva Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges in Times of Crisis, 2008, Principle 3

³⁷ Egypt: Military pledges to stop forced ‘virginity tests’, Amnesty International, 27 June 2011, available at <http://www.amnesty.org/en/news-and-updates/egypt-military-pledges-stop-forced-virginity-tests-2011-06-27>, last accessed 2 July 2012

Recommendations

The ICJ calls on the transitional authorities in Egypt to:

- i) Ensure the right of Egyptian individuals and groups representing a wide range of stakeholders, without discrimination or distinction, to participate in the constitution-drafting process and, to this end, ensure adequate time, consultation and transparency is built into the constitution-drafting process;
- ii) Provide for the establishment of a representative and democratically elected body responsible for drafting the new Constitution;
- iii) Ensure, in particular in the Constitution, the accountability of armed forces and their subordination to a legally constituted civilian authority;
- iv) Ensure the transfer of all legislative and executive powers of the SCAF, provided for in the constitutional declarations, to civilian, democratically elected authorities;
- v) Ensure, including in the Constitution, that provisions relating to states of emergency are limited in time and to situations that threaten the life of the nation, that no measures are taken under this state of emergency that derogate from Egypt's obligations under international law and, to this end, repeal the emergency law No.162/1958;
- vi) Bring the whole judicial system in line with international standards of independence, impartiality and accountability;
- vii) Repeal Decree No.4991 expanding the scope of military jurisdiction;
- viii) Reform the MCJ to restrict the jurisdiction of military courts to military offences only and to exclude cases involving human rights violations;
- ix) Break the cycle of impunity that prevails over human rights violations carried out by law enforcement and military officials and, to that end, ensure that those responsible are held accountable;
- x) Ensure prompt, thorough and impartial investigations into all allegations of human rights violations;
- xi) Ensure that persons accused of gross human rights violations, including those constituting crimes under international law, are brought to justice and prosecuted before ordinary civilian courts, in accordance with international law standards;
- xii) Ensure that sanctions are commensurate with the gravity of the crimes committed; and
- xiii) Ensure the right of victims of human rights violations to effective remedies and to reparation and, to this end, provide adequate and timely transitional justice mechanisms.