

Egypt's new Constitution: A flawed process; uncertain outcomes



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EGYPT'S NEW CONSTITUTION: A FLAWED PROCESS; UNCERTAIN OUTCOMES

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EGYPT'S NEW CONSTITUTION: A FLAWED PROCESS; UNCERTAIN OUTCOMES

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

Egypt has struggled under both the ruling of the Supreme Council of the Armed Forces (SCAF) and President Morsi to find its way to a new constitution that complies with international rule of law and human rights standards. The process leading to the adoption of a new constitution has failed to meet international principles of inclusivity, participation and transparency, and has thereby undermined the transition to a genuine democracy in Egypt.

The transition process was overseen from its inception by the SCAF. Unfortunately, instead of paving the way for a clear and participatory reform process, the SCAF consistently opted for opaque, rushed and non-consensual policies that have severely undermined both the legitimacy of the process itself and its outcomes. Even though President Morsi took over from the SCAF on 30 June 2012, the transition process continues to be carried out under the legal framework enacted by the SCAF.

Indeed, immediately following the uprising that led to the toppling of former President Hosni Mubarak, the SCAF suspended the 1971 Constitution and handpicked an eight-man committee to amend it, behind closed doors, in a period of just ten days. A set of 10 limited amendments was approved in a 19 March 2011 referendum by a sizeable majority, consequently bringing into force an amended 1971 Constitution.

However, despite this approval, on 30 March 2011 the SCAF promulgated an entirely new Constitutional Declaration, which included the articles submitted to the referendum and further articles loosely based on the 1971 Constitution. The Declaration was neither publicly discussed nor consulted upon, nor was it put to a referendum.

The SCAF used this March Constitutional Declaration and other mechanisms to exercise comprehensive control over the process leading to the adoption of a new constitution as well as over the transitional period as a whole. These attempts to broaden and consolidate control took different expressions.

First, the March Constitutional Declaration gave wide legislative and executive powers to the SCAF in the transitional period. The exercise of these powers lacked popular legitimacy and led the SCAF, on several occasions, to substitute itself for the will of the Egyptian people, including by adopting other Constitutional Declarations. One such Declaration was the 17 June 2012 Constitutional Declaration, which granted sweeping powers to the SCAF on the eve of the election of a new President. President Morsi later abrogated this Declaration and transferred these powers to himself. Moreover, through the March Constitutional Declaration, the SCAF drastically curtailed the amended 1971 Constitution without any reasoning, consultation or debate, thus creating uncertainty about the status and functioning of the institutions provided for by the 1971 Constitution in the transitional period, including the Supreme Constitutional Court.

A second attempt to reinforce SCAF's powers came with the proposed "Supra Constitutional Principles", which SCAF argued would provide certain guarantees for a

representative Constituent Assembly and for rights and freedoms to be included in the new Constitution, but which largely aimed to curtail any civilian control or oversight of the armed forces. Although this document was abandoned after strong opposition from both political parties and civil society, the SCAF continued to pursue the aims of the Principles, in particular by incorporating some of them in the June Constitutional Declaration.

Third, the aspirations of Egyptians to ensure the accountability of all State institutions and their compliance with universally recognized human rights and rule of law principles were severely undermined by the relentless efforts of the SCAF to shield the armed forces from accountability. The SCAF, through the March and June Constitutional Declarations, provided for a “constitutional framework” that paved the way for the military to operate outside any form of democratic procedures and without democratic legitimacy; unaccountable to democratically elected civilian authorities. While the unaccountability of the armed forces has been a long-standing practice in the history of Egypt, enshrining this practice into the constitutional or legislative framework violates the most basic rule of law principles.

Fourth, the organisation of both the parliamentary and presidential elections before the adoption of a new constitution that reflects the aspirations of the Egyptian people, confers specific powers to each of the State institutions, sets out the mandate of these institutions and organises the relationship between them has *de facto* prolonged the transitional process for an additional period. Indeed, the President was elected on 24 June 2012 without knowing the precise details of his mandate, how he is supposed to exercise it, and under what safeguards or oversight. This situation has been further undermined by the SCAF’s pre-emptive attempts to curtail the President’s powers, in particular through the June Constitutional Declaration.

In addition to these initiatives by the SCAF, several judicial decisions have contributed to the confusion and uncertainty regarding the drafting of a new constitution. In particular, Article 60 of the March Constitutional Declaration on the selection of the members of the Constituent Assembly led to various political conflicts and judicial proceedings about whether or not, or under which conditions, Parliament has the authority to select the 100 members of the Constituent Assembly. Consequently, the dissolution of the first Constituent Assembly, by a decision from the High Administrative Court, and the dissolution of the People’s Assembly, following a decision by the Supreme Constitutional Court, have cast serious doubts about the legitimacy and the legality of the current Constituent Assembly, and have contributed to undermining both the process of adopting a new constitution and the outcomes of the transitional process as a whole. The fact that the Administrative Judicial Court is yet to rule on the legality of the current Constituent Assembly has significantly reinforced the uncertainty about the latter’s work and its effectiveness.

Further, the March Constitutional Declaration lacks any provisions regarding the precise mechanism for adopting the Constitution and the procedure to be followed in the event that the draft Constitution is rejected. Additionally, the six-month timescale for drafting the Constitution contained in Article 60 is unlikely to accommodate the necessary consultation and participation required in order to draft a constitution that truly reflects the views of the Egyptian population. Potentially even more problematic would be the establishment of a third Constituent Assembly

by President Morsi, since it would be required to draft a new constitution within three months.¹

As a result of this confused and rushed constitution-making process, the draft of the new Constitution, published by the Constituent Assembly on 14 October 2012, provides few guarantees to reinforce the rule of law and human rights in Egypt. The provisions relating to the armed forces are insufficient to set up comprehensive civilian oversight of the armed forces and therefore reinforce their unaccountability. In addition, while most of the articles relating to human rights and freedoms extend the language of the 1971 Constitution in this regard, they fall short of Egypt's obligations under international law, including requirements relating to torture and other ill-treatment, equality before the law and freedom of thought, conscience and religion. Moreover, the rights set out in the Draft Constitution continue to be subject to "*the limits of the law*" or "*as defined by the law*", with no restriction on what or how extensive these limitations might be and whether the limitations are precise, free of ambiguity and necessary in a democratic society. Furthermore, the Draft Constitution does little to ease concerns regarding the judiciary, as it provides insufficient guarantees for the independence, impartiality and accountability of the judiciary, including the Office of the Public Prosecutor and the Supreme Constitutional Court.

The Egyptian authorities must address the challenges currently facing the process of constitutional reform as a matter of urgency. The current Constituent Assembly should ensure that the process for drafting the Constitution is in accordance with international standards of inclusivity and transparency. Equally important is the need to determine the procedure to be followed by the Constituent Assembly and the timeframe for drafting the Constitution in a way that guarantees the full participation of the Egyptian people. In addition, the procedure for adopting the Constitution must also be addressed and clarified in order to avoid further confusion and contention.

In meetings the International Commission of Jurists (ICJ) had with Egyptian officials, including the former Minister of Justice, Mr Adel Abdel-Hamid Abdullah, the ICJ was told that the 1971 Constitution was a sensible starting point for the drafting of a new Constitution or that the 1971 Constitution needed some minor amendments only. However, as this report demonstrates, the 1971 Constitution falls short of international law, rule of law and human rights standards in many respects. The new Constitution must comply with these standards in order to ensure a clean break with the practices and policies of President Mubarak's regime.

The Egyptian authorities have failed so far to meet the aspirations of the Egyptian people to establish the rule of law, protect the enjoyment of human rights without restriction, guarantee the independence of the judiciary in all circumstances, and ensure the effectiveness of democratic institutions. These aspirations were at the heart of the sweeping popular protests that led to the toppling of former President Mubarak. Instead, since then, Military and Ministerial Decrees have been passed undermining the enjoyment of human rights, including increasing the jurisdiction of military and state security courts and attempting to grant the military a role in law enforcement activities.²

Major reforms of the Egyptian legal system must therefore be implemented, in particular dismantling the legal framework relating to the state of emergency by repealing the emergency law and other elements of the Egyptian law that severely

¹ Article 3, Constitutional Declaration 12 August 2012, available at http://www.sis.gov.eg/En/LastPage.aspx?Category_ID=1232

² Decree No.193, of 10 September 2011 and Ministerial Decree No.4991 of 13 June 2012

restrict the enjoyment and exercise of human rights and freedoms, and ending the use of military and special courts to try civilians.

In this regard, the new Constitution must ensure that provisions relating to the state of emergency are limited in time and to situations that threaten the life of the nation. In addition, measures taken under this state of emergency must not derogate from Egypt's obligations under international law, in particular, amongst 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. Any emergency provisions contained in the new Constitution must also not derogate from the right to a fair trial before a competent, independent and impartial tribunal. This right should be recognised, respected and protected in all circumstances. To this end, military or exceptional courts must not be used to try civilians. They also must 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 unlawful killings. The jurisdiction of military courts must be limited to military personnel and relate strictly to military offences.

Not only must the new Constitution ensure an end to the use of military courts to try civilians, it must also bring the whole judicial system in line with international standards of independence and accountability. Therefore, the Egyptian Constitution should guarantee the independence of the High Judicial Council and, to this end, ensure that the executive has no control over the nomination of the High Judicial Council's members as well as over its administration and the broader administration of the judiciary. The Constitution must also guarantee the independence of the Office of the Public Prosecutor, which has long been under the effective control of the executive. Prosecutors play a crucial role in ensuring the proper administration of justice and in enforcing human rights, in particular by investigating and prosecuting human rights abuses. In Egypt, Prosecutors have failed to impartially discharge these functions and to conduct prompt, thorough, independent and impartial investigations into human rights violations that have taken place for decades, some of which continue to take place. Most of the claims of the victims of serious human rights abuses have been either dismissed or not properly prosecuted.

An additional aspect of ensuring that the legacy of human rights violations is addressed effectively is the need to provide for the necessary guarantees for the non-repetition of these violations. This should be addressed in the Constitution, including by setting out the basis for strategies and mechanisms to deal with this legacy in a comprehensive manner. The Constitution should also provide for meaningful mechanisms to enforce human rights, in particular by providing for an effective judicial remedy to protect constitutional rights and uphold the supremacy of the Constitution. In this regard, the Constitution should adequately guarantee the independence of, and define the role and competences of and procedures before, the Constitutional Court so that it has the ability to control the conformity of laws with the Constitution, in particular by ensuring that these laws do not undermine or violate universally recognized and accepted human rights. Egyptians must have full and unrestricted access to this court.

"Egypt's New Constitution: A Flawed Process; Uncertain Outcomes", a report by the International Commission of Jurists, examines the process of constitutional reform taking place in Egypt following the ouster of former President Mubarak on 11 February 2011. In particular, it examines the transition process to date as well as the drafting procedure for, and the content of, the new Constitution. It also analyses whether this process conforms to international rule of law and human rights standards and addresses the challenges that must be overcome in order to tackle the legacy of

President Mubarak's regime with due regard for the rule of law and human rights. In so doing, it examines the provisions relating to human rights and rule of law issues in the 1971 Constitution and assesses them in light of international law and standards. Where applicable, the report also refers to international and regional mechanisms and standards, some of which are not directly binding on Egypt but provide authoritative guidance as to the best legal standards available and from which Egyptian authorities can seek inspiration.

The report sets out urgent institutional and legal reforms that, together with sufficient political will, may help to: ensure the drafting of a constitution in accordance with international rule of law and human rights standards; provide for constitutional and other legal guarantees against the non-repetition of human rights violations; and create an independent and impartial justice system that would ensure the proper administration of justice in Egypt.

Through this Report, the ICJ urges the Egyptian authorities to:

- i) Ensure the right of Egyptians to fully participate in the constitution-making process and to take part in the conduct of public affairs;**
- ii) Ensure adequate time is provided for the constitution-making process to allow for a comprehensive public dialogue in order to draft a constitution that fully represents the views of Egyptians;**
- iii) Provide for the establishment of a representative and democratically elected body responsible for drafting the new Constitution, if the Constituent Assembly fails to meet these standards or is dissolved by the upcoming decision of the High Administrative Court;**
- iv) Ensure, in the Constitution, the accountability of the armed forces and their subordination to a legally constituted civilian authority;**
- v) Ensure the role of the armed forces is adequately defined in the Constitution and specifically limited to matters of national defence only;**
- vi) Ensure the supremacy of the rule of law and that the powers of the State are not exercised arbitrarily;**
- vii) Ensure the new Constitution fully guarantees the principle of separation of powers and, to that end, outline clearly the respective duties of the executive, judiciary and legislature;**
- viii) Incorporate in the new Constitution a comprehensive Bill of Rights in accordance with international human rights law and standards;**
- ix) Define the content and substance of these rights as well as their scope, including permissible limitations or restrictions the State may be able to impose;**
- x) Ensure that these limitations or restrictions are precise, free of ambiguity and necessary in a democratic society;**
- xi) Ensure that peremptory norms, including, among others, the right to life; the right to be free from torture or other ill-treatment; the right not to be subjected to enforced disappearance; the right to a fair trial; and the application of the principle of legality, are rights from which no derogation is accepted, including in times of emergency;**
- xii) Ensure the right of victims of human rights violations to an effective remedy and to reparation and, to this end, provide adequate enforcement mechanisms;**

- xiii) Ensure that the new Constitution contains provision for independent judicial review of legislative and executive acts in accordance with the Constitution, interpreted in line with international law and standards;**
- xiv) Bring the whole judicial system, including the Office of the Public Prosecutor, in line with international standards of independence, impartiality and accountability; and**
- xv) End the use of military and special security courts to try civilians and exclude all cases involving human rights violations from the jurisdiction of such courts.**

This report is compiled on the basis of findings from a high-level mission the ICJ conducted in Egypt from 30 January to 3 February 2012, the aim of which was to assess the rule of law and human rights situation in Egypt and the planned process of constitutional reform, and on the basis of continued monitoring of the transition process. The ICJ delegation comprised Justice Azhar Cachalia, ICJ Commissioner and Judge of the South African Supreme Court of Appeals, Wilder Tayler, ICJ Secretary General, Said Benarbia, ICJ senior legal adviser for the Middle East and North Africa (MENA) programme, Alice Goodenough, ICJ legal adviser for the MENA Programme, and Marya Farah, ICJ associate legal adviser for the MENA Programme. The delegation met with the then Chief Justice of the Court of Cassation (currently head of the Constituent Assembly), Hossam El Gheriany, then Head of the Advisory Council to the SCAF, Mansour Hassan, then Minister of Justice, Adel Abdel-Hamid Abdullah, and other senior members of the Ministry of Justice and Ministry of Foreign Affairs, as well as judges, lawyers, NGOs and victims that suffered human rights abuses during the protests that led to the ouster of former President Mubarak.

CHRONOLOGY

2011

- 11 February President Hosni Mubarak forced from office; SCAF assume power
- 13 February Constitutional Declaration promulgated by SCAF suspending 1971 Constitution
- 9 March Female protestors arrested, detained in military detention and subject to forced genital examination; defended as "virginity tests"
- 10 March SCAF decree amending Penal Code to include Article 375 bis and Article 375 bis A on "hooliganism, terrorizing, and thuggery"
- 19 March Referendum approves set of 10 amendments to 1971 Constitution
- 30 March Constitutional Declaration promulgated by SCAF, which amends both the amendments approved in the 19 March referendum and the 1971 Constitution
- 18 July SCAF restructures the cabinet, issues decree that changes appointment of SCC President to the oldest of the three vice-presidents
- 20 July SCAF amends electoral law
- 12 September SCAF passes executive decree increasing the number of acts falling under emergency law provisions
- 27 September SCAF further amends electoral law and timetable for Parliamentary elections set out
- 1 November Publication of latest draft of "Supra Constitutional Principles"
- 18 November Widespread and prolonged protests commence against the Supra Constitutional Principles and military rule and are forcibly repressed; over 35 people are killed
- 28 November First phase of elections for People's Assembly begins
- 7 December SCAF appoints a new cabinet under Prime Minister Kamal al Ganzouri

2012

- 23 January People's Assembly holds first session
- 24 January SCAF announces partial lifting of the state of emergency, except in cases of "thuggery"
- 11 March Military court finds doctor accused of carrying out forced "virginity tests" innocent
- 17 March Parliament votes for a Constituent Assembly composed of 50 percent Parliamentarians and 50 percent non-Parliamentarians
- 24 March First Constituent Assembly elected by Parliament, liberal bloc MPs walk out of the voting

28 March	Constituent Assembly holds first session; various liberal and secular members withdraw
10 April	High Administrative Court decision dissolves first Constituent Assembly
23-24 May	First round of presidential elections take place
31 May	State of emergency formally comes to an end
6 June	Revised criteria for election of Constituent Assembly agreed by Parliament
12 June	Second Constituent Assembly elected by Parliament
13 June	Ministerial Decree expanding the military's law enforcement powers
14 June	Supreme Constitutional Court decision declares parliamentary elections law unconstitutional and the formation of the People's Assembly "null and void"; Supreme Constitutional Court decision declares amendments to political exclusion law unconstitutional
15 June	SCAF Decree dissolving Parliament
16-17 June	Presidential run-off held
17 June	Constitutional Declaration promulgated by SCAF amending March Constitutional Declaration, including by consolidating legislative and executive power in the SCAF
24 June	Mohammed Morsi announced as President
26 June	High Administrative Court decision suspends Ministerial Decree of 13 June 2012
30 June	President Morsi sworn in
8 July	Presidential Decree reinstating Parliament
10 July	Supreme Constitutional Court decision suspending the Presidential Decree of 8 July
13 July	President-appointed committee tasked with reviewing sentences of military courts against civilians; recommends pardoning them all
12 August	Constitutional Declaration promulgated by President Morsi abrogating 17 June Declaration and transferring powers from SCAF to the President; Orders retirement of Field-Marshal Mohamed Hussein Tantawi, Minister of Defence and former head of SCAF, and Samy Annan, Chief of Staff
22 September	High Administrative Court decision confirming SCC 14 June decision regarding unconstitutionality of People's Assembly
22 September	Presidential order appointing 3,649 judges to State Security Courts
14 October	Amended draft of the new Constitution published

GLOSSARY

ACHPR	African Charter on Human and Peoples' Rights
CA	Constituent Assembly
CAT	Convention Against Torture
CCP	Code of Criminal Procedure
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CPPED	Convention for the Protection of all Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
HJC	High Judicial Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
JAL	Judicial Authority Law
JID	Judicial Inspection Directorate
MCJ	Military Code of Justice
NDC	National Defence Council
SCAF	Supreme Council of Armed Forces
SCC	Supreme Constitutional Court

A. The Constitution-Making Process

Egypt is yet to have a constitution drawn up and adopted in accordance with international law and standards. Historically, Egypt's constitutions were generally drafted and approved under proceedings that failed to meet democratic standards of inclusiveness, participation and transparency.

1) The 1971 Constitution and the March 2011 Constitutional Declaration

The 1971 Constitution was drafted by a committee appointed by President Anwar Al Sadat shortly after he took over as acting president on 15 October 1970. Both the 1971 Constitution and its amendments in 1980, 2005, and 2007 were initiated by the executive, drafted under a procedure controlled by the executive and aimed to reinforce the executive's control over the Egyptian legal and political systems.³

The 1971 Constitution was submitted to a referendum and received, according to the official results, a 99 percent "yes" vote. Amendments to the constitution all also passed with overwhelming margins that cast serious doubts over the transparency of the whole constitution-making and adoption process.⁴

The transparency of the constitution-making process was also undermined under the rule of the Supreme Council of Armed Forces (the SCAF). The SCAF, an unaccountable military body, took *de facto* control in Egypt in the wake of Hosni Mubarak's ouster. After suspending the 1971 Constitution,⁵ the SCAF handpicked an eight-man committee to draft a governance document for the transitional period. The committee failed to hold any meaningful consultations with political parties, civil society actors or other stakeholders, either on the content or the format of the amendments. Egyptians were given three weeks to consider the amendments and give a "yes" or "no" vote on the whole package.

The result was that a limited set of 10 amendments to the 1971 Constitution were approved by a sizeable majority on 19 March 2011 through a referendum, bringing into force an amended version of the 1971 Constitution, although the precise date it was due to come into force was not made apparent. The revised Constitution granted no role for the SCAF.

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 March Constitutional Declaration). The March Constitutional Declaration is one of four such declarations that the SCAF adopted after February 2011, without any meaningful consultations with political actors and other

³ For example, in 2007, amended Article 179 of the 1971 provided that "the President may refer any terror crime to any judiciary body stipulated in the Constitution or the law".

⁴ Results of May 2005 referendum available at: <http://electionguide.org/results.php?ID=81>, last accessed 12 October 2012; Results of the March 2007 referendum available at: <http://electionguide.org/results.php?ID=1324>, last accessed 12 October 2012

⁵ Constitutional Declaration of 13 February 2011

stakeholders or any form of democratic affirmation.⁶ Most recently, on 17 June 2012, on the eve of the election of a new President and following the Supreme Constitutional Court's (SCC) decision declaring the formation of the whole People's Assembly null and void, the SCAF promulgated substantial amendments to the March Constitutional Declaration.⁷ Once again, these amendments were the result of unilateral action on the part of the SCAF. Although these amendments were later abrogated by President Morsi, the effects of SCAF's other Constitutional Declarations continue to guide the transitional process.

By unilaterally adopting these Constitutional Declarations, the SCAF undermined the right of Egyptians in all sectors of society to meaningfully participate in the drafting and adoption of a new Constitution. 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.*"⁸

In its General Comment on Article 25, the UN Human Rights Committee, which is the monitoring 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.*"⁹ The Committee also recognised that Article 25 guarantees that: "*peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government*";¹⁰ and that: "*Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process.*"¹¹

These principles are well established in other regional systems. For example, Article 2 of the Inter-American Democratic Charter, the instrument that contains the collective commitment to maintaining and strengthening the democratic systems in the Americas, recognises that: "*Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.*"¹²

⁶ Constitutional Declaration of 13 February 2011, suspending the 1971 Constitution; Constitutional Declaration of 30 March 2011; Constitutional Declaration of 25 September 2011 amending Article 38; Constitutional Declaration of 17 June 2012

⁷ Judgment in SCC Case No.20/24, published in the Official Gazette – Issue 24, Appendix A, 14 June 2012

⁸ International Covenant on Civil and Political Rights, New York, 16 December 1966, Art. 25. Egypt signed the ICCPR on 4 August 1967 and ratified it on 14 January 1982. See also Article 21 of the Universal Declaration for Human Rights, Paris, 10 December 1948, which refers to the right to "democratic participation" and, in particular, Article 21(3): "*The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*"

⁹ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) CCPR/C/21/Rev.1/Add.7, Para. 5

¹⁰ *Id.* Para.2

¹¹ *Id.* Para.6

¹² Inter-American Democratic Charter, Lima, 11 September 2001

2) Formation and dissolution of the first Constituent Assembly

Both the 19 March amendments (Articles 189 and 189 Bis) and the March Constitutional Declaration failed to provide a precise and coherent framework for the constitution-making process and the establishment of the Constituent Assembly (CA). Article 60 of the March Constitutional Declaration states: *"Within 6 months of the 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."*¹³ Through Article 60, the SCAF amended Article 189 and 189 Bis, which were submitted to referendum, and substituted itself for the "President"; made the drafting of a new constitution mandatory, as opposed to permissive; and ensured that the SCAF controlled the Constitution-drafting process.

Neither the amendments approved by referendum nor the Declaration set out the criteria that should be applied in relation to the selection of candidates, whether these candidates could include parliamentarians, what requirements were needed to ensure the inclusive representation of all sectors of Egyptian society in the CA and what should happen where the referendum resulted in a "no" vote.

In November 2011, the then Egyptian Deputy Prime Minister, Ali Al-Selmy, published the "Supra Constitutional Principles", or "Selmy document", with the stated purpose of establishing *"criteria for the formation of the Constituent Assembly to develop a new constitution for the government"*.¹⁴ These principles were purportedly developed in order to guarantee basic rights and a more inclusive approach regarding the selection of the members of the CA. However, they also gave SCAF broad powers to request the redrafting of certain provisions of the new Constitution as well as the right to form a new assembly if the draft was not completed within six months of the CA's formation.

Following widespread protests, the Supra Constitutional Principles were seemingly abandoned in early December 2011, leading the SCAF's newly appointed "advisory council" to set up a panel to discuss the criteria for members of the CA with various political groups. By mid-March, Parliament had narrowed the proposals for the criteria, reportedly submitted to it by NGOs, parliamentarians, trade unions and syndicates, to three: a CA made up exclusively of parliamentarians; a CA devoid of any parliamentarians; and a mix of parliamentarians and the public.¹⁵ A joint session

¹³ Article 60, 30 March 2012 Constitutional Declaration, available at: <http://www.egypt.gov.eg/arabic/laws/constitution/default.aspx>, last accessed 12 October 2012

¹⁴ Supra-Constitutional Principles available at: http://www.mpil.de/shared/data/pdf/pdf/2011.11_-_constitutional_principles_document_arabic8.pdf
Unofficial translation available at http://www.mpil.de/shared/data/pdf/pdf/2011.11_-_constitutional_principles_document_english2.pdf, last accessed 12 October 2012

¹⁵ *"The Constitution" is in the hands of the People's Assembly and Shura Council who agreed that the representation of members will be 50% in the Constituent Assembly*, Al Masry Al Youm, 18 March 2012. Available at: <http://today.almazryalyoum.com/default.aspx?IssueID=2444>, last accessed 14 October, 2012

of Parliament on 17 March 2012 resulted in a vote for a CA composed of 50 percent parliamentarians and 50 percent non-parliamentarians.

On 24 March 2012, Parliament met to elect the members of the CA, choosing from over one thousand nominees proposed by political parties and MPs.¹⁶ The criteria and procedures by which the list was drawn up, including whether there were safeguards to ensure the election of members that were representative of a broad cross-section of Egyptian society, were not publicized. Following the vote, over 20 of the CA members-elect resigned, citing lack of equal representation for women and religious and other minorities.

Indeed, both the Parliamentary elections and the selection of the members of the first CA resulted in the effective marginalisation of women and religious and other minority groups from participation in the conduct of public affairs, and failed to secure their fair representation in publicly elected institutions.¹⁷ Article 7 of the Convention on the Elimination of Discrimination Against Women (CEDAW), to which Egypt is a party, obliges States to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, by ensuring the rights of women: *"(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government."* The African Charter on Human and Peoples' Rights (the ACHPR), to which Egypt is party, also recognises the right to political participation without discrimination.¹⁸

Under international law, States have an obligation to ensure that no distinction, exclusion, or restriction based, among others, on race, religion, or ethnic origin has the purpose or effect of restricting the enjoyment and exercise of political rights, including the right to take part in the conduct of public affairs.¹⁹ Consequently, States have the obligation to address the structural obstacles that prevent people belonging to these groups from exercising their rights.

The Constitution-making process in Egypt has been undermined not only by the exclusion of large sectors of the Egyptian society but also by political discord, uncertainty and, as mentioned above, by the ambiguity of some Articles of the Constitutional Declaration, in particular, Article 60. To overcome this ambiguity, the first CA sought to establish bylaws to guide the drafting process, including rules on the attendance of CA members, criteria on the replacement of members and the establishment and duties of committees within the CA.²⁰

¹⁶ *Parties make nominations for Constituent Assembly*, 22 March 2012, Daily News Egypt, available at <http://dailynewsegypt.com/2012/03/22/parties-make-nominations-for-constituent-assembly-elections/>, last accessed 12 October 2012.

¹⁷ For example, a total of 12 women were elected to the People's Assembly, 4 to the Shura Council and 6 to the first CA. One factor that contributed to the lack of female representation was the removal by the SCAF of the quota for women in the electoral law, through Decree 108/2011.

¹⁸ Article 13 of the Convention on the Elimination of Discrimination Against Women, New York, 18 December 1979. Egypt signed CEDAW on 16 July 1980 and ratified it on 18 September 1981; and Article 2 of The African Charter on Human and Peoples' Rights, June 1981.

¹⁹ See for example, Articles 25 and 26 of the ICCPR, and Article 5 of the Convention on the Elimination of Racial Discrimination (CERD)

²⁰ *Constitution will likely be crafted behind closed doors*, Al Masry Al Youm, 5 April 2012, available at <http://www.egyptindependent.com/news/constitution-will-likely-be-crafted-behind-closed-doors>, last accessed 12 October 2012.

However, meetings of the first CA were rendered moot by a judgment of the High Administrative Court²¹ on 10 April 2012.²² In this case, the applicants, a group of activists and constitutional law experts, argued that the CA's mandatory composition of 50 percent parliamentarians and 50 percent non-parliamentarians 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 but as members of a committee charged with selecting the members of the CA, which was held to be an administrative task.²³ 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. In reaching this conclusion the Court failed to consider the legality of the Constitutional Declaration. Other views hold that the assumption that Parliament required a permissive power before allowing elected representatives to take part in the constitution-drafting process was open to challenge on several grounds, particularly given that the permissive power in this case derived from the unelected SCAF.

3) Establishment of a new Constituent Assembly

Following the decision of the High Administrative Court, the SCAF met with political parties on 28 April and proposed six main criteria for the election and functioning of a new CA.²⁴ These were rejected as an infringement on Parliament's authority.²⁵ Following the rejection, the SCAF delivered a 48-hour ultimatum for Parliament to agree on criteria or face unilateral action by the SCAF.²⁶ Revised criteria were agreed on 6 June 2012 by the Parliament and a new CA was elected on 12 June.²⁷

The CA quickly set up bylaws outlining the course of its work. Article 14 of the bylaws established five specialized committees.²⁸ The CA further issued guidance on the work of the committees and, in particular, that they should: take into account the objectives of the "January 25 revolution"; rely on Egypt's past Constitutions, including the March Constitutional Declaration; take into consideration the Constitutions of other countries; and refer to the dispositions of international human rights treaties and covenants on human rights.²⁹

²¹ Under the civil law system, the Administrative Court system, or State Council, is a judicial body charged with oversight of issues relating to public administration. The High Administrative Court is at the head of this system.

²² Decision of the High Administrative Court, First Chamber, Tuesday 10 April 2012 Case No.26657

²³ *Id.*

²⁴ *SCAF and parties agree on Constituent Assembly criteria*, 28 April 2012, available at <http://en.aswatmasriya.com/news/view.aspx?id=e57dd8de-002c-41fa-bc3d-0ca8efad23f0> last accessed 12 October 2012

²⁵ *Legislative committee of the People's Assembly rejects military and parties agreement on the criteria of the Constituent Assembly*, 29 April 2012. Available at: <http://www3.youm7.com/News.asp?NewsID=665041>, last accessed 14 October 2012

²⁶ Update: SCAF to set Constituent Assembly criteria if parties fail to agree, Egypt Independent, 5 June 2012, available at: <http://www.egyptindependent.com/news/military-council-meets-party-chiefs-over-political-politicians-fjp-boycotts-news-2> last accessed 12 October 2012

²⁷ It is notable that only 7 women were elected to the new CA

²⁸ These included: 1) The form of the State and the basic fundamentals of the Egyptian society; 2) Freedoms, rights, and general obligations; 3) System of governance and public authorities; 4) Independent accountability and institutional control; and 5) Propositions, public dialogue and outreach

²⁹ CA guidance on the work of the specialized committees, available at: <http://dostour.eg>, last accessed 12 October 2012

When adopting articles the bylaws require consensus by all 100 members. If consensus is not reached, amendments are made and the article must be approved by 67 members. If an article again fails to pass, it must be approved by 57 members after further amendments.

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 2012, which held that the electoral law for the People's Assembly elections was unconstitutional and led to the dissolution of Parliament. Given that members of the now dissolved Parliament, elected pursuant to this "unconstitutional" electoral law, were elected to the current CA, the legality of the CA has been challenged. Numerous cases have therefore been filed before the Administrative Court on this basis as well as on the basis of a lack of adequate representation on the CA.³⁰ Notwithstanding the ruling of the SCC and the pending legal challenge, the CA has continued to forge ahead.

In addition to the challenges regarding its legality, the CA is also facing time restrictions, since under Article 60 of the March Constitutional Declaration the CA must draft the Constitution within six months of its appointment, with a referendum being held within 15 days of its completion. The current CA was elected in June 2012. It should therefore present a draft constitution by the end of December 2012. This time frame is insufficient to draft a constitution that fully represents the views of all Egyptians.

Guidance provided by the United Nations on constitution drafting suggests that 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.³¹ 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.

Only a democratically elected and fully representative CA, operating under a comprehensive mandate and with a sufficient time frame, can allow for the requisite public dialogue to take place, and can consequently define constitutional principles and establish the structure, procedures, powers, and duties of government institutions, as well as a Bill of Rights. Sufficient time, transparency and consultation mechanisms must therefore be built into the process, none of which are present in the March Constitutional Declaration or in subsequent Constitutional Declarations.

B. Civilian Oversight of the Armed Forces

The 1971 Constitution contained few provisions relating to the armed forces. Article 150 placed the President as the Supreme Commander of the armed forces and

³⁰ Case No.49469 for the judicial year 66. At the time of writing the Administrative Court had referred the case to the SCC, requesting the SCC to rule on the constitutionality of Article 1 of law 79 of 2012, issued by President Morsi, which states that the decisions of the Parliament regarding the elections of the members of the CA are subject to the control of the constitutionality of laws.

³¹ See, for example, Guidance Note of the Secretary General, United Nations Assistance to Constitution-making Processes, Principle 4 available at http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf last accessed 12 October 2012.

granted him the power to declare war, subject to the approval of the People's Assembly. Article 180 further established that the armed forces belonged to the people and limited its duty to protecting the country, its territorial integrity and security.

However, these limited constitutional provisions did not prevent the army, in practice, from becoming pivotal to the political and economic system. The economic power of the army extends from military and civilian industries to agriculture and national infrastructure, including the construction of roads, schools, and bridges. This economic power has allowed the army to exercise comprehensive influence over political issues. Indeed, since the 1952 overthrow of the Egyptian monarchy by Gamal Abd Al-Nasser and the Free Officers movement, the Egyptian army has continued to play a major role in shaping Egypt's policies.

Following the toppling of former President Mubarak, this power has increased further, and has been "constitutionalized". Indeed, while the constitutional amendments put to referendum on 19 March 2011 did not alter the above provisions of the 1971 Constitution, the March Constitutional Declaration granted the army, in the form of the SCAF, far-reaching legislative and executive powers.

Following the issuance of the March Constitutional Declaration, the SCAF initiated various mechanisms to maintain the autonomy of the armed forces, free from any form of civilian oversight. One attempt came through the Supra Constitutional Principles, which pronounced the SCAF as "*solely responsible for all matters concerning the armed forces, and for discussing its budget, which should be incorporated as a single figure in the annual state budget*" and granted it exclusive competence to approve all bills relating to the armed forces before they come into effect. Further, Principle 9 included as one of the duties of the armed forces a mission to "*defend constitutional legitimacy*".³²

Although the Supra Constitutional Principles were quickly abandoned, the SCAF's June 2012 amendments to the March Constitutional Declaration reflected the aims of these Principles to reinstate the autonomy of the armed forces free from any civilian oversight, including by granting comprehensive authority to the SCAF for matters relating to the armed forces; empowering the SCAF with a veto power over any declaration of war; and providing for the use of the armed forces to maintain security and defend public property, including outside of an armed conflict.³³

The uprising that led to the toppling of President Mubarak was centred on the ideal of ensuring the accountability of all State institutions and their compliance with universally recognized rule of law principles. Although the June Constitutional Declaration was abrogated by President Morsi in August 2012, the army continues to be one of the most powerful and influential state institutions in Egypt.

The draft of the new Constitution, published by the CA on 14 October 2012, (the Draft Constitution) offers few articles relating to the armed forces. Article 196 establishes a National Defence Council (NDC), under the chairmanship of the President of the Republic, which is empowered to deal with issues relating to the means necessary to

³² Supra-Constitutional Principles available at: http://www.mpil.de/shared/data/pdf/pdf/2011.11_-_constitutional_principles_document_arabic8.pdf
Unofficial translation available at http://www.mpil.de/shared/data/pdf/pdf/2011.11_-_constitutional_principles_document_english2.pdf, last accessed 12 October 2012

³³ Amended Article 53 of the Constitutional Declaration

secure the security and the safety of the State.³⁴ Article 197 provides that the armed forces belong to the people and have a duty to protect the State, and to maintain the security and safety of its territory. However, Article 198 provides that the Minister of Defence is the Commander in Chief of the armed forces and is appointed from among its officers.

These Articles are insufficient to set up comprehensive civilian oversight of the armed forces. They enshrine in the Constitution a practice of precluding civilians from serving as Minister of Defence and, consequently, reinforce the unaccountability of the armed forces.

In this respect, the UN Human Rights Council recently highlighted, in Resolution 19/36 on human rights, democracy and the rule of law, the need to ensure that *"the military remains accountable to relevant national civilian authorities"*.³⁵ The UN Human Rights Committee has also persistently pointed out the need to subject the armed forces to effective control by civilian authorities. The Committee has previously expressed its concerns at *"the lack of full and effective control by civilian authorities over the military and the security forces"*,³⁶ as well as *"the lack of a clear legal framework, defining and limiting the role of the security forces and providing for effective civilian control over them."*³⁷

From a comparative perspective, Article 4 of The Inter-American Democratic Charter states 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"*.³⁸ The General Assembly of the Organization of American States has also highlighted that *"the system of representative democracy is fundamental for the establishment of a political society wherein human rights can be fully realized and that one of the fundamental components of that system is the effective subordination of the military apparatus to civilian power"*.³⁹ 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"*.⁴⁰

³⁴ The NDC is composed of: the Presidents of the People Assembly and the Shura Council; the President of the Cabinet; the Ministers of Defence, Foreign Affairs, Finance, and Interior; the Presidents of the General and Military Intelligence Services; the Chief of Staff of the Army; and the Commanders of the navy and air forces and air defence.

³⁵ Human Rights Council, A/HRC/Res/19/36, 19 April 2012, para.16(j)(vi). See also a similar statement by its predecessor the UN Commission on Human Rights in Resolution 2000/47, para.1(c)(ix), 25 April 2000,

³⁶ Concluding Observations of the Human Rights Committee: El Salvador, doc CCPR/C/79/Add. 34, 18 April 1994; part 4. Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/013a57379e3ccd57c12563ed0046d4c4?Opendocument> last accessed 12 October 2012

³⁷ Concluding Observations of the Human Rights Committee on Romania, CCPR/C/79/Add. 11, 29 July 1999, para.9

³⁸ The Inter-American Democratic Charter, 11 September 2001

³⁹ Preamble of resolution AG/RES. 1044 (XX-0/90) adopting the Annual Report of the Inter-American Commission of Human Rights, June 8, 1990. See also Annual report of the IACHR for 1990-1991 available at: <http://www.cidh.org/annualrep/90.91eng/chap.4d.htm> last accessed 12 October 2012

⁴⁰ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Venezuela, State Security*, 29 December 2003, OEA/Ser.L/V/II.118, para.280, available at: <http://www.cidh.org/countryrep/Venezuela2003eng/chapter3.htm#A>. last accessed 12 October 2012. See also comments made by the Commission in the case of Guatemala, Inter-American

The drafting of the new Constitution offers a unique opportunity to fully confront the issue of civilian control over, and the accountability of, the armed forces. It also provides an opportunity to ensure appropriate scrutiny and transparency over the economic interests of the armed forces, and to guarantee that its role is limited to national defence.

C. Rule of Law and Separation of Powers

1) *Separation of Powers under the 1971 Constitution*

Part V of the 1971 Constitution outlined the powers of the three separate branches of government, providing chapters on the Legislature,⁴¹ the Executive,⁴² and the Judicial Authority.⁴³ Although the powers of these branches were spelled out in the Constitution, the independence and functioning of both the legislature and the judiciary suffered under the rule of former President Mubarak. These powers were either insufficient, particularly in light of an Emergency Law that granted sweeping powers to the executive, or lacked the clarity to ensure the adequate delimitation and separation of power in practice.⁴⁴

The result was the heavy predominance of the executive, in particular the President, over the other branches of government. Indeed, the President was constitutionally empowered to appoint one third of the Shura Council⁴⁵ and, under Article 136, to dissolve the People's Assembly when "necessary". No specific details were provided for what conditions might be necessary so as to permit dissolution. Article 141 also gave the President a large discretionary power to "appoint the Prime Minister and relieve him", and "to appoint his deputies, the ministers and their deputies and relieve them of their posts." No constitutional constraints were imposed on these appointments or dismissals. Further, the President was constitutionally empowered to exercise comprehensive influence over the judiciary. Actions that impeded the judiciary's full autonomy ranged from the executive's power of appointment of certain judicial positions to the extensive powers granted to the President under emergency provisions in the Constitution and under the Emergency Law.⁴⁶ These broad presidential powers were criticized by the Human Rights Committee: "*The President's role as both part of the executive and part of the judiciary system is noted with concern by the Committee.*"⁴⁷ (See chapter E below on the Constitution and the Judiciary).

Commission on Human Rights, *Justice and Social Inclusion: The Challenges of Democracy in Guatemala, General Conclusions on the Rule of Law in Guatemala*, doc. 5 rev. 10EA/Ser.L/V/II.118, 29 December 2003.

⁴¹ Part V, Chapter II, Articles 86-136 delineates the duties and powers of the People's Assembly. Part VII, Chapter I, Articles 194-205, delineates the duties and powers of the Shura Council, added following constitutional amendments in 1980.

⁴² Part V, Chapter III, Articles 137-152, delineates the duties and powers of the President, while the criteria and method of electing the president is set out at Part V, Chapter 1, Articles 73-85.

⁴³ Part V, Chapter IV, Articles 165-173, governs the Judiciary Authority, Part V, Chapter V, Articles 174-178, deals with the SCC.

⁴⁴ Emergency Law No.162 of 1958, as amended

⁴⁵ Article 196 of the 1971 Constitution. Article 35 of the March Constitutional Declaration similarly affirms, "The Shura Council will be composed of...one-third of whom will be appointed by the president of the republic."

⁴⁶ Law No.162 of 1958, as amended.

⁴⁷ Concluding Observations of the Committee on Human Rights on Egypt, CCPR/C/78/Add.23, 9 August 1993, para.9

These provisions, together with Article 73 of the 1971 Constitution which gave the President the broad duty to “*tend to the boundaries between authorities in such way as to ensure that each shall perform its role in national action*,” granted the President a critical role as an active player and arbiter over the functioning and constitutional remit of the other branches.

Consequently, although the 1971 Constitution provided for a bicameral legislature with detailed competences, in practice, the legislature was viewed as a rubber stamp for executive action. Safeguards designed to ensure a check over the executive, such as Parliament’s ability to approve or reject legislation adopted by the President pursuant to Article 108 of the 1971 Constitution, did not function effectively.⁴⁸ One of the primary reasons for this failure was the lack of free and fair elections and endemic corruption that pervaded all branches of government.⁴⁹ The resulting hegemony of former President Mubarak’s National Democratic Party ensured that actual critical review was largely absent⁵⁰.

This proved especially problematic given that, until 2005, the Presidential candidate was nominated by a two-thirds majority of the People’s Assembly.⁵¹ As a result, in every election from 1981 to 2005 President Mubarak ran uncontested. Constitutional reforms introduced in 2005 and again in 2007 allowed parties to nominate candidates and for individuals to run for election. However, following the 2007 reforms, parties had to have been operating uninterrupted for five years and have obtained at least three percent of the seats in both the People’s Assembly and the Shura Council, or six percent in either parliamentary house.⁵² In addition, independents could be nominated by obtaining 250 signatures from members of the People’s Assembly, the Shura Council or the regional assemblies, provided 65 of these came from members of the People’s Assmelby, 25 came from members of the Shura Council and 10 came from regional assemblies in at least 14 regions. Given these restrictions, former President Mubarak was able to run for office without any meaningful challenges from both opposition parties and independent candidates.

⁴⁸ Article 108 of the 1971 Constitution enabled the President to adopt decrees having the force of law in cases of “*necessity or exceptional circumstance*”. This power had to be authorized by two-thirds of the People’s Assembly, be for a limited period of time and for specific subject matters. In addition, decrees enacted under Article 108 were to be submitted to the People’s Assembly at the end of the authorization period. Other provisions that enabled the People’s Assembly to act as a check on executive power included the review of vetoed legislation (Article 113), the approval for contracting loans or expenditure of treasury funds by the executive (Article 121), the ability to establish commissions of inquiry (Article 131), impeachment procedures (Article 85) and the ability to question Ministers and the Prime Minister, including the ability to withdraw its confidence in Ministers (Articles 124-130).

⁴⁹ On Transparency International’s Corruption Perceptions Index, Egypt ranks 112 out of 183 countries and scored 2.9 out of 10. On the World Bank’s 2011 *Worldwide Governance Indicators*, Egypt was ranked 28% against other countries on its control of corruption and -0.68 for governance on this issue, on a scale of -2.5 to +2.5. Global Integrity’s scores for 2007-2010 record a slight improvement in the country’s anti-corruption legal framework, but a deterioration in its implementation.

⁵⁰ For example, in the 2010 elections the NDP won 420 out of 504 seats in the People’s Assembly, the lower house of Parliament, and 80 out of 88 seats in the Shura Council, the upper house of Parliament. See Consortium for Elections and Political Process Strengthening (CEPPS), Election Guide, Egypt, available at: <http://electionguide.org/results.php?ID=1790> last accessed 31 October

⁵¹ Article 76 of the 1971 Constitution

⁵² Article 76 of the 1971 Constitution, as amended by constitutional reforms of 25 May 2005 and of 26 March 2007. As an exception to this rule, for a ten-year period from 1 May 2007 parties who had at least one seat in either House of Parliament could nominate a member of their Leadership Council to run.

2) Rule of law during the transitional period

In spite of the fact that the improper control of the executive over most areas of political and social life was a key motivating factor in the uprising against former President Mubarak, the SCAF continued to undermine the principle of the separation of powers during the transitional period; monopolising legislative and executive powers and expanding the use of military courts to the detriment of the ordinary judicial system. For example, through Articles 56 and 57 of the March Constitutional Declaration, the SCAF granted itself broad legislative, executive and administrative powers and used these to issue numerous decrees that ranged from substantive legislative amendments to administrative issues.

In addition, the SCAF was able to exercise comprehensive oversight over the electoral process, by both defining the electoral system and amending the electoral law. The electoral law for the People's Assembly was based on Law No.38/1972, as amended. However, further amendments to the law were drawn up and passed by Decrees issued by the SCAF. The process was highly contentious and resulted in three sets of amendments.⁵³ 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.

The SCAF's legislative powers were also reinforced by various judicial decisions, including the SCC decision that led to the dissolution of the People's Assembly. On 21 February 2012, the SCC received a case from the chamber responsible for examining appeals before the High Administrative Court regarding the constitutionality of the amended electoral law.⁵⁴ It was argued by the applicant, a candidate running as an individual, that the revised electoral law violated Article 7 of the March Constitutional Declaration. On 14 June 2012, the SCC ruled in favour of the applicant, declaring the above Articles unconstitutional and therefore "*that the formation of the whole Assembly is null and void*".⁵⁵

In adopting the decision the SCC referred repeatedly to the sovereignty of the Egyptian people and their "*political rights*", including "*suffrage*". However, the SCC made no assessment of the legality or the constitutionality of the March Constitutional Declaration itself, assuming that it was valid and binding on the Court. In addition, the SCC's decision was based on Article 7 of the March Constitutional 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, the fact that some seats were specifically reserved for party-members to the exclusion of independents does not automatically require the preservation of seats for individual candidates only. Whether the provision is discriminatory on the basis of political opinion depends in part on the ease with which individuals can set up or join political parties. In reaching its conclusion, the Court failed to adequately explain why the entire law and therefore election results had to be struck down instead of

⁵³ Decree Law 108/2011, Decree Law 120/2011 and Decree Law 123/2011

⁵⁴ More specifically, Article 3(1), 6(1) and 9bis(a) of Law 38/1972, as amended, and Article 1 of Decree Law 120/2011

⁵⁵ Judgment in SCC Case No.20/24, published in the Official Gazette – Issue 24, Appendix A, 14 June 2012

requiring new elections for those seats where party candidates ran against independents.

In practice, the decision of the SCC paved the way for the SCAF to dissolve the People's Assembly on 15 June 2012, and to consolidate legislative and executive powers through the June Constitutional Declaration.⁵⁶ The SCAF argued that these powers were necessary to deal with the requirements of the transitional period and would be fully ceded to a civilian authority once a constitution was adopted.

Upon his election, on 8 July 2012 President Morsi issued an executive decree reinstating the People's Assembly until the Constitution was drafted and new elections were held.⁵⁷ This was swiftly followed on 10 July by a further SCC decision suspending the President's Decree. On 22 September 2012, the High Administrative Court upheld the SCC ruling.⁵⁸ Although President Morsi was unable to reinstate the People's Assembly, through his 12 August Constitutional Declaration he abolished SCAF's June Constitutional Declaration and instead granted himself all "*duties as stipulated by Article 56*", including the power to promulgate laws or object to them.

3) Separation of powers in light of international standards

As a basic tenet of the Rule of law, the separation of powers principle is particularly relevant in times of transition. As noted by the Special Rapporteur on the independence of judges and lawyers: "*Understanding of, and respect for, the principle of the separation of powers is a sine qua non for a democratic State and is, therefore, of cardinal importance for countries in transition to democracy- which heretofore have been typically characterized by precisely the absence of a separation of powers.*"⁵⁹

The UN Commission on Human Rights also noted: "*the essential elements of democracy include respect of human rights and fundamental freedoms...the separation of powers, the independence of the judiciary, transparency and accountability in public administration and free, independent and pluralistic media.*"⁶⁰ The Human Rights Council, which replaced the Commission in 2006, recently confirmed this interdependence by calling for States to "*strengthen the rule of law and promote democracy by: (a) Upholding the separation of powers by taking appropriate constitutional, legislative, judicial and other institutional measures*".⁶¹ Regional jurisprudence has confirmed that respect for separation of powers is an essential principle of a functioning democracy, which cannot be called into doubt.⁶² Meanwhile, the Human Rights Committee has confirmed that the principle of legality and the rule of law are inherent in the ICCPR.⁶³

⁵⁶ Decree No.350 of 2012; and Constitutional Declaration of 17 June 2012

⁵⁷ Presidential Decree, No. 11 of 2012, issued on 8 July 2012

⁵⁸ Ruling 6414 for the Judicial Year 58

⁵⁹ Report of the special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995/39, Para. 55, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G95/106/00/PDF/G9510600.pdf?OpenElement>, last accessed 12 October 2012.

⁶⁰ UN Commission on Human Rights, Resolution 2003/36, 23 April 2003: Interdependence on Democracy and Human Rights, para.1, available at <http://www.unhcr.org/refworld/category,LEGAL,UNCHR,,,43f313340,0.html>, last accessed 12 October 2012.

⁶¹ Human Rights Council, A/HRC/Res/19/36, 19 April 2012, para.16(a)

⁶² *Chevroi v France*, ECtHR judgment of 13 February 2003-III, para.74 onwards

⁶³ Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 16.

The Constitution should therefore both empower the judiciary, legislature and executive and regulate their competences. To this end, the Constitution should provide for specific provisions that clearly delimit the competences of each branch of the State in accordance with rule of law and separation of powers principles. By virtue of this separation, each branch may not interfere with the authority and responsibilities of the other branches.⁶⁴

As the Human Rights Committee has noted, and is particularly pertinent to Egypt, a *"lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the rule of law and a consistent human rights policy"*.⁶⁵

D. The Constitution and Human Rights

1) A Bill of Rights

a. Human Rights in the 1971 Constitution

The 1971 Constitution contained various provisions on human rights. In particular, Parts III and IV of the 1971 Constitution recognised a range of rights and freedoms, including freedom of opinion and expression (Article 47), freedom of the press (Article 48) and freedom of assembly and association (Articles 54 and 55). It also guaranteed certain rights pertaining to arrest and a fair trial (Articles 66 to 72), including the right to be presumed innocent, the right to be informed of the reason for detention or arrest and the right to complain to a court in case of arrest.

Most of these rights did not consistently meet, in their definitions and scope, international human rights standards. For example, Article 42 of the 1971 Constitution prohibited *"physical or moral harm"* of individuals arrested or detained or whose freedom had been restricted and required the *"preservation of their dignity"*. This wording falls short of international standards, including the requirements of the Convention against Torture (CAT), to which Egypt is a party, in particular Article 1, which states: *"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."*⁶⁶

Similarly, Article 40 of the 1971 Constitution stated: *"all citizens are equal before the law. They have equal rights and duties without discrimination between them due to race, ethnic origin, language, religion or creed"*. However this wording does not fully comply with international standards, including Article 26 of the ICCPR, which extends the grounds of the prohibition of discrimination to *"colour, sex, political or other opinion, national or social origin, property, birth or other status"*. In addition, Article

⁶⁴ See Inter-American Democratic Charter, 11 September 2001, Articles 3 and 4.

⁶⁵ Concluding Observations of the Human Rights Committee on Slovakia, CCPR/C/79/Add.79, para.3

⁶⁶ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984. Egypt acceded to the CAT on 25 June 1986

11 of the 1971 Constitution restricted the equality of men and women to “*political, social, cultural and economic*” matters only, and further explicitly framed women’s “*duties*” as “*the family and her work*”, granting the State a role in “*guaranteeing the coordination*” of these duties. This Article contravened Egypt’s obligations under CEDAW, to which Egypt is a party. In particular, Article 1 of the CEDAW states, “*discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*”

In addition, while the 1971 Constitution contained a number of provisions relating to economic and social rights, including the right to work (Article 13), representation of and unions for workers (Articles 26, 56, 87, 162, amongst others), the right to free education (Articles 18 and 20) and social, cultural and health services (Articles 16 and 17), no specific provisions provided for the right to “*just and favourable conditions of work*”⁶⁷ or the rights contained in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), regarding an adequate standard of living.⁶⁸

Even where the 1971 Constitution recognised the rights to freedom of expression, association and assembly, it subjected them to “*the limits of the law*” or “*as defined by the law*”. No provision was made for these limits to be “*necessary in a democratic society*”, as required by international standards. This has proven to be particularly problematic given that several laws, including the Emergency Law, severely and comprehensively limited the enjoyment and the exercise of these rights.

In addition, the 1971 Constitution failed to prohibit serious crimes in international law, including, among others, war crimes, crimes against humanity, genocide, and enforced disappearance. Accordingly, there was no constitutional provision for the right to a remedy and to reparation for these crimes.

Most importantly, the 1971 Constitution also failed to provide for effective mechanisms to enforce human rights, including an independent human rights institution, an Ombudsman, and unrestricted access to the SCC.

The above demonstrates the failure of the 1971 Constitution to meet international human rights standards, and the need to ensure effective constitutional guarantees to protect and enforce human rights, in particular through the adoption of a comprehensive Bill of Rights.

b. Human rights in the Draft Constitution

The SCAF’s March Constitutional Declaration reproduced the same wording of some of the human rights provisions contained in the 1971 Constitution, while other provisions were deleted entirely.

⁶⁷ Articles 6 and 7 ICESCR and Committee on Economic, Social and Cultural Rights, General Comment No.18: The right to work (Article 6), E/C.12/GC/18), 6 February 2006

⁶⁸ International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966. Egypt signed on 4 August 1967 and ratified on 14 January 1982. This includes the right to food and housing as well as water and sanitation, General Comment No.15: The right to water (Arts 11 and 12), E/C.12/2002/11, 20 January 2003; General Comment No. 12: The right to adequate food (Art.11), E/C.12/1999/5, 12 May 1999; and General Comment No. 4: The right to adequate housing (Art.11 (1)) E/1992/23, 13 December 1991

To overcome the limits of the 1971 Constitution and the March Constitutional Declaration, the Draft Constitution aims to broaden the content of the human rights provisions.⁶⁹ For example, draft Article 33 provides that: *"a person who is arrested or detained or his liberty is restricted by any restriction must be treated in a manner that preserves his/her human dignity, and cannot be subject to intimidation, coercion, or physical or mental abuse. He/she cannot be detained except in facilities humanely and mentally appropriate and subject to judicial review. Any official who violates the above provisions should be punished according to the law. Every testimony obtained through the above, or the threat of using some elements of the above, is null and cannot be relied upon."*

Draft Article 30 expands the equality of citizens before the law by prohibiting discrimination based on *"sex, origin, language, religion, belief, opinion, social status, or disability"*. In addition, draft Article 68 states: *"The state is obliged to take all legislative and executive measures to entrench the principle of women's equality with men in the areas of political, cultural, economic, and social life, as well as other areas without prejudice to the provisions of Islamic Sharia. The state shall provide maternal and child health services free of charge, and ensure women's protection, social and economic welfare and health, and the right to inheritance and duties towards the family and her work in the community. The state provides specific protection and care to women with dependent children, divorced women, widows, and other women who are most in need."*

In addition, the Chapter on "Rights, Freedoms, and Duties", provides for various rights, many of which were not part of the 1971 Constitution. For example, draft Article 55 extends the rights of workers to include equal opportunity, just remuneration, safe working conditions, social insurance and health care. The Chapter also provides for the right to education (Article 50), housing, clean water, and food (Article 60) and social insurance (Article 57). Freedom of thought and opinion (Article 39), the right to form unions (Article 47) and to hold public meetings (Article 45) are also present.

While most of the articles in the Chapter on "Rights, Freedoms, and Duties" extend the language of the 1971 Constitution in this regard, they still fall short of Egypt's obligations under international law, including requirements relating to torture and other ill-treatment, equality before the law and freedom of thought, conscience and religion.

For example, while the Draft Constitution expands on the articles in the 1971 Constitution relating to equality before the law, it continues to exclude non-citizens, who are under the jurisdiction of Egyptian law and court rules, from such equality.

In addition, while the draft Constitution provides: *"Freedom of belief is guaranteed. The State guarantees freedom of establishing worship facilities for the monotheistic religions as prescribed by the law,"* this provision continues to discriminate against people who do not belong to the monotheistic religions, and thus falls short of Egypt's obligations under international law relating to freedom of thought, conscience and religion. In particular, Article 18 of the ICCPR, to which Egypt is a party, states: *"i) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to*

⁶⁹ Draft Constitution of 10 October 2012, available at: <http://dostour.eg/> last accessed 12 October 2012

manifest his religion or belief in worship, observance, practice and teaching... iii) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

The Draft Constitution also continues to subject equality and women's rights to the test of compliance *"with the provisions of Islamic Sharia"*.⁷⁰ This test is based on other Articles of the Draft Constitution, in particular Article 2, which refers to the Principles of Islamic law and maintains the phrasing of the 1971 Constitution: *"Islam is the religion of the State and Arabic is the official language, and Principles of Islamic law (Shari'a) are the main source of legislation."*

Historically, Egypt has consistently subjected its obligations, both at the national and international levels, to the test of compliance with Principles of Islamic law. For example, although Egypt has ratified the ICCPR, it issued a declaration that it would comply with the Covenant's provisions since: *"Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it."*⁷¹ In its 2002 report, the Human Rights Committee observed this, and noted: *"the general and ambiguous nature of the declaration made by the state party upon ratifying the Covenant. The State party should either clarify the scope of its declaration or withdraw it."*⁷² Moreover, in its General Comment on *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols*, the Human Rights Committee stated: *"Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant... Accordingly, a State may not reserve the right to...deny freedom of thought, conscience and religion...or to deny minorities the right to enjoy their own culture, profess their own religion, or use their own language."*⁷³

In practice, by declaring Islam the religion of the State and the principles of Islamic Shari'a the main source of legislation, the Draft Constitution perpetuates the wording of the 1971 Constitution and, consequently, a system whereby all Egyptians, irrespective of their religious or non-religious beliefs, are subject to the same laws, even when they are inspired by, or based on Shari'a principles. For example, when draft Articles 3 and 37 provide that: *"the Principles of Judaism and Christianity are the main source of legislation for Egyptians belonging to these religions on issues relating to their personal status, religious affairs, and the selection of their spiritual leaders"*, it is clear that these individuals may be subject to laws inspired by the Shari'a principles on issues not relating to personal status and religious affairs. Individuals who do not belong to the monotheistic religions are similarly subjected to such laws. Further, on personal status and religious affairs issues, individuals not belonging to the monotheistic religions are subject to laws inspired by Islamic Shari'a principles, regardless of their religious beliefs.

⁷⁰ Draft Article 68

⁷¹ See UN Treaty Service, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec last accessed at 5 November 2012

⁷² Para. 5, Concluding observations of the Human Rights Committee: Egypt, 28/11/2002, CCPR/CO/76/EGY

⁷³ General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 11/4/1994, CCPR/C/21/Rev.1/Add.6, available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/69c55b086f72957ec12563ed004ecf7a?OpenDocument>

Moreover, these provisions taken together with other Articles relating to religion in the Draft Constitution, because they are overly broad and vague, may lead to the imposition of severe restrictions on the enjoyment and exercise of various universally recognized human rights. For example, draft Article 38 prohibits *"any attack against, or abuse of all prophets"*. It remains unclear what type of conduct, writing, speech or action might constitute an "attack" for the purposes of these Constitutional provisions and to what extent these provisions can limit the enjoyment and exercise of basic human rights and freedoms, including the right to freedom of expression and thought.

This could prove to be particularly problematic given that, in Egypt, numerous writers, journalists, bloggers, and human rights activists have been prosecuted, under Al-Hesba,⁷⁴ for contempt for Islam or blasphemy. In considering the periodic report of Egypt, the Human Rights Committee expressed its concerns *"at the pressures applied to the judiciary by extremists claiming to represent Islam, who have even succeeded, in some cases, in imposing on courts their own interpretation of the religion."*⁷⁵

Another source of concern regarding the human rights provisions in the Draft Constitution is that, similar to the 1971 Constitution, a number of the rights set out in the Draft are subject to *"the limits of the law"* or *"as defined by the law"*, with no restriction on what or how extensive these limitations might be and whether or not they are precise, free of ambiguity and necessary in a democratic society.

c. Towards a Bill of Rights

Initiatives on incorporating human rights provisions in the Draft Constitution have fallen short of international human rights law and standards, including human rights treaties, such as the ICCPR, the ICESCR, the CAT, and the CEDAW.⁷⁶ The provisions of these treaties include not only the content or substance of the right but also its scope, including permissible limitations or restrictions on a particular right that the State may be able to impose and the circumstances in which these restrictions can or cannot be imposed.

The new Constitution should provide for a comprehensive Bill of Rights in accordance with universally recognised human rights standards. This is necessary to:

- i) Provide groups and individuals with a comprehensive set of written rights that are safeguarded in the Constitution, which they can use to hold public authorities to account;
- ii) Provide Courts, including the SCC, with specific constitutional and legal grounds to protect human rights when authorities abuse their powers

⁷⁴ In the Islamic Jurisprudence, Al-Hesba means the propagation of virtue and prevention of vice. In the Egyptian context, it has taken the expression of a procedure through which individuals can file cases against those suspected of apostasy, blasphemy or any other form of contempt for Islam. In 1996, the Egyptian Court of Cassation declared the Egyptian scholar, Nasr Hamed Abu Zayd, who was prosecuted on the grounds that his writings constituted an act of apostasy, *"an apostate, because he has revealed his unbelief after having been a believer, even if he claims to be a Muslim."* Court of Cassation, Nos. 475, 478, 481, Year 65, 5 August 1996. After the toppling of President Mubarak, cases continue to be filed against writers and activists under Al-Hesba procedure.

⁷⁵ Para. 17, Concluding observations of the Human Rights Committee: Egypt, 28/11/2002, CCPR/CO/76/EGY

⁷⁶ Other relevant Conventions include the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all forms of Racial Discrimination (CERD), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention for the Protection of all Persons from Enforced Disappearance (CPPED)

- by unlawfully restricting the enjoyment of human rights or by violating them;
- iii) Contribute to enforcing Egypt's obligations under international law to respect, protect, promote and fulfil human rights; and
- iv) Incorporate the provisions of international and regional human rights instruments ratified by Egypt in the Constitution.

A Bill of Rights will also contribute to addressing the challenge of enforcing international human rights standards in Egypt. Because these standards were not properly incorporated into national laws, most Egyptian judges were reluctant to apply them. By incorporating international human rights standards into a Bill of Rights, as well as clearly and unequivocally recognising the supremacy of human rights Conventions over domestic law and their direct applicability in Egypt, judges can no longer ignore them or dismiss their application. Victims of human rights abuses and their representatives can also challenge, through appropriate judicial and extra-judicial proceedings, authorities and individuals who violate these rights or fail to protect them.

The Bill of Rights should therefore guarantee civil, political, economic, social and cultural rights for all and without distinction or exclusion. These rights include, among others:

- i) The right to life;
- ii) The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
- iii) The right not to be subject to enforced disappearance;
- iv) The right to be equal before the law and entitled without any discrimination to the equal protection of the law. However, equality provisions should not prohibit or exclude legislative and other measures designed to protect or advance persons, or categories of persons, subjected to or disadvantaged by unfair discrimination;
- v) The right of everyone to liberty and security of person and not to be subjected to arbitrary arrest or detention or deprived of liberty, except on legal and legitimate grounds and in accordance with procedures established by the law;
- vi) The right to a fair and public hearing by a competent, independent and impartial tribunal established by law;
- vii) The right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed;
- viii) The right to the highest attainable standard of physical and mental health; and
- ix) The right of everyone to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The Bill of Rights should also ensure that peremptory norms are absolute rights from which no derogation is permitted, including in times of emergency and in a situation of internal or external armed conflict. Such peremptory norms include, among others: the right to life; the right to be free from torture or other ill-treatment; the right not to be subjected to enforced disappearance; the right to a fair trial; and the principle of legality.⁷⁷

⁷⁷ See Article 4(2) of the ICCPR. Other non-derogable rights include the prohibition on slavery and servitude, the prohibition on imprisonment solely for failure to fulfil a contractual obligation, the right to legal recognition and freedom of thought, conscience or religion. See also Human

Other rights may be derogated from but only in certain circumstances and providing certain requirements are met. As the Human Rights Committee, in its General Comment 29 on Article 4, states of emergency, has stated: *"The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists."*⁷⁸

Consequently, *"measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature"*.⁷⁹ In addition, once a state of emergency has been validly declared, 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. As the Committee has stated: *"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."*⁸⁰

In addition, aside from the question of whether a right may be derogated from, certain rights under the Bill of Rights may be subjected to lawful, reasonable and justifiable limitations. In particular, any limitation must be necessary and capable of being demonstrably justified in a free and democratic society. The limitation must also provide for the nature of the right to be limited, the nature and the extent of the limitation, the relation between the limitation and its purpose, and why it is necessary to limit the exercise of the right instead of less restrictive means to achieve the purpose.

Finally, in order to ensure that these rights are enforceable, all authorities should be bound to respect, protect, promote and fulfil the human rights incorporated in the Bill of Rights. Access to justice must also be secured for all individuals without any distinction.

2) The Constitution and the legacy of human rights violations

Both under the rule of President Mubarak and the SCAF, the State of Egypt has failed to meet its obligations under international law to respect, protect, promote and fulfil human rights. The lack of adequate constitutional guarantees consistent with international standards, combined with a legal framework that has severely restricted the enjoyment of human rights, in particular the Emergency Law, have contributed to exacerbating human rights abuses. These abuses include, among others, cases of torture and other ill-treatment, arbitrary arrest and detention, unlawful killings, violations of freedom of assembly, association and expression, and a failure to respect and ensure basic economic, social and cultural rights.

During its mission to Egypt, the ICJ heard from individuals who were involved or suspected of being involved in peaceful protests and were targeted by law enforcement and military officials. These individuals reported that they were

Rights Committee, *General Comment 29, States of Emergency (article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, paras. 7-9

⁷⁸ Human Rights Committee, *Id.*, at para.6

⁷⁹ *Id.*, at para.2

⁸⁰ *Id.*, at para.4

subjected to arbitrary detention, torture and other ill-treatment, and the disproportionate use of force, including lethal force, by law enforcement officers. Female detainees reported being subjected to "virginity tests" carried out by military officers. One of them reported: *"I was in Tahrir Square on March 9th when army officers arrived and grabbed me from behind and dragged me, with other protesters, into the Egyptian museum. In the museum they started electrocuting and torturing us for almost seven hours. We were then taken to another area where there were weapons laid out. Photos were taken of us with the weapons. After the pictures were taken we were put on a bus and were beaten and tortured the whole night. Then we were taken to prison. In the prison, I was made to eat dirt and all the time subjected to electric shocks. I was searched and all my belongings were taken. I was told to remove all my clothes so that I would be completely naked with a female army person and a male officer. There were many men around though. The officer put his hands in me for more than 5 minutes."* The detainee was charged by a military court with "violence and thuggery". She was given a one year suspended sentence.

Other detainees reported being subjected to beatings and the use of electric shocks while in military custody in Cairo. One of them told the ICJ that *"People were ready to confess to anything to escape the nightmare"*.

Article 57 of the 1971 Constitution stated: *"Any violation of individual liberty or of the inviolability of private life of citizens or of any other rights or liberties guaranteed by the Constitution and the law shall be considered a crime, whose criminal and civil prosecution is not subject to the statute of limitations. The State shall grant a fair compensation to the victim of such violation."* Despite this provision, victims of human rights violations rarely, if ever, obtained remedy and reparation under the regime of former President Mubarak. This absence of accountability continued throughout the revolution. In meetings with the ICJ, family members of victims reported the difficulties they encountered in attempting to learn the whereabouts of victims and/or the circumstances surrounding their deaths. Both victims and family members also reported difficulties in filing cases against law enforcement officers. They also reported that they did not receive any of the compensation promised to them.⁸¹ A number of individuals stated that they had been given un-cashable checks, while some received medals for family members declared as martyrs of the revolution.

However, in meetings with the ICJ, the former Minister of Justice, Councillor Adel Abdullah, argued that the government attached: *"special importance for the martyrs and the injured of the revolution. The Prime Minister has established a fund for this and established a national council responsible for the country's martyrs and injured. People have already been compensated and the injured are being treated. Special cards have been given to the injured so that they can be given jobs in the ministries, and other privileges, for example, free membership of sports clubs, university tuition and transport."* The former Minister also argued that the lack of investigations is due to the fact that *"the office of the general prosecutor is actually fraught with a lot of complaints. Some of them turn out not to be true. However, it takes time to go through them all, especially violations against protestors and corruption cases."*

In spite of these assertions, the Egyptian authorities have failed so far to take any effective measure to address and investigate serious human rights violations committed under the rule of former President Mubarak and the SCAF, or to break the cycle of impunity that has prevailed over these violations, including by guaranteeing

⁸¹ On 30 June 2011 the SCAF issued a decree establishing a fund for the victims of the revolution and their families

victims the right to effective remedies and to reparation, and ensuring the non-repetition of these violations. Critically, those responsible for such violations were either not held to account or were given inadequate sentences.

On 11 March 2012, a military doctor alleged to have carried out “virginity tests” on female protestors, was acquitted by a Cairo 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 of that year, while attempting to justify these tests as protecting the army against possible allegations of rape.⁸² Further, on 27 December 2011, the High Administrative Court issued a ruling halting the use of “virginity tests” on female detainees in military detention facilities.⁸³

The rights of victims of human rights violations to truth, to a remedy and to reparation must be enshrined in the new Constitution in accordance with international law and standards. As a well-established principle of international law, based on international Conventions and jurisprudence,⁸⁴ the right to a remedy and to reparation encompasses the following:

- the right to vindicate one’s rights before an independent and impartial body;
- the right to a prompt, impartial, thorough and independent official investigation;
- the right to know the truth about “*past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes*”;⁸⁵
- the right to cessation and guarantees of non-repetition; and
- the right to, restitution, compensation, rehabilitation and satisfaction.⁸⁶

Separate from the rights enumerated above, States also have the obligation to prosecute and punish perpetrators of gross human rights violations.⁸⁷

Egyptian authorities must address the legacy of human rights violations in Egypt by effectively investigating and prosecuting cases of gross human rights violations committed during and after the rule of President Mubarak. The Constitution should also provide for effective, independent mechanisms to protect human rights against

⁸² 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

⁸³ Decision of the Administrative Court, Case No. 45029 of 27 December 2011

⁸⁴ The right to remedy and reparation is recognized in various international treaties, including Article 2, ICCPR; Article 2, CERD; Article 2 CEDAW; Article 2 CRC; Article 1 ACHPR; and international jurisprudence, and is considered an obligation under customary international law.

⁸⁵ Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1, recommended by the Commission on Human Rights resolution 2005/81 of 21 April 2005, Principle 2. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement> last accessed 12 October 2012

⁸⁶ See also, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/Res/60/147, 16 December 2005, Principles 18 and 19 Available at: <http://www2.ohchr.org/english/law/remedy.htm>, last accessed 12 October 2012

⁸⁷ Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1, recommended by the Commission on Human Rights resolution 2005/81 of 21 April 2005, Principle 1 and Principle 19. See also, Security Council Resolution on the question concerning Haiti, S/RES/1529 of 29 February 2004, para.7; Resolution on the situation in Côte d’Ivoire, S/RES/1479 of 13 May 2003, para.8

any abuse, including a comprehensive, independent and impartial transitional justice strategy.

ii. The Constitutional Court and Human rights

a. Supremacy of the Constitution and the Constitutional Court

The supremacy of the Constitution and the ability to uphold and enforce the provisions of the Constitution is a fundamental underpinning of the rule of law and separation of powers. In particular, through its supremacy, the Constitution, as the embodiment of the will of the people, is elevated above other laws and consequently above the legislator.⁸⁸ In this system, the body charged with oversight of the Constitution must ensure that all legislation and executive actions are in accordance with the Constitution.

Neither the 1971 Constitution nor the Constitutional Declaration provide for the supremacy of the Constitution. This should therefore be set out explicitly in the new Constitution.

In order not to undermine the separation of powers, it is essential that the enforcement mechanism is independent from the executive and legislative branch. In addition, in order to ensure that the provisions of the Constitution are enforced in practice, full access to this mechanism must be guaranteed.

In Egypt, Articles 174 to 178 of the 1971 Constitution provided for a Constitutional Court. In particular, Article 175 provides: *"The Supreme Constitutional Court has the exclusive competence to control the constitutionality of laws and regulation and to interpret the legislative texts in the manner prescribed by the law."* Article 178 continues: *"The law shall regulate the legal effects of a decision declaring the unconstitutionality of a legislative text."* This is expanded upon in the Supreme Constitutional Court Law (the SCC law), which details the precise competences of the court as follows: *"i) exercise judicial review over constitutional issues with respect to laws and regulations; ii) resolve issues of jurisdiction among judicial bodies or other judicial forums; and iii) determine a final judgment in cases where two or more judicial bodies have produced contradictory judgments of the legality of texts."*⁸⁹ Article 48 of the SCC law states: *"Judgments and decisions of the Court are final and irreviewable."* In addition, Article 49 makes clear that the SCC's decisions *"bind public authorities and individuals"*. Further, *"A provision held as void, whether in a law or regulation, shall cease to apply as of the day following its publication"*.

However, under the SCC law, the Court is limited to the *ex post facto* consideration of the legality of texts, since its mandate is *"to provide the definitive interpretation of laws, enacted by the legislature, and presidential decrees with the force of law issued in accordance with the Constitution if, during the course of their application, there arises divergent points of view, and they have an importance that necessitates their uniform interpretation"*.⁹⁰

In spite of these constitutional and legislative guarantees, the role of the SCC in upholding the rule of law and protecting human rights has been limited. This is due in

⁸⁸ *The Concept of the Supremacy of the Constitution*, Jutta Limbach, *The Modern Law Review*, January 2011, Volume 64, Issue 1, p 1-11

⁸⁹ SCC Law, No.48/1979, as amended by law 168 of 1998 and law 48 of 2011, available at: http://hccourt.gov.eg/CourtLaws/Constitutional_court.asp last accessed 12 October 2012

⁹⁰ Article 26 of Law No.48/1979

part to the fact that, under Article 73 of the 1971 Constitution, the President was empowered to "*ensure sovereignty of the people, respect for the Constitution and rule of law*," a competence similar to that of the SCC. This provision goes beyond requiring the President to respect the Constitution and instead makes the President an arbiter of whether the Constitution has been infringed, as well as responsible for upholding the separation of powers.

In addition, on several occasions the SCC has failed to address the serious human rights challenges under former President Mubarak's regime. For example, the SCC has ruled that emergency and security courts were constitutional and "*did not consider petitions on the constitutionality of transferring civilians to military courts*".⁹¹ In addition, some politically sensitive cases have remained under consideration by the SCC for many years, thereby undermining its effectiveness in upholding human rights and the Constitution.⁹²

A serious element that also undermined the authority of the SCC was the insufficiency of the guarantees of its independence. The 1971 Constitution provided for an independent SCC (Article 174) with Constitutional guarantees of irremovability for its members. They cannot be dismissed from office and only the Court can hold them to account.⁹³ Under Articles 19 and 20 of the SCC law, disciplinary proceedings against them are referred by the President of the Court to the Court's committee of provisional affairs and then to the Court's General Assembly. Further, in terms of its financial independence, the court has: "*an annual independent budget to be prepared in alignment with the public budget of the State*".⁹⁴

However, these guarantees have been undermined by the comprehensive control the executive has over the selection and appointment of the members of the courts. Former Article 5 of the SCC law gave the President unrestricted discretion in appointing the Chief Justice of the SCC. This power, combined with the President and Chief Justice's role in appointing the other members of the Court, opened the SCC up to interference from the executive. Article 5 provided: "*The President of the Republic appoints the Chief Justice of the Court by a presidential decree. Members of the court are also appointed by a presidential-decree after consulting with the Supreme Council of the Judicial Bodies; from among two candidates, one is chosen by the general assembly of the Court, and the other by the Chief Justice. At least two thirds of the appointees to the bench must be chosen from the other judicial bodies. The presidential decree that appoints a member shall indicate his position and seniority.*"

Amendments to Article 5 in 2011 limited the President's selection of the Chief Justice to among the three oldest vice-presidents of the Court and required the approval of the SCC's General Assembly. In addition, Article 183 of the Draft Constitution provides that the members of the SCC are irremovable and selected on the basis of recommendations by the general assemblies of the SCC, the Cassation Court, the State Council and the Courts of Appeal, in accordance with the law.

⁹¹ *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* by Tamir Mustafa, Cambridge University Press, 11 June 2007 p.232. For a decision confirming the ability of the President to refer cases concerning civilians to military tribunals, see Case No.1 of judicial year 15 decided on 30 January 1993.

⁹² For example, Cases No.72 and 73 of Judicial Year 17 were filed with the SCC on 8 November 1999 both challenging the constitutionality of Article 6(2) of the Military Judiciary Law, No 25/1966. Neither case was decided by the SCC. Another example is Case No. 11 of Judicial Year 13, on whether judicial supervision of elections was required. It was submitted to the SCC on 21 January 1991 and was not decided until nine years later, on 8 July 2000.

⁹³ Article 177 of the 1971 Constitution

⁹⁴ Article 56 of Law No. 48/1979

Indeed, the four articles in the Draft Constitution dedicated to the SCC (Articles 182 to 185) defer to the law to determine the procedure before the SCC, the selection of its members and the effects of its decisions.

These articles perpetuate the provisions of the 1971 Constitution whereby the competences, guarantees of independence and mechanisms of access to the SCC are set out only in subsidiary legislation (the SCC law) and not in the Constitution itself.

Such provisions have the potential to undermine the authority of the Court as these laws can be easily amended or repealed. The more guarantees relating to the SCC that are enshrined in the Constitution, the greater the protection for the Court against any attacks that aim to undermine it.

Therefore, in order to ensure the SCC can fulfil its role in the future, the new Constitution should provide for detailed guarantees for the formation, functioning and legal status of the SCC, including the independence and immunity of its members, as well as increased democratic and representative procedures for the selection of its members. Given the role played by a Constitutional Court in terms of upholding human rights and guaranteeing constitutional principles, including the rule of law and separation of powers, the SCC must be afforded sufficient guarantees of independence. This concept has been confirmed, for example, by the Council of Europe, whose recommendation on judicial independence, efficiency and responsibilities states: *"This recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional matters."*⁹⁵ Similarly, the Inter-American Court has upheld the importance of guarantees of independence for Constitutional Court judges.⁹⁶ In the context of the dismissal of eight judges of the Constitutional Court of Ecuador by the National Congress, following an irregular impeachment procedure, the Inter-American Commission stated: *"It is clear that the various international human rights agencies and courts agree that heightened stability in the tenure of judges, and the resultant ban on their free removal, is an essential part of the principle of judicial independence."*⁹⁷

In addition, the Constitution should ensure that the decisions of the SCC are binding on the other branches of government and are enforced. The requirement for decisions of the SCC to be binding is founded on the rule of law and on the principle of legal certainty. As the Inter-American Commission on Human Rights affirmed in a case involving the non-compliance of the Executive and the armed forces of Ecuador with a decision of the Constitutional Tribunal of Ecuador: *"the noncompliance with the judicial decisions not only affects legal certainty but also threatens the basic principles of the Rule of Law"*. The Inter-American Court on Human Rights, went on to hold: *"the implementation of judgments should be governed by those specific standards that enable the realization of the principles of, inter alia, judicial protection, due process, legal certainty, judicial independence, and rule of law. The Court agrees with the European Court of Human Rights upon considering that to achieve full*

⁹⁵ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17 November 2010, Chapter 1, para.1

⁹⁶ Inter-American Court of Human Rights, Case of the Constitutional Court v. Peru, Judgment of 31 January 2001, para. 64(a)-(b).

⁹⁷ Inter-American Commission on Human Rights, Case Miguel Camba Campos et al. v. Ecuador (Judges of the Constitutional Court), Report No. 99/11, Case 12.597, Merits, 22 July 2011, para. 81.

*effectiveness of the judgment, its implementation should be complete, perfect, comprehensive, and without delay.*⁹⁸

The Constitution should also expand the competence of the SCC and empower the Court to address, among other issues, disputes between State bodies concerning their competences and the constitutionality of legislative provisions as regards human rights and freedoms recognized by the constitution.

In addition, the Constitution should ensure comprehensive mechanisms to guarantee full access to the SCC.

b. Access to the Constitutional Court

In Egypt, under the SCC law cases may only be referred to the SCC by other courts when the latter determine that the constitutionality of a legislative provision (laws or regulations) is involved in a case. Moreover, if one of the parties challenges the constitutionality of a given provision, the court suspends the hearing while it assesses this challenge. Accordingly, the court can require that the applicant file an application before the SCC.⁹⁹ Consequently, citizens do not have direct access to the SCC as regards constitutional issues.

Although Egypt is not unique in prohibiting direct access to the court by individuals, a right of individual access to the SCC will help ensure the protection and enforcement of rights and freedoms enshrined in the new Constitution. Under former President Mubarak's rule, there was a distinct lack of enforcement of the rights enshrined in the 1971 Constitution. One particular obstacle in this regard was the fact that citizens were forced to rely on regular courts as gatekeepers. Therefore, where courts lacked independence, they could prevent the review of unconstitutional legislation or executive action. Even when judges are willing to transfer cases, where the judiciary lacks sufficient independence, the obstacles and costs for individuals trying to enforce Constitutional rights are likely to increase.

Direct access rights enshrined in the new Constitution could therefore represent a substantial improvement in terms of the enforcement of human rights in Egypt. One significant example in this regard is the South African Constitution, which provides for a variety of mechanisms for Constitutional review, including referral by the President or by the Premier of a province for abstract review. Further, Article 167(7) of the South African Constitution also permits an individual "*when it is in the interests of justice and with leave of the Constitutional Court, a) to bring a matter directly to the Constitutional Court; or b) to appeal directly to the Constitutional Court from any other court*".¹⁰⁰

⁹⁸ Inter-American Court of Human Rights, Case of Mejia Idrovo v. Ecuador, Judgment of 5 July 2011, (merits) paras. 85 and 105.

⁹⁹ See Articles 27 and 29 of Law No.48/1979

¹⁰⁰ Constitution of the Republic of South Africa, 1996, Chapter 8, Article 167, available at <http://www.info.gov.za/documents/constitution/1996/96cons8.htm#167> last accessed 12 October 2012

E. The Constitution and the Judiciary

1) The independence of the judiciary

a. Independence of the judiciary in Egypt

An independent judiciary is crucial in order to uphold the rule of law and ensure the effective enforcement of human rights and fundamental freedoms. In Egypt, although the 1971 Constitution contained provisions on judicial independence, these rarely materialised in practice. Through the appointment of judges and control over the administration and financing of the judiciary, as well as the recruitment, promotion and disciplining of judges, the executive was able to exercise extensive influence over the judiciary, undermining its independence and the impartiality of the court system.

Article 65 of the 1971 Constitution affirmed: *"The State shall be subject to law. The independence and immunity of the judiciary are two basic guarantees to safeguard rights and freedoms."* Chapter IV of the Constitution went on to outline the powers of the judiciary and to provide, in Article 165, that *"The Judicial Authority shall be independent"*, and in Article 166 that *"Judges shall be independent and be subject to no other authority but the law. No outside authority may intervene in court cases or judicial matters."*

However, Article 167 of the Constitution stated: *"The law shall determine the organization of the judiciary and its functions and the way in which it is established and shall prescribe the conditions and procedures concerning the appointment and transfer of its members."* In Egypt, subsidiary legislation has been used to defeat the independence of the judiciary, since it permits explicit and effective oversight of judicial affairs by the executive. For example, under the Judicial Authority Law, No.46/1972, (the JAL) the President appoints the Chief Justice of the Court of Cassation and the Prosecutor-General.¹⁰¹ Both of these Presidential appointees sit on the body charged with oversight of judicial affairs, the High Judicial Council (HJC), while the Chief Justice is also responsible for chairing the HJC.¹⁰²

In addition, while the HJC has competence over judicial appointments, promotions, transfers and disciplinary proceedings for the ordinary judiciary, the Minister of Justice's residual powers undermine the independence of the HJC and therefore the judiciary as a whole. In particular, under the JAL, the Minister of Justice is responsible for administering and financing the court system, and can accordingly: appoint the Presidents of the First Instance Tribunals, after approval from the HJC;¹⁰³ establish summary courts and determine their jurisdiction;¹⁰⁴ object to decisions taken by the general assemblies of courts;¹⁰⁵ and transfer judges to another judicial or legal post.¹⁰⁶

Further, Article 78 of the JAL establishes a Judicial Inspection Directorate (JID) as an administration of the Ministry of Justice, responsible for inspecting the work of judges and the Presidents of the Courts of First Instance. Under the same Article, the

¹⁰¹ Article 44(2) and 119 of Judicial Authority Law No. 46/1972, as amended

¹⁰² According to Article 77 Bis 1, the HJC is composed of the Prosecutor-General, the President of the Cairo Court of Appeal, the two most senior vice-presidents of the Court of Cassation and the two most senior presidents of the other appeal courts, and is chaired by the Chief Justice of the Court of Cassation

¹⁰³ Article 9 of Law 46/1972

¹⁰⁴ Article 11 and 13 of Judicial Authority Law No. 46/1972

¹⁰⁵ Article 36 of Judicial Authority Law No. 46/1972

¹⁰⁶ Art 55-58 and 62 of Judicial Authority Law No. 46/1972

Minister of Justice is tasked with establishing the regulations of the JID. Further, Article 46 of the JAL provides that the Minister of justice nominates his Assistant in charge of judicial inspection as well as agents and members of the JID, upon approval by the HJC.

Other provisions of the JAL guarantee the Minister of Justice significant influence over the careers of judges. For example, although Article 98 of the JAL grants disciplinary authority to the HJC, the Minister of Justice can also request the Prosecutor-General to initiate disciplinary proceedings against judges, which can lead to the judge's dismissal.¹⁰⁷ In addition, the Minister can require the retirement of judges in certain circumstances¹⁰⁸ and can refer anything related to the work of judges that is deemed a matter of judicial inspection to the HJC.¹⁰⁹ These provisions establish a system under which the Minister of Justice has comprehensive influence over the administration of justice.

Although proposals for reforming the JAL have been put forward, these initiatives have yet to be translated into lasting legal reforms. In addition, without Constitutional safeguards, there is no certainty that these and future reforms will comply with international law and standards.

The Draft Constitution does little to ease concerns regarding the influence of the executive over the judiciary, as it provides insufficient guarantees for the independence, impartiality and accountability of the judiciary and defers to subsidiary legislation (draft Articles 176-177).

The new Constitution should therefore provide for an independent HJC in charge of all questions relating to the recruitment, promotion, transfer and discipline of judges, and with full guarantees of institutional, administrative and financial independence from the executive. The Constitution should also include provision for a "statute for judges", which enshrines judges conditions of tenure and impartiality. Providing for such guarantees will reinforce the independence of the judiciary and contribute to protecting this independence against attacks from both the legislative and executive branches of governments.

b. The independence of the judiciary in light of international standards

In drafting the constitutional provisions relating to the judiciary, the CA should be mindful of Egypt's obligations under international law. Various instruments, to which Egypt is a party, guarantee the right to a fair hearing before independent and impartial courts or tribunals. In particular, the ICCPR provides at Article 14, *inter alia*: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".¹¹⁰ Regional Conventions have incorporated similar provisions, including the ACHPR, which states at Article 7(1): "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights

¹⁰⁷ Article 99 of JAL No. 46/1972

¹⁰⁸ Art.111

¹⁰⁹ Article 78 of JAL No. 46/1972

¹¹⁰ See also Article 18(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Article 37 of the Convention on the Rights of the Child; and Article 11 of the International Convention for the Protection of All Persons from Enforced Disappearance

*as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.*¹¹¹

The Human Rights Council has recently called on States to strengthen the rule of law and promote democracy by “*upholding the independence and integrity of the judiciary*” and to guarantee no institution or individual is above the law.¹¹² This should be done by, among other things, ensuring that: “*Comprehensive anti-corruption strategies and measures are adequately developed and applied in order to maintain the independence and impartiality of the judiciary, and to ensure the moral integrity and accountability of the members of the judiciary, legislative and executive powers.*”¹¹³ In addition, the Human Rights Committee has recommended on numerous occasions that States adopt legislation and measures to ensure that there is a clear demarcation between the competences of the executive and judicial branches of government so that the former cannot interfere in matters for which the judiciary is responsible.¹¹⁴

Standards on judicial independence are also found in specific UN instruments, in particular, the United Nations Basic Principles on the Independence of the Judiciary of 1985 (the UN Principles).¹¹⁵ The UN Principles state that: “*the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.*”¹¹⁶ Regional standards have also been developed, including the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the African Union Principles).¹¹⁷ A further set of standards is the Bangalore Principles on Judicial Conduct of 2002 (the Bangalore Principles), which are a product of several years work by the Judicial Group for the Strengthening of Judicial Integrity (JGSJI) comprising ten Chief Justices from Asia and Africa, and which were endorsed by the UN Commission on Human Rights in 2003.

Although international law does not prescribe the precise manner in which the independence of the judiciary is secured and maintained, the mechanism chosen by the State must ensure the independence of the judiciary as a system as well as the independence and impartiality of individual judges. The UN Principles affirm that: “*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any*

¹¹¹ See also Article 26 of the ACHPR on the obligation on States to guarantee the independence of the Courts, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 3 and 4 of the Inter-American Democratic Charter

¹¹² Human Rights Council, A/HRC/Res/19/36, 19 April 2012, para.16(b)

¹¹³ *Id.*, at para. 16(j)(v)

¹¹⁴ Concluding Observations of the Human Rights Committee on Romania, CCPR/C/79/Add.111, 28 July 2010, para.10. See also the Committee’s Concluding Observations on Peru, CCPR/CO/70/PER, para.10; the Concluding Observations on El Salvador, CCPR/C/79/Add.34, para.15; the Concluding Observations on Tunisia, CCPR/C/79/Add.43, para.14; and the Concluding Observations on Nepal, CCPR/C/79/Add.42, para.18

¹¹⁵ Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

¹¹⁶ Principle 1

¹¹⁷ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Union, DOC/OS(XXX)247, adopted July 2003. See also, as regards the Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges

reason.”¹¹⁸ Therefore, the mechanism chosen must guarantee judicial independence, both institutional and individual, and impartiality, both objective and subjective. Further, the UN and regional standards, provide detailed guidance on how to secure an independent judiciary. For example, the African Union Principles provide for the establishment of an independent body for making appointments to judicial bodies.¹¹⁹ In times of transition, the judiciary plays a particularly important role in safeguarding human rights. 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*”.¹²⁰

2) The Office of the Public Prosecutor

a. Executive control over the Office of the Public Prosecutor in Egypt

The independence of the Office of the Public Prosecutor (OPP) in Egypt has been a longstanding concern.

There is no constitutional basis for the OPP in the 1971 Constitution. In the Draft Constitution, no guarantees of independence are provided for in relation to the OPP or individual prosecutors, while the precise role and competences of the OPP are all subject to subsidiary legislation (draft Article 179). The legal basis for the OPP is therefore found in the JAL. The OPP is a hierarchical structure with Assistant Public Prosecutors, First Attorney-Generals, Attorney-Generals, Chief Prosecutors, Prosecutors, Assistant Prosecutors and Associate Prosecutors, all of whom are subject to the supervision of the Prosecutor-General.¹²¹ The Prosecutor-General is appointed by Presidential Decree, from among the vice-presidents of the Courts of Appeal, Counsellors of the Court of Cassation and First Attorney-Generals.¹²² Assistant Public Prosecutors, First Attorney-Generals and Attorney-Generals are also appointed by Presidential Decree after the approval of the HJC.

However, while Article 38 of the JAL contains general conditions and qualifications required for appointment to the OPP, including legal qualifications, in practice these requirements were not always met, including in the case of the Prosecutor-General.¹²³ It has therefore been argued that the Prosecutor General’s “*appointment...is not conditional upon the consent or even opinion of the Supreme Judicial Council, and no specific qualifications or conditions are required of the new appointee*”.¹²⁴

In addition, under Article 125 of the JAL, prosecutors were subordinated to their immediate superiors, the Prosecutor-General and the Minister of Justice. Under the same law, the Minister of Justice was also empowered to reprimand prosecutors (Article 126) or even to suspend them (Article 129).

¹¹⁸ Principle 2

¹¹⁹ Guideline A(4)(h)

¹²⁰ 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.

¹²¹ For an outline of the hierarchical structure, see Abdullah Khalil, “*The General Prosecutor between the Judicial and Executive Authorities*,” Nathalie Bernard-Maugiron, ed., *Judges and Political Reform in Egypt* (Cairo: American University in Cairo Press, 2008) p.62-63

¹²² Article 119 of the JAL No.46/1972

¹²³ Former Prosecutor-General Mahir Abd Al-Wahid, appointed in 2000, is a pertinent example, since he was neither a senior judge at the Court of Appeal or Court of Cassation, nor a Public Attorney and instead was serving as an assistant to the Minister of Justice.

¹²⁴ Abdullah Khalil, *Id.* at page 63

Some amendments were introduced to the JAL through Law 35/1984, with a view to limiting the control of the executive over the OPP. In particular, amended Article 67 of the JAL ensures the irremovability of public prosecutors. Further, Law 142/2006 imposed various limitations on the powers of the Minister of Justice as regards the OPP. For example, prosecutors are now subordinated to their immediate superiors and the Prosecutor-General only. Nevertheless, the Minister of Justice is able to request the Prosecutor-General to initiate disciplinary proceedings against prosecutors.¹²⁵ Administrative supervision and decisions concerning the transfer of prosecutors is still reserved for the Minister of Justice.¹²⁶ In addition, the Criminal Code of Procedure (CCP) provides for other situations where the Minister of Justice can undermine the work of the OPP. For example, Article 65 of the CCP authorises the Minister of Justice to request the President of the Court of Appeal to appoint an investigating judge to investigate specific crimes or specific types of crimes. In this situation the Minister has a discretionary power to define what crimes come under the mandate of the investigating judge.

Although the CCP grants prosecutors competence to instigate criminal proceedings, they have consistently failed, both under the rule of former President Mubarak and the SCAF, to prosecute cases of human rights violations. The failings of the OPP in this regard can largely be explained by the extensive control exercised by the executive over the OPP, by virtue of the JAL and the CCP. Indeed, Articles 63 and 232(2) of the CCP guarantee the Prosecutor-General, Attorney-Generals and Chief Prosecutors the exclusive competence to summon law enforcement officers and institute criminal proceedings against them.

b. The Office of the Public Prosecutor in light of international standards

The failings of the OPP in Egypt have severely undermined the rights of victims of human rights violations to effective remedies and to reparation, as most investigations into such violations either did not result in trials or did not result in the conviction of the perpetrators. Indeed, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, following a mission to Egypt in 2009, expressed “*his deep concern about serious and frequent allegations of torture or other ill-treatment, illegal detention and non-compliance with judicial release orders for terrorist suspects*” and urged the Government “*to ensure that prompt and independent investigations of complaints are carried out on a consistent basis with the purpose of bringing to justice all persons implicated in such offences*”.¹²⁷

Respect for human rights and the rule of law presupposes a strong prosecutorial authority in charge of investigating and prosecuting criminal offences with independence and impartiality. Therefore, various international standards have been developed relating to public prosecutors. For example, the UN Guidelines on the Role of Prosecutors (The UN Guidelines) were formulated to assist States “*in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings*”.¹²⁸ The UN Guidelines set forth principles that are applicable to

¹²⁵ Article 129 of the JAL No. 46/1972

¹²⁶ Articles 125 and 121 of the JAL No.46/1972

¹²⁷ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Egypt A/HRC/13/37/Add.2, 14 October 2009, para.56

¹²⁸ United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1999. Other relevant instruments on the role of prosecutors include: the Council

all jurisdictions, irrespective of the nature of the prosecuting authority. Guideline 3 recognises that Prosecutors are “essential agents of the administration of justice”.

The role of the OPP is reiterated by the African Union Principles: “Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.”¹²⁹

In the Inter-American and European Systems it has been affirmed that in order to carry out this essential function, “the Office of the Public Prosecutor must be an organ independent of the executive branch and must have the attributes of irremovability (security of tenure) and other constitutional guarantees afforded to members of the judicial branch”.¹³⁰ At the global level there is consensus that the State has a duty to “ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability”.¹³¹

Although the OPP should be accorded protections and guarantees akin to the judicial branch, it is also clear that the OPP must remain distinct from the judiciary in certain respects. For example, in criminal proceedings it is essential that “[t]he office of prosecutors shall be strictly separated from judicial functions”.¹³² Likewise, the Bordeaux Declaration, an opinion issued by European Judges and Prosecutors at the request of the Committee of Ministers of the Council of Europe, has reiterated that: “Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other.”¹³³ As with the independence of the judiciary, the precise mechanism and structure for securing an independent OPP is for the State in question to decide. However, “States always have a duty to provide safeguards so that prosecutors can conduct investigations impartially and objectively.”¹³⁴

In addition, sufficient guarantees need to be in place surrounding the selection, training, appointment and promotion of public prosecutors, to ensure that, “individuals of integrity and ability, with appropriate training and qualifications” are appointed and promoted.¹³⁵ Similarly, security of tenure and conditions of service, including appropriate remuneration, should be “set out by law or published rules or regulations”.¹³⁶

of Europe’s Recommendation No. R (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system; and the African Union Principles, *Id.*, Principle F.

¹²⁹ The African Union Principles, *Id.*, Principle F(k)

¹³⁰ Inter-American Commission of human rights, Report on the Situation of human rights in Mexico, OEA/Ser.L/V/II.100, Doc.7 rev.1, para.372. See also, Opinion No.12 (2009) of the Consultative Council of European Judges and Opinion No.4 (2009) of the Consultative Council of European Prosecutors on, *the Relations Between Judges and Prosecutors in a Democratic Society*, The Bordeaux Declaration at Principle 6.

¹³¹ The UN Guidelines, *Id.*, Guideline 4

¹³² The UN Guidelines, *Id.*, Guideline 10

¹³³ The Bordeaux Declaration, *Id.*, at Principle 3

¹³⁴ International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No.1, (2007), International Commission of Jurists, page 71, available at, <http://www.icj.org/no-1-international-principles-on-the-independence-and-accountability-of-judges-lawyers-and-prosecutors/> last accessed 12 October 2012.

¹³⁵ The UN Guidelines, *Id.*, Guideline 1

¹³⁶ The UN Guidelines, *Id.*, Guideline 6

In line with these international standards, the new Constitution should introduce a framework for an OPP that is not only empowered to uphold the rule of law and human rights but is also sufficiently independent from the executive.

3) States of emergency and military and exceptional courts

a. Legal framework

A key cause for concern regarding the 1971 Constitution was the existence and use of extensive emergency provisions. Article 148 of the 1971 Constitution provides: *"The President of the Republic shall proclaim a state of emergency in the manner prescribed by the law. Such proclamation must be submitted to the People's Assembly within the following fifteen days so that the Assembly may take a decision thereon. In case of the dissolution of the People's Assembly, the matter shall be submitted to the new Assembly at its first meeting. In all cases, the proclamation of the state of emergency shall be for a limited period, which may not be extended unless by approval of the Assembly."*¹³⁷

A state of emergency was declared before the 1971 constitution, as early as 1967, with only an 18-month suspension prior to Sadat's assassination in 1981. Accordingly, the state of emergency in Egypt *"is not a state of exceptionality, it has become the norm, which must never be the purpose of a state of emergency"*.¹³⁸ In 2002, the Human Rights Committee reviewed Egypt's conformity with the ICCPR. The report noted, *"the committee is disturbed by the fact that the state of emergency proclaimed in 1981 is still in effect, meaning that the State party has been in a semi-permanent state of emergency ever since"*.¹³⁹

Indeed, Article 4 of the 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."*¹⁴⁰

As the Human Rights Committee has noted: *"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."*¹⁴¹

In addition, as outlined above, any derogation to rights pursuant to such an emergency must be of an exceptional and temporary nature. With regard to the right

¹³⁷ Detailed provisions on the requisite form of notice and the powers granted to the President under a state of emergency are set out in the Emergency Law No 162/1958. Article 2(1) states: Declaration of a state of emergency and declaration of its end are issued by the President of the Republic, and the decision to announce the state of emergency should include the following: First: A statement declaring the state of emergency and announcing its reasons; Second: The borders of the areas that it includes; Third: The date from which its operation begins

¹³⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Egypt A/HRC/13/37/Add.2, 14 October 2009, para.6.

¹³⁹ Concluding Observations of the Human Rights Committee on Egypt, CCPR/CO/76/EGY, 28 November 2002, para.6

¹⁴⁰ Article 4(1) of the ICCPR, International Covenant on Civil and Political Rights, available at <http://www2.ohchr.org/english/law/ccpr.htm>, last accessed 10 March 2012.

¹⁴¹ Human Rights Committee, General Comment 29, States of Emergency (article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, Id., at para. 2.

to a fair trial, the Human Rights Committee has said that the right to be tried by an independent and impartial tribunal "*is an absolute right that may suffer no exception*".¹⁴² Therefore, most components of the right to a fair trial are widely regarded as non-derogable.¹⁴³

In Egypt, constitutional and legislative provisions applicable under the state of emergency, in particular the Emergency Law, have created a parallel justice system overseen by the President, which has severely undermined the independence of the judiciary.¹⁴⁴

Under the Emergency Law, the President has the ability to alter the composition of the Special Security Courts (Security Courts) from a purely civilian panel to a mixed military/civilian panel or an entirely military panel operating under procedures put in place by the President.¹⁴⁵ No right of appeal is permitted and no civil motions, including compensation claims by victims of human rights violations, can be brought before a Security Court.¹⁴⁶ The President also has control over the judgments and sentences issued by Security Courts.¹⁴⁷ For example, pursuant to Articles 14 and 15 of the Emergency Law, where an individual is convicted, the President has broad powers to reduce the sentence, replace the sentence by a lesser one, cancel or suspend the sentence or order a retrial before another chamber.

In addition to the Security Courts, a second parallel justice system is the military court system. This system is governed by the Military Code of Justice (the MCJ), Law 25/1966.

In times of emergency and pursuant to the Emergency Law, the President can refer certain cases to military courts.¹⁴⁸ In addition, Article 179 of the 1971 Constitution explicitly granted the President the power to "*refer crimes of terrorism to any judicial body established by the Constitution or the law*". This article was later abrogated through the March 2011 referendum on the amendments to the 1971 Constitution.

This array of constitutional and legal provisions paved the way for the SCAF to maintain the state of emergency and to use military courts to try civilians throughout most of the transitional period.¹⁴⁹ In meetings with victims of human rights violations and their families, the ICJ was informed of rapid trials of civilians before military courts, sentences following summary trials that failed to meet international standards of due process and a lack of or insufficient access to legal counsel.

The extensive use of military courts during this period has resulted in numerous violations of the right to a fair trial. In particular, the ICCPR, to which Egypt is a party,

¹⁴² Views of 28 October 1992, Communication No. 263/1987, *M. Gonzalez del Río v. Peru*, CCPR/C/46/ D/263/1987, para. 5.2.

¹⁴³ Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, para.32

¹⁴⁴ The Emergency Law No 162/1958

¹⁴⁵ Articles 7 and 8 of Law 162/1958

¹⁴⁶ Articles 12 and 11 of Law 162/1958

¹⁴⁷ Articles 12 to 15 of Law 162/1958. Article 13 allows the president to close the file at any time during or after the investigation stage and can order the temporary release of the accused.

¹⁴⁸ Article 6 of Law 162/1958 states (unofficial translation): "*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."*

¹⁴⁹ Articles. 51 and 59 of the March Constitutional Declaration

establishes international due process standards, including the right: "to a fair and public hearing by a competent, independent, and impartial tribunal established by law" (Article 14(1)); and the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" (Article 14(3)(b)). The system of Security Courts and military courts in Egypt has consistently fallen foul of the requirements of Article 14. The Human Rights Committee previously expressed its concern over "the multitude of special courts in Egypt," and the resulting need for "consistency in the judicial procedure and procedural guarantees."¹⁵⁰

In May 2012, the People's Assembly approved an amendment to the MCJ that abolished the executive's right to refer cases to military courts under a state of emergency.¹⁵¹ In addition, following his appointment, President Morsi set up a committee to review the cases of civilians tried in military courts during and since the uprising. As a result of the review, the President pardoned over 500 individuals in July.¹⁵² More recently, President Morsi announced that all convicted political prisoners arrested in pro-revolution events between 25 January 2011 and 30 June 2012, except those convicted of murder, will be released.¹⁵³

While these measures are a welcome development, a full review of cases brought before military courts should be undertaken. Other problematic provisions outlined above should also be either amended or abrogated, including the Emergency Law. Moreover, while the state of emergency was not renewed at the end of May 2012, Security Courts are still functioning, with President Morsi appointing new judges at these courts.¹⁵⁴

b. Jurisdiction of military and exceptional courts

Under the Emergency Law, Security Courts were granted jurisdiction over a wide range of crimes, including crimes specifically provided for by the President or cases referred to them by the President.¹⁵⁵ The MCJ grants military courts jurisdiction where a crime is committed in a place operated by or for the military, or in relation to property owned by the military.¹⁵⁶ Military judges themselves decide whether an offence is within their jurisdiction or not.¹⁵⁷ According to Article 3 of the MCJ, military judges are independent and irremovable. However, both military judges and prosecutors are members of the armed forces and, as such, are subject to the disciplinary procedures of the armed forces. Further, under Article 1 of the MCJ the military justice system is effectively under the control of the Ministry of Defence.

¹⁵⁰ Concluding Observations of the Committee on Human Rights on Egypt, CCPR/C/78/Add.23, 9 August 1993, para.11 Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, Comments of the Human Rights Committee, Egypt, 9 August 1993, available at <http://www1.umn.edu/humanrts/hrcommittee/G9318243.htm>, last accessed 8 April 2012.

¹⁵¹ 6 May 2012 amendments to Law 25/1966

¹⁵² Decree 5 of 2012. See also *Prisons receive the Presidential decision to pardon 572 prisoners*, Al Youm Al Saba, 23 July 2012, available at: <http://www.youm7.com/News.asp?NewsID=738710> last accessed 15 October 2012

¹⁵³ Decree of 8 October 2012, English text of decree available at: <http://english.ahram.org.eg/NewsContent/1/140/55104/Egypt/First--days/English-text-President-Morsis-pardon-decree-for-re.aspx> last accessed 14 October 2012.

¹⁵⁴ "State Security" court listens to the prosecution's pleas in "arms smuggling" case, Al-Masry Al-Youm, 22 September 2012, available at <http://www.almasryalyoum.com/node/1129286>, last accessed 12 October 2012

¹⁵⁵ Articles 7 and 9 of Law 162/1958

¹⁵⁶ Article 5 of the MCJ

¹⁵⁷ Article 48 of the MCJ

Numerous international bodies, including the Human Rights Committee and the African Commission on Human and People's Rights, have affirmed that jurisdiction over civilians charged with security crimes should not be granted to military or State security courts. In 2002, the Human Rights Committee stated in relation to Egypt: *"The Committee notes with alarm that military courts and State security courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those courts' independence and their decisions are not subject to appeal before a higher court (article 14 of the Covenant)."*¹⁵⁸ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism noted in 2009, in the context of Egypt: *"military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties."*¹⁵⁹

Furthermore, *"The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in case of serious crimes under international law, of an international or internationalized criminal court."*¹⁶⁰

The Inter-American Commission on Human Rights has in numerous cases held that trying military and police personnel for human rights violations in military or police courts constitutes a violation of the right to an independent and impartial tribunal and the right to due process.¹⁶¹

Furthermore the use of military and special security courts increases the likelihood of impunity. For example, the UN Working Group on Enforced or Involuntary Disappearances has noted that, once criminal jurisdiction has been assumed by the armed forces, the risk of impunity for serious human rights abuses increases markedly. The Special Rapporteur on extrajudicial, summary or arbitrary executions noted this correlation in relation to Peru: *"A further factor contributing to the impunity enjoyed by the members of the security forces is the fact that, where judicial proceedings are opened against them for alleged extrajudicial executions, they are almost without exception heard by military courts."*¹⁶² Similarly, in relation to Colombia, the Inter-American Commission on Human Rights stated: *"The problem of impunity is aggravated by the fact that the majority of cases involving human rights violations by members of the State's public security forces are processed by the military justice system. The Commission has repeatedly condemned the military jurisdiction in Colombia and in other countries for failing to provide an effective and impartial judicial remedy for violations of Convention-based rights, thereby ensuring*

¹⁵⁸ Concluding observations of the Human Rights Committee on Egypt, CCPR/CO/76/EGY, 28 November 2002, para.16(b)

¹⁵⁹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Egypt A/HRC/13/37/Add.2, 14 October 2009, para.32

¹⁶⁰ Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, *Id.*, Principle 29

¹⁶¹ See for example Annual Report of the Inter-American Commission on Human Rights, 2000, OEA/Ser./L/V/II.111, doc. 20 rev., 16 April 2001, Report No. 55/01, Aluisio Cavalcante et al., para.149-165. See also, Annual Report of the Inter-American Commission on Human Rights, 2000, OEA/Ser./L/V/II.111, Doc. 20 Rev., 16 April 2001, Report N° 62/01, Ríofrío Massacre, Case 11,654 (Colombia), paragraph 29, 70 and 72

¹⁶² Report by the Special Rapporteur, Mr B.W. Ndiaye on his mission to Peru 24 May to 2 June 1993, E/CN.4/1994/7/Add.2, para.48

impunity and a denial of justice in such cases."¹⁶³ These arguments are equally applicable to special security courts.

Although Article 200 of the Draft Constitution restricts the jurisdiction of the military judiciary to "*military persons and equivalents*", there is no exclusion of cases involving human rights violations committed by members of the armed forces. Furthermore, the term "*equivalents*" is ambiguous, and potentially paves the way for the legislature to increase the scope of military courts beyond permissible limits in subsidiary legislation. The new Constitution should therefore limit the jurisdiction of military courts to offences of a strictly military nature committed by military personnel. Exceptional courts should be abolished.

F. Recommendations

The ICJ calls on the Egyptian authorities, including the members of the Constituent Assembly, to:

Constitution-making process

- i) Ensure the right of Egyptians to fully participate in the constitution-making process and to take part in the conduct of public affairs;**
- ii) Ensure adequate time is provided for the constitution-making process to allow for a comprehensive public dialogue in order to draft a constitution that fully represents the views of Egyptians;**
- iii) Ensure that the current Constituent Assembly, when drafting the Constitution, complies with international standards of inclusivity, participation and transparency;**
- iv) Provide for the establishment of a representative and democratically elected body responsible for drafting the new Constitution, if the current Constituent Assembly fails to meet these standards or is dissolved by the upcoming decision of the High Administrative Court;**
- v) Ensure that women and people belonging to minority groups play an active role in the constitution-making process and in determining the legal and constitutional system of Egypt;**

Civilian oversight of the armed forces

- vi) Ensure in the Constitution the accountability of the armed forces and their effective subordination to a legally constituted civilian authority;**
- vii) Ensure the role of the armed forces is adequately defined in the Constitution and specifically limited to matters of national defence only;**
- viii) Provide for legislative and other mechanisms of oversight and control over the armed forces, including over financial and budgetary issues;**

¹⁶³ Inter-American Commission on Human Rights, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1, 26 February 1999, Chapter V. para.17

- ix) **Ensure that the Ministry of Defence is under the authority of a civilian, democratically elected leadership;**

Rule of law and separation of powers

- x) **Ensure the supremacy of the law and, consequently, that the powers of the State are not exercised arbitrarily;**
- xi) **Provide for fair, formal, regular, accessible and transparent processes of law enforcement and adjudication;**
- xii) **Ensure the new Constitution fully guarantees the principle of separation of powers and, to that end, outline clearly the respective duties of the executive, judiciary and legislature;**
- xiii) **Ensure checks and balances between the executive, legislative and judicial branches of government, and that each of these branches is accountable to the others;**

Human rights

- xiv) **Include in the new Constitution a comprehensive Bill of Rights in accordance with international human rights law and standards;**
- xv) **Guarantee in the Constitution universally recognised and accepted civil, political, economic, social and cultural rights for all, without distinction or exclusion;**
- xvi) **Define the content and substance of these rights as well as their scope, including permissible limitations or restrictions the State may be able to impose;**
- xvii) **Ensure that these limitations or restrictions are precise, free of ambiguity and necessary in a democratic society;**
- xviii) **Ensure that peremptory norms, including among others, the right to life; the right to be free from torture or other ill-treatment; the right not to be subjected to enforced disappearance; the right to a fair trial; and the principle of legality of crimes, are absolute rights from which no derogation is permitted, including in times of emergency;**
- xix) **Prohibit in the constitution serious crimes under international law, including among others, war crimes, crimes against humanity, genocide and enforced disappearance;**
- xx) **Provide for the direct applicability of international human rights law in Egypt;**
- xxi) **Incorporate in the Constitution the obligation on State authorities to respect, protect, promote and fulfil human rights;**
- xxii) **Provide for effective mechanisms to enforce human rights, including an independent human rights institution, an Ombudsman and full access for individuals to the Constitutional Court;**
- xxiii) **Enshrine in the new Constitution the right of victims of human rights violations to an effective remedy and to reparation and, to this end, provide a comprehensive, independent and impartial transitional justice strategy and mechanism to address the legacy of gross human rights violations in Egypt;**

- xxiv) Ensure in the Constitution that no amnesty or immunity provisions nor limitation periods are provided for in relation to gross human rights violations;

Constitutional supremacy and the Constitutional Court

- xxv) Include in the new Constitution explicit provision for the supremacy of the Constitution;
- xxvi) Ensure that the new Constitution contains provision for judicial review of legislative and executive acts in accordance with the Constitution, interpreted in line with international law and standards;
- xxvii) Provide in the Constitution for detailed provisions relating to the competences, formation, functioning and legal status of the Constitutional Court;
- xxviii) Enshrine in the Constitution guarantees for the independence of the Constitutional Court, including the independence and immunity of its members, as well as increased democratic and representative procedures for the selection of its members;
- xxix) Ensure that the decisions of the Constitutional Court are binding on the other branches of government and are enforced;
- xxx) Guarantee in the new Constitution full access for individuals to the Constitutional Court;

Independence of the judiciary and the Office of the Public Prosecutor

- xxxi) Through the new Constitution, end executive control over the judiciary, including by removing the executive's powers over the disciplining, appointment, promotion, transfer and removal of judges and over the financing and administration of the judicial sector;
- xxxii) Ensure that the new Constitution contains provision for a HJC with exclusive competence over all questions relating to judges' careers, and that has sufficient guarantees of independence, including financial, administrative and institutional independence;
- xxxiii) Ensure that the new Constitution contains a requirement for a statute for judges, containing guarantees for judges' conditions of tenure and impartiality;
- xxxiv) Ensure the new Constitution prohibits any restrictions, improper influences, inducements, pressures, threats or interferences in judicial decision-making and other judicial issues, including by other branches of government;
- xxxv) Enshrine in the new Constitution the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law;
- xxxvi) Enshrine in the new Constitution provision for an OPP that is sufficiently independent from the executive so that prosecutors can discharge their functions fairly, effectively and impartially;
- xxxvii) Ensure in the Constitution that prosecutors are able to perform their professional functions without intimidation,

hindrance, harassment or improper interference from any quarter or for any reason;

States of emergency and military and exceptional courts

- xxxviii) Ensure, including in the Constitution, that any declaration of the state of emergency is limited in time and to situations that threaten the life of the nation;
- xxxix) Repeal the Emergency Law and ensure that all cases pending in the Security Courts are referred to ordinary courts and that any individuals convicted before Security Courts are either retried before ordinary courts or released; and
- xl) Reform the MCJ to restrict the jurisdiction of military courts to military offences only and to exclude cases involving human rights violations.

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