

Egypt - Upholding the Rule of Law and Human Rights Following the Ouster of President Morsi

The rule of law and human rights situation in Egypt has continued to deteriorate following the military's unlawful seizure of power and ouster of President Morsi.

On 3 July 2013, the Minister of Defense and Commander of the Armed Forces, General Abdel Fattah El Sisi issued a statement suspending the Constitution, appointing the Chief Justice of the Supreme Constitutional Court (SCC), Adly Mansour, as "caretaker of the State" during an ill-defined transitional period, and laying down a road map for constitutional amendments and elections.¹

In forcibly seizing power and arrogating to itself the power to issue and implement executive orders on fundamental constitutional and governance issues, the military has acted clearly beyond the scope of its constitutional authority and thus contravened basic rule of law principles. Six months on, the current transitional authorities, failing to draw lessons from the failures of the past, have continued to operate from the same playbook as their predecessors that have long undermined the rule of law and human rights in Egypt.

For example, instead of providing for sufficient time, transparent procedures, and a representative and democratically elected body responsible for the process of drafting a new constitution, the authorities have perpetuated the same opaque procedures that historically governed the constitution-making processes in Egypt, including following the ouster of former President Hosni Mubarak. Military-appointed President Adly Mansour issued a unilateral "Constitutional Declaration" (the July Declaration) that provided for a ten-member expert committee responsible for drafting amendments to the 2012 Constitution.² A 50-member committee was appointed on 1 September to finalize these amendments.³ The new draft Constitution, approved by this committee on 2 December, will be submitted to a popular vote on 14 and 15 January 2014.

The ICJ is deeply concerned that this procedure contravenes the principles of participation, representation and transparency, and has undermined the rights of Egyptians to fully participate in the constitution-making process and to take part in the conduct of public affairs.

The ICJ is also concerned that the draft Constitution that resulted from this procedure does not serve as an appropriate foundation on which the rule of law can be concretized. The draft Constitution, in a number of critical respects, is incompatible with international standards, including those guaranteeing independence of the judiciary, ensuring the accountability of the armed forces and their subordination to legally constituted civilian authorities, and recognizing universally accepted human rights.

¹ Statement of the General Command of the Armed Forces, 3 July 2013.

² Article 28 of the July Declaration included the expert committee as part of the roadmap. Presidential Decree no. 489 of year 2013 formed the expert committee on 21 July 2013.

³ According to Article 29 of the July Declaration, the committee shall include representatives of "political parties, intellectuals, workers, peasants, members of professional syndicates, unions, and national councils, Al Azhar, churches, the Armed Forces, the police, and public figures, provided that at least 10 members are young men and women." The appointments were established by Presidential Decree no. 570 of year 2013.

Further, the provision of only six weeks, without adequate access to information or comprehensive consultative processes, for the public to consider the new draft Constitution (composed of 247 articles) undermines the right of all Egyptians to make an informed decision about the basic framework of governance and law for their society, particularly in the context of the deep political instability that has followed the ouster of President Morsi.

Adly Mansour's government and the military that backs his administration have contributed to reinforcing this political instability, including by circumventing democratic processes; shielding the armed forces from oversight and accountability to legitimate civilian authorities; and acting to severely limit the capacity of Egyptians to exercise human rights and freedoms, including the right to liberty and security of person, and the rights to freedom of expression, association, and assembly.

Repressive laws, such as law no. 107 of year 2013 on public meetings, processions and peaceful demonstrations, have been adopted and enforced with a view to silence critics of the government and military. The law not only places very restrictive limitations on the exercise of the right to the freedom of assembly, it also gives security forces sweeping powers to disperse protests, including by using lethal force even when it is not strictly necessary to protect lives.

The ICJ is concerned that law no. 107 effectively gives the security services a license to continue what has been a sustained and often violent crackdown on protesters. Since July 3, the unlawful and disproportionate use of force by armed and security forces, including firing on protesters with live ammunition, has resulted in the unlawful killing of more than 1200 individuals, in particular during the dispersal of the Rabaa Al-Adawya and Annaahda pro-Morsi sit-ins on 14 August, as well as during protests in October, November and December 2013. Thousands of people have been arrested and detained in the course of and the aftermath of these events under conditions that violate guarantees governing freedom from arbitrary detention and the right to a fair trial, in particular the rights to have access to a lawyer and to family members.

In addition, while an independent and robust judiciary and legal profession is particularly critical to upholding the rule of law and protecting human rights in times of crisis and political instability, the ICJ is deeply concerned that the courts and the Office of the Public Prosecutor (OPP) have both been used to arrest, prosecute, convict and imprison opponents of the current authorities, including members or supporters of the former Morsi Government.

The ICJ is particularly concerned that that on the basis of vague, ill-defined grounds, such as "opposing authorities" and "causing disorder", the OPP has charged thousands of individuals who were arrested following the ouster of president Morsi and the dispersal of the sit-ins. The ICJ notes, however, that the OPP has largely failed to investigate the involvement of police, security, and military forces in the allegedly unlawful killings of hundreds of protesters; establish the truth about these killings, and bring the perpetrators to justice with a view to holding them to account.

The effective impunity the security and armed forces have enjoyed for past and present human rights violations, including cases of unlawful killings, torture and other ill-treatment, and arbitrary arrests and detentions remains intact despite continuous promises by government officials to ensure accountability for human rights violations in Egypt.

To enforce the rule of law and address the dire human rights situation, the Egyptian authorities must also ensure, as a matter of urgency, a quick and steady transition of power to a legally constituted civilian authority; amend the draft Constitution to ensure its full compliance with international human rights and rule of law standards; ensure the right of all Egyptians to take part in the conduct of public affairs, including the drafting and adoption of a new constitution; ensure the oversight and accountability of the armed forces and their subordination to legitimate civilian authorities; take effective measures to respect and protect human rights and ensure accountability for past and present human rights violations; guarantee the independence of the judiciary, and to this end, ensure that courts and the OPP are not politicized or used as a means to crackdown on political opponents and protesters, or to shield armed and security officials responsible for human rights abuses from accountability.

I. The Constitution-making process

The ICJ is concerned that the new draft Constitution will not serve as a firm basis for the establishment of the rule of law in Egypt. Neither the Constitution, in a number of its provisions, nor the procedure under which it was elaborated are compatible with rule of law principles or international human rights standards.

On 8 July 2013, military-appointed President Adly Mansour issued a unilateral "Constitutional Declaration" (the July Declaration) containing 33 Articles on rights, government authorities and State institutions, and a timetable for the constitution's drafting and referendum as well as parliamentary and presidential elections.

Since the toppling of President Mubarak, unilateral "Constitutional Declarations" issued without any meaningful consultations and outside any form of democratic participation or affirmation have become common practice in Egypt.

Between February 2011 and June 2012, the Supreme Council of Armed Forces (SCAF) issued four such "Constitutional Declarations", which granted the military wide legislative and executive powers in the transitional period.⁴ After his election, President Morsi issued further "Constitutional Declarations", including the November Declaration by which he arrogated to himself sweeping powers "to protect the goals of the revolution."⁵

The adoption of unilateral executive Declarations during the transition period has effectively imposed constitutional and legal frameworks circumventing the rights of Egyptians to take part in the conduct of public affairs and meaningfully participate in the drafting and adoption of the Constitution. Most importantly, none of the Declarations relating to the Constitution or governance have provided for the establishment of a representative and democratically elected body responsible for drafting the Egyptian Constitution, nor have they ensured adequate time 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.

The July 2013 Declaration issued by the military-appointed President Mansour reproduced the same procedural and substantive deficiencies of previous efforts. This Declaration provided for an expert committee responsible for drafting amendments to the 2012 Constitution.⁶ The ten-member committee was appointed on 21 July,⁷ and

⁴ For a more in-depth analysis of these Declarations see: ICJ report "Egypt's new Constitution: a flawed process uncertain outcomes", November 2012, p.11-12 and 17-18.

⁵ 22 November 2012 Constitutional Declaration

⁶ Presidential Decree 489 of year 2013 formed the expert committee on 21 July 2013.

consisted of two members of the Supreme Constitutional Court and its Commissioners' Board, two regular judiciary judges, two State Council judges, and four Egyptian university professors of constitutional law. The Committee had 30 days from its formation to propose such amendments.⁸ A 50-member committee, "*representing all segments, communities and demographic diversities of the society, especially the political parties, intellectuals, laborers, peasants, members of trade unions, specialized federations, national councils, al-Azhar, the Egyptian Churches, Armed Forces, the police and public figures,*" was to finalize these amendments within 60 days of their receipt.⁹

On 1 September, President Mansour issued Presidential Decree no. 570 of 2013 on the composition of the 50-person Committee and its competences. Few details have emerged about the basis and criteria upon which the members of the committee were appointed.

The bylaws of the Committee provided for the establishment of various commissions¹⁰ and for the Committee's sessions to be broadcast.¹¹ However, while the Commission on societal dialogue and outreach was competent to receive propositions from the representatives and organizations of civil society and, if deemed necessary, to organize public hearings,¹² these provisions were insufficiently complied with.

The Committee, on 2 December, approved the new draft Constitution. It will be submitted to a popular vote on 14 and 15 January 2014.

The ICJ considers that this constitution-making procedure resembles the muddled and highly flawed processes of 2011 and 2012. The manner of selection, and the criteria upon which the members of the expert committee and the 50 members committee were selected, lacked any semblance of democratic legitimacy and representation. The short time period provided for amending the 2012 Constitution or drafting a new constitution does not in any event allow for meaningful discussion, debate, or input from the wide range of stakeholders.

Further, the provision of a mere six weeks from the approval and publication of the draft Constitution until the referendum is insufficient for any stakeholder to fully assess the 247 Articles provided for in the draft. In order for the public to make an informed decision, substantial information must be provided and received about these provisions, including through holding public debate about them and by ensuring access to the media for individuals from all viewpoints, including those opposing the draft Constitution.

The International Covenant on Civil and Political Rights (ICCPR), to which Egypt is a party, guarantees under 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.*"¹³

⁷ Presidential Decree 489 of year 2013, Official Gazette 29 (bis) on 21 July 2013.

⁸ *Id.* at Article 4. See also Article 28 of 8 July 2013 Constitutional Declaration.

⁹ Article 29 of the July 2013 Constitutional Declaration.

¹⁰ Article 12 of the Bylaws of the Committee of Fifty, available at http://egelections-2011.appspot.com/Dostour/la2e7et_el3amal.pdf

¹¹ *Id.* at Article 10.

¹² *Id.* at Article 15.

¹³ International Covenant on Civil and Political Rights, New York, 16 December 1966, Egypt 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*

The UN Human Rights Committee has 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.*¹⁴

The Committee also recognized 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”;¹⁵ and that “[c]itizens 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.”¹⁶

The ICJ is concerned the constitution building procedure that has been adopted and carried out undermines the right of Egyptians to fully participate in the constitution-making process and to take part in the conduct of public affairs. It echoes the confusion and uncertainty that marred the whole transition period following the toppling of President Mubarak.

II. The New Draft Constitution

Egypt’s draft Constitution expands on human rights and rule of law provisions provided for in the 1971 and 2012 Constitutions. However, the draft Constitution does not fully conform to rule of law principles or incorporate international human rights law standards.

Certain rights are either not adequately defined in the draft Constitution, such as the right to life, or not provided for, such as the right to not be subjected to enforced disappearance. Others have been elaborated on or defined either imprecisely or in a way inconsistent with Egypt’s obligations under international law.¹⁷

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.”

¹⁴ 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

¹⁵ *Id.* at para.2.

¹⁶ *Id.* at para. 6.

¹⁷ Egypt is party to most universal human rights treaties, including The Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, Egypt ratified it on 8 February 1952; International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, Egypt ratified it on 1 May 1967; International Covenant on Economic Social and Cultural Rights, New York, 16 December 1966, Egypt ratified it on 14 January 1982; International Covenant on Civil and Political Rights, New York, 16 December 1966, Egypt ratified it on 14 January 1982; International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973, Egypt acceded to it on 13 June 1977; Convention on the Elimination of all Forms of Discrimination Against Women, New York, 18 December 1979, Egypt ratified it on 18 September 1981; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, Egypt acceded to it on 25 June 1986; The Convention on the Rights of the Child, New York, 20 November 1989, Egypt ratified it on 6 July 1990; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, 18 December 1990, Egypt acceded to it on 19 February 1993; Convention on the Rights of Persons with Disabilities, New York, 13 December 2006, Egypt ratified it on 14 April 2008

For example, while equality before the law and non-discrimination are specifically guaranteed under Article 53 of the draft Constitution, they are extended to “citizens” only. The draft Constitution therefore continues to exclude non-citizens who are under the jurisdiction of Egyptian law from such equality, contrary to international law. Article 2 of the ICCPR requires States to respect and ensure “to all individuals within its territory and subject to its jurisdiction” the rights recognized in the Covenant. This requirement applies to all Covenant rights, with the exception of Article 25. More specifically, Article 26 of the ICCPR requires equality of the law for all, including without distinction on the grounds of national origin.

Another source of concern regarding the human rights provisions in the draft Constitution is that numerous rights are subject to “*the regulations of the law.*” The ICJ is deeply concerned that such regulations might have the potential of eroding the very essence of these rights. For example, under Article 73 of the draft Constitution, “citizens” have the right to organize public meetings, processions and peaceful demonstrations upon “notification” to the authorities and as “regulated by the law”. Law no. 107 of year 2013 on public meetings, processions and peaceful demonstrations places, however, imposes very restrictive limitations on the exercise of the right to the freedom of assembly, including by prohibiting any public meeting or gathering of more than 10 people without prior notification. The law not only gives the authorities wide powers to ban public meetings, processions and peaceful demonstrations if deemed a “threat to public order”, it also empowers them to forcibly disperse peaceful protests, including by using lethal force when not strictly necessary to protect lives.

Such restrictions on the exercise of the right to the freedom of assembly are inconsistent with Egypt’s obligations under international law. Under this law, restrictions on the exercise of human rights may only be imposed for a legitimate purpose recognized under articles 21 and 22 of the ICCPR. The nature and basis of these restrictions must be articulated precisely, free of ambiguity and strictly necessary in a democratic society.¹⁸ They must be the means least intrusive on the exercise of rights and must never extinguish or impair the very essence of the rights themselves.

In addition, the draft Constitution contains no provision for rights that cannot be subjected to any restriction or derogation, including under the state of emergency, as required under the article 4 of the ICCPR. Article 145 of the draft Constitution sets out the procedure for the declaration of a state of emergency and, while there are certain procedural requirements limiting the declaration itself, there is no explicit restriction on the circumstances in which a state of emergency can be declared; what measures can be taken under it and what rights and freedoms can be restricted or derogated from under it. Under international law, non-derogable rights include, amongst others, the right to life, the right not to be subjected to torture and other-ill-treatment, and the principle of legality.¹⁹

¹⁸ In addition to the relevant provisions of the ICCPR, see “*The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*”. The Principles were adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human rights, and the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, to consider the limitation and restriction provisions of the ICCPR. The Sub-Commission subsequently recognised them (E/CN.4/1984/4, 28 September 1984)

¹⁹ 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 the rights to freedom of thought, conscience or religion. See also Human

In terms of enforcement of human rights, the draft Constitution does not contain any provision recognizing the supremacy of international law, including international human rights law, over domestic law. Furthermore, specific enforcement mechanisms are also lacking. For instance, the competencies and mandate of the National Council for Human Rights (NCHR) are not specified in the draft Constitution.

III. The Rule of law and the Accountability of the armed forces

In order to establish and preserve the rule of law, the armed forces must not have any direct or indirect interference in a country's political life, and must remain subordinate to legally constituted civilian authorities. Egypt's successive Constitutions provided few guarantees to ensure such subordination or any form of civilian oversight of the armed forces. Consequently, the military not only enjoys an effective and comprehensive autonomy over its own affairs, it also plays a determinant role in shaping Egypt's policies. This role has further expanded in the transitional period.

The March Constitutional Declaration of 2011 granted the military, in the form of SCAF, far-reaching legislative and executive powers following the toppling of former President Mubarak.

The SCAF promoted various initiatives to maintain the autonomy of the armed forces, including 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*"; granted it exclusive competence to approve "*all bills relating to the armed forces before they come into effect*" and to defend "*constitutional legitimacy*".²⁰

While these Principles were abandoned following widespread protests, the SCAF's June 2012 Constitutional Declaration effectively reinforced the objectives of these Principles, 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.²¹

Following the election of President Morsi, the 2012 Constitution did little to limit the military's powers and autonomy or ensure its accountability to civilian authorities. In particular, Article 198 provided that the Minister of Defence is to be appointed from among the officers of the armed forces, thus excluding civilians from being appointed as Minister of Defence.

The new draft Constitution reproduces the same provisions that served to shield the armed forces from accountability and civilian oversight. Under the draft, Article 201 affirms the "*Minister of Defence is the Commander in Chief of the Armed Forces, appointed from among its officers.*" Similar to the 2012 Constitution, the draft also provides for a National Defence Council (NDC), where more than half the members

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

²⁰ 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

²¹ Amended Article 53 of the June 2012 Constitutional Declaration.

are from the armed forces.²² The NDC is responsible for “*matters pertaining to the methods of ensuring the safety and security of the country, for discussing the armed forces’ budget, which is incorporated as a single figure in the state budget. Its opinion must be sought in relation to draft laws on the armed forces.*”²³ Notably, the budget of the armed forces is not to be scrutinized by or thoroughly discussed in the House of Representatives. The NDC’s discussions on the budget has to only include the “*the heads of the Planning and Budgeting Committee and the National Security Committee at the House of Representatives.*”²⁴

These Articles are insufficient to set up comprehensive civilian oversight of the armed forces. They enshrine in the Constitution practices that reinforce the unaccountability of the military, including by precluding civilians from serving as Minister of Defence and circumventing any proper discussion, review or decision making by Parliament of the armed forces budget.

Indeed, the draft Constitution does not provide for any mechanism of oversight of the armed forces or any form of legislative scrutiny over their economic interests. While it limits the role of the armed forces to the protection of the country and the preservation of its security,²⁵ the draft Constitution does not provide for the military’s political neutrality nor does it prohibit their interference in Egypt’s political life.

These provisions and omissions concerning the military are particularly problematic given the Egyptian Military’s history of exercise of arbitrary authority outside of the framework of the rule of law, which culminated with the ouster of President Morsi, the suspension of the 2012 Constitution, and the subsequent unlawful seizure of power.

Not only does the draft Constitution not provide for the accountability of the armed forces to legitimate civilian authorities, it also subjects the decisions of these authorities on selecting the Minister of the Defence to the approval of the SCAF. Article 234 provides that the Minister of Defense “*is appointed upon the approval of the Supreme Council of the Armed Forces. The provisions of this article shall remain in force for two full presidential terms starting from the date on which this Constitution comes into effect.*”

Such practices are in clear conflict with international rule of law principles. The UN Human Rights Council, in reaffirming the key components of human rights, democracy and the rule of law, has called on States to ensure that “*the military remains accountable to relevant national civilian authorities.*”²⁶ Likewise, the UN Human Rights Committee, has emphasized that civilian authorities must have “*full and effective control*” over military and security forces.²⁷ The Human Rights Committee has further called for provision of legislation and regulations providing a clear legal framework for such effective civilian control and for limitations on the role of security forces.²⁸

²² Article 203 provides the composition of the NDC as “presided over by the President of the Republic and including in its membership the Prime Minister, the Speaker of the House of Representatives, the Minister of Defense, the Minister of Foreign Affairs, the Minister of Finance, the Minister of Interior, the Chief of the General Intelligence Service, the Chief of Staff of the Armed Forces, the Commanders of the Navy, the Air Forces and Air Defense, the Chief of Operations for the Armed Forces and the Head of Military Intelligence.” The composition of the NDC under the draft is largely similar to that under the 2012 Constitution.

²³ Article 203 of the draft Constitution dated 2 December 2013.

²⁴ *Id.*

²⁵ *Id.* at Article 200.

²⁶ Human Rights Council, Resolution on Human rights, democracy and the rule of law, 19 April 2012, A/HRC/RES/19/36, para. 16(j)(vi)

²⁷ Concluding Observations of the Human Rights Committee: El Salvador, 4/18/1994, CCPR/C/79/Add.34, para. 8.

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

The ICJ is therefore concerned that the process of amending the 2012 Constitution has been a missed opportunity to fully ensure civilian control over, and the accountability of, the armed forces in line with international standards.

IV: The Rule of law and the Independence of the Judiciary

An independent judiciary is an indispensable component of the rule of law. This principle is affirmed in the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles), which provide that it is the responsibility of all institutions, governmental and others, to respect the independence of the judiciary.²⁹ The independence of the judiciary is necessary in order to ensure the effective implementation and enforcement of human rights, including in times of crisis and transition. In particular, during these times, the judiciary serves as an essential check on the other branches of the State and ensures that any laws and measures adopted to address the crisis comply with the Rule of Law, human rights and, where applicable, inter-national humanitarian law.³⁰

In Egypt, while the 1971 and 2012 Constitutions provided for judicial independence, these provisions were not adequately implemented or supported through subsidiary legislation or respected in practice. Judicial independence has been particularly undermined by the executive's effective control of the courts and the Office of Public Prosecutor (OPP), as well as over the careers of judges.³¹ The executive's systematic and arbitrary interference in judicial matters has continued unabated during the transition period.

Instead of providing for sufficient guarantees for judicial independence and ending executive interference in judicial matters, the new draft Constitution reproduces the same deficiencies of the past. It guarantees the independence of the judiciary³² and the irremovability of judges.³³ However, it refers to subsidiary legislation for all questions relating to the functioning of the judiciary and the career of judges, legislation which is highly deficient.

Under the current Judicial Authority Law, No.46/1972, (the JAL), the executive, in the form of the Minister of Justice, has wide powers in terms of administering and financing the court system and influencing the career of judges. The Minister of Justice can establish summary courts and determine their jurisdiction;³⁴ object to decisions taken by the general assemblies of courts;³⁵ transfer judges to another judicial or legal post, and request the Prosecutor-General to initiate disciplinary proceedings against judges, which can lead to a judge's dismissal.³⁶ Further, Article 78 of the JAL establishes a Judicial Inspection Directorate as an administration of the

²⁹ Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 1

³⁰ Principle 1, Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis (The Geneva Declaration), International Commission of Jurists, December 2008

³¹ For a more in-depth analysis of these Declarations see: ICJ report *"Egypt's new Constitution: a flawed process uncertain outcomes"*, November 2012, p.39-40.

³² 2013 draft Constitution, *supra* at Article 184.

³³ *Id.*

³⁴ Judicial Authority Law, No. 46 of year 1972, at Articles 11 and 13

³⁵ *Id.* at Article 36

³⁶ *Id.* at Articles 55-58 and 62.

Ministry of Justice, responsible for inspecting the work of judges and the presidents of the Courts of First Instance.

This framework that allows for effective executive control of the judiciary and interference in judicial matters is inconsistent with international standards on judicial independence. The UN Human Rights Committee, in addressing similar arrangements elsewhere, has emphasized that the exercise of power by the Ministry of Justice over judicial matters, including the disciplinary appeal process and its powers of inspection of the courts, constitutes interference by the executive and a threat to the independence of the judiciary.³⁷

Executive control over the judiciary extends also to the Office of the Public Prosecutor. For example, the JAL provides that the Prosecutor-General is appointed by a Presidential Decree,³⁸ and that the Minister of Justice exercises control and administrative supervision over the OPP.³⁹

This Executive control over the OPP has been a longstanding concern in Egypt. Prosecutors have consistently failed, both under the rule of former President Mubarak and during the transitional period, to properly prosecute cases of human rights violations and act in defence of the victims' rights to effective remedies and to reparation.

Similar to the 2012 Constitution, Article 189 of the new draft Constitution provides that the OPP is "*an integral part of the judiciary*" and that the Prosecutor-General is to be appointed by a Presidential Decree upon a selection by "*the Supreme Judicial Council from among the Deputies to the President of the Court of Cassation, the Presidents of the Court of Appeals or the Assistant Prosecutor-Generals.*"

The ICJ is concerned that this Article, while ending the President's selection power of the Prosecutor-General, still falls short of international standards when providing for the OPP to be "*an integral part of the judiciary.*" International law and standards require the Office of the Public Prosecutor to be independent of the judiciary and to be objective and impartial. The UN Guidelines on the role of Prosecutors specifically provide that the "*office of prosecutors shall be strictly separated from judicial functions.*"⁴⁰

The ICJ is also concerned that the draft Constitution has failed to address the situation of jurisdiction of military courts, which are impermissibly expansive and in contravention to international standards. Article 204 provides that the military justice system is "independent" and "exclusively competent" to try all offences relating to the armed forces, its officers and personnel; offences committed by "*general intelligence personnel during and because of the service*", and civilians responsible for attacks on, amongst others, military personnel, installations, camps, zones, equipment, vehicles, weapons, ammunition, documents, and secrets. Article 204 also refers to the law to

³⁷ *Concluding Observations of the Human Rights Committee on Romania*, CCPR/C/79/Add.111, para. 10

³⁸ JAL, *supra* at Article 119.

³⁹ *Id.* at Article 125.

⁴⁰ UN Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para. 10.

"define such crimes and determine the other competencies of the military justice system."

This Article falls far short of international standards on both subject matter and personal jurisdiction of military courts. Under these standards, jurisdiction of military courts should be limited to conduct involving alleged breaches of military discipline. It should have no jurisdiction over crimes under international law and human rights violations. The Draft Principles Governing the Administration of Justice through Military Tribunals (Decaux Principles) affirm that ordinary courts, not military courts, should be used to "conduct inquiries into serious human rights violations...and to prosecute and try persons accused of such crimes."⁴¹

In addition, a consensus in international law is also developing towards prohibiting the use of military court to try civilians.⁴² These standards are affirmed in the African Union's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa⁴³ and the Decaux Principles. The importance of implementing these principles by States has been the subject of the most recent report to the UN General Assembly of the UN Special Rapporteur on the Independence of judges and lawyers.⁴⁴

V. Accountability For Human rights violations

The responsibility of the Egyptian security forces, including the Central Security Forces (*Al-Amn Al-Markazi*), General Investigations Police (*Al-Mabahet Alamma*), and the State Security Investigations Services (SSIS) (*Mabahet Amn Al-Dawla*), for widespread and systematic human rights violations, including numerous cases of unlawful killings, arbitrary detention, enforced disappearance, and torture and other ill-treatment, was a main trigger engendering the popular uprising in 2011.

Following the toppling of President Mubarak and during the entirety of the transitional period, including under the rule of President Morsi, the Egyptian authorities failed to meaningfully⁴⁵ reform the security sector and ensure the compliance of its services with international rule of law and human rights standards, ensure accountability for past human rights abuses, and prevent other abuses by the armed and security forces.

A Fact-Finding Commission established by the ousted President Mohamed Morsi to investigate the murder and attempted murder of protestors from 25 January 2011 until 30 June 2012 documented many such instances of abuse.⁴⁶ The Commission's

⁴¹ Draft Principles Governing the Administration of Justice through Military Tribunals ("Decaux Principles"), adopted by the then UN Sub-Commission on the Promotion and Protection of Human Rights in 2005, UN Doc. E/CN.4/2006/58, Principle 9. See also, Concluding Observations of the Human Rights Committee on Venezuela, UN Doc. CCPR/C/79/Add.14, para. 10; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/79/Add.66, para. 315; Concluding Observations of the Human Rights Committee on Colombia, UN Doc. CCPR/C/79/Add.2, para. 393; Conclusions and Recommendations of the Committee against Torture on Guatemala, UN Doc. CAT/C/GTM/CO/4, para. 14; Concluding Observations of the Human Rights Committee on the Democratic Republic

⁴² The Working Group on Arbitrary Detention has taken the position that military courts are incompetent to try civilians. Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, para. 8

⁴³ See Section A, principles 2(a) and 4(e) and section L of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

⁴⁴ See Report of the Special Rapporteur on the independence of judges and lawyers, 7 August 2013, A/68/285.

⁴⁵ On March 5, 2012, it was announced by the Minister of Interior that SSIS would be replaced by the Homeland Security Sector (HSS), which would be responsible for counterterrorism and national security.

⁴⁶ Presidential Decree 10 of 2012

report documented, among other matters, cases of individuals: "arrested at military checkpoints across Egypt and subjected to enforced disappearances"; "arrested by military police and intelligence officers and subjected to torture and other ill-treatment in military prisons"; "who died from torture while in military custody"; and "who died from torture while in military prisons and were then buried as "unknown" after the authorisation of the public prosecution services."⁴⁷

The Fact-Finding Commission submitted the report to the General-Prosecutor in order to investigate all cases of enforced disappearances, torture, and other ill-treatment, including by "interrogating and making public the names of soldiers, military police officers and military intelligence officers allegedly responsible for such acts."⁴⁸ The Commission also recommended the interrogation of "high ranking military officials allegedly responsible for ordering acts of torture and enforced disappearances."⁴⁹

In practice, however, these human rights abuses were rarely investigated and most of the perpetrators remain unpunished. The few trials of law enforcement officials that took place following the toppling of Mubarak resulted in acquittals or sentences that were not commensurate with the gravity of the crimes committed; thereby reinforcing the view among members of these forces and large categories of the Egyptian population that these officials are effectively above the law.⁵⁰

This impunity of police and other security and military officials responsible for human rights violations is underpinned by various provisions in the Egyptian legal framework, which grant law enforcement officials sweeping powers to arrest and detain people as well as to use lethal force in policing demonstrations.

Article 102 of the Police Act permits police officers to use firearms to disperse gatherings or demonstrations of at least five people when public order is under threat and after warning the protesters to disperse.⁵¹

Following the ouster of President Morsi, new repressive laws and policies on policing demonstrations were introduced, while impunity for past abuses continued. On 15 August 2013, the Ministry of Interior issued instructions to all security forces to "to use live ammunition in self-defence and in fighting any attack on government buildings, vital facilities and public establishments."⁵²

Law no. 107 of year 2013 on public meetings, processions and peaceful demonstrations also gives security forces sweeping powers to use lethal force in dispersing protests, including when it is not strictly necessary to protect lives.⁵³

This framework is incompatible Egypt's obligations under international human rights, including those relating to the right to life, to be free from torture and other ill-treatment, and the rights to the freedom of expression, association and assembly. It is similarly incompatible to international standards on the use of force and firearms by law enforcement officials. Under these standards, law enforcement officials "shall not

⁴⁷ Report of the Fact-Finding Commission, available in part at, <http://www.theguardian.com/world/interactive/2013/apr/10/egyptian-army-torture-disappearances-document> last accessed 26 August 2013

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See: ICJ report "Egypt's new Constitution: a flawed process uncertain outcomes, November 2012, *supra*, p.29-32

⁵¹ Police Authority Law, No.109 of year 1971, Article 102

⁵² Interior Ministry: Police will use live ammunition in self defense and to deter any attack on government buildings, Egypt State Information Service, 16 August 2013, available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticleNews.aspx?ArtID=69368>

⁵³ Article 13 of Law no. 107 of year 2013

*use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.*⁵⁴

Following the ousting of President Morsi, and as a result of the unlawful and disproportionate use of force, including firing with live ammunition, security officials and armed forces personnel were responsible for the unlawful killings of more than 1200 people, in particular during the dispersal of the Rabaa Al-Adawya and Annahda pro-Morsi sit-ins on 14 August, as well as other protests during in the last three months.

In meetings with government authorities in Egypt in August 2013, the ICJ was told that the Rabaa and Nahda sit-ins were not peaceful because some protestors were armed, and therefore international standards regarding the right to the freedom of assembly were not applicable. The ICJ recalls, however, that Egyptian law enforcement officers do not have blanket authorization to use live ammunition against protesters. The use of such force, in each individual instance, is necessarily constrained by the principles of necessity and proportionality. As one international court has noted, *"an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour."*⁵⁵ In sum, *"The right to life...and the right to be free from torture or cruel, inhuman or degrading treatment or punishment...should be the overarching principles governing the policing of public assemblies."*⁵⁶

The ICJ has persistently called on Egyptian authorities to conduct a thorough, effective, independent and impartial investigation into human rights violations committed by security and armed forces following the ouster of President Morsi, including the use of lethal force to disperse sit-ins and against protesters. Yet, neither the OPP nor the Minister of Justice have investigated, ordered the investigation or brought criminal action for the unlawful killings of protesters committed by armed and security forces following the ouster of President Morsi.

The Egyptian authorities should break this cycle of impunity that continues to prevail over human rights violations.

The new draft constitution provides for the House of Representatives, once elected, to adopt a transitional justice law that *"establishes the truth, ensures accountability, proposes frameworks for national reconciliation, and compensates victims, in accordance with international standards."*⁵⁷ While this provision is a positive development, the ICJ believes that in order to address the legacy of human rights violations, a comprehensive and meaningful reform of the framework under which the armed and security forces continue to operate is needed.

⁵⁴ Principle 9 of United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

⁵⁵ Decision as to the Admissibility of Application no. 61821/00 by Ziliberberg, European Court of Human Rights (Fourth Section), para. 2

⁵⁶ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 21 May 2012, A/HRC/20/27, *supra* at para. 35

⁵⁷ 2013 draft Constitution, *supra* at Article 241.

The Egyptian authorities should therefore:

- i) **Ensure a quick and steady transition of governmental authority to a legislature and executive, democratically elected through legitimate and fair processes consistent with rule of law principles and international standards;**
- ii) **Guarantee the right of all Egyptians to participate in the constitution-making process and, to this end, ensure adequate time, broad consultations and transparency is built into the process of drafting a new constitution;**
- iii) **Ensure that the new Constitution is fully in line with international human rights law and rule of law principles;**
- iv) **Ensure the accountability of the armed forces and their effective subordination to a legitimate civilian authority;**
- v) **Provide for legislative and other mechanisms of civilian oversight and control over the armed forces, including over financial and budgetary issues;**
- vi) **End executive control or any undue influence over the judiciary, including by removing the executive's powers over the career of judges and the functioning of the judiciary;**
- vii) **Ensure the Office of the Public Prosecutor is sufficiently independent from the executive so that prosecutors can discharge their functions fairly, effectively and impartially, and without any improper interference from any quarter or for any reason;**
- viii) **Ensure that the Office of the Public Prosecutor and courts are not subject to political pressure or interference, including as an instrumentality to prosecute political opponents for the exercise of legitimate rights, including the rights to freedom of expression, assembly and association;**
- ix) **Ensure the jurisdiction of military courts is restricted to military personnel for disciplinary offences only and excludes civilians and cases involving human rights violations;**
- x) **Break the cycle of impunity that prevails over human rights violations carried out by members of the armed forces and security services and, to this end, ensure that those allegedly responsible are held to account;**
- xi) **Ensure access to an effective remedy and reparation to victims of human rights violations; and**
- xii) **Undertake meaningful reforms of police and security forces in line with international law and standards, including by repealing Article 102 of the Police Act, Article 13 Law no. 107 of year 2013 and revising policing protocols on the use of lethal force and ensuring that such force may only be used when strictly unavoidable in order to protect life**