

**NATIONS UNIES  
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**PROCEDURES SPECIALES DU  
CONSEIL DES DROITS DE L'HOMME**

**UNITED NATIONS  
OFFICE OF THE UNITED NATIONS  
HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE  
HUMAN RIGHTS COUNCIL**

**Mandate of the Special Rapporteur on the independence of judges and lawyers.**

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 17/2.

In this connection, I would like to bring to your Excellency's Government's attention information I have received concerning **the widespread use of military and special jurisdictions to try civilians in particular on charges of "thuggery" and in violation of fair trial safeguards.**

Two urgent appeals addressing cases of civilians brought before military and special jurisdictions have recently been sent to your Excellency's Government jointly with other mandate-holders, respectively on 11 November 2011 and on 22 December 2011. The latter communication has regrettably remained without a response. I look forward to receiving a response to these communications and engage in a dialogue on this matter of great concern with your Excellency's Government.

According to the information received:

Since the Supreme Council of the Armed Forces (SCAF) took power in February 2011 to manage the State's affairs during the transitional period, it is reported that at least 12,000 civilians have been tried before military and emergency State security courts in Egypt. Such practices have mainly been observed in cities, in particular in Cairo and Alexandria, but also on the local level in villages and local governorates.

On 1 March 2011, the SCAF amended the penal code under the legislative powers accorded to it by the Constitutional Declaration of 13 February. Articles 375 bis and 375 bis (a) were added, introducing the crime of "thuggery". Thuggery is defined as displaying force or threatening to use force against a victim with the intention to intimidate or cause harm to him or his property.

In statement No. 68 issued in July 2011, the SCAF affirmed that only those individuals charged with thuggery, possession of illegal weapons and rape, would be tried by military tribunals. In a press conference held on 5 September 2011, General Adel Morsi, Chair of the military judicial authority, announced that military courts had tried 11,879 civilians, acquitted 785 of them and that 1,225 convictions were awaiting ratification by the military during the period 28 January to 29 August 2011. He argued that SCAF was compelled to use military trials to prosecute certain crimes committed by civilians and that this was done only in cases of thuggery, possession of illegal weapons and rape. He further stated that the referral of civilians to military tribunals would cease once the emergency laws were lifted. It is also alleged that criminal proceedings have systematically been initiated despite the flagrant lack of evidence in many cases.

The widespread use of military courts to try civilians has reportedly been justified under Egypt's emergency law and the Code of Military Justice (as amended in 2007). Its article 48 allows the prosecutor to refer a case to military courts on the basis of articles 5 and 6 of the Code, which permits civilians to be referred to military courts for crimes committed in violation of the penal code, provided the crime is committed against the military (military officials, facilities or equipment) or in areas operated by the military. It is alleged that these provisions, in particular due to the interpretation of *areas operated by the military*, have been applied very broadly to justify the referral of a case to military courts.

It is reported that the majority of cases brought before military courts have involved political opponents who have not committed any criminal offence or individuals arrested for their alleged involvement in the commission of common criminal offences. In most of the cases, the sentence has allegedly been issued following brief investigations and hearings – in some instances lasting only 48 hours – and in violation of the defendants' rights to have access to a lawyer of their own choosing, to a court appointed lawyer before and during trials and in violation of his or her rights to defence.

One year following the 2011 mass protests, on 24 January 2012, Field Marshal Hussein Tantawi announced that the state of emergency would be lifted in all parts of the country "except in fighting acts of thuggery" starting 25 January 2012 marking the first anniversary of the start of the mass protests.

While I welcome this initial step towards bringing an end to the state of emergency, I am alarmed at the alleged widespread use of military and special jurisdictions to try civilians mainly on charges of "thuggery" in particular given the alleged broad interpretation of the provisions of the penal code incriminating this offence. Allegations according to which these trials have been carried out in violation of fair trial safeguards in the majority of cases are also matters of serious concern.

In this regard, without prejudging the accuracy of the information received, I would like to seek clarification on these allegations and draw the attention of your

Excellency's Government to the relevant fundamental human rights principles and norms governing states of emergency and administration of justice in this context.

First and foremost, I wish to underline the importance of upholding the rule of law at all times, including in periods of transition and states of emergency. As consistently expressed in the framework of my mandate, I wish to stress that every individual shall have the right to be tried by ordinary courts or tribunals using established legal procedures in accordance with principle 5 of the 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). Likewise, tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals. This is also the view held by the Human Rights Committee which stated, in its General Comment No. 32 that "Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials" (para. 22).

In this respect, bearing in mind that in principle civilians should not be brought before military courts, I am further concerned about the formulation and interpretation of the provisions of the Code of Military Justice authorizing the referral of civilians to military courts. In particular, the provisions justifying military jurisdiction when the offence is committed in areas operated by the military may be subject to overly broad interpretation. Indeed, under a state of emergency a potential high number cities and regions may be considered to be under the control of the military. Following your Excellency's Government's announcement on 24 January 2012, it is unclear whether these provisions would still apply to justify military jurisdiction. Therefore, I would appreciate clarification in this regard.

A fundamental element and safeguard of the rule of law is also the principle of legality, which is enshrined in article 15 of the International Covenant on Civil and Political Rights, which Egypt ratified on 14 January 1982. Article 15 stipulates that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." This principle imposes a general duty on States parties to clearly define by law all criminal offences in the interest of legal certainty and to prevent any broader application of penal laws by analogy. In this respect, while I was not provided with an official translation of articles 375 bis and 375 bis (a) of the penal code, I am however concerned by the vague formulation of the criminal offence of "thuggery" in the penal code and the alleged resulting broad application of these provisions.

Notwithstanding this, the requirements of the independence and impartiality of the judiciary and of fairness of judicial proceedings apply with full force to any military or special courts. As indicated by the Human Rights Committee in its General Comment No. 29 (2001) on article 4 of the Covenant "States of Emergency": "As certain elements of

the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence.” (para. 44). However, I have observed in the overwhelming majority of cases that trials carried out before military or special courts often give rise to serious violations of fundamental guarantees of the right to a fair trial. Information received regarding civilians tried before military and special tribunals in Egypt seems to corroborate this general concern.

With respect to the allegation that criminal proceedings have systematically been initiated despite the lack of evidence, I wish to refer your Excellency’s Government to the 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). In particular guideline 11 provides that prosecutors shall perform an active role in criminal proceedings, and, where authorized by law or consistent with local practice, in the investigation of crime and supervision over the legality of these investigations. Most importantly, prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded in accordance with guideline 14. Moreover, guideline 13 stipulates that in the performance of their duties, prosecutors shall carry out their functions impartially and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.

At this critical phase of transition, I call on your Excellency’s Government to abide by its international obligations and take all necessary measures to ensure that suspected civilians are tried by ordinary courts and receive a fair trial in accordance with international human rights standards. I would appreciate assurances from your Excellency’s Government that, as a matter of principle, civilians will not be subjected to the jurisdiction of military or special courts.

Moreover, it is my responsibility under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. Since I am expected to report on these cases to the Human Rights Council, I would be grateful for your cooperation and your observations on the following matters:

1. Are the facts alleged in the above summary of the case accurate?
2. Please provide figures on the number of civilians tried before military or special courts since February 2011. Kindly specify on which charges they have been tried.
3. Please provide detailed information on the legal grounds and conditions under which an individual may be tried before a military or special court

and how this complies with international standards including the right to a fair trial.

4. Please indicate the definition of “thuggery” as enshrined in articles 375 bis and 375 bis (a) of the penal code and explain how these and their application comply with international standards, in particular the principles of legality and legal certainty.
5. Please indicate whether any amendments to the Code of Military Justice are contemplated.

I would appreciate a response within sixty days. I undertake to ensure that your Excellency’s Government’s response to each of these questions is accurately reflected in the reports I will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

Gabriela Knaul  
Special Rapporteur on the independence of judges and lawyers