

AMNESTY INTERNATIONAL

MEMORANDUM: EGYPT'S DRAFT LAW ON COUNTER TERRORISM

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Introduction

Draft counter-terrorism legislation due to be signed into law by President Abdel Fattah al-Sisi is deeply flawed and the Egyptian authorities must scrap or thoroughly revise it in order to comply with their obligations under the Egyptian Constitution and international law. The legislation in its current form allows the authorities to take extreme measures that would usually only be invoked during a state of emergency, granting the President similar powers to those held during the 30-year-long state of emergency imposed by former ruler Hosni Mubarak.

The draft law was introduced by the State Council, the judicial body charged with drafting legislations in the absence of an elected parliament after the Public Prosecutor was killed in a bomb attack in Cairo on 29 June 2015 and armed groups launched a succession of deadly attacks on security forces in the North Sinai governorate two days later.

The draft law, approved by the Cabinet on 1 July 2015 and due to be sent to the President for his sign-off at any time, broadly expands the definition of a “terrorist act” currently provided for under the provisions of the Penal Code. If adopted in this form, it will effectively ban rights to freedom of expression, association and peaceful assembly. Amnesty International is particularly concerned that the proposed legislation would impose heavy fines for individuals who report incidents and figures about “terrorist operations” which differ from the accounts announced by the State. The law poses a particular risk for journalists, bloggers, human rights defenders and others who publish credible information legitimately. The law will also give the authorities increased powers to detain people without proper judicial oversight and with limited fair trial guarantees, in breach of both the Egyptian Constitution and international law and standards.

In its current format, the draft law adds new offences to the large list of those already punishable by death under the penal code.¹ It provides for the death penalty as mandatory punishment in 13 new offences, even though international standards clearly state that the scope of the application of the death penalty should never be extended.

Furthermore, the draft law gives the security forces the right to use lethal force whenever they deem

¹ In November 2002, the UN Human Rights Committee expressed concerns about “the very large number of offences which, under Egyptian law, are punishable by the death penalty”. Since that time, Egyptian law-makers have increased the number of offences punishable by death. See Human Rights Committee, *Concluding observations of the Human Rights Committee* (UN Doc: CCPR/CO/76/EGY), 28 November 2002, para12.

necessary to implement the law's provisions, without the proper considerations of the principles of necessity and proportionality established in international standards.² The draft law does not set adequate criteria for the use of such force and grants security forces acting to implement the law immunity from criminal liability, even if their actions breached international standards on the use of force.

The draft law also gives the President powers equivalent to those under a state of emergency, without properly complying with the strict requirements set forth by international law, including Article 4 of the International Covenant on Civil and Political Rights (the ICCPR), to which Egypt is a State Party.

Since approved by the Cabinet, the draft law has been widely criticized by many national and international human rights groups, as well as the Egyptian Press Syndicate, and the Supreme Judicial Council, the highest judicial body in the country which is mandated to review draft laws along with many other tasks.³

Amnesty International acknowledges the difficult situation Egypt is going through. According to statements by the authorities, attacks by armed groups have resulted in the deaths of at least 700 members of the security forces since 3 July 2013. Attacks have also targeted diplomatic missions and the judiciary, with the Italian consulate damaged by a car bomb on 11 July 2015; three judges killed in the Sinai on 16 May 2015; and the Public Prosecutor killed in a bomb attack on 29 June 2015. Amnesty International condemns any attack that targets members of the general population, including the attacks committed against diplomatic missions and the judiciary. However, it is essential that the authorities and security forces confront such threats in a manner which respects human rights and complies with Egypt's obligations under international law.

Amnesty International is concerned over the broad implications that the draft legislation would have on human rights and the rule of law in Egypt. If the authorities intend to adopt the law, the organization urges them to undertake a thorough review of the draft and bring it in line with international human rights law and standards. The authorities must ensure that they cannot abuse their new powers to silence peaceful dissent.

Amnesty International offers the following analysis of Sections 1-7 of the draft law and its provisions, detailing where the legislation falls short of international human rights law and standards.

Section 1: Overly broad definition of "terrorist act" in contravention with national and international standards

The draft law provides a broad and vague definition of "terrorist act" that is contrary to the principle of legality, the requirement to limit both criminal liability and punishment to clear and precise provisions in law that existed and were applicable at the time when the offence was committed,

² The UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

³ See, eg, *Joint Statement from Parties, Institutions, Rights Organizations, and Public Figures on the Proposed Counterterrorism Law*, 15 July 2015: <http://www.cihrs.org/?p=15433&lang=en>

except in cases where a later law imposes a lighter sentence.⁴

Such a wide definition of “terrorist act” has the potential to effectively ban and criminalize the legitimate exercise of human rights, including the rights to freedom of expression, association and peaceful assembly. In practice, the authorities and security forces are likely to use the sweeping scope of the legislation to muzzle their political opponents and critics.

Article 1, Paragraph 7, of the draft law defines a “terrorist act” as “the use of force, violence, threats, fear” undertaken with the aim of “disturbing public order”; “harming national unity”; “damaging the environment, natural resources, monuments, public and private entities”, or “obstructing the work of public institutions, local councils, diplomatic missions, and places of worship from carrying out their work whether wholly or partially”, or “impeding the application of the provisions of the Constitution and the laws”.

The adoption of a vague and wide definition of “terrorist act” contravenes the principle of legality enshrined in the Egyptian Constitution⁵ and, different Supreme Constitutional Court (SCC) rulings, as well as the ICCPR, the African Charter on Human and Peoples’ Rights (the ACHPR), and the Arab Charter for Human Rights.⁶ Under international law, the acts that are criminalized must be clearly and precisely defined so that an individual could know what act can lead to criminal responsibility. Further, the elements of the offence shall be defined clearly so it can be proven by evidence. The vague terms provided in the draft law, such as “disturbing public order and social peace” and harming “national unity”, would prevent an individual to know what is consider to be a crime under this law.

Amnesty International is concerned that the draft law reincorporates offenses from the Law Regulating the Right to Public Gatherings, Processions and Peaceful Protests (Law 107 of 2013, the Protest Law), including “disturbing public order”, “damaging public and private institutions” and “impeding the application of the provisions of the Constitution and national laws”. Thousands of people have faced criminal charges, trials and prison for such offences since the authorities passed

⁴ For a fuller definition, see eg UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Report by the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* (UN Doc: E/CN.4/2005/103), 7 February 2005, para33.

⁵ Article 95 of the Egyptian Constitution states: “Penalties are personal. There shall be no crime or punishment except pursuant to a law, and a penalty may only be inflicted by a court judgment. Penalty shall only be imposed for acts committed after the effective date of the law imposing it”. Translation of the 2014 Egyptian Constitution is available at <http://www.sis.gov.eg/Newwr/Dustor-en001.pdf>

⁶ Article 15 of the ICCPR states “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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby”. Article 7(2) of the ACHPR states: “No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.” Article 15 of the Arab Charter for Human Rights “No crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favourable to the defendant shall be applied”.

the Protest Law in November 2013.⁷

The organisation also found that rights groups' campaigns including in the Human Rights Council calling on the authorities to amend or drop repressive laws are interpreted by the government and Egyptian media as using threats and fear against the state to impede the application of national laws, disturb public order or harm national unity.⁸ The very recent example is the campaigns and urgent appeals by rights groups in the UN Human Rights Council to drop or amend the draconian protest law. The same vague language such as "harming national unity" was used when the 6th April Youth Movement was banned by a court order in April 2014 with the justification that the movement "harm the national unity" of the country.⁹

Amnesty International's research has also shown that journalists who have challenged information released by the government have faced trumped up charges on similar grounds to those set out under the draft law, including "broadcasting false news with the aim of disturbing public order and harming national unity".¹⁰ The organization is concerned that journalists could face further threats of detention under this new law for their independent reporting, protected under their right to freedom of expression.

The draft law also expands the definition of a "terrorist act" under Article 1, Paragraph 2 as "any conduct with the intent of achieving one of the purposes listed above [ie 'disturbing public order' and 'harming national unity']... and which leads to harm to the national economy". This results in a very vague definition of "terrorist act", as it does not specify that the "conduct" involved must be violent. Amnesty International is concerned that the authorities and security forces are likely to employ this broad definition to both criminalize and punish the actions of peaceful protesters and critics of the government.

Amnesty International is further concerned that the authorities would use the vague definition of a "terrorist act" in the law to impose unlawful restrictions on the rights to freedom of expression, peaceful assembly and association. Individuals who peacefully oppose or criticize the current government would be at grave risk of facing false "terrorist" charges that carry heavy punishments, including life imprisonment and death sentences.

Amnesty International notes that Egyptian law already contains an extremely broad definition of terrorism that has been the subject of criticism from UN treaty bodies and UN human rights experts. Article 86 of the Penal Code, as amended by Law 97 of 1992, currently defines the offence of

⁷ For a more detailed analysis of the Protest Law, see *Amnesty International, Egypt: new protest law gives security forces free rein*, 25 November 2013 and *Amnesty International, Generation jail: Egypt's youth go from protest to prison* (Index: MDE 12/1853/2015), 29 June 2015, p9: <https://www.amnesty.org/en/documents/mde12/1853/2015/en/>

⁸ Amnesty International, *Egypt: Renewed crackdown on independent groups; government investigating human rights workers*, 14 June 2015. <https://www.amnesty.org/en/documents/mde12/1873/2015/en/>

⁹ Egypt: Amnesty International Annual Report (2014/2015). <https://www.amnesty.org/en/countries/middle-east-and-north-africa/egypt/report-egypt/>

¹⁰ Amnesty International, *Egypt: Journalists jailed or charged for challenging the authorities' narrative* (Index: MDE 12/1573/2015), 2 May 2015: <https://www.amnesty.org/en/documents/mde12/1573/2015/en/> (Amnesty International, *Egypt: Journalists jailed*)

“terrorism” to mean “any use of force or violence or any threat or intimidation to which the perpetrator resorts in order to carry out an individual or collective criminal plan aimed at disturbing the peace or jeopardizing the safety and security of society and which is of such nature as to harm or create fear in persons or imperil their lives, freedoms or security; harm the environment; damage or take possession of communications; prevent or impede the public authorities in the performance of their work; or thwart the application of the Constitution or of laws or regulations.”

The UN Human Rights Committee has stated that the “definition of terrorism contained in that law is so broad that it encompasses a wide range of acts of differing gravity”, and called on Egypt to review the law to define “terrorism” “...much more precisely”.¹¹ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in his report after his mission to Egypt in 2009, stated that the definition of “terrorism” under Article 86 of the Penal Code is “notably broad and risks including acts that do not comprise a sufficient relation to violent terrorist crimes”.¹² Far from complying with the recommendations of the Human Rights Committee and the Special Rapporteur, the authorities have proposed a definition of “terrorism” which is even broader and vaguer than the current law. The draft falls far short of the requirements of Egypt’s Constitution and international law and standards.

Recommendations

- Amnesty International calls on the Egyptian authorities to: Implement the recommendation of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, by amending the definition of “terrorism” or “terrorist act” in domestic law to incorporate a three-step, cumulative characterization, which must include all the following criteria:
 - (a) Acts committed against members of the general population, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages;
 - (b) Acts committed for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act;
 - (c) Acts which correspond to all elements of a serious crime as defined by the law.
- Ensure that any provision criminalizing “terrorism” complies with the principle of legality, as enshrined in Article 15 of the ICCPR, Article 7(2) of the ACHPR, Article 15 of the Arab Charter for Human Rights, Article 95 of the Egyptian Constitution, and rulings of the Supreme Constitutional Court.

¹¹ Human Rights Committee, *Consideration of reports submitted by states parties under Article 40 of the Covenant* (UN Doc, CCPR/C/79/Add.23), 9 August 1993, para8.

¹² Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (UN Doc: A/HRC/13/37/Add.2), 14 October 2009.

Section 2: Lack of accountability for use of excessive force

Article 6 of the draft legislation states that individuals would not be criminally liable if they used force in the course of their duties to implement the provisions of the counter-terrorism law, as well as to protect themselves from danger, or to respond to a threat to themselves or to “money or properties”, and where the use of force was necessary and sufficient to deal with the threat.

This Article does not state the criteria under which the security forces could use force and does not clearly state that the use of force to protect properties and money must be of minimal nature. It does not also comply with the strict limits on the use of force set down under international standards, including the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The inclusion of “properties and money” in the draft of Article 6 violates such international law and standards, which require that security forces not use firearms except in self-defence or defence of others against an imminent threat of death or serious injury.¹³ In this respect, Amnesty International notes that security forces are already afforded sweeping powers to use force to disperse unauthorized demonstrations under the Protest Law and other legislation restricting the right to peaceful assembly.¹⁴ In practice, security forces are likely to use Article 6 of the draft legislation in concert with such laws to continue to disperse protesters using excessive force, including unnecessary lethal force, with total immunity from criminal investigation or prosecution.

Article 6 would contravene international standards which require that states ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence¹⁵; and, in the case of suspected extrajudicial executions, that thorough, prompt, and impartial investigations are conducted and those responsible are brought to justice.¹⁶

Recommendations

Amnesty International calls on the Egyptian authorities to:

- Drop Article 6, or else amend it substantially to ensure that the use of force by security forces complies with international standards, including the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

Section 3: Restrictions on freedom of expression

Article 1, Paragraph 8, of the draft law considers the funding of “terrorism” to include “providing or collecting data and information... whether directly or indirectly... with any means, including digitally or electronically, with the intent of... facilitating the commission of the terrorist crime”. Amnesty

¹³ UN Basic Principles on the Use of Force and Firearms, Principle 9

¹⁴ See Amnesty International, *Generation jail: Egypt's youth go from protest to prison* (Index: MDE 12/1853/2015), 29 June 2015, p9: <https://www.amnesty.org/en/documents/mde12/1853/2015/en/>

¹⁵ UN Basic Principles on the Use of Force and Firearms, Principle 7

¹⁶ UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions, Principles 9 and 18

International is concerned that the authorities could use this article to criminalize and punish independent media, including individuals who self-publish on-line and who use social media. The wide and vague definition of a "terrorist act" in the draft law leaves journalists open to criminal prosecution on charges of "harming national unity, disturbing public order or harming the national economy". Amnesty International has documented several cases of journalists who have faced similar charges of "broadcasting false news with the aim of disturbing public order and harming national unity" under the penal code.¹⁷

Furthermore, Article 26 of the draft law sets a prison term of between five to seven years for anyone who promotes or prepares to promote the commission of a "terrorist" offence, whether orally or in writing, or "...by any other means." Article 27 further establishes prison terms "of not less than five years and not more than 15 years for anyone who creates a website with the intent of promoting ideas for the commission of a terrorist act". Both articles are so vague that the authorities and security forces could use them as a pretext to target journalists, human rights defenders and others critical of the government simply for legitimately publishing information on the Internet.

Article 33 of the draft law criminalizes the act of "intentionally publishing false news about "terrorist" crimes that are different from official statements". The original draft provided for a two-year prison sentence for the offence, but in mid-July 2015 the government announced it would change the punishment to a fine of 200,000 to 500,000 Egyptian pounds (approximately US\$26,000 to US\$66,000).¹⁸ In its proposed form, the article would effectively prevent journalists, as well as others who engage in different forms of self-publication, from collecting and publishing information about human rights violations and abuses from different sources, including from victims and witnesses. This article contravenes the right to freedom of expression as enshrined in both the Egyptian Constitution¹⁹ and in international human rights treaties to which Egypt is a State Party.²⁰ It poses a high risk for journalists, social media users, human rights defenders and others who legitimately publish credible information.

Recommendations

Amnesty International calls on the Egyptian authorities to:

- Drop articles 1/8, 26, 27 and 33 to ensure the law does not allow the prosecution of individuals for the legitimate, non-violent exercise of their rights enshrined in international law, including

¹⁷ Amnesty International, *Egypt: Journalists jailed or charged for challenging the authorities' narrative* (Index: MDE 12/1573/2015), 2 May 2015: <https://www.amnesty.org/en/documents/mde12/1573/2015/en/> (Amnesty International, *Egypt: Journalists jailed*)

¹⁸ See eg Ahram Online, *Egypt's cabinet alters controversial anti-terror bill*, 16 July 2015: <http://english.ahram.org/NewsContentP/1/135504/Egypt/Egypt-cabinet-alters-controversial-antiterror-bil.aspx>

¹⁹ Article 72 of the Constitution states that "The State shall ensure the independence of all State-owned press institutions and media outlets, in a manner ensuring their neutrality and presentation of all political and intellectual opinions and trends as well as social interests and also guaranteeing equality and equal opportunities in addressing public opinion".

²⁰ Article 19.2 of the ICCPR states "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". Article 9 of the ACHPR states: "Every individual shall have the right to receive information" and: "Every individual shall have the right to express and disseminate his opinions within the law."

the right to freedom of expression of independent journalists, bloggers and others who engage in forms of self-publication.

- Drop Article 33 of the draft law as it would effectively prevent independent reporting and would not allow journalists and others to collect information about “terrorism” from different sources.

Section 4: Fair trial guarantees, including the right to be brought promptly before a judge

Articles 38-41 expand the powers of the security forces and the Public Prosecution to hold individuals in detention without charge or trial. The new powers allow for prolonged periods of pre-trial detention, in contravention of the Egyptian Constitution and international human rights law and standards. The current draft law removes the right of a detainee to be brought promptly before a judge, which is not to be restricted even in times of emergency, enhancing the risks of incommunicado detention.

The draft law extends the period under which the arrested person can remain in the custody of the security forces before being presented to a Public Prosecutor. Under Article 38 of the draft law, the security forces may detain an individual in their custody for up to 24 hours if there is enough evidence that there is “a risk of a danger of a terrorist crime”. The article further allows the Public Prosecution, or other “investigating authority”, to extend this period of pre-trial detention in police custody for up to seven days and can be renewed for similar periods. The article does not provide that a Public Prosecutor or a judge must question the detainee or begin investigating the case against them before extending the detention.

Under Article 54 of the Constitution, security forces must present anyone they detain before the Public Prosecution (“the investigating authority”) within 24 hours of making the arrest.²¹

The provisions in Article 38 of the draft law fail to meet the required safeguards provided by international law and contravene the right to liberty and the right not to be arbitrarily detained. In its current form, Article 38 would allow the security forces to keep the arrested person in their custody for an extended period even before a formal investigation by the Public Prosecutor begins and without any judicial oversight to allow the detainee to challenge the lawfulness of the detention.

Amnesty International is concerned that the draft law would leave the detainee vulnerable to abuse, including torture and other forms of ill-treatment. The organization’s research has shown that torture and other forms of ill-treatment in most cases take place at the initial periods of detention which in most cases lead to confessions extracted under torture while the detainee is videotaped.

Article 39 of the draft law imposes restrictions on the rights of the detainee to be informed of the charges against them and to access their family and lawyers, if the authorities consider it would pose a risk of interfering with the interrogation or the collection of evidence. As required by

²¹ Article 54 (para2) of the Egyptian constitution “Every person whose freedom is restricted shall be immediately notified of the reasons therefore; shall be informed of his/her rights in writing; shall be immediately enabled to contact his/her relatives and lawyer; and shall be brought before the investigation authority within twenty four (24) hours as of the time of restricting his/her freedom”.

international human rights law²², but also by the Egyptian Constitution,²³ anyone arrested must immediately be notified of the reasons for arrest and be allowed to contact a lawyer of his/her choice and to notify a third person in the outside world that they have been taken into custody. However, given the broadness of the provision incorporated in the draft law, Article 39 would place the detainee at risk of incommunicado detention.

Article 40 states that, during the holding period detailed under Article 38 of the law, and before it ends, the security forces must hear the statement of the person and present them to the Public Prosecutor for interrogation. The Public Prosecutor then has a period of 48 hours to question the detainee and order their continued detention or release. This article contravenes the Egyptian Constitution and the Code of Criminal Procedures which establish a period of 24 hours for the police to present the detainee to the Public Prosecutor or else to release them. International standards require that anyone arrested or detained is brought promptly before a judge or other officer authorized by law to exercise judicial power.²⁴

Article 41 of the draft law grants Public Prosecutors exceptional powers to order and renew the pre-trial detention of individuals suspected of "terrorism" for a prolonged period without any judicial oversight. Under the Code of Criminal Procedures, Public Prosecutors currently only have the power to order the pre-trial detention of an individual for a period of four days after they begin their investigations.²⁵ If a Public Prosecutor wishes to extend the pre-trial detention of an individual, they must first refer the case to an investigating judge, and then, if the investigation continues, to an Appellate Court of Misdemeanour.²⁶ Egyptian law therefore limits the time an individual may spend

²² Article 9(2) of the ICCPR states that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." Article 7(c) of the ACHPR guarantees that every individual has: "The right to defence, including the right to be defended by counsel of his choice", Article 14 of the Arab Charter for Human Rights states that "Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members"....

²³ Article 54 of the Egyptian Constitution states that "Every person whose freedom is restricted shall be immediately notified of the reasons therefore; shall be informed of his/her rights in writing; shall be immediately enabled to contact his/her relatives and lawyer; and shall be brought before the investigating authority within twenty-four (24) hours as of the time of restricting his/her freedom.

"Investigations may not start with the person unless his/her lawyer is present. A lawyer shall be seconded for persons who do not have one. Necessary assistance shall be rendered to people with disability according to procedures prescribed by law."

²⁴ Article 9(3) of the ICCPR, Article 14(5) of the Arab Charter, Section M(3) of the Principles on Fair Trial in Africa.

²⁵ Articles 137 and 201 of the Code of Criminal Procedures.

²⁶ Under Article 202 of the Code of Criminal Procedures, the circuit judge must first listen to the arguments of the Public Prosecution and defendant and may then order the defendant's continued detention without charge or trial for one or more periods of up to 15 days each, up to a total of 45 days. Under Article 203, if the Public Prosecution is continuing with its investigation once that period of pre-trial detention has expired, the case then comes before an Appellate Court of Misdemeanours. Under Article 143 of the law, the court first listens to the arguments of the Public Prosecution and the defendant, and can then extend the defendant's detention without charge or trial for up to 45 days. At the end of that time, the court must then review the case once more. The Appellate Court of Misdemeanours can continue to extend an individual's detention without charge or trial for 45-day periods, up to a limit of two years for suspects in crimes punishable by life imprisonment or death.

in pre-trial detention without judicial review. However, under Article 41 of the draft counter-terrorism law, Public Prosecutors investigating “terrorism” offences would have the authority of Investigating Judges as set out under the Code of Criminal Procedures.²⁷ Such judges are able to order the pre-trial detention of individuals for much longer periods – for an initial period of 15 days that can be renewed for up to 45 days after listening to the arguments of both the Public Prosecution and the defendant.²⁸ If the Investigating judge has not completed the investigation at the end of that time, the case comes for review before an Appellate Court of Misdemeanour, which may order the individual's release or continued pre-trial detention of up to two years.

Article 41 of the draft law also vests Public Prosecutors investigating “terrorism” with the authority of Appellate Courts of Misdemeanour. In effect, the article would completely remove judicial oversight from pre-trial detention for “terrorism” offences. Public Prosecutors would be able to order the detention of an individual without charge or trial with the powers of an Investigative Judge and then renew the individual's pre-trial detention for prolonged periods with the powers of an Appellate Court. Such provisions would severely hamper the protection of the right to liberty and the presumption of innocence, and remove an important safeguard against torture and other ill-treatment, enforced disappearance and other human rights abuses.

Amnesty International considers that the Office of the Public Prosecution lacks the necessary requirements of independence and impartiality to be considered a judicial authority given its mandate as an investigating and accusing authority at the same time. Hence, allowing the Public Prosecutor to decide on the renewal of pre-trial detention, while at the same time investigating and accusing the detainee, could lead to an abuse of its power. The organization has documented several cases of abusive use of pre-trial detention against peaceful protesters and journalists since the ousting of President Mohamed Morsi on 3 July 2013. Hundreds of those held on pre-trial detention have not been referred to trial after spending almost two years in detention.

Recommendations

- Amnesty International calls on the Egyptian authorities to: Ensure that detentions are carried out in strict accordance with international standards.
- Ensure that the law protects the right of all detainees to be brought within 24 hours before a judge or other judicial authority or otherwise released as regulated in the Egyptian Constitution.
- Guarantee to all detainees the right to access a lawyer of his/her choice and to notify a third person in the outside world of the place of detention.
- Ensure that any decision to renew the period of pre-trial decision is taken by a judicial authority and not left to the discretion of the Public Prosecutor. Extensions of pre-trial detention must be

²⁷ Under Article 206(bis) of the Code of Criminal Procedures, senior Public Prosecutors already have the powers to act as Investigating Judges, similar to those described in this section, when conducting criminal investigations into issues of national security and embezzlement. The now-defunct Emergency Law also vested such powers in the Public Prosecution. See Amnesty International, “Public Prosecution's special powers”, *Egypt: Systematic abuses in the name of security* (Index: MDE 12/001/2007), 10 April 2007, p24: <https://www.amnesty.org/en/documents/MDE12/001/2007/en/>

²⁸ Article 142 of the Code of Criminal Procedures.

exceptional and based on an individualized determination that is reasonable and necessary.

Section 5: Establishment of special courts for “terrorist” offences

Article 48 of the draft law states that a special “terrorism” court is to be established to look into the offences contained in this law and to issue verdicts in the cases before it in an expedited manner. The article further states that the Supreme Judicial Council shall regulate the work of this court or other circuits in different governorates, without clarifying the scope and proceedings to be followed before these courts.

As it stands, Article 48 will undermine the right to a fair trial and contravenes both the Egyptian Constitution and international human rights law. All persons have the right to be tried before ordinary tribunals under established legal procedures and must be equal before courts. Special courts, whether military or criminal, with expedited procedures and verdicts severely undermine the rights ensured to defendants under national and international law.

International standards require all courts to be competent, independent and impartial, and must equally respect all fair trial rights.²⁹ Similarly, Article 97 of the Egyptian Constitution establishes that: “No person may be tried except before his/her ordinary judge. Exceptional courts are prohibited”.

Further, Principle 5 of the UN Basic Principles of the Independence of the Judiciary states that “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. 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. ”Amnesty International is concerned that these special courts are being created to displace the jurisdiction of ordinary courts without the proper provisions to ensure the independence and impartiality required and with the sufficient safeguards to guarantee the right to a fair trial.

Article 50 of the draft counter-terrorism law introduces a fundamental change to how Egyptian law treats trials of a defendant conducted in absentia. Egyptian courts routinely try, convict and sentence individuals in their absence for offences ranging from fraud to criminal defamation to murder. In several cases documented by Amnesty International, courts have conducted mass trials of individuals in their absence and handed down hundreds of life and death sentences for offences linked to political violence.³⁰ However, under the Code of Criminal Procedures, individuals sentenced in their absence are entitled to a retrial at the same stage of litigation, if they subsequently present themselves before the court. The original in Egyptian law that absentia verdicts

²⁹ Article 14 of the ICCPR states that “All persons shall be equal before the courts and tribunals... [and]... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 26 of the African Charter of Human and People Rights and Article and Article 16 of the Arab Charter for Human Rights.

³⁰ See for example, Amnesty International, *Court sentences 37 to death, 491 to life in jail* (Index: MDE 12/023/2014), 30 April 2014: <https://www.amnesty.org/en/documents/mde12/023/2014/en/>; and *Court sentences 183 to death, jails five* (Index: MDE 12/038/2014), 24 June 2014: <https://www.amnesty.org/en/documents/mde12/038/2014/en>

do not stand and the process begins again at the same stage of litigation.³¹ This provision is a key safeguard against human rights violations, as in practice Egyptian courts routinely consider the case against an individual as prima facie if they are not present.

However, under Article 50 of the proposed counter-terrorism legislation, if a defendant is absent from a trial but their legal representative appears in court and presents arguments on their behalf, the law would now consider them to have been tried in their presence. The proposed article undermines the rights of defendants to defend themselves and to attend the trial in which they can observe it and be listened to by the court and consult with and effectively instruct their lawyer. Article 50 would strip defendants tried in their absence of their right to a retrial in their presence, and their only recourse would be to appeal to a higher court.

Article 14 (3(d)) of the ICCPR states that everyone shall have the right: "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing".

Recommendations

Amnesty International calls on the Egyptian authorities to:

- Review Article 48 to ensure that every person is tried before an ordinary tribunal without the resort to special courts and with respect of all fair trial guarantees.
- Drop Article 50 that considers a judgment to be in the presence of the defendant, if the defendant was absent in the trial but his legal representative was present and ensure that the general provisions of the Code of Criminal Procedures are applicable

Section 6: Right to appeal

Article 51 introduces a reduced period of 40 days in which defendants accused of "terrorist acts" can appeal verdicts before the Court of Cassation, a shorter period than the 60-day period currently provided for by Law 57 of 1959, which regulates appeals before the Cassation Court.

Article 52 of the draft law similarly limits the stages of appeal as it mandates the Court of Cassation to assess the incidents presented in the appeal in the first time and issue a final verdict, contrary to the general provision in Egyptian law which requires that appeals before the cassation court are on two stages of litigation.

According to Law 57 of 1959, when a case first comes before the Court of Cassation, the court's role is only to assess whether there are errors in the application of the law. If the court finds errors, it is entitled to refer the case to a criminal court for retrial. Once the criminal court concludes the retrial the case goes once more before the Court of Cassation, the court then looks into the incidents of the case and issues a final verdict.

By removing the two stages of appeals, this provision of the counter-terrorism legislation would abolish a key fair trial guarantee for those convicted by the special courts. Amnesty International fears that this new provision will expedite the implementation of death penalties and will put

³¹ Under Article 388 of the Code of Criminal Procedures.

hundreds of people at risk of execution after deeply flawed, expedited proceedings. The organization has documented a number of cases where courts have handed down death sentences against hundreds of individuals, following grossly unfair trials.³²

Recommendations

Amnesty International calls on the Egyptian authorities to:

- Drop Article 51 of the draft law and refer instead to the general provisions under Law no 57 of year 1959 Regulating Appeals before the Court of Cassation which stipulate that the timeframe for appeals before the Court of Cassation is 60 days.
- Drop or amend Article 52 to ensure that all defendants have access to the two stages of appeals before the Court of Cassation, as outlined in Article 446 of the Code of Criminal Procedures.

Section 7: Executive powers

Under Article 54 of the draft law, broad powers are given to the President to “take necessary measures to ensure public order and security whenever there is danger of terrorist crimes”. The President also has the power to “isolate areas or evacuate them or impose a curfew to maintain public order and security”. These executive decisions of the President can last for up to six months and are not limited in scope. The decision of the President has to be approved by Parliament within six days, or by the Cabinet in cases where the Parliament is dissolved or does not exist.

As there is currently no Egyptian Parliament, nor a clear timetable providing for its election, the draft law would in its current form grant sweeping powers to the President without any oversight. The President would hold unchecked powers to take measures that derogate from Egypt's international human rights obligations. Under international human rights law, States may only take such measures in situations of public emergency which threaten the life of the nation, the existence of which States have officially proclaimed, and in compliance with the stringent conditions required by Article 4 of the ICCPR.³³

In Amnesty International's opinion, Article 54 would effectively reinstate the 30-year-long state of emergency imposed by Hosni Mubarak when he came to power in 1981 and which finally lapsed in 2011 following the mass protests of the “25 January Revolution” in 2011 that toppled his administration. Emergency powers given to the authorities and security forces during that period facilitated gross human rights violations, including torture and other ill-treatment; enforced disappearances; prolonged detention without charge or trial; and grossly unfair trials of civilians before Emergency State Security Courts and military tribunals.³⁴

³² See eg Amnesty International, *Egypt sentences a further 183 people to death in new purge of political opposition*, 21 June 2014: <https://www.amnesty.org/en/latest/news/2014/06/egypt-sentences-further-people-death-new-purge-political-opposition/>

³³ See Human Rights Committee, *General Comment No. 29: States of Emergency (article 4)* (UN Doc: CPR/C/21/Rev.1/Add.11), 31 August 2001.

³⁴ See eg Amnesty International, *Egypt: Systematic abuses in the name of security* (Index: MDE 12/001/2007), 10 April 2007, p24: <https://www.amnesty.org/en/documents/MDE12/001/2007/en/> ; and *Time for justice: Egypt's corrosive system of detention* (Index: MDE 12/029/2011), 20 April 2011:

Amnesty International's research has also shown that the authorities exercised similar executive powers following the attacks in the Sinai Peninsula in October 2014, when the President issued a decree to isolate the town of Rafah and established a "buffer zone". The decision was followed by the mass forced eviction of residents by the military, without prior notice, alternative accommodation or adequate compensation.³⁵

As detailed by the Human Rights Committee, when the State is to impose restrictions on the exercise of rights recognized in the ICCPR, "States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right".³⁶

The Committee has further expanded that, if States purport to invoke the right to derogate from the Covenant due to an emergency situation, States "must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation".³⁷

Recommendations

Amnesty International calls on the Egyptian authorities to:

- Either drop Article 54 or fundamentally revise it to ensure that the powers given to the President are in accordance with requirements established by international law in relation to declaring a state of emergency, including restrictions in time and scope, oversight by judicial authority and prohibiting measures that violate human rights. It must also be amended in order to ensure that any measures taken do not derogate from non-derogable rights.
- The law must also ensure that any given Presidential power that restricts the exercise of rights is necessary and proportionate to a legitimate aim.

<https://www.amnesty.org/en/documents/mde12/029/2011/en>

³⁵ Amnesty International, *Egypt: end wave of home demolitions, forced evictions in Sinai amid media blackout*, 27 November 2014: <https://www.amnesty.org/en/latest/news/2014/11/egypt-end-wave-home-demolitions-forced-evictions-sinai-amid-media-blackout/>

³⁷ Human Rights Committee. *General Comment No. 29, States of Emergency (article 4)*, 31 August 2001, para5.