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EGYPT

COURTING CHAOS AND CONTROVERSY

THE CIRCUMVENTION OF THE RULE OF LAW, HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS BY THE EGYPTIAN JUDICIARY

THIS REPORT HAS BEEN PREPARED BY THE GUERNICA GROUP (TGG)

FULL REPORT

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Table of Contents

Executive Summary

1. Over the past two years, the Egyptian State Litigation Authority have commissioned a number of reports to examine a number of issues, including the history of the Muslim Brotherhood and its involvement in Egyptian politics.

2. The reports have sought to demonise the group and cast them as the catalyst behind a number of concerns that Egypt has faced, both historically, and more latterly, following the 'Arab Spring'; specifically, post Tahrir Square protests and the election of President Mohammed Morsi.

3. Guernica 37 International Justice Chambers have been instructed by The Cordoba Foundation to assess those reports and undertake an independent investigation into the issues raised therein.

4. Two reports have already been published.[1]

5. This is the third report in the series, and is arguably, the most important as it examines the Egyptian legal system in response to the State Litigation Authority's report that seeks to deny the suggestion that the rule of law in Egypt has been undermined.

6. In short, the State Litigation Authority's report is propaganda, and seeks to justify the fact that the protections provided by the Egyptian Constitution, domestic legislation and international law, are ignored to such an extent that the Egyptian legal system is now merely another tool of the State to silence opposition and further oppress a people whose democratic rights are already seriously curtailed.

7. Addressing by way of critical analysis specific issues raised in the State Litigation Authority's report, this piece of research provides an objective overview of the historical development of the Egyptian legal system, with an emphasis on the criminal justice system.

8. It is notable that historically, as is highlighted in the initial chapters of this report, the Egyptian system was seen as a 'beacon' in the legal landscape of the Middle East, to such an extent that it was replicated, on an almost universal basis, throughout the region.

9. However, this example to others wasn't to last, and it wasn't long before 'military rule', or at least its significant involvement in the political system, began in Egypt.

10. This involvement, in what ought to be a citizen-led system, was to further develop so as to permeate all aspects of Egyptian life; a position that despite the Tahrir Square protests and the removal of the autocratic regime of Hosni Mubarak, continues today.

11. This is despite free and pluralistic democratic elections being held and the Egyptian populace electing President Mohammed Morsi.

12. As has been discussed in previous reports, Morsi won office following a process that independent international experts determined was free, inclusive and fair.

13. Despite the introduction of democracy to Egypt, and therefore to a degree, its citizens securing what it demanded in the demonstrations, the first democratically-elected President was removed by way of military *coup d'état*, and therefore the status quo was maintained insofar as the ruling class was concerned.

14. Not only was it maintained, but with the drafting of a new constitution the military provided itself with significant opportunity to further its own power and did so with the explicit intention of removing the reforms brought about by Morsi which limited the military's influence within the political sphere.

15. In one of its first actions and as soon as the opportunity arose, the post-Morsi regime immediately limited the democratic rights and freedoms of citizens.

16. Further, this report looks at the elements of Egyptian domestic legislation, including its constitution, and considers those protections that look to guarantee fundamental rights and freedoms, and offer relevant fair trial protections.

17. These domestic provisions are considered alongside Egypt's international obligations, including those under treaties such as the Universal Declaration on Human and Peoples

Rights, and the International Convention on Civil and Political Rights – treaties that are often viewed as the foundation for the international observance of human rights.

18. This report considers the rights that purportedly exist in Egypt and how they are protected; starting with one of the most fundamental systems of protection – the judiciary, and therefore, an independent judiciary. It is only through a fiercely independent judiciary that both the principle of the separation of powers can exist and a system of protection can develop.

19. The State Litigation Authority claims that Egypt's judiciary is independent; however, as will be observed in later chapters, the fact that a court makes an appropriate decision does not mean that the court in question, or for that matter, the wider judiciary is legitimate.

20. The report relies on a handful of justifiable decisions to defend its position; however, as the analysis in later chapters of this report demonstrates, a legitimate decision does not legitimate an otherwise illegitimate decision – and as the plethora of decisions considered below shows, the Egyptian judiciary is anything but independent.

21. This fact, however, is entirely at odds with the constitution which clearly guarantees the position as it also guarantees fair trial rights.

22. The position espoused in this report is that the degree of influence exercised by the executive, the entirety of the judiciary is under its influence and beholden to its whims.

23. This report therefore asks, whether on an objective basis, does the judicial system respect the principles of the Universal Declaration on Human Rights (UDR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter etc. As we demonstrate, the short answer is that it does not, and therefore it cannot be said to be independent or have any respect for the fair trial principles that we go on to consider, with the background of a number of recent criminal cases that have come before the courts and are discussed accordingly.

24. As has been alluded to, an essential feature of any democracy is an individual's right to a fair trial.

25. The State Litigation Authority report suggests that the fact that there are examples where an individual has successfully appealed a sentence or conviction is evidence of the system working properly. Further, that fair trial rights are respected as where there are issues these can be duly rectified on appeal.

26. This report contends the above position is not sustainable as this is yet another example of the State manipulating facts to suit a particular narrative.

27. We devote a full chapter to fair trial rights: what they are and how they should operate in practice. In pursuit of objectivity, cases cited by the authority are considered here, as are those the authority conveniently ignores such as the mass trials at Mina where hundreds were convicted in a matter of hours. In this instance, the accused were prevented from adducing evidence in their defence or even challenging allegations made against them by the prosecution.

28. Further, the chapter on fair trials examines the legality of trials in absence, something that we have seen used with increasing frequency in Egypt since the unlawful removal of President Mors. This appears to be a deliberate tactic on the part of the executive, the prosecution and the judiciary, one being utilised to circumvent procedural safeguards. An example of this being the trial, conviction and sentencing of individuals for offences, despite the fact that they were imprisoned in other countries during the relevant time, or even, on occasion, dead.

29. We seek to take this position further and refer to the mass incarcerations of what the authority would have us believe are terrorists, but in reality, are either political opponents, or merely individuals who have sought to advance a position that may be different, or contrary, to that maintained by the government.

30. These individuals are not only subjected to a judicial system that has no respect for their rights, but they are forced to endure inhumane and degrading treatment, including the systematic use of torture.

31. The report from the authority would suggest that torture is not used, much less used on a systematic basis. However, it fails to answer the complaints of those victims, and further, it has refused to commence any investigation to those allegations of torture made.

32. This report concludes that the current judicial system in Egypt is part of an assembly line of abuse comprising of a manipulation of the judicial system, the crackdown of fundamental rights and freedoms, therefore the erosion of democracy and its foundation pillars.

33. The following pages shed light into the Egyptian judicial system today. It highlights serious ignorance of its own constitutional and legislative protections, and further, its ignorance of international law. This is all designed, it would appear, to strengthen the state's grasp on power currently held by President Sisi and his supporters.

Chapter 1: Introduction

34. On January 17, 2017, 9 Bedford Row Barristers Chambers published the fourth release in their series of reports commissioned by the 'State Litigation Authority' of Egypt.

35. The previous three publications have already been addressed, and thus, this report seeks to address the fourth, entitled '*Egypt Courts and Some Recent Challenges*'.

36. The report suggests that it will "*address a number of headline issues concerning human rights in Egypt"* and that the report will demonstrate "*...the developing state of the human rights programme of the government in today's Egypt that has had to cope with problems of the past and turbulence in recent years, as it establishes a modern democracy."*[2]

37. With all due respect to its authors, who are acting within the parameters of their instructions, the report does nothing of the sort.

38. 'Egypt Courts and Some Recent Challenges' is merely propaganda that seeks to attempt to justify the crackdown on human rights, the imprisonment of anyone who dares to disagree with the ruling autocracy, and the removal of those fundamental rights and freedoms that we would expect to be respected in any democracy.

39. It is accepted that there are fair trial protections within the statutory framework of the Egyptian criminal justice system and its constitution; further, the safeguards that are suggested to be in place also go some way to guarantee the independence of the judiciary. However, protections and principles are meaningless if they are not adhered to or ignored.

40. This is the prevailing situation in Egypt vis-à-vis its criminal justice system because safeguards that purported to act as guarantees are simply ignored. Individuals are held in pre-trial detention longer than the two-year maximum. Furthermore, rules of

evidence are ignored, fair trial protections dispensed with, and it is clear that the judiciary is influenced by the ruling autocracy.

41. This report, by way of background, commences with discussion concerning the relevant history of the Egyptian legal system, and how it has been developed to the position that we see today.

42. It then goes on to consider relevant international treaties to which Egypt is a State Party, and thereafter, the relevant elements of domestic legislation that compliments the principles of those international treaties with a specific focus on fair trial, and due process, rights and guarantees.

43. These chapters underpin that which is noted in paragraph 6 above, in that those rights that we expect to see are expressly guaranteed either by the domestic statutory and constitutional framework, or guaranteed by inference through Egypt's position as a State Party to the International Covenant on Civil and Political Rights (ICCPR) etc. and therefore, there is expectation that they would be adhered to.

44. It is after these preliminary introductory chapters that the reality of the position in Egypt is considered, as opposed to that which ought to happen in 'theory'.

45. Chapters 4, 5, and 6 below consider whether the Egyptian judiciary is truly independent, whether fair trial rights are adhered to, and whether the rights and freedoms of those detained in custody are respected.

46. The short answer to the three questions above is that the judiciary is anything but independent, and the rights that individuals would expect, either before the court at trial or during detention, are roundly ignored.

47. Chapter 7 deals with the catalyst behind the recent undermining of the criminal justice system and re-visits a common theme throughout the three previous reports drafted by the authors of this, namely, that having seized power through a military coup d'état, President Sisi's regime has sought to restrict and remove all opposition to his rule

through the use of various tactics, including the removal and/or criminalisation of democratic rights and their associated fundamental freedoms.

48. In today's Egypt, there is no such thing as 'free speech' or 'free expression'; merely voicing an opinion can result in arrest and imprisonment for a number of years.

49. The suggestion therefore in paragraph 1 of 'Egypt Courts and Some Recent Challenges' that the state is establishing "*...a modern democracy*", is quite frankly nonsensical.[3]

50. Where individuals are tried *en masse,* or thousands have been detained for merely expressing an opinion, and many more subjected to unlawful and abhorrent practice of 'enforced disappearance', Egypt cannot claim to be a democracy since no democracy would have any part in such practices.

51. This report was produced using open-source material, considering news reports from numerous outlets, as well as a plethora of reports from NGOs, INGOs and relevant departments of State organs of a number of different countries, as well as the European Union, the European Parliament and the UN.

52. All sources used are freely available for consideration and have been appropriately referenced where required.

Chapter 2: Relevant History of the Egyptian Legal System

53. The Egyptian legal system has evolved over centuries and has its origins in the Napoleonic Codes, Roman law and Islamic Shari'a.[4] The modern Egyptian legal system first emerged in 1874 when Egypt gained sovereignty from the Ottoman Empire in matters pertaining to legal and administrative regulation matters,[5] and by 1875 Egypt had formed its own national legal system.[6]

54. Many political public figures played a significant role in the recent history of Egypt and its transition towards democracy, independence and the development of the legal system, such as Abd El-Razzak El-Sanhuri' who drafted the civil Egyptian code.[7]

55. In the late 19th and early 20th centuries Egypt saw significant developments in its legal system accompanied by an active political and social movement, bringing about economic change.[8]

56. Jurists and scholars adopted a European position in relation to its legal thinking in commercial, criminal, civil and maritime matters.[9] Family law remained under the supervision of Islamic courts, specifically *El Mahakem El Shari'a* until 1956.[10]

57. In 1956, these family courts were integrated into the national court system.[11] However, in cases of marital disputes involving non-Muslims, religious substantive law of the religious minority applied.[12]

58. Egypt established its Supreme Court – the Supreme Constitutional Court – in 1969 to enforce the compliance of laws with the provisions of the Egyptian Constitution.[13] The Egyptian Constitution of 1971 further declared the judiciary independent and autonomous from the executive branch.[14]

HISTORY OF EGYPT'S LEGAL SYSTEM

59. Upon gaining sovereignty over legal matters from the Ottoman Empire in 1974, Egypt began to form various courts.[15] Instead of implementing the Ottoman Code of Obligations, Egypt, under heavy influence of the European powers of the19th century, established the 'mixed courts' in 1876, using a civil code referenced on the French Napoleonic Codes.[16] These mixed courts necessitated the need for a set of laws that had secular influence.[17] A second civil code, again based on the Code Napoleon, created National Courts in 1883.[18]

60. As a result, towards the end of the 19th century, Shari'a courts ceased to govern secular transactions for both Egyptians and non-Egyptians.[19] As a result, civil law derived mostly of French origins now prevailed throughout the Middle East.[20] Consequently, the modern legal systems of Middle Eastern countries share similar features to that of French law.[21]

EGYPT'S JUDICIAL SYSTEM

Historical Evolution of the Egyptian Judicial System

61. The Egyptian judicial system, based on European and French legal concepts,[22] acquired its modern characteristics during the Egyptian liberal project in the late 19th century with the establishment of mixed courts in 1875 and civil courts in 1883.[23] This project, promoted by the first Egyptian liberals, was based upon "the principles of separate authorities, judiciary independence, rule of constitution and law, and the existence of an elected cabinet responsible before the parliament which voices the nation's will."[24]

62. Prior to this period, and before the establishment of mixed and civil courts, the judicial system lacked structural organisation.[25] Religious courts were courts of

competencies, not entrusted to other judicial councils, where provisions of Islamic jurisprudence were implemented.[26] Over time, new courts were established to adjudicate disputes that did not fall within the religious courts' jurisdiction.[27] These new courts were subjected to positive legislation such as the tribunal of Merchants of Alexandria, the Jurists Association and the Ahkam Council.[28]

63. With the increase of such councils, religious courts' jurisdiction shrunk to personal status matters.[29] Moreover, due to continuing Ottoman rule, legal sovereignty notwithstanding, disputes concerning a foreigner as a litigant were resolved through the foreign privileges system by consults of foreign countries.[30]

64. The legal culture in Egypt in the 20th century underwent significant political and social changes following independence from British rule.[31] Egypt's struggle to establish a modern state was closely linked to its struggle in modernising the judicial and legal systems, and imposing national sovereignty over them.[32] This struggle served as a catalyst to the development of modern civil codes and the modern judiciary, which claimed jurisdiction over all litigations, irrespective of the litigants' nationalities.[33]

65. As per the Montero Treaty of 1937, the foregoing movement culminated with the dissolution of foreign privileges.[34] "*The dissolution of religious courts and concessional councils in 1956 was the last step towards the realisation of the Egyptian judiciary unification and cohesion."*[35]

Egypt's Legal System in the 19th and 20th Centuries

66. The mixed courts of Egypt were founded in October 1875 by Ismail Pasha, the Khedive of Egypt.[36] The mixed courts established the rule of law in Egypt, developed a truly Egyptian court system and were the base on which the post-war Egyptian legal system rests.[37] These courts helped reform Egypt's 19th century legal system where consular courts competed with government tribunals and religious courts for jurisdiction.[38] The mixed courts encouraged critical analysis, reasoning, scholarly

research and the emergence of an elite group of lawyers in Egypt.[39] These courts also encouraged freedom of thought, independence of action, and a respect for national rule of law, which fostered nationalist opinion.[40]

67. The mixed courts contained civil law codes inspired by a mix of French civil code and British common law, but also contained significant Islamic and local principles.[41] The courts were intended to streamline legal issues and hear disputes between foreign nationals and Egyptians, and between individuals of different nationalities.[42]

68. The mixed courts paved the way for the development and reform of Egypt's legal system.[43] A step forward in the unity of jurisdiction was the establishment of the native courts in 1883 (after the British occupation of 1882).[44] Egyptian judges in these new 'native courts' used codes based on the mixed courts' 1875 codes and followed their interpretation of the law.[45]

69. Despite the emergence of the native courts, mixed courts remained the foremost judicial authority between 1875 and 1949, a period of political and social change in Egypt.[46] Over time, and after the establishment of the mixed courts in 1875, native courts in 1883, and the Montreux Convention reforms in 1936, the Egyptian legal system grew closer while the influence of foreign consular jurisdiction lessened.[47] By 1937, the mixed and native courts merged and became the national courts.[48] The fusion of the mixed and native courts provided an up-to-date and solid system. Finally, these disparate legal courts became unified in 1956.[49]

EGYPT'S CIVIL LAW

70. The Egyptian Civil Code was the primary source of civil law in Egypt.[50] Instead of implementing the Majalla (the Ottoman Code of Obligations enacted in 1286) in Egypt, the European powers of the 19th century created mixed courts in 1876, using a civil codes pattered on their French counterparts.[51] Afterwards, a second civil code based on the Code Napoleon was enacted in 1883 for the national courts.[52] Thus, by the end of the 19th century, Shari'a law ceased to govern secular transactions for both Egyptians and non-Egyptians.[53]

71. Shortly after the two secular civil codes were promulgated in 1891, Muhammed Qadri Pasha produced a treatise, called *Murshid al-Hayra,* containing a code on property, contracts and agencies in accordance with the Hanafi school of Islamic jurisprudence.[54] "*This code was intended as a nationalistic reminder of the existence of Islamic law, and as a prod directed towards the backers of the two secular Civil Codes*." However, the *Murshid al-Hayra,* like the Majalla, was never used in legal practice in Egypt.[55] The national and mixed courts used Western materials instead, and court precedents involved Western influence.[56]

72. In 1936, an Anglo-Egyptian Treaty gave Egypt limited independence.[57] During the same year, a committee for the revision of Egyptian Civil Codes was formed.[58] This committee included Abd El-Razzak El-Sanhuri, a politician and lawyer.[59]

73. In no small part due to the enactment of the civil codes of 1875 and 1883, Shari'a no longer occupied the same public role as it did previously.[60] Consequently, the idea of reinstating Shari'a over secular matters was unattractive to significant portions of the Egyptian populace.[61] Instead, Sanhuri suggested adapting Shari'a to progressively meet the needs of modern civilisation before replacing the Western-inspired system of law.[62] Instead, Sanhuri posited, Shari'a should play a subsidiary role through its application in the absence of provisions of secular legislation.[63]

74. In 1942, Sanhuri drafted a revised civil code reflecting his earlier vision of a progressive Shari'a existing alongside a secular civil code.[64] An example of this model can be found in Article 1 of the Civil Code of 1948, which was based on Sanhuri's earlier draft:

> "*Article 1 of the Civil Code of 1948 enjoins judges to issue their judgments in accordance with the letter and spirit of the provision of the Code itself, failing that, in accordance with custom, and in the absence of custom, in accordance with the principles of Islamic Shari'a.*[65] *In the absence of the latter, judges will apply principles of natural law and rules of equity, as also instructed by Article 1.*"[66]

In essence, Shari'a was in place to support secular legislation, and their principles were used to supplement statutory provision and custom, or provide an answer where there was no prior statutory provision.[67] However, the extent of its supplemental role in missing legislation remained unclear.[68]

75. The Civil Code of 1948 was one of the first Egyptian legal codes subjected to representative review rather than executive diktat.[69] The new civil code, which contained 1,149 articles, again closely followed the French civil law model.[70] Its purpose was to modernise law by adopting ideas from Western civil law specifically that focused on the regulation of business and commerce.[71] Ultimately, the code did not include any provisions regarding family law and succession, and demurred to Shari'a in these areas.[72]

76. Through its development, the Egyptian Civil Code became the source of law for numerous other Middle Eastern jurisdictions, such as pre-dictatorship kingdoms of Libya and Iraq, Jordan, Bahrain, Qatar, and the commercial code of Kuwait.[73]

77. Additionally, Sudan's 1970 Civil Code was in large part copied from the Egyptian Civil Code.[74] Today, except Saudi Arabia and Oman, all Arab nations' modern civil codes are based partly or wholly on Egypt's Civil Code.[75]

EVOLUTION OF EGYPT'S CONSTITUTION

The 1923 Constitution

78. Egypt's modern constitutional history can be traced back to the Egyptian revolution of 1919 where Egypt demanded independence from Britain.[76] Britain had governed Egyptian territory as a protectorate since 1914.[77] Egypt's agitation against British rule and its increasing demand for independence resulted in its formal termination under the provisions of a joint declaration in 1922.[78] This declaration helped establish a 30-member legislative committee comprised of political parties and members of the revolutionary movement, who then went on to draft a constitution for an independent Egypt.[79] This constitution has served as the model for all Egyptian constitutions that have followed.[80]

79. The 1923 Constitution established a constitutional monarchy with the King of Egypt as the head of the executive and enshrined many personal freedoms.[81] It mandated primary education, privacy of the home, property, telephone, and created a bicameral parliament.[82] Although the 1923 Constitution gave much power to the King, it also sought, albeit to a limited extent, to empower the people.[83]

80. Despite initial steps towards democratisation, the 1923 Constitution still delegated extensive power to the executive.[84] For example, the King retained power to single-handedly disband parliament, appoint up to two-fifths of the senate, veto parliament bills and ratify laws.[85]

81. Furthermore, successive kings frequently ignored or violated the constitution.[86] Additionally, the constitution made no reference to the rights of women, except when it mentioned the requirement of primary education for boys and girls.[87]

82. Infringement upon personal liberties was facilitated by embedded exceptions, conditions and qualifications.[88]

83. Democratisation was further hindered by interference by the British into Egypt's politics and policymaking.[89]

84. The 1923 Constitution was briefly replaced by one promulgated in 1930 for five years.[90] In contrast to the enfranchisement of all adult males in 1923 Constitution, the 1930 Constitution limited the enfranchisement to men owning a certain amount of property.[91]

The 1952 Constitution

85. The 1952 Constitution was adopted following the abolishment of Egypt's constitutional monarchy.[92] This constitution transformed Egypt into a republic ruled by elements of the military, who were responsible for the 1952 revolution.[93] The military dominated the political sphere through the Revolutionary Command Council.[94] Consequently, the period between 1952 and 1970 witnessed the military issuing and revoking constitutional orders, effectively hindering the development of the effective multiparty democracy that the 1952 revolution was designed to achieve.[95] As a consequence, three constitutions were issued between 1952 and 1970.[96]

86. First, there was the Constitution of January 16, 1956.[97] The second, was the Unity Constitution of 1958, which came about after the creation of the United Arab Republic of Egypt and Syria.[98] Lastly, the third was the Interim Constitution of March 25, 1964, issued following the dissolution of the Egypt-Syria union.[99] "This Constitution remained in place until a new one was promulgated in September 1971."[100]

The 1971 Constitution

87. The 1971 Constitution was the fourth adopted constitution since the declaration of the republic.[101] This constitution remained in force until its dissolution in 2011 and stipulated four main goals: world peace, Arab unity, national development, and freedom of humanity and all Egyptians.[102]

88. Over the years, this constitution has been amended on three occasions and by two presidents.[103]

89. The first instance was in 1980 by President Sadat at the end of his presidency.[104] The 1980 amendment made Shari'a law (Islamic law) the basis of all laws and the main source of legislation.[105]

90. Additionally, the 1971 Constitution established a multi-party, semi-presidential system of government with a strong executive, legislative and judicial authorities.[106] However, significant restrictions on political activities effectively rendered Egypt a one-party state.[107] The constitution subjugated political parties to the law wherein the government could control which parties could participate in elections.[108]

91. The second set of amendments were initiated by President Hosni Mubarak in 2005 and 2007.[109] The last round of amendments was the most extensive, changing 34 articles of the constitution.[110]

92. The purpose behind these amendments, proposed by the ruling National Democratic Party, was to steer the country's political and economic tendencies away from socialism and towards capitalism.[111] Furthermore, after the 2005 elections, the government experienced increasing opposition.[112]

93. In response to government opposition, amendments to the constitution were presented with Articles 5, 88 and 179, adding constitutional permanence to the emergency law in place since 1981.[113]

94. In 2007, the Mubarak regime's amendments to the constitution included prohibitions on the formation of political parties based on race, religion or ethnicity.[114] These amendments were put to a popular referendum.[115] Despite low voter turnout and boycott by opposition groups, the referendum passed with 75.9% approval.[116] Such actions on behalf of the government embedded deep resentment against the system that would eventually explode in the popular revolts on 25th of January 2011.[117]

Constitutional Developments in 2011, the Post-Mubarak Era

95. As a result of a two-week long revolt between January 25, 2011 and February 11, 2011, President Hosni Mubarak resigned.[118]

96. Immediately after, the Supreme Council of the Armed Forces took over the State, dissolved state institutions, suspended the constitution, and established an eight-man constitutional committee.[119]

97. A referendum was held on March 19, 2011, where a constitution draft proposed by the foregoing committee was ratified.[120] This was followed by parliamentary elections in January 2012 and presidential elections in May 2012.[121] Both of these elections saw the emergence of the Muslim Brotherhood's Freedom and Justice Party (FJP) as a dominant political force in Egypt.[122] The FJP won 70% of the seats in parliament while their presidential candidate, Mohammed Morsi, won the Presidency.[123]

98. Once the new parliament was elected, they prepared a new and more permanent constitution for Egypt.[124] Parliament's role was to establish a representative constituent assembly comprising of MPs and others outside the parliament.[125] Thus, a constitutional declaration was issued on March 30, 2011, which mandated the formation of a 100-member constituent assembly.[126]

99. In October 2012, the assembly completed the first draft of the new constitution, the exercised being finalised on November 29, 2012.[127]

100. In light of the growing criticism regarding the lack of diversity in the assembly, President Morsi attempted to consolidate his power by issuing a further constitutional declaration on November 22, 2012, which prohibited any judicial challenges to his decisions.[128]

101. This, in turn, barred judicial review of the constituent assembly which had been established with Morsi's support, and paved the way for the assembly's draft to go to referendum.[129] In December 2012, the draft was adopted in a public vote.[130]

102. Despite the vote, some criticised the document as lacking popular ownership giving the rushed and closed process through which it was developed.[131] The 2012 Constitution strengthened the role of Islam in the legislative and judicial process.[132] It again established Shari'a as the principle source of Egyptian law.[133] The constitution defined those principles as "*evidence, rules, jurisprudence and sources accepted by Sunni Islam*."[134]

Constitutional Challenges in 2012 under the Morsi Regime

103. The new 2012 Constitution survived for approximately six months.[135] Elements of society resisted Morsi's consolidation of executive powers, despite it being argued that the step was necessary to ensure a smooth transition, and the implementation of the revised constitution.[136]

104. This resistance between pro- and anti-Morsi supporters grew violent.[137] At the same time, society became divided between the ruling Islamists and minority secularists.[138]

105. On June 30, 2013, a section of society protested and called for Morsi's resignation.[139]

106. The military deposed Morsi on July 3, 2013, by way of an armed coup d'état, suspended the constitution, and set up an interim government headed by the Supreme Constitutional Court President, Adly Mansour.[140] Following the forced removal of Morsi on July 3, 2013, Egypt's military-backed government began a two-phase process to create a new constitution that would replace Egypt's 2012 one.[141]

107. In the first phase, the regime tasked a committee of ten legal experts with drafting a list of constitutional amendments.[142] During the second phase, 50 representatives from various state institutions and social groups built upon the amendments and wrote a new constitution.[143] The draft was finalised on December 1, 2013.[144]

108. "*On July 8, 2013, President Mansour issued a new Constitutional Declaration outlining a new transition process and interim governing structures*."[145] The declaration granted Mansour legislative and executive powers and further powers to appoint and dismiss ministers.[146]

109. Further, the declaration's recognition of the right to free speech was limited to the extent allowed by the law.[147] While Article 10 of the declaration granted freedom of assembly, it only did so under certain conditions, and remained silent on the specifics of those conditions.[148]

110. In order to review specific articles of the 2012 Constitution and propose amendments, the declaration created a ten-member committee, including six judges and four constitutional lawyers.[149] This task was completed in August 2013, with a draft submitted to a 50-memebr committee.[150]

111. In December 2013, the final draft of the revised constitution was approved in a referendum initiated by then Interim President, Adly Mansour, by 98.1% of voters in January 2014.[151] Importantly, the reforms in the 2014 Constitution was the strengthened role of the security sector, the army, the police and the judiciary.[152]

112. However, this is not an accurate reflection, given that many 'No' advocates were arrested purely for their opposition to the constitution, and thus the electoral process adopted was fundamentally flawed.

Chapter 3: International Treaties

113. It was in response to the horrors of the Second World War that the United Nations (UN) was formed, which in turn sought to set out the fundamental rights of all human beings across the world, regardless of creed, colour or citizenship.

114. These rights were, and still are, seen as 'universal'; they are blind in essence, and as such, their implementation and enjoyment ought also to be blind.

115. Free from restriction, free from removal, and free from repression.

116. With these principles in mind, the Universal Declaration of Human Rights (UDHR) was drafted; its vision being freedom and peaceful enjoyment of those rights, its heart beating to the rhythm of justice, and as a result, the right to a fair trial.

117. The very first line of the 'Preamble' to the UDHR reads:

> *"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."*[153]

118. This theme of rights, dignity, freedom and justice is continued throughout; one of the most important articles being Article 10:

> "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*"[154]

119. The relevance and importance of the UDHR and those other treaties that were drafted subsequently will be discussed in further detail below; however, it is essential that we view this as our starting point when looking to consider the fairness or otherwise of any State's judicial system, or the manner in which it treats its citizens.

120. The UDHR is fundamental insofar as a global viewpoint on human rights is concerned as it is arguably at this juncture that we can identify the beginning of the global movement towards respect for human rights.

121. Peter Baily OBE in his article "*The Creation of the Universal Declaration of Human Rights*" rightly acknowledges the UDHR as being "*...regarded as possibly the single most important document created in the twentieth century and as the accepted world standard for human rights."*[155] And that its intention was to "*...set a standard of rights for all people everywhere – whether male or female, black or white, communist or capitalist, victor or vanquished, rich or poor, for members of a majority or a minority in the community."*[156]

122. This assessment is in keeping with the preamble of the UDHR which was to reflect:

> "*recognition of the inherent dignity and...equal and inalienable rights of all member of the human family"* and therefore provide "*...the foundation of freedom, justice and peace in the world.*"[157]

123. Given its words and given the importance with which the declaration is viewed, it is a natural conclusion to believe that those nations signing and ratifying the treaty would adhere to its principles, and seek to treat society within the confines of those ideals.

124. The mere signing of a treaty, however, is inconsequential if its articles, and indeed its spirit is to effectively be ignored.

125. Actions do indeed speak louder than words, and it is actions upon which an individual, a group or indeed, an entire State is judged.

126. This concept of human rights has become well-known and a widely accepted term to use, despite there being a number of different interpretations, with many of those differences being based on a cultural background; however, the principles rights as enshrined within the UDHR do not differ from culture to culture.

127. It is accepted that the UDHR is not legally binding, but as noted, it is the basis of all international human rights law; and the fact that when proposed, it was passes unanimously, is an indication of how its principles ought to be accepted; and principles that Egypt accepted by virtue of it becoming a State Party to the declaration in 1948.

128. The signing of the declaration and the other instruments outlined within this document, is, on the face of it, evidence of the development of democratic rights and associated fundamental rights and freedoms in Egypt; the reality however, as is often the case, different than the theory.

129. Following the declaration, two further 'binding' UN covenants were formed: the *International Covenant on Civil and Political Rights* (ICCPR)[158] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[159] Combined, these three documents are often referred to as the '*International Bill of Human Rights.'*[160]

130. Over the years, the fundamental principles enshrined within the UDHR and the further two covenants have been developed and expanded further so as to focus of a variety of specific topics, such as refugees, discrimination, torture and racial discrimination to name but a few.

131. Specific to members of the Organisation of Islamic Cooperation (OIC)[161], the Cairo Declaration on Human Rights in Islam (CDHRI) was compiled, its intention being to compliment the UDHR and keep to its central principles, but also to ensure that it was Shari'a-compliant[162].

132. Regardless of the name of the treaty however, their respective intentions are the same in that all signatory States, by ratifying such treaties, have effectively announced that the actions and behaviours described in those relevant statutes are not to be tolerated and thus rejected.

133. In the same vein, in 1986, Egypt 'acceded' to the 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'[163] with no reservations, and thus by this, is bound by the obligations contained therein.

134. It is incumbent on Egypt to send regular reports to the Committee Against Torture (CAT), the body responsible for monitoring; upon which the CAT will make recommendations.

135. It is of note however that as yet, Egypt has failed to sign or become a State Party to the Conventions Optional Protocol, and similarly, neither has it signed or opted to become a State Party to the 'International Convention for the Protection of all Persons from Enforced Disappearance'[164].

136. There are a number of other treaties to which Egypt is already a State Party; however, the focus of this report is on recent 'trials' and the extent to which, or otherwise, Egypt adheres to its national and international obligation insofar as its arrest, detention and trial procedures are concerned.

137. It is therefore appropriate to consider just what Egypt's obligations are by virtue of it being a State Party to the above noted treaties and conventions.

The Universal Declaration of Human Rights (UDHR)

138. It would be counter-productive to list each and every article of the convention; however, it is essential, given the prevailing circumstances in Egypt, that Articles 3, 5, 7, 9-13 and 18-20 are noted, in that every citizen has the:

a. Right to life, liberty and security of person;

b. Right not to be subjected to torture or to cruel, inhumane or degrading treatment or punishment;

c. Right to be deemed as equal before the law;

d. Right not to be subjected to arbitrary arrest, detention or exile;

e. Right to a fair and public hearing by an independent and impartial tribunal;

f. Right to be presumed innocent;

g. Right not to be subjected to arbitrary interference with his privacy, family, home or correspondence;

h. Right to freedom of movement and residence;

i. Right to freedom of thought, conscience and religion;

j. Right to freedom of opinion and expression; and

k. Right to freedom of peaceful assembly.[165]

139. Many of these rights are taken for granted and not, for many individuals, consciously acknowledged as rights, given that they are so entrenched in our daily lives as citizens as a democratic State.

140. Simply because they have become synonymous with life does not mean that they are to be ignored however; such rights are essential and provide the foundations upon which any democracy is built.

141. s a consequence, there ought to be no derogation from such rights.

142. Those further UN treaties[166] to which Egypt is a State Party do not confer 'further' rights on citizens; moreover, they develop and specify those individual rights detailed above, providing relevant protections.

143. Egypt is bound to the provisions of:

l. The Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment;

m. The International Covenant on Civil and Political Rights;

n. The Convention on the Elimination of All Forms of Discrimination against Women;

o. The International Convention on the Elimination of All Forms of Racial Discrimination;

p. The International Covenant on Economic, Social and Cultural Rights;

q. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

r. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict;

s. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; and

t. The Convention on the Rights of Persons with Disabilities.

144. The issue however, is whether the policies of the Egyptian Government, and specifically the regime of Sisi, adheres to those obligations and whether reports in support of that regime are correct in that they highlight "*…the developing state of the human rights programme of the government in today's Egypt…"* and that its policies are required "*…as it establishes a modern democracy.*"[167]

The African Union

145. As is noted above, it is not merely UN treaties to which Egypt is bound.

146. As a member of the African Union, Egypt is bound by the Constitutive Act[168] of that union, and in particular Article 4 (m) – (p) of the Act, that reads:

> "*Article 4 The Union shall function in accordance with the following principles: (...)*
>
> *(m) respect for democratic principles, human rights, the rule of law and good governance;*
>
> *(n) promotion of social justice to ensure balanced economic development;*
>
> *(o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;*
>
> *(p) condemnation and rejection of unconstitutional changes of governments."*

147. Freedom is the essential tenant of the Act, freedom of citizens; again, it fails to be considered as to whether Egypt demonstrates its adherence to the Act, and in doing so, reference (p) in that the seizing of power and the ousting of President Morsi simply cannot be argued to be constitutional given that it was achieved at the barrel of a gun, rather than the appropriate use of the ballot box.

The European Union

148. The European Union, by its very nature, does not seek to enact instruments of international law in a manner that is either in accordance, or complimentary, to unions such as the UN or the African Union.

149. It does however hold essential democratic rights and fundamental freedoms at its core, and seeks to entrench those principles in the agreements it enters into with nations outside of the Union.

Chapter 4: Independence of the Judiciary

150. The independence of the judiciary is one of the most basic guarantees of justice.

151. According to the UN Basic Principles on the Independence of the Judiciary, judges must be free from external interference, restrictions or influence so they can decide matters before them impartially "*on the basis of facts and in accordance with the law.*"[169]

152. Following the principle of separation of powers, in order to guarantee balance between branches of State power and ensure control over abusive practices committed by the security forces, it is particularly important that judges are not subjected to inappropriate or unwarranted influence from the executive.

153. In this vein, in 2007, the UN Human Rights Committee warned against the influence of the government in the judicial system:

> "*a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation.*"[170]

154. In its 2014 annual report, the former UN Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, also highlighted the relevance of the principle of judicial independence for human rights protection and respect to the rule of law in a democratic society:

> "*as the enforcement of human rights ultimately depends upon the proper administration of justice, an independent, competent and impartial justice system is paramount if it is to uphold the rule of law*"[171] (emphasis added).

155. The report commissioned by the State Litigation Authority of Egypt lists a number of international human rights treaties ratified by the Egyptian State, as well as international standards that are binding to the Egyptian legal system and national rules that recognise and promote the independence of the Egyptian courts.

156. Egypt is party to the International Covenant on Civil and Political Rights (hereinafter ICCPR), whose Article 14 recognises the right to an "*independent and impartial tribunal established by law.*"[172] Similarly, Article 26 of the African Charter of Human and Peoples' Rights[173] obliges States parties to "*guarantee the independence of the courts,*" and Article 12 of the Arab Charter on Human Rights establishes that States parties shall

> "*guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats,*" while its Article 13 recognises the right to an "*independent and impartial court.*"[174]

157. Such is the relevance of the principle of judicial independence, that the African Commission on Human and Peoples' Rights has held that the right to a fair trial – including the right to be tried by an impartial court - "*should be considered non-derogable providing as they do the minimum protection to citizens.*"[175] The Human Rights Committee followed the same line and concluded that deviating from fundamental principles of fair trial, including the presumption of innocence, "*is prohibited at all times.*"[176]

158. These provisions have been expanded by other non-binding instruments such as the UN Basic Principles on the Independence of the Judiciary, the Beirut Declaration on Judicial Independence or the Cairo Declaration on Judicial Independence which provide valuable guidelines and references to design a powerful and impartial judicial

system, and follow the standards set by Article 10 of the 1948 Universal Declaration of Human Rights, which proclaimed that:

> "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*" [177] (emphasis added).

159. Nevertheless, the mere existence and acceptance of these rules does not guarantee that they are complied with, so it is necessary to differentiate between the theoretical protections given by international rules to guarantee judicial independence and the practice of the Egyptian courts.

160. Comparatively, in 1993 in its concluding observations on Egypt, the Human Rights Committee noted that although the State had provided comprehensive information on the legislation of Egypt and included an annex with a useful comparative analysis of the legislation in respect of the provisions of the covenant, it provided "*very little information on practice relating to the implementation of the covenant and the actual enjoyment of human rights in Egypt or difficulties negatively affecting it.*"[178]

161. The same conclusion can be drawn with respect to the report commissioned by the State Litigation Authority of Egypt: although the Egyptian State is legally bound to the aforementioned treaties examined in the report, Egyptian courts have systematically failed to uphold the due process and fair trial standards and the principle of judicial independence recognised in these articles in practice. Although since the 1971 Constitution, all Egyptian constitutional texts have proclaimed the 'independence' of the Supreme Constitutional Court; in practice, the executive has traditionally had a prominent role in the appointment of its members as will be examined in the following sections.

162. The report commissioned by the State Litigation Authority of Egypt dedicated a full chapter to the independence of the Egyptian courts and drew the conclusion that the

Egyptian judiciary is independent based on two main reasons. First, it argued that the Supreme Constitutional Court has taken certain decisions that were detrimental to the interests of the executive power, which "*indicate its independence.*" Second, it noted that the appeals mechanisms in the ordinary courts have overturned unfair convictions on appeal "*thus enhancing independence within the institution.*"[179]

163. These two arguments, nevertheless, are factually incorrect, legally irrelevant and relying on baseless assumptions.

164. First, as will be analysed in this chapter, the Supreme Constitutional Court is a powerful institution in Egypt, but it is not considered to be independent from the executive's interests. On the contrary, the general perception both in Egypt and internationally is that after a series of politically-motivated appointments, the Court is highly politicalised and fulfils the interests of the current military-led government. The fact that in the past the Supreme Constitutional Court issued certain decisions that were not in favour of the Egyptian government's position does not *per se* demonstrate the independence between both institutions.

165. Second, the mere existence of an appeal system to overturn unfair decisions by lower courts is not a factor that could measure the degree of independence of Egyptian courts. Although the right to appeal is important to ensure a fair trial, the fact that sentences may be appealed is not indicative of the references or motivations behind the courts' decisions, and of the degree of independence and impartiality of the judge or court that issues the ruling.

166. On the contrary, other elements such as the system of appointments and promotions, disciplinary and accountability mechanisms, the remuneration of judges or their security of tenure are essential to understand the motivations behind courts' judgments and assess their impartiality and independence. As a matter of fact, the Human Rights Committee clarified that the requirement of independence of the judiciary refers, in particular:

"*to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature*"[180] (emphasis added).

167. Therefore, this chapter will analyse the conditions for appointment and promotion of judges in Egypt, as well as the disciplinary proceedings against them and the relationship between the executive and the judiciary. After careful examination of all these factors, the only possible conclusion is that on the basis of its current regulation and practice, the Egyptian judiciary is not independent by any objective assessment.

168. At present, all these factors indicate that presently, the Egyptian executive enjoys significant, and almost complete, control over judicial institutions in the country. It must be noted that even the report commissioned by the State Litigation Authority of Egypt acknowledges that the ordinary court system "*enjoys less autonomy, with the executive having a role in appointments, security of tenure, administering and financing the courts and discipline*" [181] (emphasis added).

169. Accordingly, independent legal experts, international organisations and institutions for human rights protection have all agreed that the Egyptian judicial system is non-independent. The general consensus is that the influence of the executive power in the judicial system is so strong that judges do not receive the correct incentives to decide on an impartial, and therefore appropriate, basis, and a number of sensitive high-profile judgments have responded to political motivations instead of legal reasons and objective evidence.

170. In this context of lack of independence and executive's control, judicial processes in Egypt cannot be considered to be fair and consistent with the rule of law.

Independence of the Judiciary in the Ordinary Courts System

171. Egypt has traditionally failed to ensure the independence of its judicial institutions as the executive has retained a significant, albeit inappropriate, role in the appointment of judges and prosecutors.

172. In 1993, the Human Rights Committee noted with concern that the president had a "*role as both part of the executive and part of the judiciary system*" as he was entitled "*to refer cases to the State security courts, to ratify judgments and to pardon.*" [182]

173. As mentioned above, the report commissioned by the State Litigation Authority of Egypt puts special emphasis on the fact that successive Egyptian constitutions have recognised the principle of judicial independence. Nevertheless, although theoretically proclaimed in the supreme piece of legislation of the country, the principle has not been reflected in the specific legislation governing the judicial system in Egypt and its practice.

174. The constitution in Article 186 *"leaves it to the legislator to articulate judicial independence of the ordinary courts,*" including procedures of appointments, retirement and disciplinary measures[183]. In application of this constitutional mandate, the law governing the system of Egypt's ordinary courts is the Judicial Authority Law No. 46 of 1972 (hereinafter JAL); while the Code of Civil and Commercial Procedure and the Code of Criminal Procedure determine the courts' jurisdiction.

175. The report commissioned by the State Litigation Authority of Egypt acknowledges that the JAL "*allows the executive a role in judicial appointments, transfers, inspections and the administration of justice, which impacts upon the court's independence*"[184] (emphasis added).

176. In this vein, during the last years, the Egyptian judiciary has come under significant international scrutiny. In February 2014, the International Bar Association Human Rights Institute (hereinafter IBAHRI) published a report entitled 'Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt'[185]

concluding that although judicial independence is constitutionally protected, "*the Ministry of Justice is given wide powers over judges which provide scope for abuse.*" As a matter of fact, the IBAHRI noted that:

> "*the legal framework also gives a role to the executive branch in the appointments system, particularly at the higher judicial level, allowing scope for politicised decision-making. A lack of transparency and the absence of public examinations for appointments also leads to a perception – if not a reality – of nepotism*" [186] (emphasis added).

177. Two years later, in September 2016, the International Commission of Jurists (hereinafter ICJ) published a 156-page report with a detailed analysis of the functioning of the Egyptian judicial system and its relationship with the executive. This report, which concluded that the Egyptian regime is using the judiciary as a 'tool of political repression' defended that constitutional provisions, laws, policies and practices "*impede the ability of the judiciary to function in an independent and impartial manner.*" [187]

178. Both studies highlighted the overwhelming role that the executive has in key aspects affecting the independence of the judiciary, such as judicial appointments, assignments, promotions, secondments, disciplinary proceedings and the normal functioning of the courts.

179. First, the **Supreme Judicial Council** (hereinafter SJC) is the institution in charge of the supervision of judicial affairs. Its mandate is included in Article 188 of the 2014 Constitution, which provides that judicial affairs "*are managed by a higher council whose structure and mandate are organised by law.*" Its functioning is regulated by Law No. 35 of 1984. Among other tasks, this Council is responsible for the interviewing of judicial candidates[188] and initiating disciplinary investigations.

180. The executive's interference in this body affects both its functions and composition.

181. First, although this institution should be essential to guarantee the independence of the Egyptian judiciary and separation of powers, it only has a secondary role in the determination of the key aspects affecting the judges' careers. In this vein, the ICJ concluded that, in practice, the SJC "*acts as a rubber stamp for the Minister of Justice*" as its role is "*largely limited to providing approval to the Minister's decisions.*" [189] As will be shown below, the Minister of Justice has overtly broad powers in relation to the careers of judges, while the powers of the SJC to act independently of the minister are "*severely limited.*" [190]

182. Second, the president of the country – at present, Abdel Fattah al-Sisi – has the power to appoint the President of the SJC, who is also the President of the Court of Cassation,[191] although his appointment is exclusively based on seniority criteria. The rest of members of the SJC are not selected by judges or following objective merit-based criteria, thus it is neither a representative nor an expert body. No woman has ever served as member of the SJC. As a matter of fact, it has been alleged that "*the executive of making judicial appointments based on political considerations that would ensure a cooperative SJC and judiciary in line with the regime's core interests*"[192] (emphasis added).

183. The system of **appointment** of judges for ordinary courts does not follow objective merit-based criteria either or established procedures. The only requirements found in Article 38 of the JAL are the following:

a. Egyptian citizenship with full civil capacity;

b. Minimum age requirements depending on the position;

c. A law degree from an Egyptian university or an equivalent foreign degree and an equivalency exam;

d. The absence of a criminal or disciplinary record; and

e. Good conduct and reputation.

184. There is no system of public tests and examinations in place to access suitability or competence of judicial candidates, or those already in position. The appointment

procedure is unclear and has been defined as closed and opaque. The SJC approves a judicial candidate "*once he or she has been appointed by either the President of the Republic, the Minister of Justice or the chief judge of the court to which the judge will be appointed.*" [193]

185. The IBAHRI notes that the appointment process "*is not fully meritocratic and that it is well known in Egypt that judges' sons will often become judges even if their academic record makes them ineligible for appointment.*"[194] The case of the President of Tanta Court stood out for its gravity as it was alleged that he had 21 sons and nephews in either judicial or prosecutorial offices "*even though some have academic records that should have disqualified them from the judiciary.*"[195] Therefore, access to a judicial career is based on personal connections, and thus, nepotism is "*pervasive and systematic.*" [196] This ultimately raises doubts about the preparation and impartiality of Egyptian courts.

186. Adding to this partiality, there are very few female judges as a result of persistent discrimination, with it being portrayed as an inappropriate profession for women. As a matter of fact, "*the number of women judges in Egypt is one of the lowest in the world.*" [197]

187. In analysing the political influence of the executive over the judicial appointments, in 2014 the Carnegie Endowment for International Peace noted that since 2001, the executive branch in Egypt used:

"*direct and indirect tools to incentivize judicial self-restraint and discourage judicial activism. This included hiring more police academy graduates into the judiciary, vetting new hires for affiliations with the judicial independence movement or opposition groups, and assigning regime-friendly judges to cases involving the regime's core interests. <u>These circumstances persist today</u>*"[198] (emphasis added).

620. Judges are frequently selected from the Office of the Public Prosecutor, as the prosecutorial and judicial careers are not properly differentiated in Egypt. As a matter of fact, the IBAHRI notes that the vast majority of judges, "*or perhaps even all judges* […], *are promoted from the ranks of the public prosecution.*" [199]

188. This may lead to lack of independence and impartiality. According to the ICJ "*there is a very close relationship between the two functions, to the detriment of the independence of both,*"[200] because the Minister of Justice has direct control over the Office of the Public Prosecutor. This also reduces the "*diversity of background and experience of candidates.*" [201] As a matter of fact, although prosecutors are considered part of the judiciary in Egypt organisationally, the Office of the Public Prosecutor is "*part of the Ministry of Justice.*" [202] In this vein, the Minister of Justice can temporarily assign Court of Appeal judges to the prosecution office.

189. Relevantly, the process of appointment for **Prosecutors** suffers from the same defects as that in place for the appointment of judges, including a lack of merit-based criteria and unfair and non-transparent procedures in both appointments and promotions. There is a public exam for acceding directly to the position of Assistant Prosecutor (without having first been an Associate Prosecutor), but the exam is administered and regulated by the Ministry of Justice. Prosecutors are appointed by presidential decree, and there have been credible allegations of discrimination: "*in 2014, 138 applicants to the OPP* [Office of the Public Prosecutor] *were turned down because their fathers had not obtained university degrees.*" [203] Despite of all these problems, "*since the ouster of President Morsi and the military-supported government that followed, little has been done to reform the OPP and to end subordination under Executive*" [204] (emphasis added).

190. Appointments to the higher echelons of the ordinary judicial system are determined by the executive. In this vein, as previously mentioned, the President of the Republic appoints both the Chief Justice of the **Court of Cassation**, also the head of the SJC, and its Vice-Presidents from the list of nominees selected by the Court's General Assembly. The President of the Republic also appoints the remaining members of the

Court from the nominees proposed by the Minister of Justice and the General Assembly of the Court. Meanwhile, the Minister of Justice chooses the Presidents of First Instance Courts from among the judges of the appellate courts. Lower ranking judges are chosen by the president of each court.

191. Apart from the system of appointments, after a careful examination of the JAL, the ICJ has identified up to nineteen powers granted to the Ministry of Justice with regards to **promotion, secondment and transfer of judges**. In this vein, the Minister of Justice is legally empowered to:

a. Assign judges and prosecutors to specific courts and cases. According to the ICJ, the Ministry of Justice retains ultimate control over all criminal investigations as it may remove investigations from the Office of the Public Prosecutor and request a Court of Appeal to assign an investigative judge to a particular case or to specific types of crime at his own discretion.[205] These assignations are not transparent and do not follow pre-established criteria, so these practices "*could influence the outcome of a particular case and present a direct conflict of interest*" [206] and ease politicised and selective prosecutions[207]. In this vein, the minister can also request first instance courts to reconsider decisions, and even refer the matter to the SJC, related to the assignment of cases, hearing dates or judges[208]. The ICJ notes that since the army's seizure of power in July 2013, "*the Minister of Justice has repeatedly issued decisions transferring specific cases from ordinary court buildings to police training academies, controlled by the Ministry of Interior.*"[209]

b. Assign and transfer judges and prosecutors to different positions, including to non-judicial work. In this vein, the minister may assign judges of the Courts of Appeal to be presidents of first instance courts[210] or to the Court of Cassation;[211] he may transfer judges between courts,[212] or assign judges to serve within the Office of the Public Prosecutor[213] or to other administrative posts within the Ministry of Justice.[214] This allows the minister to move the judges he wants "*to the courts where specific lawsuits will be examined or to*

banish judges to remote, less prestigious courts if he disagrees with their choices," [215] and so the influence over the judiciary is insurmountable. Moreover, there is a problem of underpayment among Egyptian judges; as a consequence, these transfers are commonly considered a lucrative reward in exchange of political favours.[216]

c. Choose the judges that will comprise the staff of the *Judicial Inspection Department* without following any pre-established criteria; and supervise and determine the rules that guide its work.[217] The *Judicial Inspection Department* is a fundamental institution for the promotion, transfer and disciplinary procedures of judges that is part of the Ministry of Justice and acts under the minister's direct authority. This institution evaluates the work of judges and prepares "*the roster of judges eligible for promotion and assignment*"[218]: the procedure for promotion, which has been defined as "*opaque*",[219] depends on the judges' technical inspection records drafted by this department. As a matter of fact, the list of judges that will be subject to technical inspection is "*prepared by the Minister of Justice, at his or her discretion.*" [220] In this context, the IBAHRI reminded Egypt that international standards require that the power to discipline or remove a judge must be vested in an institution independent of the executive, "*and this is clearly not currently the case.*" [221]

d. Control and administratively supervise both the court system and the Office of the Public Prosecutor.[222] According to the ICJ, "*all aspects of the work of the OPP* [Office of the Public Prosecutor] *and conduct of prosecutors appears to be subject to the influence of the Executive,*"[223] and therefore, prosecutors cannot fulfil their functions impartially and act against public officials to investigate violations of human rights. Relevantly, the Minister of Justice defines these conditions under which both judges and prosecutors receive healthcare and social welfare.[224]

192. At the same time, the President of the Republic has been granted power to identify and select judges and prosecutors "*for secondment to foreign governments or international bodies.*"[225]

193. In these circumstances, it is beyond comprehension to conclude that the Egyptian judiciary is independent from the executive, as all the incentives provided to judges depend directly from the government. According to the IBAHRI, these powers "*threaten independence as they allow the Minister to reward or punish serving judges, and therefore provide an incentive for judges to please the government*"[226] (emphasis added).

194. The contention of the State Litigation Authority that the system is independent, therefore, is fundamentally flawed and without any legitimate basis.

195. With regards to **disciplinary mechanisms**, the Ministry of Justice has an important role in the investigation and disciplining of judges and prosecutors. The minister can request the Prosecutor-General to initiate disciplinary proceedings against judges and prosecutors;[227] he can request the Disciplinary Board to suspend a judge during the investigation and trial of an alleged crime;[228] he can assign judges to conduct investigations about alleged misconducts of a judges of the Court of Cassation or the Courts of Appeal,[229] and his Ministry implements the disciplinary sanctions.

196. Moreover, the norms and standards regulating disciplinary procedures fail to comply with international standards of due process as judges are not provided with the rights to choose the counsel of their choice, nor are they given sufficient time and facilities to prepare their defence. Furthermore, there is no requirement that punishments are proportionate to the misconduct: although judges should only be removed in cases on proven grounds of incapacity or grave misconduct that renders the judge unfit to discharge the duties of his judicial office; this proportionality principle is not guaranteed in Egyptian rules. As a matter of fact, there is no code of ethics, no guide for judicial or prosecutorial conduct, or established written standards against which a judge's behaviour can be uniformly assessed, nor one that legally defines the

misconduct of judges and prosecutors; the disciplinary process therefore, is often perceived as arbitrary and unpredictable.

197. Since the ousting of former President Morsi, the number of disciplinary and criminal proceedings pursued against judges critical of the current regime confirms the lack of judicial independence in Egypt. Judges have been forcefully removed from their positions based on political position, and therefore in violation of their freedoms of expression and association.

198. The most representative case in this regard is the forced retirement of 41 judges for having issued a public statement in July 2013 –the 'July Declaration'- in which they criticised the military coup d'état as an assault on electoral legitimacy and called upon the pillars of the Egyptian State to return to democratic values and constitutional legitimacy. Half of the judges who signed this statement were subjected to disciplinary proceedings, and in March 2015 the Disciplinary Board forced them into retirement. Other judges who signed the declaration were transferred and assigned to posts "*that required them to travel frequently between judicial circuits.*" [230]

199. Several international institutions and human rights organisations condemned this decision and portrayed it as representative of the lack of independence of Egyptian courts.[231] In this vein, twelve Egyptian human rights groups noted that the rule in which the Disciplinary Board based its decision –Article 73 of the JAL- had been interpreted as only precluding judges from directly participating in electoral politics, which was not the case of the 'July Declaration'. Moreover, the involvement of judges in Egyptian public life was "not new": although several judges had participated and given public statements expressing political opinions during the protests of January 2011 and June 2013 criticising Mohammed Morsi's government – they were not subject to disciplinary action. In contrast, other similar cases in which judges had made excessive media appearances or had constantly discussed political matters had led to mere warnings by the Disciplinary Board[232].

200. The double standard applied to this case invited these groups to believe that:

> "*the real reason for the retirements is not the judges' involvement in politics, as stated in the case files and inquiries, but rather for opinions they expressed in opposition to the current governing administration, especially given the lack of specific standards for acts that require disciplinary sanctions for judges or the loss of a judgeship.*"[233]

201. Notably, the judge who filed the initial complaint against these judges – Ahmed al-Zen, who was the President of the professional association 'Judges Club', was appointed Minister of Justice in 2015.[234]

202. These 41 judges were punished for raising concerns over the human rights situation in the country, and for calling for a return to democracy, as a result of disciplinary procedures marred with violations of due process standards.[235] Analysis of these disciplinary procedures have concluded that they were conducted by a non-independent body as one of the judges sitting on the Disciplinary Board had signed a complaint against the judges, and highlighted several irregularities in the proceedings. Among other breaches of due process standards: judges were neither informed of the initiation of investigations nor given prior notice of the hearings; they could not access the case file in advance of the hearings; were prevented from making oral statements; and could not appoint counsel of their choice. In this vein, they were forced to be represented by a judge or a former judge. However, they could not find any judge who was willing to represent them, as the only one who had accepted "*withdrew his counsel after receiving a written warning*" with regards to an alleged incident of misconduct reported as occurring two years before.[236] Therefore, the judges were forced to represent themselves.

203. Although these judges publicly insisted in their statement that they were not involved in politics and "*did not support any particular side,*" the Disciplinary Board concluded that the judges had lost their impartiality and credibility because their

actions gave the impression that they were against the "revolution of 30 June" and that they supported the Muslim Brotherhood.[237] Notably, in making this finding and defining the events of June 2013 as a "revolution", the Board made a political and partisan pro-military-regime reading of the historical events.

204. However, this case does not constitute an isolated problem. According to the ICJ, since August 2013, at least 40 other judges have been either dismissed or transferred to non-judicial functions following disciplinary proceedings. The Carnegie Endowment for International Peace commented that many of the judges who had challenged Mubarak's rule before the 2011 revolution "*are now finding themselves systematically purged from the judiciary.*"[238]

205. These sanctions have drastically undermined judicial independence:

> *"Not only have they resulted in removing and punishing those judges who are seen as critics of the ruling regime. They have had a chilling effect on judges who are interested in defending judges accused of misconduct, and are likely to have a chilling effect on other judges who would otherwise be minded to speak out in favour of judicial independence, the rule of law and against human rights violations."* [239]

206. Although the report commissioned by the State Litigation Authority of Egypt acknowledges some of these drawbacks, it fails to provide an answer to these concerns and concludes that the Egyptian judiciary is independent. The only argument provided to justify this position is that the Court of Cassation "*has overturned a number of high profile convictions and sentences on appeal from the lower courts, citing procedural mistakes by lower courts' judges,*"[240] and made reference to one single case to support such argument. Nevertheless, as mentioned above, this factor is not directly relevant either to measure the independence of the judiciary or to resolve a problem of lack of independent judges. More importantly, the independence of the

Court of Cassation has been itself put into question, as its Chief Justice is directly appointed by the country's president.

207. The same issues concerning the lack of independence arises with regards to the **Administrative Courts**. In this vein, the President of Egypt nominates the Head of the State Council, the body with the exclusive competence to

> "*adjudicate in administrative disputes, disciplinary cases and appeals, and disputes pertaining to its decisions."*[241] It is also competent to *"issue opinions on the legal issues of bodies to be determined by law, review and draft bills and resolutions of a legislative character, and review draft contracts to which the state or any public entity is a party.*"[242]

208. In 2003, the Court of Cassation found that the State Council was not an independent organ, as it was an agent of executive power: "*the description 'Independent Judicial Organ' of both the administrative prosecution, by Law no.21/89, and the Supreme Judicial Council, by Law no.10/1986, violates the Constitution because both are agencies of the Executive power represented by the Minister of Justice".* Although the report commissioned by the State Litigation Authority of Egypt seeks to counterbalance this argument by making reference to a decision by the Supreme Constitutional Court, that decision was issued in 2000 – before one of the Courts of Cassation; and the author of the report, in the footnote, agrees that the composition of the State Council is "*inconsistent with the* constitutional principle of judicial independence."[243]

209. Finally, military courts are also non-independent.

210. In its General Comment No. 32, the Human Rights Committee confirmed that the provisions of Article 14 of the ICCPR "*apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military.*"[244] The law that regulates the military courts of Egypt is the Military Court of Justice (Law No. 25

of 1996), as amended by Law No. 138 of 2010, No. 1 of 2013 on the participation of the armed forces in maintaining public security and protecting vital facilities of the state, and by Law No. 136 of 2014 on protecting and securing public and vital facilities.

211. Following the criteria established by the Human Rights Committee, military courts must fulfil the same standards of independence and impartiality that are required from ordinary courts. However, the report commissioned by the State Litigation Authority of Egypt failed to analyse the independence of military tribunals, and just provided a justification of its competence to try civilians.

212. The reality is, nevertheless, that the Egyptian military judiciary is not independent. Military judges are subject to the military chain of command and military discipline, and are under direct control of military authorities. They are appointed by the Minister of Defence "*based on the recommendation of the Director of the Military Judiciary, who has the rank of major-general,*" and must fulfil "*the conditions of service and promotion criteria for armed forces officers.*" [245]

213. These conditions are inconsistent with established international standards of judicial independence set out by regional human rights courts; in particular, in Findlay v. the United Kingdom –which established an international precedent to assess the independence of military courts- the European Court of Human Rights concluded that as all the members of the military court, including the president, "*were subordinate in rank*" [246] to the convening officer and "*fell within his chain of command,*"[247] and he had the power "*to dissolve the court martial either before or during the trial,*" [248] Mr Findlay's doubts about the tribunal's independence and impartiality "*could be objectively justified.*"[249] Due to the intrinsic similarities between this system of dependencies and the Egyptian military justice, the same can be concluded, *mutandis mutandi* with respect to the independence of Egyptian military courts.

214. In this vein, in 2002 the Human Rights Committee in its Concluding Observations on Egypt declared that there are "*no guarantees*" of the military courts' independence.[250]

215. Other factors that negatively affect the independence of the judiciary and favour the politicisation of the institutions are that judges do not receive appropriate legal training, and they are underpaid and overworked.[251] There are constant backlogs created by the lack of personnel to help judges, and the lack of legal materials and case-law online and "*inadequate technology*" [252] have undermined the provision of justice. Courts continue to heavily rely on handwritten documentation.

216. Thus, judges do not receive the correct incentives to exercise their obligations independently, efficiently and impartially, as well as to analyse each of the matters presented before them individually and carefully, and respect the human and procedural rights of the Egyptian citizens. Relevantly, according to the IBAHRI, judges are currently dealing "*with up to 300–400 cases per day.*"[253]

217. This concerning lack of resources stands in direct violation of international standards of justice. In her last annual report, the Special Rapporteur on the independence of judges and lawyers noted that

> "*States should show their commitment to an independent, impartial and competent justice system by providing adequate infrastructures, facilities and material resources for the judiciary to perform its duties, allocating a reasonable part of the national budget to the justice sector*"[254] (emphasis added).

218. Nevertheless, this long-standing problem of insufficient independence seems to have aggravated since 2014 with the arrival of Sisi to power. According to the ICJ, after the military coup d'état in 2013 that forcefully removed Morsi from the presidency of the country, both Presidents Mansour and Sisi have used "*their unchecked power to crackdown on political dissent,*" and noted with particular concern that during the last years, both judges and prosecutors could not escape this crackdown:

"*those that have spoken out against erosions of the rule of law and human rights have faced disciplinary proceedings, been transferred to non-judicial positions and been dismissed from office.*"[255]

219. Speaking in favour of judicial independence and respect for the rule of law has been punished with unfair disciplinary proceedings marred by due process violations that have curtailed the judges' rights of freedom of expression, association and assembly.[256] In this vein, the ICJ noted that "*especially since the overthrow of President Mubarak, judicial independence and impartiality has declined dramatically.*"[257]

220. In May 2014, thirteen human rights organisations sent a joint letter to the permanent representatives of members and observer States of the United Nations Human Rights Council (HRC) addressing the situation of human rights in Egypt at the 26th Session of the HRC.[258] In their letter, these organisations noted the lack of accountability for human rights violations and expressed grave concern about threats to the independence and functioning of the judiciary: "*judicial practices cast serious doubts on the independence of the judicial system and on its ability to ensure accountability.*" The organisations highlighted several trials of a highly political character in which the independence of the Egyptian courts seemed to have been compromised.[259]

221. Similarly, on November 10, 2015, the UN Office of the High Commissioner for Human Rights (hereinafter OHCHR) noted that military courts in Egypt do not meet the requirements of independence "*since judges are subject to the orders of their superior military officers.*"[260] The OHCHR declared to be deeply disturbed at the arbitrary arrest and detention of Egyptian human rights defender and journalist, Hossam Bahgat, who had been interrogated without legal counsel for more than eight hours in a military intelligence building, having published an investigative report. His arrest, according to the OHCHR, would appear to be "*a violation of his right to freedom of expression.*"

222. Criticisms of the lack of judicial independence in Egypt also came from the African Commission on Human and Peoples' Rights[261] which condemned the Arab Republic of Egypt's "*disregard to regional and international fair trial standards*" after the unlawful imposition of mass death sentences.

223. Finally, although the report commissioned by the State Litigation Authority of Egypt highlighted that the "*compilation of UN materials*" for the last Universal Periodic Review of Egypt did not include any "*allegations of a lack of independent and impartiality within the judiciary,*"[262] the reality is that the lack of judicial independence was raised at the Universal Periodic Review of the Republic of Egypt as a deeply concerning problem.[263] In this vein, Egypt was encouraged to "*strengthen and guarantee the independence of the judiciary*" and ensure an independent judicial system.[264] Nevertheless, in analysing the post-UPR situation, the Cairo Institute for Human Rights Studies concluded that "*political control of the judiciary has continued to jeopardise the right to a free and fair trial.*"[265]

224. The conclusion drawn by the State Litigation Authority report, therefore, is without any real foundation, and an attempt to manipulate the true position to suggest that such issues hadn't been raised.

225. Nevertheless, in spite of these widespread criticisms, and in spite of the contrary position espoused by the Egyptian Government, Egypt has not yet accepted the visit request issued by the UN Special Rapporteur on the independence of judges and lawyers, despite the Rapporteur having issued two requests for official visit in 2014 and 2015.[266]

226. On the contrary, the Egyptian parliament is currently debating a legislative reform of the JAL that would constitute an additional blow to the independence of the judiciary and the separation of powers in Egypt.

227. This new draft seeks to reform Article 44 of the JAL to allow the president to directly appoint all the heads of judicial committees -including the head of the Administrative Prosecution Authority, the head of the State Lawsuits Authority, the head of the Court

of Cassation, and the head of the Egyptian State Council- from three candidates nominated by each council without following seniority criteria.[267] Both the State Council and the SJC have opposed the draft, while the association 'Judges Club' defined it as "*a 'suspicious' measure that includes dangerous violations of the Constitution*"[268] and declared that it constituted "*a major violation of Egypt's judicial system.*"[269]

The Supreme Constitutional Court

228. The Supreme Constitutional Court was established by the 1971 Constitution with the exclusive competence to *"control the constitutionality of laws and regulations and to interpret the legislative texts in the manner prescribed by the law.*"[270]

229. Although under Mubarak's rule the Supreme Constitutional Court issued certain decisions that were contrary to the interests of the executive, the President had a clear role –and broad discretion- in the appointment of the Court's Chief Justice.[271] Moreover, the other members of the Court were chosen by the President from a list of nominees selected by the General Assembly of the Court and the Chief Justice, who had also been appointed by the President. This in turn allowed the executive to have direct control of the Court's membership.

230. With such a degree of dependence on political power, the Supreme Constitutional Court has traditionally been reluctant to "*challenge the 'core interests' of the regime, upholding key elements of the autocratic state and politically repressive practices.*"[272] In this vein, the ICJ found that since its formation, the Court has been viewed as *"lacking in independence and inconsistent in terms of its role in safeguarding human rights,*" noting that the Court had, for example, ruled that emergency and security courts were constitutional and *"did not consider petitions on the constitutionality of transferring civilians to military courts.*"[273]

231. One of the most well-known and representative cases of political interference in the Supreme Constitutional Court occurred in 2001 after the Court declared the unconstitutionality of the NGO-law and called for judicial supervision of the elections.

232. As a consequence, former President Hosni Mubarak decided to directly intervene in the appointment process of the Court's members and selected Fathi Nagib –the Chief Justice of the Court of Cassation and former Assistant Minister of Justice, a loyalist to his regime- for the position of Chief Justice of the Supreme Constitutional Court, even if he was not even part of the Court. Subsequently, Nagib appointed five additional members to the Court from Mubarak's most loyal ranks.

233. In order to impede this kind of political appointments aimed at modifying the Court's ideological character at the executive's will by adding an indefinite number of loyal members to the Court, the 2012 Constitution sought to limit the membership of the Supreme Constitutional Court to the President of the Court and ten members;[274] so seven of the judges had to return to the posts they held before being designated as members of the court.

234. Since that moment, the Supreme Constitutional Court lost its independence,[275] started to be completely subjected to the interests of the regime and used as a "*rubber stamp in the manipulation of elections.*"[276]

235. It must be noted that the two cases mentioned by the report commissioned by the State Litigation Authority of Egypt that are allegedly representative of the court's "*history of striking down laws to the detriment of the regime,*" date from 1986 and 1996 – before this interference in the court by the executive in 2001; and from 2012, after the fall of Mubarak.

236. Moreover, even before 2001, the independence of the court was put into question. The ICJ highlights several cases in which the court failed to rule or delayed its ruling on politically-sensitive cases:

> "*two cases led in 1999 on the jurisdiction of military courts were never decided by the SCC. In another case, regarding the necessity of judicial supervision of elections, the SCC delayed ruling on the case for 9 years.*"[277]

237. The Commission thus concluded that the Supreme Constitutional Court "*has historically not been perceived as an independent or impartial court.*"[278]

238. At present, the jurisdiction, composition, and the general characteristics of the Supreme Constitutional Court is regulated in Articles 191 to 195 of the 2014 Constitution. Article 192 defines the Court's competency:

> "*The Supreme Constitutional Court is exclusively competent to decide on the constitutionality of laws and regulations, interpret legislative texts, and adjudicate in disputes pertaining to the affairs of its members: in disputes between judicial bodies and entities that have judicial mandate; in disputes pertaining to the implementation of two final contradictory rulings, one of which is issued by any judicial body or an agency with judicial mandate and the other issued by another body; and in disputes pertaining to the implementation of its rulings and decisions.*"[279]

239. Articles 191 and 194 proclaim the independence of the Court, and Article 193 establishes a flexible number of judges in its membership: "*the Court is made up of a president and a sufficient number of deputies to the president*". Therefore, this Article permits the composition of the Court to fluctuate again, and then, to be affected by political manipulation. At present, the Court is comprised of 12 judges, all of whom are male.

240. Although the 2014 Constitution helped increase the independence of the Supreme Constitutional Court from the executive and self-regulate its system of appointments

and disciplinary proceedings, there are still several factors that threaten the independence and impartiality of the Court.

241. In particular, after completing an in-depth analysis of the Court's regulation and membership, the ICJ concluded that the Court "*fails to meet international standards by not including in the law additional selection criteria and providing for transparent procedures for appointments, including guaranteeing non-discrimination*" [280] (emphasis added). In this vein, the selection criteria for members of the Supreme Constitutional Court is the same as that for judges of ordinary courts so, as mentioned previously, it lacks "*objective merit-based criteria.*"[281] This opacity in the system of appointment has ultimately affected the perceived impartiality of the Court, as the lack of diversity in the Court has resulted in it being viewed "*as isolated from the general concerns and realities of the population at large.*" [282]

242. Another factor that negatively affects the Court's independence relates to disciplinary proceedings. Similar to the situation of ordinary judges, the basis to initiate investigations into allegations of misconduct against judges of the Supreme Constitutional Court "*is both broad in scope and ill-defined*"[283] as the disciplinary process "*grants a wide discretion to decision-makers as to whether disciplinary proceedings should be instituted.*" [284]

243. Finally, recent historical events have contributed to the perception of the Supreme Constitutional Court as a politicised institution, aligned to the interests of the military regime.

244. The judiciary played a prominent role in the post-revolution period when the army – through the unelected Supreme Council of Armed Forces (SCAF) – took power. Despite the decades-long influence over the judicial system and the existing patronage of the judiciary, after the revolution, the SCAF did not modify the judicial system. It neither dissolved the Supreme Constitutional Court -although it suspended the constitution and disbanded both parliamentary chambers- nor did it replace its Chief Justice, Faruq Sultan, who was the head of the Presidential Election Commission.

After Mubarak's ousting, Sultan remained in office even though he was considered a *fulul* –a loyalist- appointed by Mubarak to help his son Gamal come to power.[285]

245. Therefore, although Mubarak's-era executive and the legislative branches disappeared after the 2011 revolution, the judiciary –comprised by loyalists to the military regime- maintained its power.

246. Being Mubarak-era appointees, several judges of the Supreme Constitutional Court remained loyal to the military regime, so the Court -through a series of highly-politicalised decisions- paralysed the institutional development of the new democratic system.

247. Unsurprisingly, it annulled Article 1 of Law 17-2012, the Political Isolation Law -which banned officials of the former regime from holding political office- thus members of Mubarak's regime could participate in the post-revolution elections.

248. Nevertheless, the most important decision taken by the Court that shaped the transitional period occurred in June 2012, when the Supreme Constitutional Court announced the unconstitutionality of the parliamentary elections and ordered the dissolution of the People's Assembly, thus leaving the country without its lower parliamentary chamber. The chamber was dominated by the Brotherhood as its political party, the Freedom and Justice Party, had won the first democratic parliamentary elections. The Assembly had been defined as the first expression of the Egyptian democratic voice, the legacy of the revolution and the "*most tangible step forward in Egypt's democratic transition.*"[286]

249. Moreover, four days later, on June 17, 2012, the SCAF issued a constitutional declaration that subordinated the Egyptian presidency to its power.

250. The timing of these two decisions coincided with the first democratic presidential elections in Egypt and were intimately related to the possibility that Mohammed Morsi -the candidate of the Freedom of Justice Party- could win the electoral contest instead of Ahmed Shafiq -former Commander of the Egyptian Air Force, Minister of

Civil Aviation and Prime Minister under Mubarak's rule- who was allowed to participate in the elections due to the Supreme Constitutional Court's decision.[287] According to The Carter Centre,

> "*it was widely assumed that the Islamist-dominated Parliament was being removed to either weaken Mohammed Morsi should he win the election or to lay the groundwork for a "restoration" of the former regime in the case of a Shafiq victory.*"[288]

251. As noted in the second report of this series, the decision to dissolve the lower parliamentary chamber:

> "*constituted a clear judicial interference in the political process, a perversion of transition and a step backwards on the path of the 25 January Revolution. It was defined as a "catastrophe in the history of the Egyptian judiciary". This decision demonstrated how the judiciary, an institution linked and nurtured by the former regime, still enjoyed immense power. A power that it would use to shape the transitional process and determine the post-Revolutionary political scenario*".

252. Nevertheless, after Morsi's electoral victory, the judiciary, and more particularly, the Supreme Constitutional Court, continued issuing judgements that shaped and paralysed the democratic transition.

253. First, the Supreme Administrative Court suspended the first constitutional drafting committee on April 2012;[289] thereafter, the Supreme Constitutional Court suspended President Morsi's decree reinstating the People's Assembly, annulled the validity of the elections for the upper parliamentary chambers -the Shura Council-, and declared the unconstitutionality of the second Constituent Assembly.[290] Meanwhile, the judiciary continuously rescinded presidential decrees calling for parliamentary

elections.[291] It is worth noting that this institution, which set itself up as the purest protector of fairness and legality, was "*the same body that had supported the legitimacy of previous 'elections' held under dictatorial regimes from Nasser to Mubarak.*"[292]

254. These constant efforts to impede the organisation of new parliamentary elections raised questions concerning whether members of the opposition and remnants of the old regime were willing to fight the Muslim Brotherhood in the ballot boxes, as an additional electoral victory of the Muslim Brothers would leave the old oligarchy without legitimacy to oppose Morsi.

255. Relevantly, Egypt has lacked a lower parliamentary chamber since June 2012 – the moment the Supreme Constitutional Court dissolved the People's Assembly – to December 2015. Thus, most legislative functions had been carried out by the executive. President Sisi could rule the country without parliamentary supervision for one and a half years. Thus, after the military coup d'état, he became the only ruler of the country, with practically unlimited powers.

256. Although the report commissioned by the State Litigation Authority of Egypt defined these measures that dissolved the democratically-elected institutions as a demonstration of the court's power and of the "*audacity of its ruling*", such was the influence of these decisions over the general transitional process that some authors defined them as a *soft coup d'état.*[293] The report notes that during that time, the Supreme Constitutional Court "*still saw itself as the arbiter of constitutional issues*", which could be seen as ironic in a post-revolutionary / unconstitutional context.

257. These verdicts do not represent an independent exercise of justice, but evince the politicised nature of the Supreme Constitutional Court, which clearly benefited the interests of certain political groups at the expense of others. Notably, the Supreme Constitutional Court was the only institution representing the pre-revolutionary *status quo* and thus had incentives to maintain its tacit support to the military power. The ICJ agrees with this analysis by noting that "*because of these decisions, many view*

the SCC as a politicized body. The fact that the Executive had extensive powers in appointing the judges of the Court, in particular the President, has further contributed to this perspective."[294] Unsurprisingly, these decisions created popular outrage and citizens organised to protest against what was considered a 'judicial coup'.

258. Ultimately, this 'judicial coup', which produced institutional stagnation and paralysed the long-awaited change after the 2011 revolution, paved the way for the military coup in 2013. In Morsi's words:

> "*people's trust in the law was shaken, and the political scene was confused by repeated interferences in political decision-making, and by the intervention in sovereign matters which do not fall within the judiciary's function.*"[295]

The Carnegie Endowment for International Peace linked these political judgments to the long-standing lack of independence of the Egyptian judicial system, noting that "*Mubarak's efforts to dismantle judicial independence successfully produced a conservative body whose top echelon supported the pro-stability narrative that invited the generals back to rule."*[296]

259. It must be noted that when the Supreme Constitutional Court issued its most controversial decisions, at least half of its membership was comprised by members appointed after 2001.[297] Maher Sami Youssef, one of the loyalist five judges appointed by Fathi Nagib as members of the Supreme Constitutional Court in 2001 communicated the unconstitutionality of the People's Assembly to the press.[298]

260. As mentioned in the second report of this series, the Court helped the army install what has been defined as "military constitutionalism", in which "*Egypt's governing constitutional framework was whatever the SCAF said it was;*"[299] and in exchange, the SCAF instituted itself as the "*best protector of the judiciary.*"[300] Consequently, the interests of both the judiciary and the army were aligned during the transitional

period, and worked against the political opposition of the Muslim Brotherhood. As a matter of fact, after Morsi's appointment, the judiciary declared that:

> "*Saving Egypt from the coming destruction will not happen without the unity of the army and the people, the formation of a national salvation front consisting of political and military leaders, and the upholding an unequivocally civil state with military protection, exactly like the Turkish system... If this does not happen in the next few days, Egypt will fall and collapse, and we will regret [wasting] the days that remain before a new constitution is announced... The people's peaceful protest is imperative and a national duty, until the army responds and announces its support for the people.*"[301]

261. The harmonisation and agreement between both institutions –the judiciary and the army- was confirmed after the military coup d'état against President Morsi, when Adly Mansour -the Chief Justice of the Supreme Constitutional Court- was appointed as interim President of the new military-led regime.

262. He dissolved the Shura Council, thus accumulating all the power in the executive.[302] Moreover, some of the seven judges removed after the limitation of membership provided by the 2012 Constitution, were reinstated in their positions. However, according to the ICJ, "*it is not clear what procedure and criteria were used to reinstate these judges.*" [303]

263. All these judicial decisions affected the transitional path to democracy and helped consolidate military power. By dissolving the People's Assembly, these rulings paralysed the institutional development of the transition born out of the Tahrir revolution and deteriorated the position of the political groups that had won the first democratic elections of the post-Mubarak era, particularly, of the Freedom and Justice party.

264. As a matter of fact, after analysing this recent evolution of the historical events and the Supreme Constitutional Court's decisions, the ICJ concluded that there is a perception that the judges of this Court have "*since the overthrow of President Mubarak, become a tool of the military authoritarian system and the Sisi regime.*"[304] The IBAHRI also noted that since President Morsi's overthrow, Egypt's judges "*have played a central role in drafting the country's new constitution.*"[305] In the group's opinion, "*there is no dispute: in practice and in process, judges have been at the centre of Egypt's political life.*" [306]

265. In any event, whether the Court is perceived as a politicised body or not, it is not possible to conclude that the Egyptian judicial system is generally independent based on the experience and trajectory of this particular Court.

266. First, the Supreme Constitutional Court is a Court of specialised jurisdiction, similarly to military courts; and more relevantly, individuals have no direct access to the Court, as only lower tribunals can refer questions on the constitutionality of laws to be decided. It is particularly concerning that, in this vein, the ICJ noted that "*lower courts have frequently proved reluctant to exercise their discretion to refer cases involving challenges of constitutionality of provisions alleged to violate human rights*" [307] (emphasis added) to the Supreme Constitutional Court, which raises doubts about not only the Court's representativeness of the judicial system, but also its impartiality and independence.

267. Notably, ordinary courts have systematically rejected any request to refer a decision on the constitutionality of the Demonstration Law to the Supreme Constitutional Court, and there is no mechanism to seek a review of a court's refusal to bring the matter before the Supreme Constitutional Court.

268. In conclusion, after an exhaustive analysis of the relevant factors determining the degree of independence shown by the judiciary, it is only possible to deduce that neither ordinary courts nor military courts are independent from the executive power in Egypt.

269. Moreover, recent judicial decisions have confirmed the general perception that the Supreme Constitutional Court, far from representing an independent institution, is a deeply politicised body.

270. With such a degree of interference in the judiciary, it is not possible to ensure fair trial standards and guarantee justice. This, in turn, has relevant international consequences, not only at the level of human rights protection, but also when deciding about extradition procedures or the execution of arrest warrants issued by Egyptian authorities.

Chapter 5: Fair Trial Rights

271. Justice may transform into arbitrariness when judicial investigations and trials fail to fulfil the necessary guarantees of due process.

272. Due to the relevance of these protections in modern democratic societies, numerous international human rights treaties and declarations have included the right to a fair trial as one of the most fundamental principles of justice and human dignity. This right is instrumental to protect individuals from the "*unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms,*"[308] including the right to life and liberty.

273. In this vein, Article 10 of the Universal Declaration of Human Rights proclaims:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*[309]

1.

274. Article 14 of the International Covenant on Civil and Political Rights[310] (ICCPR) developed this principle and provided a multifaceted definition of the right to a fair trial.

275. Accordingly, the ICCPR listed the different standards that conform to the right to a fair trial, including:

a. Equality before the courts and tribunals;

b. Publicity of trials;

c. Presumption of innocence;

d. The right to be informed promptly of the nature and cause of the charge;

e. The right to have adequate time and facilities for the preparation of one's defence;

f. The right to communicate with counsel of one's own choosing;

g. The right to be tried without undue delay;

h. The right to be tried in one's presence;

i. The right to be defended by legal assistance of one's own choosing; and to have legal assistance assigned;

j. Equality of arms or the right to examine, or have examined, the witnesses in opposition and to obtain the attendance and examination of witnesses on one's own behalf under the same conditions as the opposing witnesses;

k. The right to an interpreter;

l. The right not to be compelled to testify against oneself or to confess guilt;

m. The right to appeal;

n. The right to compensation in cases of miscarriage of justice;

o. The principle of *non bis in idem:* no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

276. Article 7 of the African Charter of Human and Peoples' Rights follows the same criteria to determine procedural fairness and guarantee the proper administration of justice.

277. Both the ICCPR and the African Charter should be the most relevant standards to assess the legality of Egypt's judicial procedures, as they are binding international treaties that impose strict and mandatory legal obligations on national institutions. Egypt is a state party to both international instruments, and so Egyptian judicial institutions are obliged to comply with their content, regardless of the characteristics of the specific legal culture, the security situation of the country or the state of national politics.

278. Finally, the content of the ICCPR, and more particularly, of its Article 14, has inspired the jurisprudence of most international institutions, human rights instruments and courts dealing with human rights violations and international criminal law. Consequently, its content is now widely considered to be reflective of international customary law, and therefore, binding for all the community of States.

279. Both the Human Rights Committee and the African Commission for Human and Peoples' Rights have issued guidelines for the interpretation and implementation of these complex, interlinked and evolving standards. General Comment No. 32 and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,[311] respectively, provide relevant criteria to assess whether there has been a violation of due process rights in a particular case. As a matter of fact, General Comment No. 32 stands as an "*authoritative interpretation*" of the meaning and application of article 14 of the ICCPR.[312]

280. Contrary to the criteria followed by other international and regional courts and institutions, the Human Rights Committee –the body in charge of the interpretation and compliance with the ICCPR– leaves a narrow margin of appreciation for States to determine the meaning and application of the right to a fair trial. In this vein, in its General Comment No. 32, the Committee established that:

> "*Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees*"[313] (emphasis added).

281. Additional interpretative criteria can be found in reports and statements given by UN Special Rapporteurs, in the case law of regional human rights courts, and in the jurisprudence of the Human Rights Committee and of the UN Working Group of Arbitrary Detention.

282. This chapter will analyse the current regulation and practice of Egyptian courts in light of these international standards of fairness and assess whether the Egyptian judicial system is consistent with the rules and principles guaranteeing the right to a fair trial. Our aim is to assess whether the relevant international guarantees of fairness and due process have been implemented, and if so, to what extent.

283. In this vein, although there are provisions guaranteeing fair trial standards in the 2014 Constitution[314], the Code of Criminal Procedure, the Criminal Code and even the JAL, implementation by the courts has not been adequate. The ICJ, for example, noted that proceedings before both ordinary and military courts "*have been marred by a litany of violations of internationally recognised rights*"[315] (emphasis added).

284. The Egyptian judicial system is in a deeply concerning situation. Such is the degree of unfairness and arbitrariness of the judicial processes and the gravity of the due process violations, that the right to a fair trial in the country is currently under threat.

285. Serious procedural irregularities have arisen in recent high-profile cases which sparked widespread international criticisms. Although the court's impartiality is one of the most essential principles of justice, the concerning lack of judicial independence in Egypt –analysed in the previous chapter- facilitates politically-motivated trials in which defendants are deprived of their most basic procedural rights.

286. The report commissioned by the State Litigation Authority of Egypt acknowledges some breaches of fair trial rights; however, it defends that due to the complexity of the analysis, the situation must be assessed "case by case", thus failing to identify the serious and systematic pattern of due process violations existing in the Egyptian judicial system.

287. Moreover, the report seeks to suggest that the evidence points to the conclusion that procedural irregularities are being "corrected" during appeal proceedings, as "*the Court of Cassation has acted to quash convictions and order retrials*" and there have been several "*mass acquittals*". Nevertheless, this analysis fails to acknowledge: that retrials have led to new convictions as a result of unfair proceedings; that the right to compensation for miscarriages of justice has not been afforded in most cases; and that despite some acquittals, hundreds of Egyptian citizens continue to be imprisoned or sentenced to death after having been subjected to unfair trials. Moreover, in violation of established international norms, civilians are systematically tried before military courts – courts that have been constantly criticised for falling short of international standards of fairness.

Presumption of Innocence

288. According to Article 14.2 of the ICCPR, everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law. The principle of presumption of innocence is one of the most "*fundamental principles of fair trial.*"[316]

289. This principle places the burden of proof on the prosecution to demonstrate the individual criminal responsibility of the accused *beyond reasonable doubt.*[317].At the same time, it obliges judges to *substantiate* their decisions on reasoned judgements based on sufficient *evidence*.

290. In this vein, according to the Human Rights Committee, courts' judgments must analyse the essential findings – the evidence that demonstrate those factual elements, and the link between the criminal actions and the individual accused – as well as the legal reasoning made to justify the decision on the individual's guilt. Judgements must also be made public in order to ensure the transparency of the proceedings and that there is a social control over the legality and fairness of judgments.

291. Reasoned judgements are essential, not only to ensure the principle of presumption of innocence and determine the specific reasons and evidence that justify the conviction or acquittal of an individual, but also to help determine standards for interpretation and application of laws and allow citizens to understand the rules to which they are bound.

292. Such is the relevance of the principle of presumption of innocence, that it has been recognised in all major international and regional human rights conventions and treaties, including the African Charter of Human and Peoples' Rights, whose Article 7 recognises the right "*to be presumed innocent until proved guilty*" and notes that "*punishment is personal and can be imposed only on the offender.*"[318] Similarly, Article 96 of the 2014 Constitution of Egypt declares that "*the accused is innocent until proven guilty in a fair court of law, which provides guarantees for him to defend himself.*"[319]

293. This principle has also been the cornerstone of judicial proceedings before international criminal tribunals, such as the International Criminal Court (ICC).

294. Article 66 of the Rome Statute - the international treaty that regulates the jurisdiction and functioning of the ICC - also obliges the Prosecutor "*to prove the guilt of the accused*" and places a threshold for convictions consistent with the international standards set by the ICCPR: "*the Court must be convinced of the guilt of the accused beyond reasonable doubt.*"

295. This important principle has multiple consequences and manifestations.

296. First, in General Comment No. 32, the UN Human Rights Committee explicitly stated that all public authorities must refrain "*from prejudging the outcome of a trial e.g. by abstaining from making public statements affirming the guilt of the accused*"; and consequently, that defendants should "*not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals*"[320] (emphasis added).

297. Despite the manifest clarity of this standard, in Egypt, various defendants have been placed into soundproof, and sometimes opaque, cages during trial; particularly in trials held in police academies,[321] thus portraying defendants as violent and dangerous criminals, most notably, former President Morsi.

298. The report commissioned by the State Litigation Authority of Egypt justified the placement of defendants in soundproof cages during the trial of former Morsi by alleging that the trial was reported to be chaotic, with constant disruptions by lawyers, journalists and defendants.[322] This situation, nevertheless, did not justify such an overwhelming limitation of the defendants' rights to presumption of innocence.

299. Moreover, although the report states that the cages "*enabled the defendants to be present at their trial*", the reality is that as a result of their placement in soundproof cages - with their microphones being controlled by the judge - defendants were not able to either speak with their lawyers or hear the judge. Consequently, they could not exercise the necessary faculties to consider that they were *de facto* present in their trials.

300. In any case, even if the report could provide some factual arguments to justify the use of soundproof cages in this particular case, it failed to explain the widespread and general use of these cages in Egyptian criminal trials. Although the report mentioned the need to guarantee judges' security as the "original rationale"[323] for the use of these cages, such argument cannot be considered acceptable for such an overwhelming number of criminal trials in Egypt, as detained and unarmed defendants cannot possibly constitute a real threat to the Court.

301. Although the report mentioned the shooting of three judges, the truth is that their regretful assassinations took place outside Court premises, and according to the same article linked in the report, "*It was unclear whether the reported murders were linked to the sentencing.*"[324] Therefore, their tragic death cannot be manipulated as a valid argument to justify the placement of defendants in cages.

302. Regional human rights courts, including the European Court of Human Rights (ECHR), have built abundant jurisprudence concerning the use of these cages. In Svinarenko and Slyadnev v. Russia[325], the ECHR ruled that, although order and security in the courtroom is "*indispensable*", the means chosen for ensuring such order and security "*must not involve measures of restraint which by virtue of their level of severity* […] *or by their very nature would bring them within the scope of*" inhumane or degrading treatment or punishment. The Court found that the placement of the defendants in cages had reached the minimum level of severity to be considered a degrading treatment, because the defendants' exposure to the public eye in a cage "*must have undermined their image and must have aroused in them feelings of humiliation, helplessness, fear, anguish and inferiority*" and might have also conveyed to their judges a negative image of them as being dangerous, "*thus undermining the presumption of innocence.*" [326]

303. Relevantly for the "security reasons" alleged in the report commissioned by the State Litigation Authority of Egypt, the ECHR explicitly ruled that it could not find:

> "*Convincing arguments to the effect that, in present-day circumstances, holding a defendant in a cage* […] *during a trial is a necessary means of physically restraining him, preventing his escape, dealing with disorderly or aggressive behaviour, or protecting him against aggression from outside. Its continued practice can therefore hardly be understood otherwise than as a means of degrading and humiliating the caged person. The object of humiliating and debasing the person held in a cage during a trial is thus apparent*" [327] (emphasis added).

304. Consequently, according to international case law, placing defendants in cages during their trial is not only a violation of the principle of presumption of innocence, but also an unnecessary and disproportionate measure to provide security to the court that amounts to degrading treatment. Their use in Egypt is, therefore, unjustified.

305. Second, with regards to the principle of presumption of innocence, in order to avoid arbitrariness, judges must publish reasoned judgements that analyse the individual criminal responsibility of the accused and expose the legal arguments and the specific evidence that substantiated the finding of guilt.

306. Nevertheless, in recent years in Egypt, according to the ICJ, "*Rushed trials have ended in speedy convictions based on poorly reasoned judgments*", in which judges failed to demonstrate the specific criminal responsibility of each convicted individual.[328] In this vein, the organisation reminded that

> "*Convictions that are not based on proof of the guilt of each individual accused for the crimes for which he or she is charged and convicted violate the presumption of innocence and compromise the principle of individual criminal responsibility*". [329]

307. Alarmingly, as will be exposed in the cases listed at the end of this chapter, hundreds of citizens have been tried and sentenced to death in Egypt in mass trials that lasted at the most, a little over one and a half hours. These trials, characterised as "*a complete travesty of justice*" by former UN High Commissioner for Human Rights,[330] constitute the most blatant and the worst imaginable violation of the principle of presumption of innocence.

308. When the specific responsibility of a particular individual cannot be demonstrated with the evidence available, the court must acquit the defendant, in accordance with the principle of the presumption of innocence. However, this has not been the practice in Egypt, particularly during the last four years, in which judges have imposed severe sentences having handed down woefully unreasoned judgements based on general findings - unsubstantiated by evidence - that failed to demonstrate the individuals' specific implication in the crimes.

309. This has occurred particularly in political trials *"involving dozens or hundreds of accused."*[331] In these trials – which attracted widespread international condemnation – Egyptian courts failed to describe the individual guilt or the specific actions that justified each defendant's criminal responsibility "beyond a reasonable doubt", rather issuing general and severe criminal sentences against perceived opponents to the military regime whose names appeared in the long lists that accompanied the judgements.

310. Finally, the principle of the presumption of evidence also places the burden of proof on the prosecution. Consequently, it is the prosecution who has to demonstrate the guilt of the accused beyond reasonable doubt, basing its case on specific evidence that would associate the defendant to the particular crimes with which he has been charged.

311. However, in the last years, Egyptian courts have convicted and sentenced hundreds of individuals in the absence of sufficient evidence that would prove beyond reasonable doubt the responsibility of the accused – and thus support a guilty verdict – and without taking into account available exculpatory evidence that could have led to acquittals. Relevantly, the Egyptian Code of Criminal Procedure does not make any explicit mention regarding the right to the presumption of innocence, and fails to establish a certain level of proof for convictions, so guilty verdicts are based on the judges' discretion when assessing the evidence.

Access to Counsel

312. The Constitution of 2014 does not explicitly guarantee either the right to communicate with counsel during trial, nor the right to communicate with counsel in private and confidence. Article 98 only recognises a generic "*right of defense either in person or by proxy*"; and despite Article 54 of the 2014 Constitution prohibiting interrogations without the presence of a lawyer, the last years have been marred by allegations of defendants having been precluded from communicating with their counsel.

313. A number of organisations have reported cases in which the accused could neither access their counsel nor communicate with them confidentially because officials of the detention centres were present during visits. As a matter of fact, there are instances of orders having been issued by security services "*prohibiting access to detention centres for lawyers and others.*"[332]

314. In this vein, it must be submitted that the UN Human Rights Committee has explicitly stated that the right to communicate with counsel

> *"requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications*"[333] (emphasis added).

315. Of concern, is the fact that Egyptian law fails to guarantee the "*confidentiality of communications between a person and his or her legal counsel,*" [334] so the access is neither confidential nor regular.

316. This situation has aggravated due to the aforementioned recent practice of using soundproof cages to hold defendants during trials. This practice precludes defence counsel from communicating with their clients during trial and makes it difficult to

hear and understand what is being said in court. It must be noted that judges have control over microphones and the sound system, and thus are able to control the accused's communications with their counsel and with the court, thus tampering with their participation in proceedings.

317. Additionally, the quality of the microphones is often poor and, according to the ICJ, "*where the cage is also opaque, it renders any communication (even visual) between the accused and his or her counsel almost impossible*"[335] (emphasis added).

318. Finally, as will be exposed in the cases analysed at the end of this chapter, on occasions, lawyers have decided not to participate in the proceedings as a way to protest the unfairness of the judicial processes and the arbitrariness of the courts. In these and other cases, defendants have been tried without the presence of their lawyers and thus, suffered serious violations of their right to a defence.

Intimidation and Harassment to Lawyers

319. Lawyers have suffered verbal and physical abuses, and have been detained, investigated and prosecuted, while they were visiting detention centres and police stations in order to either defend their clients or be present during interrogations.

320. These acts harm not only the lawyers' ability to fulfil their duties, but also their clients' right to legal assistance and an adequate defence. At the same time that they discourage other lawyers from providing counsel.

321. It must be noted that international standards of fairness and due process, in particular the UN Basic Principles on the Role of Lawyers, have established guarantees for the functioning of lawyers, obliging States to ensure that lawyers

> "*are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference*" and "*shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions*

for any action taken in accordance with recognised professional duties, standards and ethics."[336]

322. Moreover, Article 54 of the 2014 Constitution of Egypt guarantees that all those whose freedoms have been restricted shall be allowed to *immediately* contact their lawyer, and shall not be questioned unless their lawyer is present. In this vein, Article 98 also guarantees the independence of lawyers and the protection of their rights "*as a guarantee for the right of defense*", while Article 198 explicitly prohibits "*arresting or detaining lawyers while exercising their right of defense*", except in cases of *flagrante delicto*.

323. Despite all of these theoretical legal protections, there have been instances of lawyers being harassed, intimidated, beaten, threatened and abused by authorities for actions carried out in their professional capacity, and then being precluded from filing a formal complaint. Moreover, while the Egyptian Lawyer's Profession Law establishes certain protections, according to the ICJ, they "*lack clarity, are limited in scope and do not adequately protect lawyers from all forms of harassment and intimidation and guarantee their ability to carry out their functions.*"[337]

324. Lawyers however, have not only been intimidated in detention facilities while providing assistance to their clients, but also during trial proceedings. In this vein, several judges have started investigations against lawyers that were representing their clients in court, usually "*in response to lawyers attempting to uphold the human rights of their clients,*"[338] and thus while they were carrying out their functions.

325. For example, Judge Mohammed Nagy Shehata – who also presided over the controversial trial of *Ahmed Douma and 268 others* – referred a lawyer for investigation for "*compromising the stature of the judge*" after he questioned the impartiality of the court when the judge decided not to include documentation related to the assault and to the unlawful detention of protesters by the military. The judge

literally asked the counsel "*Do you want military and police forces to be beaten up and not respond?*"[339]

326. This is despite Principle 20 of the UN Basic Principles on the Role of Lawyers recognising that lawyers shall enjoy "*civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority*" (emphasis added).

Adequate Time and Facilities to Prepare a Defence

327. Defendants also suffer constant violations of their right to adequate time and facilities to prepare a defence, as prosecutors have usually failed to provide relevant information and evidence to defence lawyers. On many occasions, courts have supported the refusal to disclose essential evidence, thus obliging defence counsel to "*submit their pleadings, on the newly presented evidence*" immediately after it was presented in court; and consequently, impeding an appropriate response. It is deeply alarming that on occasions, the prosecution has asked for an exorbitant amount of money in exchange of disclosing documentation.[340]

328. This is contrary to the international standards of fairness set by the Human Rights Committee in its General Comment No. 32, which – in interpreting the term "adequate facilities" – noted that it must include access to "*all materials that the prosecution plans to offer in court against the accused or that are exculpatory*"[341] (emphasis added).

329. In certain cases of a political nature, judicial proceedings have been rushed to impede the preparation of an adequate defence. On other occasions, the courts failed to notify defence counsel about the date and location of a hearing sufficiently in advance. This, in turn, affected the transparency of the trials and other key procedural rights, such as the right to be tried in someone's presence, the right to adequate time to prepare a defence and the right to be assisted by legal counsel. In this vein, General Comment

No. 32 has stressed that "*Courts must make information regarding the time and venue of the oral hearings available to the public.*"[342] Similarly, the African Commission of Human and Peoples' Rights has determined that the accused "*may not be tried without his or her counsel being notified of the trial date and of the charges in time to allow adequate preparation of a defence.*"[343]

330. Even in cases of trials *in absentia*, the Human Rights Committee confirms an obligation to inform defendants about the proceedings, and of the date and place of their trial "*sufficiently in advance.*"[344]

331. Problems arise not only in practice, but also in the regulation of these standards. First, the Constitution of 2014 fails to explicitly guarantee the right to adequate time and facilities to prepare a defence. The Code of Criminal Procedure determines that lawyers have the right to examine the investigation only the day before the interrogation of the accused – which may not be enough time to prepare the defence; and according to the ICJ, the provisions regulating both the right to examine the investigation and access to counsel "*lack clarity and are not sufficiently comprehensive to conform with Egypt's obligations under the ICCPR standards.*"[345]

332. Moreover, in contravention and misdemeanour cases, the same code determines that notice of the hearings must be made three days and one day in advance, respectively; and in cases of *flagrante delicto* or when the accused is held in preventive detention, the notice does not need to inform about the *date* of the hearing at all.[346] Surprisingly, informing about the *location* of the hearing in the notices is not mandatory in Egyptian law.[347]

The Right to be Tried in Someone's Presence

333. Trials in absentia are common in Egypt, despite the presence of the defendant during trial being considered an essential element of the principle of equality of arms and of the right to defence.[348] Article 14.3 of the ICCPR recognises that both defendants and

legal counsel must be able to attend trials and court proceedings to examine witnesses, hear the arguments presented by the prosecution, and rebut them. Consequently, trials in absentia are generally not permissible under the ICCPR because they compromise the accused's ability to exercise his procedural rights.

334. The practice of trials in absentia has been the subject of significant criticism by human rights organisations. Through abundant jurisprudence, international human rights courts and institutions have established a number of safeguards and exigent guarantees that must be respected and upheld in order to consider that a trial *in absentia* is consistent with fair trial standards.[349]

335. First, the accused must have been informed of the proceedings – the prosecution must demonstrate that the accused had actual knowledge of the indictment and proceedings and voluntarily chose to be absent from the hearings. Consequently, the mere silence of the accused is not enough,[350] and merely exercising due diligence "*when attempting to notify the accused of the proceedings is insufficient to justify commencing a trial in absentia.*"[351]

336. In his analysis of trials in absentia in international law, Alexander Schwarz indicated that according to the Human Rights Committee, trials in absentia are only permissible when the accused has waived his right to be present, and

> "*Such a waiver is, in the opinion of the HRC in Maleki v Italy, only permissible if the court has fulfilled its obligations, particularly with regard to the procedures for summoning and informing the defendants, and if the court can prove that the summons to appear has, in fact, reached the accused. The lack of such proof, from the viewpoint of the HRC, constitutes a breach of the right to be present and, according to article 14 of the ICCPR, cannot be remedied by a representative that appears to speak for the accused*"[352] (emphasis added).

337. Nevertheless, this has not been the case in Egypt where hundreds of accused have been sentenced without having received individual notifications on the proceedings. The prosecution should have demonstrated that each of those accused had knowledge of the proceedings, that they had been notified and that they were absconding.

338. Second, as per recognised principles of international law, State authorities must afford the accused the right to appear in court at any moment and request a retrial.[353] Under Egyptian law those convicted in absentia have a right to retrial once they appear before a court of law, which has been the central argument held by the report commissioned by the State Litigation Authority to justify the practice of trials *in absentia* in Egypt. The report even justified the mass imposition of death penalties in the absence of the accused as a necessary measure to give "*the greatest discretion as to sentencing to the court conducting the trial at a later date with defendant present, once the absentia conviction and sentence have been vacated.*"[354]

339. However, the Government of Egypt has recently proposed a reform to the Code of Criminal Procedures – which has been preliminary approved by the Egyptian Parliament in April 2017 – that would abolish Article 388, which recognises the right to be retried after having been convicted in absentia "*before the same court at the same stage of litigation, even if their delegates had attended the trial to present the reason why the defendant was not able to attend the trial.*"[355] If definitively adopted, this amendment would breach Egypt's obligations in international law and constitute a new threat for the defendants' right to a fair trial.

340. Moreover, the systematic and, by default, imposition of the "*statutorily allowed maximum"*[356] in these trials – which according to the report by the State Litigation Authority, "*proceed summarily to enter a conviction, without consideration of the merits and pass sentence*" – is contrary to international law.

341. In this vein, we must highlight that several civil jurisdictions do not permit trials in absentia "*where the accused is charged with serious crimes.*"[357] Following this line, trials in absentia should not be allowed when the potential – and in Egyptian courts,

likely – punishment is death penalty. To impose a death penalty in the absence of the accused, and in the circumstances currently experienced by Egyptian courts, is prohibited under international law, particularly when taking into account that according to the ICCPR and the Human Rights Committee, the highest standards of due process must be respected in cases that could lead to the imposition of a death penalty.

342. It must be noted that, according to David Risley, even if the right to retrial makes sentences issued as a result of trials in absentia nothing more than "*legal placeholders*", to convict and sentence an absent defendant without a trial on the merits "*is logically irreconcilable with the presumption of innocence*"[358] and contrary to Article 96 of the 2014 Constitution.

343. Third, even in trials in absentia, international law requires that the accused is legally represented by a lawyer. According to General Comment No. 13 of the UN Human Rights Committee, "*when exceptionally for justified reasons trials in absentia are held, strict observance of the right of the defense is all the more necessary*"[359] (emphasis added). The European Court of Human Rights also confirmed this right to legal representation in Pelladoah v. The Netherlands.[360]

344. In contrast, under Egyptian law, no lawyer or other representative of an absent defendant "*is allowed to enter an appearance or speak on the defendant's behalf in in absentia proceedings, even to offer an explanation for the defendant's absence or to challenge the legality of the criminal charge or charges.*"[361]

345. The absence of defence lawyers in in absentia proceedings was the main argument that former judge and Counsellor of the Egyptian State Council, Sarwat Abd El-Shahid, used to defend that in absentia trials violate Egyptian standards of justice and entail a "*flagrant violation of the established legal principles related to fair trials, mainly the impartiality of the judge.*"[362] According to the Counsellor, prohibiting the attorney of a defendant in absentia from appearing and representing the accused

before a criminal court, gives rise to accusations of bias when determining the question of a retrial:

> "*Permitting the same Court to deliberate the case once more following the issuance of a judgment in absentia therein means that the judge has at least an inclination of the mind or a preconceived opinion regarding the merits of the case. This burdens the defendant with a doubled hardship, represented in exerting efforts for clearing the Court's preconceptions that were harboured in the first trial and then attempting to convince it anew of another belief contrary to the one previously formulated. This explicitly breaches the right of defense*" (emphasis added).

346. Finally, it has been argued that in cases where defendants are held in opaque cages, even if they are physically present in court, it cannot be considered that they are being tried in their "presence", as they are not able to follow proceedings, participate in process, analyse the evidence, or give instructions to their counsel; so consequently, they are not able to present a proper defence.

Publicity of the Hearings

347. Article 14 of the ICCPR establishes that everyone shall be entitled to a "*public hearing by a competent, independent and impartial tribunal*" (emphasis added).

348. That same article includes certain exceptions to the general principle of publicity of hearings, by specifying that the press and the public may be excluded from all or part of a trial

"*for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*" (emphasis added).

349. Article 14, however, sets different standards for judgements rendered in a criminal case or in a civil suit, noting that these judgments shall always - even in cases in which "*the public is excluded from the trial*"[363] – be *"made public*" except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

350. These rights and principles are reflected on the 2014 Constitution, whose Article 187 proclaims that "*Court sessions are public, unless, for reasons of public order or morals, the court deems them confidential. In all cases, the verdict is given in an open session.*"[364]

351. The UN Human Rights Committee has provided relevant guidelines of interpretation of these international standards. Following the general principle included in Article 14, in its General Comment No. 32 the Human Rights Committee stated that all trials in criminal matters or related to a suit at law "*must in principle be conducted orally and publicly,*" noting that the publicity of hearings is fundamental to ensure "*the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.*"[365]

352. In order to ensure publicity of the trials, the Human Rights Committee obliges courts to make information regarding the time and venue of the oral hearings "*available to the public"* and provide for *"adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.*"[366]

353. Moreover, the Human Rights Committee defined the list of specific limitations established in Article 14 as "*exceptional circumstances,*" thus calling for their restrictive interpretation; and highlighted that hearings must not be limited "*to a particular category of persons.*"[367]

354. These regulations contrast with the reality of the judicial proceedings in Egypt, as, since 2013, the Ministry of Justice has ordered the transfer of numerous cases from ordinary court buildings to police academies which are controlled by the Ministry of Interior. These hearings are thus closed to the public: only defence counsel is allowed to access these hearings, while the defendants' family members and journalists must obtain permission from the judge to access the building – a permission that has been rejected in most occasions "*despite requests,*" [368] as noted by the ICJ.

355. This new practice of closed hearings breaches the defendants' right to be tried in a public trial. Moreover, the opacity of these hearings hampers the social capability to control and monitor the fairness of the administration of justice in Egypt.

356. Due to its general character, this prohibition cannot be justified in any of the *exceptional circumstances* set in Article 14 of the ICCPR. Restrictions on the publicity of trials must be decided on a case-by-case basis by the judge in charge of the proceedings, who will have to take into account the specific and exceptional factors exposed in Article 14.

357. In contrast, in Egypt, access to police-controlled academies and venues is restricted on a general basis, and the decisions of transferring the cases are not justified on the exceptional circumstances listed by Article 14. Consequently, this practice is contrary to the international standards of publicity of trials.

358. Finally, according to Amnesty International, the proposal for amendment of the Code of Criminal Procedure would eliminate the requirement that the defendant or his lawyer "*be present in court when a verdict is issued.*"[369] The law also includes proposals to prohibit the live broadcast of trials, and under some circumstances, oblige journalists to obtain the approval of judges "*before publishing news about*

trials so as to ensure that newspapers are objective in their coverage of high-profile cases,"[370] which imposes additional limitations to the publicity of trials in Egypt.

Equality of Arms

359. Article 14.3.e of the ICCPR proclaims the accused's right to "*examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*" This has traditionally been known as the principle of *equality of arms* between the defence and the prosecution, considered "*the single most important criterion in evaluating the fairness of a trial.*"

360. Analysis of the Egyptian judicial system reflects a concerning situation with regards to equality of arms during judicial proceedings. They report undue limitations on the defendants' right to call witnesses and cross-examine witnesses under the same conditions of the prosecution. Defendants have been afforded different *procedural* opportunities than the prosecution, differences that have not been based on objective and reasonable grounds, as required by the Human Rights Committee.

361. These situations have deprived the defence of the opportunity to contest all the arguments and evidence adduced by the other party, thus leading to "*actual disadvantage or other unfairness to the defendant"* – the official standard established by the Human Rights Committee.

362. Through abundant case law, the Human Rights Committee has established relevant criteria to determine whether there has been a breach of the principle of equality of arms, and consequently, a violation of the right to a fair trial. For example, in its Communication No. 1058/200 - case Vargas Mas v. Peru – the Committee held that the restriction of the applicant's ability to question witnesses and the threats received by his lawyer led to a breach of Article 14 of the ICCPR.[371]

363. In this vein, the Human Rights Committee held that although Article 14 of the ICCPR does not provide an *"unlimited right"* to obtain the attendance of any witness requested by the accused, but only "*a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings,*"[372] in every case, the accused must be given "*the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution*"[373] (emphasis given).

364. The right to equality of arms, however, must be read in the light of two factors. First, that the burden of proof rests on the prosecution; and second, that other due process rights, such as the right to be tried 'without undue delay', require proceedings to be efficient. Consequently, as noted above, there are limitations on the parties' rights to have witnesses admitted, and judges are only required to hear witnesses that are relevant for the case.

365. Nevertheless, this limitation cannot be arbitrary; and although the number of witnesses admitted by the prosecution and the defence do not necessarily have to be mathematically equal, the number of witnesses admitted to the defence must not be *disproportionally inferior* to the number of prosecution witnesses.

366. This proportionality principle has been previously examined and interpreted by regional and international human rights courts, and by international criminal tribunals, which have established relevant precedents to decide whether there has been a violation of the right to equality of arms. Some courts have added a requirement of 'prejudice' to consider that there has been a violation. For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Oric[374] established a relevant reference to assess whether the number of witnesses admitted for each side is proportional:

> "*If Oric's calculations are correct – and the Prosecutor does not seriously contest them – Oric can expect to be allotted only 30 witnesses and 27 days of testimony, as compared to the 50 witnesses and 100 days of testimony that were allotted to the Prosecution. This allocation is not remotely proportional to the time that was allotted to the Prosecution. The Prosecution is of course correct that the Defense must ordinarily articulate specific prejudice in challenging a Trial Chamber's order. But since the Appeals Chamber has struck down most of the subject matter restrictions imposed by the Trial Chamber, the disparity in this instance is so great that no specific prejudice need be shown. Given the complexity of the issues at stake, particularly regarding military necessity, such disproportion cannot be justified*".

367. Therefore, for the ICTY Appeal Chamber, a disparity of 50-30 witnesses is "*so great"* that the defence is not required to prove a "*prejudice*" in the chamber's order.

368. This standard is useful to assess the situation in the Egyptian judiciary. First, it must be highlighted that the principle of equality of arms is not included in the 2014 Constitution. Although Articles 96 and 98 recognise due process rights and the right to defence respectively, neither of these two articles includes an explicit mention regarding the equality among procedural parties, or to their right to present evidence and to summon and cross-examine witnesses.

369. In practice, the ICJ claimed that in "numerous" cases, Egyptian judges "*have refused to allow defence witnesses to present evidence and for the accused to call defence witnesses and cross-examine prosecution witnesses on the same terms as the prosecution.*"[375]

370. Moreover, these differences and disproportions that are found in practice have recently been transformed into law. On February 18, 2015, the Government of Egypt approved an amendment to Articles 277 and 289 of the Code of Criminal Procedure that eliminated fair trial guarantees for the defence by providing judges whose sole

authority is "*to decide whether witnesses can be called and their testimony heard*", thus blocking "*the ability of defense lawyers to call witnesses for trials.*"[376] If adopted, this amendment would grant judges complete discretion to disregard or accept the testimonies of witnesses at trial. The Government justified the amendment as a counter-terrorism measure, and the Minister of Justice Ahmed Al-Zind explained that it was designed to expedite trials against alleged terrorists belonging to the Muslim Brotherhood:

> "*The defence of terrorist Brotherhood members exploit the legal articles, which gives them the right to listen to witnesses' testimonies, as a way to stretch out the trial duration.*"[377]

371. The State Council criticised the amendment and issued an opinion declaring that the amendment was unconstitutional, as it breached Articles 96 and 97 of the 2014 Constitution and the Supreme Constitutional Court decisions "*which oblige the court to summon all witnesses requested by the defendants without restrictions.*" [378]

372. The State Council thus sent back the reform to the executive for "further review", which was considered by the report commissioned by the State Litigation Authority of Egypt as indicative of "*Egypt's active consideration of balancing various fair trial rights of an accused*"[379] (emphasis added).

373. However, this alleged 'consideration' by the Egyptian Executive ended in April 2017, when the Egyptian Parliament finally voted to preliminarily approve the bill, and thus to amend the Code of Criminal Procedure, which according to Amnesty International, will

> "*severely undermine the right to defense and the presumption of innocence especially since the Egyptian criminal justice system has an appalling record in relying only on police or government witnesses to convict and sentence hundreds in mass trials.*"[380]

374. Despite having been subjected to widespread criticisms at both national and international levels, this "*draconian*" [381] amendment is currently under debate by the Egyptian Parliament.

Military Courts

375. Although the ICCPR does not prohibit *per se* the creation of military courts and the trial of civilians by this type of tribunals, the Human Rights Committee has declared that trials of civilians by these military courts should be "*exceptional"*, and established two different requirements to try civilians in military courts:

a. The standards test: "*the State party must show that resorting to such trials is necessary and justified by objective and serious reasons*" (emphasis added), which must be substantiated in each specific case, and

b. The justification test: "*with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials*"[382] (emphasis added).

376. It must be noted that the Committee raised serious doubts about the fairness and transparency of this type of proceedings, and thus insisted on their exceptional character: "*the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned.*"[383] Notably, in 1993, the Human Rights Committee reminded Egypt in its Concluding Observations that "*military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties.*"[384]

377. In 2003, the African Commission of Human and Peoples' Rights maintained a stricter approach and established the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which recognised the right of civilians not to be tried by military courts: "*military courts should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts.*"[385]

378. In contrast, Article 204 of the Egyptian Constitution of 2014, which regulates the military judiciary, declares that civilians can stand trial before military courts for crimes that represent

> "*a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories;*" crimes related to conscription; or crimes that represent "*a direct assault against its officers or personnel because of the performance of their duties;*" leaving it to the law to define such crimes and determine "*the other competencies of the Military Judiciary.*"[386]

379. This already wide jurisdiction and competence to try civilians was recently expanded with Law No. 1 of 2013, on the participation of the armed forces in maintaining public security and protecting vital facilities of the state, and by Law No. 136 of 2014, on protecting and securing public and vital facilities, which broadened the scope of the military jurisdiction to "*crimes perpetrated against public facilities [including streets and university campuses], utilities and properties, referred to in Article 1 of this decree by law*"[387] (emphasis added). Law No. 136 of 2014 used counter-terrorism arguments to justify the expansion of military justice, placing all public and vital facilities under "*military jurisdiction*".

380. Therefore, civilians may be tried in military courts for committing any type of crime on "*public facilities*" – including electricity stations, gas pipelines, oil wells, railroads,

bridges and roads – even if it is hard to observe how this standard could fulfil the two requirements of exceptionality set out by the Human Rights Committee. First, resorting to such trials is neither necessary nor justified by "*objective and serious reasons*", and second, the State of Egypt has failed to justify why regular civilian courts would be unable to undertake these trials.

381. Notably, and without providing any justification to substantiate the argument, the report commissioned by the State Litigation Authority of Egypt concludes that the provisions defining the jurisdiction of the military courts "*provide, in clear and specific terms, those exceptional circumstances in which military courts may exercise jurisdiction over a civilian, in accordance with international standards.*"[388] Therefore, after correctly setting the international standards that apply to the military jurisdiction, the report fails to analyse these standards with respect to Egyptian law and simply concludes that Egyptian military courts comply with them. In order to provide a sense of justification, the report includes a footnote mentioning three legal cases that would theoretically support its argument: *Martin v. United Kingdom*, in the European Court of Human Rights;[389] *Abbassi v. Algeria*, Communication No. 1172/2003 at the Human Rights Committee;[390] and *Kurbanova v. Tajikistan*, Communication No. 1096/2002 at the Human Rights Committee.[391]

382. However, far from supporting the standards set by the Egyptian military, a careful examination of these three cases clearly evidences that the regulation of military courts in Egypt is in violation of international standards of fairness.

383. In the three cases, both the European Court of Human Rights and the Human Rights Committee concluded that the trials of a civilians by military courts were in violation of fair trial standards, and consequently, constituted a violation of human rights. Relevantly for the Egyptian regulation, in *Martin v. United Kingdom* the European Court of Human Rights established that:

> "*The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so, only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts in abstracto"* [392] (emphasis added).

384. In that case, even if there were two civilians sitting as ordinary members of the tribunal, the European Court of Human Rights found that "*the composition, structure and procedure*" of the tribunal were in themselves "*sufficient to raise in him a legitimate fear as to its lack of independence and impartiality.*"[393] As mentioned in the previous chapter, the independence of Egyptian military courts has also been seriously called into question.

385. Additionally, in both *Abbassi v. Algeria* and *Kurbanova v. Tajikistan,* the Human Rights Committee confirmed the essential character of the "justification test" by establishing that the state party must

> "*demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable.*"[394] Moreover, the state party must also demonstrate "*how military courts ensure the full protection of the rights of the accused.*"[395]

386. As both States, Algeria and Tajikistan - similarly to Egypt - had failed to provide a justification that could demonstrate why recourse to a military court was required or why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying the civilians, the Committee found that there was a

breach of their right to a fair trial. Relevantly, the Committee noted that the mere invocation of domestic legal provisions to expand the military jurisdiction to certain categories of serious offences does not "*constitute an argument under the Covenant in support of recourse to such tribunals.*" [396]

387. Despite these trials failing to comply with recognised international human rights standards, it is estimated that more than 7,420 Egyptian civilians have been tried by military courts since October 2014, when Egyptian authorities have tried more than 7,400 civilians in military courts since October 2014, when Sisi approved new legislation that "*vastly expanded military court jurisdiction.*"[397] At least 1,468 defendants from Minya governorate were referred to military trial as a consequence of the approval of the law.[398] During this time, military tribunals have sentenced at least 60 people to death.[399] Five citizens condemned to death by a military tribunal in August 2014 were executed in May 2015.[400]

388. The report commissioned by the State Litigation Authority of Egypt has justified these excessive numbers and widespread violations of human rights and due process standards by noting first, the recent terrorist threats suffered in the country; and second, the huge backlog in the ordinary courts. However, none of these arguments fulfil both the standards and the justification tests, and justify providing such a wide jurisdiction of military courts over civilians.

389. Moreover, although the report noted that the approval of Law No. 136 of 2014 was aimed at protecting public infrastructure "*in response to the increase in terror attacks aimed at the energy sector in Egypt,*"[401] in its analysis on military trials in Egypt, Human Rights Watch found that a large number of the defendants were accused of "*participating in illegal or violent protests, as well as membership in or support for the Muslim Brotherhood,*" [402] which is hardly related to the protection of the electricity supply.

390. It must be noted that, as will be exposed in the following chapters, the counter-terrorism narrative has been frequently adopted by Egyptian authorities to justify the

approval of abusive legislation criminalising dissent and criticism. As a matter of fact, Nadim Houry, Human Rights Watch's deputy Middle East and North Africa director argued that:

> "*The referral of so many civilians to military courts is an attempt by Egyptian authorities to provide a judicial rubber stamp for their crackdown* […] *But these military trials – often involving hundreds of civilians at a time – are neither fair nor credible.*" [403]

391. Second, in an attempt to demonstrate the fulfilment of the so-called justification test, the report noted that military jurisdiction had been expanded in order to "*assist with processing the backlog of cases before ordinary courts*" as a consequence of the increase in political violence and the elimination of special courts.[404] However, the backlog of cases must be solved by the provision of more funding and resources to ordinary courts, and not by referring civilians to military courts known for their difficulties to uphold human and due process rights.

392. Military trials stand out due to their lack of respect for international standards of justice and procedural rights. Egyptian military courts do not follow the Egyptian Criminal Procedure Code. They have conducted mass trials against dozens or hundreds of accused, including children.[405] Moreover, these trials are not open to the public, so the ICJ complained that "*difficulties in accessing military court proceedings and their judgments*" had limited the institutions' ability "*to provide detailed analysis of cases of civilians tried before such courts.*" [406] Media are frequently not allowed to access these trials, so their transparency is very limited.

393. Consequently, both the regulation and the practice of military trials of civilians in Egypt is not consistent with international standards and should conform a serious and relevant indicator of the alarming situation of justice system in the country. In November 2015, the UN Office of the High Commissioner for Human Rights expressed outrage at the prosecution of a human rights defender and journalist,

Hossam Bahgat, by military courts and called upon Egypt to take urgent measures to "*halt the expanding use of the military justice system for cases involving civilians.*"[407]

394. Additionally, on October 21, 2016, the UN Working Group on Arbitrary Detention (WGAD) issued its opinion No. 42/2016 concerning Ahmed Yoursry Zaky's arrest and deprivation of liberty in Egypt. In this opinion, the Group noted that it had already concluded, in numerous occasions, that the subjection of civilians to military justice constituted "*a violation of the right to a competent, independent and impartial tribunal.*"[408] In its opinion 11/2012, the WGAD maintained that military trials "*showed no guarantees of independence*", and in Opinion No. 10/2014 it reminded that *"in principle, military tribunals should not try civilians."* [409]

395. The following cases illustrate WGAD's opposition to the lawfulness of military trials against civilians in Egypt:

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion No. 10/2014 (Egypt) **UN Doc No. A/HRC/WGAD/2014/10**

Date: 23rd July 2014 **Government reply**: None

Victims

12 Egyptian nationals, including Mohamed Essayed Ali Rasslan, Mohamed Mohamed Abdo Abdullah, Ahmed Hussein Ali, Ahmed Mohamed Tohamy, Motaz Ahmed Motwali, Mohamed Mohamed Abduh, Assayed Mohamed Ezzat Ahmed, Assayed Saber Ahmed Suleiman, Ahmed Hassan Fawaz Atta, Mohamed Abdel Hamid Abdel Fattah Abdel Hamid, Sayyed Ali Abdel Zaher, and Mahmoud Abdel Fattah Abbas.

Facts

Eight of them were arrested on 4th July 2013 by army officials, while they were demonstrating in front of the Governorate of Suez building against the military takeover. The remaining four were arrested ten days later, on 14th August 2013, while they were demonstrating in the same place against the dispersal of the Rabaa' Al-Adawiya sit-in.

They were charged by a military prosecutor with several offenses under the Penal Code and the Code of Military Justice—including use of violence against members of the armed forces, throwing stones, pushing over iron fences; removing barbed wires, and verbally insulting the armed forces—. The four arrested on 14th August were also charged with two additional property offenses.

The eight individuals arrested on 4th July were sentenced to one-year' imprisonment by the Military Court of Suez on 24th July 2013, while on 3rd September 2013, the same Court sentenced three of the accused to 15 years' imprisonment and one to life in prison.

Finding

The WGAD found that the fact that the 12 individuals were tried before a military tribunal after taking part in public demonstration constituted a violation not only of their right to freedom of opinion and expression, but also of their right to a fair trial. Consequently, their detentions are arbitrary and fall within categories II and III of arbitrary detention.

The Working Group made reference to its own jurisprudence, as well as to the jurisprudence of the African Commission of Human and Peoples' Rights, of the Inter-American Court of Human Rights and the European Court of Human Rights to hold that customary international law is developing to exclude "*the criminal jurisdiction of military courts over civilians*". The WGAD has in multiple occasions held that "*military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts".*

Relevant Cases Before Egyptian Courts

396. Experts agree that the judicial system in Egypt has deteriorated significantly since 2013. Such is the seriousness and the gravity of the due process violations in some judicial processes that they bear no resemblance to justice.

397. This section will expose some cases that exemplify the above-listed violations of fair trial guarantees. However, it must be noted that these cases only constitute a small representation of the overall crisis of Egyptian justice, but pretend to be reflective of a more general and systematic pattern of judicial oppression.

398. One of the most egregious cases of the last years is the famous *Marriot Cell case*, also known as the Al-Jazeera case. In 2014, three Al-Jazeera journalists – Mohamed Fahmy, Baher Mohamed and Peter Greste – were accused, alongside 17 other individuals, of various criminal charges.

399. Mohamed Fahmy and Baher Mohamed were accused of membership of an illegal organisation, of membership of the Muslim Brotherhood, and of possession of written material and audio recordings that promoted the goals of those organisations. Baher Mohamed was also accused of obtaining supplies "*banned for civilian use,*" and the three of them faced charges for supplying the illegally established organisation "*with material and financial aid,*" possessing telecommunication and transmission devices "*without receiving a license from the appropriate administrative institutions,*" and broadcasting outside Egypt false news about the "*internal conditions of the country.*"[410] The charges demonstrate that Egyptian legislation is filled with ancient and abusive norms that criminalise the act of insulting state institutions or of spreading rumours that may harm the country's reputation.

400. As confirmed by one of the defence lawyers,[411] the trial was characterised by a litany of violations of due process standards. First, both the judges and the prosecutor had been specifically selected as a consequence of a "special order" - an order that invited to question, since the very beginning of the judicial process, the impartiality and

independence of the court's composition. Second, the lack of evidence to substantiate the charges was alarming. According to the lawyer:

> "*Not a single digital or hard copy piece of evidence showed the journalists were in any way linked to the Brotherhood. Not a shred of evidence showed that any of the journalists gave the Brotherhood money or other material support. There was not even an allegation by the prosecution that any particular video played by Al Jazeera had been doctored, let alone proof that it was so.*"[412]

401. Hours of videos unrelated to the case were shown during the trial to create a false impression that there was abundance of evidence against the accused, while only one of the eight witnesses brought by the prosecution was relevant to the cases of the three journalists: an intelligence officer that confirmed the prosecution's story through "*serious investigations that he personally carried out and using his confidential sources,*"[413] which he did not reveal.

402. Moreover, quite unbelievably, and in breach of the fundamental principle of equality of arms, the judge asked the defence to pay $170,000 to view the video evidence that would be brought against them.

403. With regards to the principle of presumption of innocence, defendants were not only dressed as prisoners and placed in cages during the trial - which, as mentioned above, is an illegal practice condemned by the Human Rights Committee - but also the images of their detention were published by Egyptian authorities against a "*sinister background music from the soundtrack of "Thor: The Dark World.*"[414] Adding to this public denigration of the accused, the judgment literally claimed that "*Satan joined [the journalists] in the exploitation of this media activity to direct it against this country.*"[415]

404. Eleven of the accused were convicted *in absentia* to ten years' imprisonment. The other nine individuals were present at the judicial proceedings: two of them were found innocent and acquitted; one of them was sentenced to three years in prison, and the rest – including Mohamed Fahmy, Baher Mohamed and Peter Greste – were sentenced to seven years' imprisonment.

405. On June 23, 2014, the UN High Commissioner for Human Rights, Navi Pillay, issued a statement urging a review of Egyptian law and judicial procedures after the "*shocking*" conviction of the journalists.[416] She noted that court proceedings had been "*rife with procedural irregularities and in breach of international human rights law,*" and expressed particular concern about "*the role of the judicial system*" in the clampdown against media and civil society: "*Harassment, detention and prosecution of national and international journalists* […] *have become commonplace*" in Egypt. Navi Pillay complained about the broadness and vagueness of the charges against the journalists, that "*reinforce the belief that the real target is freedom of expression.*" Finally, she noted that despite its gravity, this case was not an isolated incident of procedural violations, but indicative of a wider pattern of judicial persecution against criticism and political opposition: "*In addition to journalists, several prominent activists have been harshly sentenced in court proceedings that generally fell far short of key international standards for fair trials.*" Therefore, the UN High Commissioner called upon Egyptian authorities to review all these cases. In her own words, "*Egypt's reputation, and especially the reputation of its judiciary as an independent institution, are at stake* […] *There is a risk that miscarriage of justice is becoming the norm in Egypt.*"

406. The seven individuals convicted in their presence appealed the verdict. In their appeals, defence counsel alleged that the reasons for the defendants' convictions were weak, that the evidence to substantiate convictions was insufficient, and that their defence rights were violated. They claimed that the judge had used vague expressions to justify the convictions and failed to explain how the defendants' actions fulfilled the criminal elements of the legal definition of each crime. Moreover, the judgment had based its findings on invalid forced confessions. As a matter of fact, the judge had

issued a verdict before receiving the medical examiner's report that analysed the allegations of physical and mental duress.

407. Furthermore, the judgment of the trial court represents a clear violation to freedom of expression and freedom of the media:

> "*They gathered these reports for the purpose of broadcasting them on a satellite news channel which operates outside of Egypt which also serves one of the outlawed terrorist organizations (the terrorist group the Muslim Brotherhood) through showing the country – falsely – in a state of chaos with videos and pictures as if Egypt was a failed state suffering from deep divisions, internal violent clashes, and unclear leadership from the top. They strove to abort the national efforts to achieve the goals set forth in the political roadmap by broadcasting this inside and outside the country using this channel which adopted ideas against this country, and for which 10 of the defendant's work.*"

408. In 2015, the Court of Cassation found that the trial court judgement had failed to provide sufficient legal reasoning and justification to impose a conviction. For example, it did not prove the existence of an illegal organisation, the manner in which the materials were going to be distributed, or the nature of the support given to the alleged illegal organisation. Moreover, the judgment seemed to rely on forced confessions, and was "*full of contradictions.*" Consequently, the Court of Cassation ordered their retrial in the criminal court of Giza:

> "*The sentence is lacking the evidence to prove the elements of the crime that the appellants were charged with; therefore, the sentence is flawed and must be overturned.*"

409. The fact that the Court of Cassation ordered a retrial in this case constitutes one of the most fundamental arguments of the report commissioned by the State Litigation Authority of Egypt, to maintain that the Egyptian judicial system respects international standards of fair trial, noting that the Court of Cassation has "*fairly consistently* reversed *injudicious rulings on appeal.*"[417]

410. Nevertheless, with this argument, the authors seem to wilfully ignore that retrial processes have also been characterised by renewed violations of due process and resulted in the confirmation of lengthy sentences. For example, in late 2015, as a result of the retrial, journalists Mohamed Fahmy, Bahar Mohamed and Peter Greste were again condemned to three years' imprisonment.

411. In September 2015, the United Nations Special Rapporteur on Freedom of Expression, David Kaye, publicly condemned the new sentence and urged the immediate release of the detained journalists, as Mohamed Fahmy and Bahar Mohamed continued in detention.[418] The Special Rapporteur claimed that the journalists' detention and subsequent trials had "*been inconsistent with international human rights law from the start*" and added that the sentences reinforced "*the sense that freedom of expression is under attack in Egypt.*"[419] He could observe a number of significant legal flaws in the new verdict, including that "*the broadcasting of information should never be restricted, certainly not without evidence of a serious immediate threat to a legitimate national security interest.*"

412. The retrial process was characterised by procedural deficiencies, lack of evidence and violations of due process rights: the defendants were placed in a cage, and the charges against them were still "*baseless and politicised.*"[420] Their sentences were widely perceived as an attack on the independent national and international media, and more particularly, on the news network Al-Jazeera for having given coverage to the Muslim Brotherhood. According to Amnesty International, the ruling appeared to be politically-motivated, "*with the intention of silencing media outlets critical of Egypt's rulers and sending a message to the Muslim Brotherhood that any association with the group will be punishable.*"[421]

413. As a result of widespread and constant international pressure, both journalists, Mohamed Fahmy and Bahar Mohamed, were finally released following a presidential pardon issued by President Sisi in September 2015. Nevertheless, this pardon from the executive power, far from demonstrating the capacity of Egyptian courts to correct judicial mistakes and abuses inside the system, is reflective of the opposite. As a matter of fact, according to Ahmed Ragheb, Director of National Community for Human Rights:

> "*Besides undermining the independence of the judiciary, presidential pardons only focus on famous activists while many unknown ones are also in jail* […] *This means [Sisi] is aware that there is a serious problem with justice in Egypt.*"[422]

414. By the time of their release, both Mohamed Fahmy and Bahar Mohamed had spent more than 20 months "*being grilled and punished*" for doing their work.[423]

415. The case of *Alaa Abdel Fattah and 24 others* is also representative of the deficient situation of fair trial protections in Egypt. Alaa Abdel Fattah is an Egyptian human rights defender and activist, and co-founder of the popular pro-human rights blog Manalaa. Months after the military coup d'état, on November 26, 2013, Alaa Abdel Fattah participated in a peaceful demonstration that opposed a constitutional reform that expanded the military courts' jurisdiction over civilians. The demonstration was violently suppressed by Egyptian security forces, and Alaa Abdel Fattah was charged with "*organizing the protest on 26 November illegally, assaulting a police officer and stealing his walkie-talkie.*"[424] The following day, Egyptian police forces raided his house, beat, and then arrested him, without presenting any arrest warrant or providing reasons for his arrest. Blindfolded and handcuffed, he was taken to an unknown place, and on November 29, 2013, he was transferred to Tora maximum security prison. He could only access his lawyer – under conditions that did not ensure the confidentiality of the communications – once every 30 days.

416. Alaa Abdel Fattah was released on bail in March 2014. However, his right to adequate time and facilities to prepare a defence was very limited. His counsel could not access several CDs containing evidence even if they were later played to the court. As a matter of fact, counsel could only access certain evidence for the first and only time during court proceedings. According to a trial observation report commissioned by the Euro-Mediterranean Human Rights Network, which sent a number of legal experts to observe the proceedings in this case, the defendant was denied an opportunity to prepare a defence as the court had:

> "*wrongly refused the Defendant's application to order the Prosecution to disclose to the defence in advance of the trial valuable evidence in the Prosecution's possession, namely closed circuit television (cctv) video film of the protest. The rejection of the application deprived the Defendant of an opportunity to analyse this evidence before the trial* […] *a defence analysis of the video may have led to evidence persuasive of innocence. A tribunal of fact may be assisted by enlargements or enhancements of particular frames from video film*"[425] (emphasis added).

417. This is particularly worrying, as the defendants were held in a soundproof cage where they could not properly see and hear the evidence, and consequently, could not provide their counsel with instructions related to it.[426] As a matter of fact, defendants complained that they could not follow proceedings because the microphones were not working adequately and because the cage was so thick that it was almost opaque. Notably, proceedings took place in the police training academy in Tora, with the corresponding limitations for the general public to access the trial.[427]

418. His legal counsel "*were routinely not informed of the dates of hearings in advance and often found out only the day before via media reports.*"[428] As a matter of fact, he was informed that the judge in his case had handed down a judgement and sentenced him to 15 years' imprisonment, while Fattah and one of his lawyers "*were waiting*

outside the court to attend the hearing." Contrary to international norms – which determine judgments shall always, even in cases in which the public is excluded from the trial, be *"made public*" with almost no exception – the judge "*never entered the court room and there was no hearing either,*"[429] so his judgment was rendered *in absentia*. Alaa Abdel Fattah was arrested on the spot, and although he was released on bail in September 2014, he was re-arrested in October 2014 at the Tora Institute for Police Officers while attending a hearing on his case.

419. In Al Mazraa Prison, he was subjected to continued harassment by other cellmates and prison guards, who did not allow him to wear winter clothes.

420. In February 2015, Alaa Abdel Fattah and the other 24 accused were retried for participating in an unauthorised protest. Far from acquitting him for having simply exercising his legitimate right to peaceful assembly, Alaa Abdel Fattah was sentenced to five years in prison, while other defendants received three-year sentences[430].

421. On June 6, 2016, the United Nations Working Group on Arbitrary Detention (WGAD), after analysing all these allegations, concluded that Alaa Abdel Fattah's detention was arbitrary as it was the result of the exercise of his right to freedom of opinion and his participation in a peaceful demonstration. The WGAD noted that the prosecution had failed to provide sufficient evidence proving that he organised the protest, or that he had committed any crime during the peaceful protest that endangered public order. As a matter of fact, the WGAD noted that the criminal legislation used to convict Alaa Abdel Fattah – Law No. 107 of 24 November 2013 on the Right to Public Meetings, Processions and Peaceful Demonstrations, known as the "Protest Law" – was abusive and contrary to international law. Despite this decision proving the illegality of his sentence, Fattah continues in prison. It is only possible to conclude that retrial proceedings in Egypt do not solve the human rights violations occurred during trials in first instance.

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion No. 6/2016 (Egypt) **UN Doc No. A/HRC/WGAD/2016/6**

Date: 20th October 2016 **Government reply**: 20th April 2015

Victim

Alaa Ahmed Seif al Islam Abd El Fattah, human rights defender and the co-founder of the blog aggregator Manalaa, which promotes free speech and human rights.

Facts

The facts of the case have been exposed in detail in this chapter.

Finding

The WGAD found that Mr. Abd El Fattah's deprivation of liberty was arbitrary and in violation of Articles 9 and 14 of the ICCPR, falling into categories I, II and III of arbitrary detention. First, the Working Group noted that the Government of Egypt had failed to provide convincing evidence to demonstrate either that Mr. Abd El Fattah had called for the demonstration— "*therefore, he could not be prosecuted or tried for not fulfilling the legally prescribed notification procedures applicable to the organizers*"—; or that he committed crimes during the protest.

The Working Group reiterated that the Law No. 107/2013, which was the basis of Mr. Abd El Fattah's conviction, seemed to be "*contrary to international law*" and constitute "*a tool for repressing peaceful demonstrations*". In this vein, the Working Group confirmed that the use of twitter to invite people to participate in a protest is protected by the right of freedom of opinion and expression. It is WGAD's established position that:

"*the peaceful, non-violent expression or manifestation of one's opinion, or dissemination or reception of information, even via the Internet, if it does not constitute incitement to national, racial or religious hatred or violence, remains within the boundaries of the freedom of expression. Hence, deprivation of liberty applied on the sole ground of having committed such actions is arbitrary*".

Finally, the WGAD noted that Mr. Abd El Fattah had had problems to access and communicate with his lawyers because he was placed in a soundproof glass cage during proceedings, and that security forces neither showed an arrest warrant nor explained the reasons of Mr. Abd El Fattah's arrest. All these acts constitute a breach of Article 9 of the ICCPR.

422. A case that has been ignored by the report commissioned by the State Litigation Authority of Egypt, and one that shares significant similarities with the previous one is the one of *Ahmed Douma, Ahmed Maher and Mohamed Adel.* The three accused are political activists, and both Maher and Adel are co-founders of the April 6 Youth Movement, an advocacy organisation established to support workers.

423. They all participated in the November 26, 2013 protest, organised before the Shura Council, to oppose the expansion of the military courts' jurisdiction over civilians in the proposed new constitution. After the protest, Egyptian police started seeking Ahmed Maher for having allegedly incited protesters to demonstrate on November 27, 2013.

424. On November 30, Ahmed Maher, accompanied by Ahmed Douma and several supporters, went to the Abdeen courthouse to turn himself in to Egyptian authorities. His supporters, who were peacefully protesting outside the courthouse, were brutally attacked by the police.

425. On December 2, 2013, he was interrogated without the presence of his lawyer about the organisation of the unauthorised protest outside the courthouse. He was detained for four days and then transferred to Tora Prison, where he was held in solitary confinement.

426. On December 3, 2013, Ahmed Douma was arrested without police authorities being able to show an arrest warrant. Like Ahmed Maher, he was detained for four days, transferred to Tora Prison and held in solitary confinement.

427. Two days after, on December 5, 2013, the Public Prosecutor charged Ahmed Douma, Ahmed Maher and Mohamed Adel with "*taking part in an unauthorized protest, disturbing public order and assaulting police officers.*"[431]

428. Their trial started on December 8, 2013. Mohamed Adel did not attend the proceedings and was therefore tried *in absentia*. According to their lawyers, "*only witnesses for the prosecution were called to testify that Messrs. Maher, Douma and*

Adel had attacked police officers, while the three men maintained that they were only demonstrating peacefully and that the trial was politically motivated."[432]

429. On December 18, 2013, police officers went to the NGO, Egyptian Centre for Economic and Social Rights – Mr Adel's workplace – raided the offices, and arrested Mr Adel and five of his colleagues. Mr Adel was held in incommunicado detention for four days.

430. Defendants were forced to remain in a cage during proceedings in violation of their right to the presumption of innocence. Moreover, following orders from the Minister of Justice, proceedings were transferred to the Institute of the Guardians of the Police. There, armed policemen in charge of the access to the building only permitted defence counsel to attend the hearings, so the general public and the press were forced to remain outside. On only one occasion, certain family members were authorised to enter the trial.[433]

431. Less than a month after the protest and their detention, the three men were sentenced by the Abdeen Misdemeanour Court to three years' imprisonment according to criminal provisions established in the recently-approved Protest Law.

432. In a report, the Hisham Mubarak Law Centre claimed that the verdict was flawed, noting that "*policemen's testimonies did not match the accusations, were sometimes contradicting, vague and inaccurate, in addition to eyewitnesses not recognising the defendants in several instances.*"[434]

433. The three men were held at Tora Prison, where they remained, until the completion of their sentences. The decision of the Abdeen Misdemeanour Appeals Court of April 7, 2014, confirmed the sentence; and 21 days later, the Abdeen Court for Urgent Matters declared the April 6 Youth movement a prohibited organisation.

434. In January 2016, however, the three human rights defenders were convicted to an additional six months' imprisonment *in absentia* for having assaulted a police officer in 2014 during a session of their appeal. During that session, they demanded the

handcuffs "*taken off their wrists while in court,*"[435] but security forces at court rejected their request and "*beat the defendants.*"[436] The sentence came as a result of a report filed by security personnel alleging that the defendants had assaulted them.

435. After analysing the facts, the United Nations WGAD concluded that their deprivation of liberty was arbitrary and urged the Government of Egypt to release the detainees. The WGAD highlighted, particularly, the fact that the appeal hearings of the three defendants were held on the premises of the Tora Police Academy "*which operates under the Ministry of the Interior,*" constituted a breach of Article 14 of the ICCPR: "*a court sitting in a building attached to a non-judicial authority violates the principle of separation of powers as it is clearly liable to interfere with the executive.*"[437] The Group also noted that the "*expedient nature*" of the trial indicated that the investigation procedure "*was not impartial, that the judges were biased and only listened to the witnesses for the prosecution*", which constitutes an additional violation of the defendants' right to a fair trial.[438]

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion No. 49/2015 (Egypt)
Date: 29th March 2016

UN Doc No. A/HRC/WGAD/2015/49
Government reply: 25th July 2014

Victims

Human rights activists Ahmed Saad Douma Saad, Ahmed Maher Ibrahim Tantawy and Mohamed Adel Fahmi. Ahmed Maher Ibrahim Tantawy and Mohamed Adel Fahmi are co-founders of the April 6 Youth Movement.

Facts

The facts have been established in the present chapter of this report. Notably, in its response the Government noted that the new Constitution, approved in 2014, "*guaranteed that no civilians could be tried before military courts*", although hundreds of civilians have been systematically tried by military courts and the Executive expanded the military jurisdiction over civilians.

Finding

The victims were detained while exercising their right to freedom of expression and opinion during a peaceful demonstration, so the WGAD found that the detention of the three citizens was arbitrary and related to their legitimate exercise of human rights activities. According to the WGAD, there are convincing facts demonstrating that the judicial proceedings against the three citizens are a consequence of their political and human rights activities, and the application of "*overly broad offences*" in the case constitutes "*an unjustified restriction on the rights to freedom of expression and to a fair trial*".

The Working Group reminded Egyptian authorities that they must inform individuals arrested of the reasons of the arrest and of the charges against them. The lack of information about the reasons of arrest or about the charges the detainees were facing, constituted a violation of Article 9 of the ICCPR. Similarly, the detainees' lack of access to their lawyers amounts to a violation of their right to be assisted by counsel established in Article 14 of the ICCPR.

Meanwhile, according to the WGAD, the incommunicado detention of Mr. Adel also contravened Articles 9 and 10 of the Covenant, as "*the intentional failure of the authorities to disclose his fate placed him outside the protection of the law*" (emphasis added) and impeded to bring him promptly before a judge. In this regard, the WGAD notes, "*secret and/or incommunicado detention constitutes the most severe violation of the international norm protecting the right to liberty of human beings under customary international law. Arbitrariness is inherent in this form of deprivation of liberty as the individual is placed outside the cloak of any legal protection*" (emphasis added).

With regards to the legal reasons used to justify their deprivation of liberty, the WGAD analysed the content of the Law on the Right to Public Meetings, Processions and Peaceful Demonstrations" n°107-2013 and defined it as "*restrictive*", as it placed "*extremely broad restrictions*" on the right to freedom of expression and peaceful assembly. The Working Group found that the Law is in contravention of Article 21 of the ICCPR, as it imposes restrictions that "*are outside the scope of what is necessary in a democratic society*". Consequently, as the legal provisions are incompatible with fundamental rights and freedoms, a deprivation of liberty based on such provisions would qualify as arbitrary.

Finally, the WGAD concluded that the three victims were not tried by an impartial, competent and independent tribunal. The Working Group bases its finding in three reasons: first, the expedient nature of the trial, which invited one to believe "*that the investigation procedure was not impartial, that the judges were biased and only listened to the witnesses for the prosecution*". Second, that judges failed to investigate allegation of mistreatment by defendants, although

436. As a consequence of this second sentence, Ahmed Maher and Mohamed Adel were released after three and a half years in prison.[439]

437. Ahmed Douma is still imprisoned, as he was sentenced to life imprisonment in the *Cabinet clashes* case, in which Ahmed Douma and 268 other defendants faced charges of "*illegal assembly, the acquisition of arms, assault on police and military forces, the burning of the scientific institute and the vandalism of other government buildings, including the cabinet and parliament buildings.*"[440] The defendants participated in a sit-in at the Egyptian executive offices in December 2011 in the context of the Egyptian Arab Spring that marked the beginning of a series of mass protests and demonstrations that ended with the ouster of Hosni Mubarak. The sit-in led to clashes with security forces in which 18 people lost their lives.

438. The judicial process in this case was characterised by arbitrariness and countless procedural violations. Three lawyers - Basma Zahran, Mahmoud Bilal and Oussama Al Mahdi - were referred for investigation in September 2014 for allegedly "*disrupting and causing trouble*" by demanding that their client Ahmed Douma, who was in a sound-proof cage, should be heard by the court.[441] Although these investigations were later discontinued, they affected both the trial proceedings and the lawyers' ability to adequately defend their clients, at the same time that they set a negative precedent for the legal profession, as they punished lawyers for carrying out their legitimate functions.

439. Apart from the problems suffered by defence lawyers, this case is a prime example of the inequality of arms between the defence and the prosecution, as the judge precluded the defence counsel from accessing a complete copy of the case files, including the "*conclusions of the Fact-Finding Commission formed by Presidential Decree 10/2012, a copy of the Military Prosecution's investigations, and an official copy of the judicial investigations.*"[442] Moreover, the Judge prevented the defence from: seeing videos used by the prosecution to substantiate its case against the defendants, summon a number of defence eye witnesses, and present relevant

documentary evidence supporting the defence's allegation that law enforcement officers used excessive force against protesters.

440. According to analysis undertaken by 19 human rights organisations and six Egyptian political groups, Douma's trial was "*sullied from the beginning by flagrant infringements upon due process.*"[443] First, he was tried on a charge that was not brought against him by the investigating judge and was not listed in the indictment. More than two thirds of the trial sessions took place in the Police Academy without access to the public, thus contravening the defendants' right to a public hearing.

441. Such was the degree of partiality during the judicial process and the gravity of the violations of defendants' rights, that at one point, there was *only a court-appointed lawyer present in the courtroom,*"[444] as the Lawyers Syndicate had issued a resolution in November 2014 "*prohibiting any lawyer from appearing before the circuit or accepting a court appointment in this case*"[445] due to "*legal violations against Douma's defense team*", "*lack of access to an appropriate independent defense*" and "*arbitrary treatment by the judge.*"[446] The judge, however, appointed a lawyer without Douma's consent, a decision that breached Douma's right to appoint counsel of his choice.

442. The judge in charge of the case, Judge Mohamed Nagy Shehata, became famous not only in Egypt but internationally, for both his abusive and extremely harsh sentences, and for leading proceedings wearing sunglasses. Known as "The Executions judge,"[447] he led the aforementioned Al-Jazeera case and sentenced *"188 to death on charges related to the killing of eleven police officers in Kerdasa.*"[448] He had spoken to the media about the case before the end of Douma's trial, thus breaching the defendants' right to be presumed innocent until proven guilty.

443. A loyalist to the former military regime and a declared enemy of the revolution, Judge Shehata used to constantly publish news against the Muslim Brotherhood and political activists on his Facebook account. Although his impartiality was widely questioned, and despite the fact that he was involved in the forging of the 2005 parliamentary

elections, he was appointed as leading judge of one of the six special judiciary circuits "dedicated to terrorism and violent crimes" established in December 2013.[449]

444. As a result of the deficient judicial process, on February 4, 2015, Ahmed Douma and 229 other Egyptian citizens were sentenced to life imprisonment, while 39 other defendants - all of them minors - were convicted to 10 years in prison. This sentence was the harshest against activists that demonstrated against Hosni Mubarak's regime in 2011 and, according to Atlantic Council, it brought to the forefront "*pressing questions about the politicisation of court rulings.*"[450]

445. All the defendants, except Mr Douma, were sentenced *in absentia.* In the last two years, the Egyptian police has arrested 145 of the convicted.[451]

446. Seventeen human rights organisations issued a statement condemning the verdict and calling for the intervention of the Supreme Judicial Council "*to restore judicial credibility,*"[452] as they claimed the verdict provided clear evidence that there existed "*a significant defect in the Egyptian justice system,*" noting particularly that it was indicative of the position of the Egyptian judiciary "*as an adversary – rather than an arbitrator of conflict – with its issuance of the most severe of punishments, its undermining of the most basic of judicial guarantees, and its issuance of mass death and lifetime sentences.*"[453]

447. Ahmed Douma appealed the verdict, and in July 2017, the Cairo Criminal Court upheld his sentence. Although the Court acquitted 92 defendants, it maintained life imprisonment sentences against 43 of the appellants, and 10 years' imprisonment convictions for nine minors.

448. In a joint statement, human rights groups defined the verdict "*the end-result of a politically-motivated judicial charade devoid of any remote semblance of due process, further congealing the antidemocratic system that Douma and so many other Egyptians courageously challenged in 2011.*"[454] Sentencing dozens of individuals to life imprisonment in such an egregious judicial process constitutes a travesty of justice, and a clear indication of the arbitrariness of the Egyptian judicial system.

449. The Court of Cassation has scheduled the first hearing of the appeal process in October 2017.

450. Nevertheless, the case of *Douma and 268 others* is not the only one in which defence counsel have been subjected to prosecution to silence criticism. *Twenty-two lawyers* were prosecuted in Minya for "insulting the judiciary" after they participated in a demonstration outside the court in 2013 to protest against the extraordinarily unfair sentences imposed on their clients. Eight of them were sentenced *in absentia* to life imprisonment and other one to three years.[455] In March 2017, the lawyers tried *in absentia* were retried and sentenced to five years' imprisonment.

451. As a consequence of this latest unfair conviction, the Lawyers Syndicate called upon all lawyers "*not to interact with judges or court employees*", and hundreds of lawyers responded by starting a nationwide strike.[456]

452. Another case that must be analysed when assessing the Egyptian judicial system is the case of *Yara Sallam and 22 others*. The case embodies most of the fair process violations that characterise the current practice of Egyptian courts and that were listed in the previous section of this chapter.

453. Sallam is an award-winner human rights defender who, at the moment of her arrest, was working for the NGO Egyptian Initiative for Personal Rights (EIPR). The arrest of the defendants took place whilst they were demonstrating against the recently-approved Protest Law. Nevertheless, according to Amnesty International, Sallam was not even participating in the protest[457] but buying drinks from a local kiosk in Heliopolis.[458]

454. The defendants were accused of breaching the same law they were protesting against by participating in an unauthorised demonstration and organising it without prior notice. They faced charges of "*sabotaging public properties*"; "*possession of inflammable materials*"; and "*taking part in showing off force with the objective of terrorising the public.*"[459] Sanaa Seif, the sister of Alaa Abdel Fattah, was among the 23 accused.

455. Sallam was interrogated by unidentified individuals, without the presence of her lawyers, about her human rights work and her activities in the EIPR, which reinforces the argument that she was prosecuted due to her human rights activism.

456. They were arrested on June 21, 2014, and their trial began on June 29. Due to the unusual procedural speed, the defence counsel "*faced major logistical challenges obtaining the case file*"[460] and only had access to part of the investigation file at the beginning of the trial, thus ignoring evidence that was later demonstrated to be essential. Moreover, neither the defendants' counsel nor their families were informed of the defendants' transfer to police stations.[461]

457. Additionally, lawyers were not informed that the location of the first hearing was transferred from the Heliopolis Misdemeanour Court to a police training academy in Tora, despite the fact that the ministerial order to change the location had been signed three days before the hearing. Defence counsel had to run to the new courtroom, which they had problems in accessing. The defendants' families were prohibited entry.

458. The trial was finally adjourned until September, but this case is reflective of a wider problem in the Egyptian judicial system, that of lack of time and facilities to prepare a defence.

459. In breach of the principle of presumption of evidence, the men accused in this case were handcuffed during trial[462] and Sallam was held in a cage.[463] Moreover, the 23 accused were convicted despite the fact that the judge failed to analyse the individual guilt of each accused. As a matter of fact, the initial hearing on the merits of the detention of Sallam was not held and "*there was no form of individualised hearing on the merits of the detention.*"[464] The judge's decision only referred to one piece of evidence: the statement of an officer present at the scene.[465]

460. Interestingly, according to the ICJ, no evidence could place the 23 individuals at the demonstration, and the video broadcasted to show that five of the accused were in the protest only showed police officers using violence against protesters and that the only

armed individuals were actually "*members of the security forces in plain clothes.*"[466] Defence lawyers noted serious inconsistencies among prosecution witnesses' testimonies: "*the police secretary accused the protesters of damaging a police vehicle at 9:30pm on 21 June 2014, despite the demonstrators having been arrested at 5:30pm that day.*"[467]

461. On July 3, 2014, several Special Rapporteurs of the Human Rights Council, including the Chair-Rapporteur of the Working Group on Arbitrary Detention; Chair-Rapporteur of the Working Group on the issue of Discrimination against Women in Law and in Practice; Special Rapporteur on the promotion and Protection of the Right to Freedom of Opinion and Expression; Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association; Special Rapporteur on the situation of Human Rights Defenders; and Special Rapporteur on Violence against Women issued a joint urgent appeal to the Government of Egypt expressing concern about the detention and prosecution of the human rights defenders.[468]

462. Despite these serious procedural deficiencies, the absence of evidence linking Sallam to any violence, and the multiple violations of the defendants' due process rights, on October 26, 2014, Cairo Misdemeanours court found 22 of the accused guilty and sentenced them to "*three years' imprisonment, a further three years' police monitoring, a fine of 10,000 Egyptian Pounds (approx. €1,098) each, and the payment of compensation for the damages caused.*"[469]

463. The decision was appealed, but contrary to what was held by the report commissioned by the State Litigation Authority of Egypt, the appeal process did not correct judicial mistakes. Far from annulling the sentence and releasing the 22 individuals, on December 28, 2014, the appeal court, sitting in New Cairo Police Academy, sentenced them to two years in prison. The sentence on appeal was condemned by several human rights groups, which noted that the charges were baseless and that the judicial process had constituted a show trial[470] "*based on scant evidence and intended to warn citizens against defying government policies.*"[471]

464. After 15 months in prison, both Sallam and Sanaa Seif were released following a presidential pardon that involved 165 individuals. Most of them had been sentenced and imprisoned for having protested against the new military regime's abusive policies. It must be noted that at the moment of their release, defendants had appealed their cases to the Court of Cassation, but – as exposed in the UN Special Procedures' joint urgent appeal - it was unlikely that the Court of Cassation would render a decision in this case "*before two years,*" [472] which rendered the appeal useless.

465. Comparable to what was previously concluded in the Al-Jazeera case, a presidential pardon is not indicative of the fairness of the judicial system but, on the contrary, of its arbitrary character. Moreover, as the report commissioned by the State Litigation Authority of Egypt recognises, the presidential pardon does not originate a right to compensation for miscarriages of justice:

> "*No compensation is due if the conviction is set aside upon appeal, before the judgment becomes final, or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, rather than because of a miscarriage of justice.*"[473]

466. Consequently, Sallam and the other defendants in the same case have not received any compensation from the Egyptian State for the violation of their rights to personal freedom as a result of their unfair judicial process.

467. In December 2015, after Sallam's release, the UN WGAD concluded that her deprivation of liberty had been arbitrary and called upon the Government of Egypt to accord her "*adequate remedy*", including an enforceable right to *compensation* in accordance with article 9(5) of the ICCPR.[474] The UN WGAD confirmed the complete absence of evidence to convict Sallam by noting that "*no information on any evidence of Sallam's role, if any, in the demonstration (including alleged violence) was provided by the Government.*"[475]

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinión No. 52/2015 (Egypt) **UN Doc No. A/HRC/WGAD/2015/52**

Date: 6th April 2016 **Government reply**: 7th May 2015

Victim

Yara Sallam, Transitional Justice Officer at the Egyptian Initiative for Personal Rights. Recipient of the North Africa Shield 2013 prize for her work on the Women's Human Rights Defenders Program at Nazra for Feminist Studies.

Facts

A detailed exposition of the case of Yara Sallam can be found in Chapter XX. In summary, she was arrested alongside her cousin, on 21st June 2014 while they were buying drinks in a kiosk. She was subsequently interrogated without the presence of her lawyers about her human rights work and the organisation she worked in. She was accused of participating in an illegal demonstration calling for the release of prisoners of conscience the same day she was arrested, and of committing violent acts, even though she claimed that she had not attended the protest. She was transferred to another police station without informing her lawyers or families of such transfer.

Finding

The WGAD concluded that Yara Sallam's detention was arbitrary. First, the fact that immediately after her arrest, she was questioned about her human rights work, confirmed that the deprivation of liberty "*related to her human rights activities*". The WGAD noted the lack of evidence to support the criminal allegations against Mrs. Sallam and the absence of credible and specific criminal allegations against the defendant. According to the WGAD:

"*the Government did not rebut the prima facie reliable information that Ms. Sallam was not actively participating in any demonstration at the time of her arrest. Instead the Government merely stated in general terms that participants in the demonstration blocked the road and impeded the flow of traffic. No information on any evidence of Ms. Sallam's role, if any, in the demonstration (including alleged violence) was provided by the Government to the Working Group*" (emphasis added).

The WGAD reiterated its concerns over the Law on the Right to Public Meetings, Processions and Peaceful Demonstrations" n°107-2013, holding that it leaves the door open to a very restrictive and repressive interpretation and that it recognises collective responsibilities.

Finally, the Working Group concluded that Mr. Sallam's deprivation of liberty was contrary to both Article 9 of the ICCPR—as she was not brought before a judicial authority for eight days after her arrest—and Article 14—as she was not assisted by a lawyer during the first interrogation—.

468. Surprisingly, although the case of Yara Sallam and 22 others awakened widespread international criticism and appeared in several international media outlets – articles in newspapers such as The Guardian having portrayed the case as an indication of the disappearance of justice in Egypt;[476] the report commissioned by the State Litigation Authority of Egypt did not make any mention to it, and thereby demonstrates its willingness to ignore the actual facts, and simply manipulate the truth to support its position.

469. In spite of the gravity of the attacks on lawyers and the violations of due process and fair trial standards in the previous cases, there are three judicial cases that have awakened unparalleled outrage and dismay in the international community: the *Matai*, the *Adwa* and the *Kerdasa* police stations cases, in which hundreds of individuals were tried together and sentenced to death in mass trials.

470. In the Matai police station case, held in March 2014, the Minya Felonies Court tried 529 individuals for participating in an "attack" on a police station. Although only one police officer died as a result of clashes between demonstrators and security forces, all defendants were found guilty of murder and of "*'attempted murder of two other officers', 'seizing weapons' and 'damaging public property.* "[477] Notably, most accused were supporters of the Muslim Brotherhood or of the Freedom and Justice Party, consequently, there were perceived as political opponents to the new military regime after the coup d'état of Sisi.

471. All defendants were tried in a single session and sentenced two days later: the 529 individuals were sentenced to death in a two-sessions trial of less than 100 minutes. The verdict was perceived as part of the "*continuing crackdown on individuals suspected of supported the ousting President.*" [478]

472. Eight human rights Special Procedures Rapporteurs of the United Nations Human Rights Council issued a joint statement noting the "*numerous procedural irregularities*" reported, including limited access to lawyers during proceedings - several lawyers were prevented from entering the court during the trial, and trials *in*

absentia - more than three-quarters of the defendants, 398 citizens, were not present at court.[479] The experts declared to be:

"*appalled by the lack of clarity of the charges under which each individual was sentenced to death. Reports that some of them received capital punishment for charges of unlawful gathering, or any other offence not involving murder, indicate a clear violation of international law.*"[480]

473. The United Nations experts concluded that the imposition of the sentence of death on 529 defendants, after a two-day trial, made "*a mockery of justice.*"[481]

474. This case stands for the inequality of arms between the prosecution and the defence. It has been reported that in the Matai police station case "*no evidence was put forward by the prosecution implicating any individual,*"[482] while the defence was allowed to neither present its case or to call witnesses. Contrary to the principle of presumption of innocence and the court's obligation to demonstrate criminal responsibility on an individual basis, "*in its judgment, the court did not detail what evidence it was relying upon or how the evidence proved the guilt of each particular accused on the particular charges.*"[483]

475. According to the United Nations OHCHR, the judge did not even call on "*each defendant by name*" and some of the defendants who were in detention at the time of the trial "*were not brought to the court.*"[484]

476. As a matter of fact, although the evidence submitted to court demonstrated that a small number of individuals were carrying wooden or metal sticks, "*nothing in the court's judgment identified its reasoning for its finding that particular accused possessed one or more particular weapons,*"[485] and it was a sufficient evidence to make a general finding of guilt and justify the conviction of hundreds of individuals to either life imprisonment or death.

477. Moreover, exculpatory evidence was not taken into account. Although two police officers declared, respectively, to have witnessed five and two of the accused beating

Colonel Mostafa Rajab Al Atar to death, the Court found that nine accused had participated in his death. The Court did not clarify "*which accused the police officer had identified"*[486] and the police officer was not a direct witness of the Colonel's killing, as he stated that he learned about his death later. Moreover, the Colonel's wife identified two individuals responsible for her husband's death, but the identity of one of them did not match with those identified by the first police officer. Moreover, the list of names of suspects provided by police reports did not match "*the names given by either police officer.*"[487]

478. Despite the absence of evidence and the grave contradictions between witnesses' testimonies, the Court convicted the accused, a decision that demonstrates that since mid-2013, Egyptian courts have manipulated the most basic criminal guarantees – including the principle of presumption of innocence – to start a policy of judicial oppression and mass incarceration of political opponents by the new military regime.

479. After the Minya Felonies Court received the Gran Mufti's opinion, most of the convicted were sentenced to life imprisonment, but the Court upheld the death penalty for 37 individuals.

480. The second one, the *Adwa* police station case, was held in April 2014. In this case, the Minya Felonies Court sentenced 683 individuals to death for the attack on the police station and the killing of police officers in August 2013, a month after the military coup d'état that ousted former President Mohammed Morsi. The trial consisted on "*one short trial session and one, 15-minute sentencing hearing.*"[488]

481. The judgments in both this and the Matai case were "*poorly reasoned, repetitive, frequently incoherent and used insulting and inappropriate language*", and stood for the use of vocabulary and narratives incompatible with objective legal terminology and with the principle of presumption of innocence. For example, the *Adwa* case referred to one accused as "*the devil Mohammed Badie who has come out of the core of hell along with the other devil accused.*"[489]

482. According to the ICJ, both judgements failed to analyse:

> "*how the evidence substantiated the charges against each individual accused. Instead, the court set out the underlying events as it found them, listed the content of the prosecution's evidence it appeared to be relying on, responded summarily to some of the statements made by defence counsel or defence witnesses on behalf of some of the accused, before listing which accused were convicted and which accused had been acquitted.*"[490]

483. Despite the fact that in the *Adwa* police station case the Minya Felonies Court only analysed the killing of nine individuals, it convicted all the 683 accused on charges of premeditated intentional murder, and then, on June 21, 2014 – after hearing the Grand Mufti's opinion – confirmed death sentences against 183 of these individuals and 15 years' imprisonment against five citizens.

484. The Court failed to provide a reasoned judgement that would explain how these 188 citizens were individually responsible for the killings. Although it could be demonstrated that a small number of the defendants were in the police station,

> "*none of the evidence appears to name or identify the individuals responsible for the killings*", and although the Court concluded that it considered all the accused collectively responsible for the crime, "*none of the evidence listed by the court appears to demonstrate any complicity or conspiracy between the accused to carry out the killing.*"[491]

485. Apart from failing to provide a legal and reasoned analysis of the individual criminal responsibility of each of the 188 convicted individuals, the Minya Felonies Court ignored key exculpatory evidence that could have demonstrated that a number of the accused were not in the police station at the time of the events.

486. Moreover, two of those convicted, Mohammed Badie – Supreme Guide of the Muslim Brotherhood – and Mabrouk Mamdouh Abdel Wahab, were found guilty of inciting the attack against the police station. The Court justified its finding in two documents – one of them based on "secret" police sources – that indicated that Badie had called the organisation of protests to demand Morsi's return to power. After analysing both pieces of evidence, the ICJ found that none of them seemed to be

> "*sufficient to prove that each of the first two accused incited a violent attack on Adwa police station*", furthermore, the ICJ added, "*no other evidence listed by the court in its judgment appears to support this charge against the first two accused*".

Consequently, both men had suffered a breach in the right to be presumed innocent until proven guilty.

487. After the verdict, a group of African and UN human rights experts issued a joint statement noting that both Matai and Adwa trials constituted "*a continuing and unacceptable mockery of justice that casts a big shadow over the Egyptian legal system.*"[492] They declared that the trials constituted a violation of both the ICCPR and the African Charter, to which Egyptian authorities are bound.

488. It must be highlighted that the number of people sentenced to death is "*the highest recorded in the recent past from two mass trials.*"[493] The authors decided to wilfully ignore that hundreds of individuals were simultaneously charged with the murder of the same police officer.

489. The report commissioned by the State Litigation Authority sought to diminish the relevance of these appalling and outraging mass death convictions by presenting several arguments:

a. First, the authors of the report echoed the narratives and the vocabulary of the military regime and devoted several paragraphs to explain that the defendants'

actions constituted an alleged "*larger coordinated attack*" against twelve police stations in Minya, as part of "*the Muslim Brotherhood's systematic plan targeting military and police structures.*"[494] Moreover, although completely unrelated to the facts of the trial, the authors of the report also mentioned the "*dramatic rise in revenge attacks against Christian sects*" in the Minya governorate.[495]

i. These paragraphs appear to seek to justify the extreme judicial measures and portray the defendants as violent criminals, in spite of the lack of evidence showed during trial to prove the allegations, as well as the difficulties of the defence to bring their own evidence to court and the lack of specification of the individual criminal responsibility of each defendant.

b. Second, the report seems to place all blame for the abuses committed during trial on Judge Said Youssef, who was leading both Matai and Adwa judicial processes. The report attempted to portray him as an exception in the Egyptian judiciary:

i. "*Both trials were heard before the same Judge who had initially recommended that all 1,212 accused be sentenced to death in March and April 2014. It was this initial recommendation, from a single judge, sitting in the same courtroom, which sparked international condemnation*"[496] (emphasis added).

ii. Nevertheless, as shown in the previous cases, several other judges were in charge of judicial processes characterised by serious violations of the defendants' right to a fair trial. Therefore, the problem has not arisen as a result of the actions of a specific judge, but due to deficient legislation, appointment mechanisms and incentives that affect the whole judicial system.

iii. Furthermore, although the report noted that the Judge, known in Egypt as 'Said the butcher', "*no longer sits on criminal trials*", he is still part of the civilian judiciary.

iv. Finally, contrary to what is stated in the report commissioned by the State Litigation Authority of Egypt, the "*initial recommendation*" by Judge Said Youssef, was not the only decision that "*sparked international condemnation".* The confirmation of dozens of death penalties after consulting the Grand Mufti's opinion was also widely criticised by the international community, with a group of nine United Nations experts issuing a statement expressing "*outrage*" for this decision, which constituted "*the largest mass death sentence to be confirmed in Egypt in recent history.*"[497]

c. The report commissioned by the State Litigation Authority of Egypt notes that the Court of Cassation, on appeal, ordered a retrial of these two cases.

i. However, it must be highlighted that the Court of Cassation claimed that the Minya Felonies Court had failed to "*provide reasons for acquitting some of the accused,*"[498] while ignoring the same problem of lack of reasoning with regards to the convictions.

ii. Moreover, already in 2014, several United Nations legal experts claimed that it would be unlikely that another mass trial would observe fair trial standards.[499] Justice cannot be served unless defendants are tried individually and guaranteed a proper defence. As shown by the cases previously exposed, retrials ordered by the Court of Cassation have led to new lengthy convictions, so it is likely that the retrials will lead to dozens of renewed death penalties or sentences of life imprisonment.

iii. As a matter of fact, on August 2017, Minya Criminal Court announced a new sentence in the re-trial of the *Matai police station case* (case No.

8473/2013)[500]: The Court condemned 12 defendants to death, and 140 individuals to life imprisonment - nine of them in absentia - and two to 10 years' imprisonment.[501]

iv. In August 2017, the human rights organisation Egyptian Initiative for Personal Rights (EIPR) issued a press release condemning the new verdict. The organisation explained that the retrial was characterised by numerous violations of the defendants' right to a fair trial, including violations of the principle of equality of arms and the right to be presumed innocent until proven guilty. Defence lawyers complained that they:

> "*were only permitted to speak for two minutes for each defendant, and the court rejected requests made by the defense to hear from some witnesses and cross examine others. In addition, the court did not call on experts to analyse the videos that were used as evidence against the defendants. A previous ruling by the Court of Cassation to send the case back for retrial, described the camera footage as incorrect.*"[502]

v. Despite of the lack of evidence and the numerous human rights violations suffered by the defendants, Egyptian courts have still sentenced a dozen of citizens to death and hundreds to life in prison for the murder of a single police officer.

vi. The retrial of the Adwa police station case is ongoing at the time of writing.[503]

d. Finally, the report commissioned by the State Litigation Authority of Egypt noted that the fact that the majority of the accused in these mass trials were tried and sentenced in absentia "*makes it evident that, according to the*

existing judicial safe guards set out in Egyptian laws, none of those sentenced persons may, in effect, be executed."[504] However, in the retrial process, all those sentenced to death were tried in their presence, while 110 of those convicted to life imprisonment are "*currently in detention,*"[505] so their sentences can be - and are being - executed.

490. The retrial of the *Kerdasa police station case* also led to the imposition of more than a hundred lengthy sentences, including 20 death penalties.

491. In this case, the Giza Felonies Court tried 188 individuals for their responsibility in another attack on a police station the same day that the massacre of Rabaa al-Adawiya Square took place.

492. The trial was held in the Tora Police Institute, thus outside ordinary court premises. The judge in this case did not allow any defence witnesses to provide their testimony, while key prosecution witnesses were absent from court and consequently, could not be cross-examined.[506] This lack of proportionality between the tools and opportunities provided to the defence and the prosecution to present and support their cases led to a blatant violation of the defendants' right to a fair trial.

493. According to the ICJ, the trial was characterised by several violations of fair trial standards, including:

"*denying many of the accused the right to legal counsel, denying the right to a public hearing, refusing to allow defence witnesses to testify, prohibiting the cross-examination of prosecution witnesses by defence counsel, and failing to produce credible evidence as to the individual guilt of each accused.*"[507]

494. In February 2015, the Giza Felonies Court sentenced 183 of the accused to death. The Court also issued a not-guilty verdict for two defendants, dropped the charges against another two, and condemned a minor to ten-years' imprisonment. Among those

sentenced to death was Samia Habib Mohammed Shanan, "*the first woman to be tried and sentenced to death since the military coup in July 2013.*"[508]

495. Although one year later, in February 2016, the Court of Cassation annulled the death sentence of 149 of these accused and ordered a retrial, the Cairo Criminal Court upheld death penalties against 20 defendants and sentenced 80 individuals to life imprisonment. Thirty defendants were also handed sentences 15 years' imprisonment, and a minor received 10 years.[509]

496. The analysis of these cases leads us to conclude that since July 2013, under the new military-led regime, defendants are not usually given adequate time and facilities to prepare a defence. In the analysed period, judges have failed to ensure equality of arms and public hearings and have breached the presumption of innocence by handing down convictions despite an alarming lack of evidence and the absence of any analysis of individual conduct and responsibilities. Due to its systematic character, it is possible to discern a clear pattern of violation of due process standards that have transformed the Egyptian judiciary into a tool of repression against political dissent and human rights activism.

497. These are not isolated cases, but exemplifications of a wider and more serious problem in the Egyptian judicial system, that of a lack of respect for fair trial and due process guarantees. In this vein, various United Nations Special Rapporteurs and human rights experts noted, with regards to the mass death convictions, that there "*a clear need for a serious and comprehensive reform in any legal system that allows for such developments to occur*"[510] (emphasis added).

Chapter 6: Arrest and Detention

498. This chapter analyses the serious problems present in the Egyptian judicial system with regards to arrest, pre-trial detention, and conditions of detention.

499. Since the military coup d'état of 2013 and the ascendance of President Sisi to power, constant reports and abundant evidence of torture, enforced disappearances, and deaths in custody of political opponents and critics of the new regime, have contributed to generate a concerning portrait of the Egyptian prison system and of official detention policies, thus tarnishing the international reputation of the new regime and particularly, of the Egyptian judiciary.

500. The report commissioned by the State Litigation Authority acknowledges these "*unprecedented*" criticisms, noting the numerous allegations of "*mass and arbitrary arrests, enforced disappearances, of failing to comply with due process during arrest, and criticisms in relation to the conditions of pre-trial detention and torture in custody*"[511] and devotes a full chapter to analyse the State's response to these allegations. Sadly, the report adopts a counter-terrorism narrative and calls for a reading of these allegations in "*the context of the impact of unprecedented levels of terrorism*"[512] in the country; thus, attempting to either justify or diminish the gravity of these abusive violent practices in Egypt.

501. Nevertheless, no terrorist threat or counter-terrorism policy could ever justify mass and systematic violations of human rights, the use of torture against citizens or the practice of widespread enforced disappearances. According to the Fact Sheet on Human Rights, Terrorism and Counter-terrorism drafted by the OHCHR:

> "*not only is the promotion and protection of human rights essential to the countering of terrorism, but States have to ensure that <u>any counter-terrorism measures they adopt also comply with their international human rights obligations</u>*"[513] (emphasis added).

502. Similarly, the OHCHR clarified that if a counter-terrorist measure involves a deprivation of liberty, "*strict compliance*" with international human rights law related to the liberty and security of persons and the right to due process "*is essential*".

Arbitrary Arrests of Egyptian Citizens

503. Article 9 of the ICCPR recognises the right to liberty and determines the maxim that "*no one shall be subjected to arbitrary arrest or detention.*" Arbitrary arrests are different from unlawful arrests, described as those which are not conducted "*on such grounds and in accordance with such procedure as are established by law.*"

504. In order to make a proper analysis of the arrest practices in Egypt, it must be noted that the Human Rights Committee deepened into the differences between arbitrary and unlawful arrests, clarifying that arrest or detention may be authorised by domestic law "*and nonetheless be arbitrary*". According to the Committee:

> "*The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.*"[514]

505. Therefore, the mere reference to the existence of national legislation to justify the validity of a certain arrest is not acceptable. In this vein, arrest or detention as punishment for the legitimate exercise of human rights, or after a manifestly unfair trial "*is arbitrary*" according to the Human Rights Committee.

506. Since mid-2013, it is estimated that 41,000 people – particularly political opponents, human rights activists and journalists – have been arrested by Egyptian security forces. The government itself has acknowledged 34,000 arrests.[515]

507. After the military coup d'état that ousted Egypt's first freely elected president Egyptian authorities started a "*crackdown on the Muslim Brotherhood*" that expanded to all those who expressed opposition, dissent or criticism towards the new regime or who exposed human rights violations.[516] Human Rights Watch identified "*a widespread campaign of arrests targeting a broad spectrum of political opponents,*"[517] which Amnesty International defined as a "*sweeping crackdown on dissent*" that has put "*at least 34,000 persons – by the government's own admission – and possibly thousands more, behind bars.*"[518] According to a government-sponsored fact-finding commission in July 2014, 7,000 people arrested during Morsi's removal in mid-2013 "*remained in pre-trial detention.*"[519]

508. The report commissioned by the State Litigation Authority acknowledges that security forces have conducted mass arrests of Egyptian citizens: 600 individuals were arrested in April 2015 in the Sinai Peninsula, and 100 more in April 2016 in the context of a demonstration against the government to protest against the transfer of sovereignty of the Tiran and Sanafir islands to Saudi Arabia. The report seeks to justify both instances of mass arrests by alleging counter-terrorism needs, portraying the Muslim Brotherhood, the main political group in the opposition, as a terrorist entity.[520]

509. The reality is that both instances were arbitrary, as they failed to guarantee the international standards established in Article 9 of the ICCPR, and were aimed at supressing the legitimate exercise of human rights.

510. According to international law, arrests must be conducted under reasonable suspicion that each of the arrestees have committed an offence. However, the mass arrest of 100 individuals in April 2016 was simply intended to impede the celebration of a legitimate demonstration.

511. Criticisms towards the government or towards other nations cannot justify the arrest of a hundred people, and the fact that the demonstration was organised without the consent of authorities does not render the demonstration illegitimate. As a matter of fact, the obligation to obtain previous consent to call demonstrations, contained within the Law on the Right to Public Meetings, Processions and Peaceful Demonstrations" No. 107 of 2013, has been severely criticised and considered contrary to international law.

512. The Working Group on Arbitrary Detention declared that the law appeared "*to be used as a tool for cracking down on peaceful demonstrations,*" noting that it placed "*extremely broad restrictions to the right to freedom of expression and peaceful assembly.*"[521] Similar criticisms were expressed by the UN High Commissioner for Human Rights, who called upon Egyptian authorities "*to amend or repeal this seriously flawed new law.*"[522] In particular, the UN High Commissioner for Human Rights expressed concerns at the massive fines and prison sentences "*that can be imposed on those found to be in breach of this law.*" [523]

513. Therefore, the allegation that the arrests were 'lawful' on the basis that the demonstration was contrary to the Protest Law, does not impede to characterise them as repressive, politically motivated and consequently, as "*arbitrary*".

514. Article 9 of the ICCPR regulates the rights of those who have been subject to arrest, including the following:

The right to be informed, at the time of arrest, of the reasons for the arrest:

515. In 2014, the Human Rights Committee provided a comprehensive interpretation of the rights contained within Article 9 in its General Comment No. 35.[524] In this General Comment, the Human Rights Committee indicated that this requirement applied broadly *"to the reasons for any deprivation of liberty,"* [525] regardless of the formality or informality of the arrest, and that information must include not only the legal basis for arrest, but also the "*enough factual specifics to indicate the substance of the complaint.*" [526] The Committee further clarifies that this right is designed to enable

arrestees "*to seek release if they believe that the reasons given are invalid or unfounded.*"[527]

516. Although Article 54 of the Constitution of Egypt prohibits conducting arrests without warrant, except in cases of *flagrante delicto*, Egyptian security forces often fail to show such warrants or explain the reasons of the arrest. As a matter of fact, Human Rights Watch noted in its last report on Egypt, that in none of the cases it had documented "*did police or National Security officers show suspects a warrant or tell them why they were being arrested.*"[528] Similar allegations were communicated to the UN Working Group on Arbitrary Detention:

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion No. 42/2016 (Egypt) **UN Doc. No. A/HRC/WGAD/2016/42**
Date: 6th December 2016 **Government reply**: None

Victim

A student at the University of Cairo, Ahmed Yousry Zaky.

Facts

On 3rd May 2015, security forces raided and searched Mr. Zaky's home, and subsequently, they handcuffed and arrested him without showing a warrant. Mr. Zaky was brought to the homeland security headquarters in Lazoghly, where he was severely tortured and held in secret detention for one month, until "*he confessed to the crimes that he had been accused of*". On 4th June 2015, he was brought before a military prosecutor without his lawyer, and charged under the counter-terrorism law for "being affiliated to a terrorist group", "blocking traffic and roads", "sabotaging power stations", "arson", "disturbing public order" and "participating in the murder of a police officer"; charges that could be punished by death. His lawyer could only meet him after he left the prosecutor's office. He was blindfolded—so he did not have the opportunity to read the prosecutor's papers, although he was required to sign them—and even if he showed clear signs of torture, the prosecutor denied the lawyer's request to authorize a medical examination.

Following the expansion of military jurisdiction to try civilians by *Law No. 136 of 2014 on the securing and protection of public and vital facilities*, Mr. Zaky was indicted in military case No. 288 of 2015. Mr. Zaky was accused, alongside 52 other defendants, of killing of Colonel Wael Tahoun on 21 April 2015, despite the fact that his family testified that Mr. Zaky was with them when the crime was committed.

Mr. Zaky was subsequently transferred to Al Aqrab prison, whose authorities refused all visits to inmates in November 2015. He has not received adequate medical attention since the moment of his detention despite his deteriorating health situation.

Seven months after his arrest, in January 2016, Mr. Zaky was finally taken before a military court, which has admitted the confessions obtained under torture as a key evidence in his trial.

Finding

The WGAD found that Mr. Zaky's deprivation of liberty is arbitrary and falls within categories I and III of arbitrary detention. First, Mr. Zaky was not informed of the reasons for his arrest, and consequently his detention could not be based on legal grounds and constituted a breach of Article 9 of the ICCPR. Second, Mr. Zaky's deprivation of liberty was contrary to Article 14 of the ICCPR because he was deprived from access to a lawyer, was subjected to military justice, and his confession was used to confirm the charges. According to the Working Group,

"*when someone is forced to confess to a crime, and that confession is then used to convict him or her, then the*

The right to be promptly informed of any charges against him

517. General Comment No. 35 notes that this fundamental right applies in connection with ordinary criminal prosecutions as well as with military or other special prosecutions "*directed at criminal punishment.*"[529] Nobody can remain detained without knowing the charges he has been accused of. Otherwise, the detained cannot challenge the legal basis for the deprivation of his liberty.

518. Nevertheless, on numerous occasions, the Egyptian authorities have failed to inform detainees of the reasons of their detention. Although the report commissioned by the State Litigation Authority highlighted that the U.S. Department of State had noted in a 2015 report that "*authorities usually inform [defendants] promptly and in detail of charges against them*", it failed to inform that the same report had also reported hundreds of arrests that did not comply with due-process laws as "*authorities did not charge the detainees with crimes.*"[530]

519. Again therefore, the State Litigation Authority report continues to be selective in its use of evidence, and therefore manipulate the true picture. *The right to be promptly brought before a judge or other officer authorised by law to exercise judicial power.*

520. The Human Rights Committee has clarified that this right must be respected in all cases "*without exception*"[531] – regardless of the choice of the ability of the detainee to assert it – and even before "*formal charges have been asserted.*" [532] In order to guarantee respect for the rule of law and ensure both the safety of the detained person and the legality of his deprivation of liberty, it is essential that the person is "*physically*"[533] brought before a judge and placed under judicial control. His detention must not exclusively depend on law enforcement officials.

521. A direct corollary of this right, is the States' obligation to facilitate access to counsel for detainees in criminal cases "*from the outset of their detention,*"[534] as lawyers must assist detainees during the whole judicial process.

522. General Comment No. 35 gave specific guidelines for interpretation of the term 'promptly' in this Article, noting that 48 hours is "*ordinarily sufficient*"[535] to prepare for the judicial hearing, and consequently, any delay longer than 48 hours "*must*

remain absolutely exceptional and be justified under the circumstances" [536] (emphasis added), as it is widely acknowledged that the risk of torture and enforced disappearance dramatically increases the longer the detained person remains outside judicial scrutiny.[537]

523. Egyptian legislation seems to comply with the temporal standard, as Article 54 of the Egyptian Constitution reduces the time to "*24 hours*" from the moment the detainees' "*freedoms have been restricted*". However, Article 54 of the Egyptian Constitution does not require the detainee to be brought before a judge, but before "*the investigative authority*", which includes both prosecutors and investigative judges. Prosecutors are not the adequate authority to decide on the detention of a certain individual, as they fail to fulfil the requirements of independence, objectivity and impartiality established by the Human Rights Committee.[538]

524. The ICJ analysed the legislation regulating the temporary limits with regards to detention and found that detainees can be up to five days outside the supervision of the investigating judge - which is much longer period of time than the 48 hours recommended by the Human Rights Committee:

> "*The prosecutor can then order a detention period of four days, after which the accused must be brought before a judge. The investigative judge can then order a preventive detention for 15 days, renewable by a further 45-day detention and only after the 60 days have elapsed is the accused required to be brought before a judge.*"[539]

525. Moreover, in direct breach of both Article 9 of the ICCPR and the guidelines provided by the United Nations, Egyptian authorities have held several human rights defenders and political opponents in incommunicado detention for long periods of time. According to the ICJ, the practice of incommunicado detention has intensified following the ouster of Morsi and the "*crackdown against perceived opponents of the regime,*"[540] highlighting the gravity of certain cases in which individuals were "*held*

incommunicado for months and denied all access to legal counsel"[541] (emphasis added). The organisation emphasised the *Ansar Beit Al Maqdis case,* before the Cairo Felonies Court, in which most of the more than 200 accused were "*denied access to counsel and held incommunicado for between four and six months.*"[542]

526. According to the Human Rights Committee, incommunicado detention that prevents prompt presentation before a judge "*inherently violates*" [543] Article 9, and may also violate "*other rights under the Covenant, including articles 6, 7, 10 and 14,*" [544] referring to the right to life, the right to be free from torture or cruel, inhumane and degrading treatment, or the right to a fair trial. The Committee, therefore, notes the intrinsic connection between judicial control over the physical conditions of the detainee, and the protection of his most basic rights under the Covenant, thus making incommunicado detention a particularly heinous and dangerous State practice that renders the detention "*unlawful and arbitrary.*"[545] The Working Group on Arbitrary Detention has drawn similar conclusions:

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion 54/2016 **UN Doc No. A/HRC/WGAD/2016/54**
Date: 30th January 2017 **Government reply**: None

Victim

Mohamed Hamed Mohamed Hamza, a military officer in the Egyptian army.

Facts

On 27th April 2015, Mr. Hamza received a subpoena from the military intelligence and presented himself to the service. He was interrogated, arrested and detained without having been provided with any reasons. Mr. Hamza was held under incommunicado detention and solitary confinement, and beaten with sticks for days at the Nasr City facility of the military intelligence service. After days in this situation, Mr. Hamza confessed to crimes.

Subsequently, on 6th May 2015, he was brought before a military prosecutor in the absence of his lawyer, and was charged with "attempting a forceful coup, changing the Constitution of the State, its republican order and the system of Government" and with forcefully "attempting to occupy some public institutions".

His trial started on 18th May 2015, and he was tried alongside other 27 defendants before a military court, in hearings that were closed to the public. He remained incommunicado for long periods of time. The Court accepted the evidence obtained under torture (of Mr. Hamza and the other 27 accused), but refused to investigate the allegations of torture. Additionally, lawyers "*were not allowed to obtain copies of the prosecution records and were refused the right to bring their own files during the hearings*". On 19th August 2015, Mr. Hamza was sentenced to life imprisonment "*on the basis of the confessions he had made under torture*". Most defendants and all their lawyers were absent from the courtroom on the day of sentencing.

Finding

The WGAD found that the allegations were credible, and in the absence of a reply from the Government, it concluded that the deprivation of liberty of Mr. Hamza was arbitrary and contrary to Article 9 and 14 of the ICCPR. Moreover, it referred the situation to the Special Rapporteur on Torture.

The right to be tried within a reasonable time or to release:

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion 60/2016 (Egypt/Kuwait) **UN Doc No. A/HRC/WGAD/2016/60**
Date: 24th January 2017 **Government reply**: None

Victim

A student, Omar Abdulrahman Ahmed Youssef Mabrouk.

Facts

On 1st October 2015, Mr. Mabrouk was arrested in Kuwait City by members of the Kuwait State Security, who failed to show a warrant or to provide reasons for Mr. Mabrouk's arrest. He was held under incommunicado detention, and after the arrest, Egyptian judicial authorities issued a request of extradition based on "*unclear charges of being affiliated with a group that committed Internet- related crimes*". Mr. Mabrouk could not challenge the extradition because he was held under incommunicado, so on 2nd November 2015, he was extradited to Egypt, where he remained under incommunicado detention and was tortured for five months, until he confessed being involved in the constitution of an unlawful group. His family was not informed about the extradition and only heard about his detention on a later date.

As a result of his confession obtained under torture, Mr. Mabrouk was accused and charged with "*being a member of a terrorist organization and of being involved in extremist terrorist activities*", but the Prosecutor did not announce the specific charges against him. Therefore, according to the WGAD, "*Mr. Mabrouk has not been notified of any charge against him or been brought before a judge for more than one year*". He saw a lawyer for the first time on 11th April 2016—although he was not allowed to speak with him—and on 20th April 2016, he could see his family for the first time after 6 months of detention. Neither Mr. Mabrouk nor his lawyer have been able to access the legal file concerning his case.

Finding

The WGAD concluded that Mr. Mabrouk's detention was arbitrary. The Group confirmed that the allegations were credible and consistent with previous communications of the Working Group on Enforced or Involuntary Disappearances sent to both Egypt and Kuwait (see A/HRC/WGEID/108/1, paras. 62-63). Moreover, the WGAD noted that the facts reported match "*a pattern that the Working Group has observed in recent years, during the political crisis in Egypt*".

According to the Working Group, Mr. Mabrouk's detention was contrary to Article 9 of the ICCPR, as he was held incommunicado and prevented from challenging the lawfulness of his detention before a judge. The facts presented would fall within categories I and III of arbitrary detention, in particular, Egyptian authorities would have breached Mr. Mabrouk's rights to be informed of the reasons of his arrest, to challenge his detention before a court of law, and not to be forced to testify against himself or to confess guilt.

527. Article 9 of the ICCPR explicitly notes that detainees must be tried without undue delay and that pre-trial detention should *never* be the *general rule*. The UN Human Rights Committee has confirmed the exceptional character of pre-trial detention in its General Comment No. 35, which requires this type of preventive detention to be based on "*an individualised determination that it is reasonable and necessary taking into account all the circumstances.*" The Comment lists three possible purposes: prevent flight, interference with evidence or the recurrence of crime.

528. Moreover, the Human Rights Committee obliges national authorities to establish in law all the "*relevant factors*" to order pre-trial detention and prohibit the use of "*vague and expansive standards such as "public security.'*"" In this vein, the Committee prohibits the establishment of general rules that *de facto* order pre-trial detention "*for all defendants charged with a particular crime*", or based on "*the potential sentence for the crime charged.*"

529. However, Egyptian authorities have constantly failed to comply with these standards in both law and practice.

530. First, Egyptian Law does not require that "*all alternative measures to detention are considered prior to issuing a detention,*"[546] and therefore, it is not considered an exceptional and necessary measure. Moreover, the Law admits ordering pre-trial detention in cases that would not be accepted by the Human Rights Committee, such as where the crimes were committed

> "*in flagrante delicto and the judgment must be enforced as soon as it is issued, regardless of whether the accused appeals*" and, even more alarmingly, where "*it is necessary to prevent grossly compromising security and public order as a result of the magnitude of the crime.*"[547]

This vague reference to both public order and the gravity of the crime has been explicitly prohibited by the Human Rights Committee, as previously exposed.

531. While the legal framework is defective, the practice is even more upsetting, as both judges and prosecutors have applied a "*presumption in favour of pre-trial detention*" [548] (emphasis added) in the overwhelming majority of cases against members or supporters of the opposition, critics and human rights activists. As a result, hundreds and even thousands of Egyptian citizens have arbitrarily and unfairly remained in custody for "*years*".[549]

532. Moreover, judicial authorities have engaged in the systematic and rampant use of pre-trial detention and maintained thousands of Egyptians in jail for prolonged periods of time[550] without a proper legal basis to justify their imprisonment or adequate legal protection. Recent statistics released in July 2014 showed that 7,389 people remained in pre-trial detention "*in connection with the unrest surrounding Morsi's overthrow*"[551] one year before. Pre-trial detention has, consequently, become "*a tool to impose prison sentences without trial*" in Egypt.[552] As a matter of fact, although the Code of Criminal Procedure already allows prolonged periods of preventive detention,[553] Mansour passed a decree making pre-trial detention indefinite "*for persons accused of certain crimes.*"[554]

533. The report commissioned by the State Litigation Authority of Egypt acknowledges this situation and explains that the backlog of cases and the corresponding "*long periods in pre-trial detention and detention pending appeal*" is the practical consequence "*to the disbanding and subsequent constitutional prohibition of the special security courts (which used expedited procedures).*"[555] However, this argument - which the report also uses to justify the organisation of mass trials, the expansion of the military courts jurisdiction and the widespread violations of due process rights - cannot be accepted.

534. First, the Human Rights Committee has determined that prolonged pre-trial detention jeopardised the presumption of innocence, so it has explicitly established that delays in the completion of the investigations can never be justified on "*understaffing or budgetary constraint*". The elimination of a special jurisdiction, the emergency courts, known for serious violations of fair trial rights cannot lead to further and graver

breaches. If courts are unable to process all the cases on time, the exceptional character of pre-trial detention should lead to mass releases, instead of mass -baseless - incarcerations.

535. Nevertheless, although the shortage of both human and material resources is a concerning problem affecting the Egyptian judiciary, and could certainly be one of the reasons behind the widespread commission of human rights abuses during the investigation and prosecution of alleged crimes, taking into account both the general human rights situation in the country and the legislation and policies initiated by the Executive to crackdown on dissent and opposition, it is extremely unlikely that the lack of sufficient resources is the only factor explaining such situation.

536. As will be shown in the following chapter, Egyptian courts have been transformed into a tool of oppression, and the Egyptian legal system has attempted to provide an apparent veil of legitimacy to the abuses: having thousands of political opponents and critics to the new military regime populating Egyptian jails in the long term is an effective way to ensure the stability of the new political system, and a strategy already used by previous military regimes in Egyptian history.[556] As the Human Rights Committee defends "*deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.*"

537. As a matter of fact, numerous human rights organisations agree that pre-trial detention is being used as tool of political punishment in Egypt.[557] In May 2016, the Egyptian Initiative for Personal Rights highlighted that at least 1,464 citizens had spent more than two years in pre-trial detention, and therefore longer than that which is allowed by Egyptian law.[558]

538. The report commissioned by the State Litigation Authority of Egypt suggests that Egyptian authorities:

> "*have sought to address this issue and a number of amendments to the Criminal Procedure Code have been implemented and/or considered, including for example, proposals to place the* ***right to call witnesses in the***

hands of the court *which have been weighed up against the impact on the defence right to examine witnesses.*"

539. This proposed legislation, which was already analysed in the previous chapter, has been considered abusive by several human rights organisations and legal experts, as it gives unlimited powers to courts to decide whether to call and hear defence witnesses, thus breaching the rights to a defence, and the right to produce and examine witnesses.

540. It is surprising, that while in chapter IV the report commissioned by the State Litigation Authority holds that this new legislation is a positive as it would help reduce pre-trial detention, in chapter III it had praised the Government for returning the amendments for further review, as it demonstrated the country's "*active consideration of balancing various fair trial rights of an accused.*"[559]

541. This contradiction seeks to circumvent the only legitimate and lawful solution to the problem of pre-trial detention in Egypt: to stop the criminalisation of legitimate dissent, and release all individuals arbitrarily and unlawfully detained, particularly, those who have already spent two years or more in detention pending trial.

542. The following opinions of the Working Group on Arbitrary Detention are illustrative of the concerning problem of pre-trial detention in Egypt, which also affects minors:

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion No. 14/2015 (Egypt) **UN Doc No. A/HRC/WGAD/2015/14**
Date: 5th August 2015 **Government reply**: 18th February 2015

Victim

A minor whose name the WGAD did not disclose.

Facts

On 27th December 2014, security forces from the State Security Directorate arrested at him at his home in the presence of his family members. It was alleged that security forces did not show any arrest warrant. He was detained at the State Security Directorate where he was not allowed to meet or communicate with his family during several days. Despite credible evidence supporting his alibi, he was brought before a prosecutor and accused of destroying a police car and participating in a demonstration in support of the Muslim Brotherhood.

In its reply, the Government alleged that the minor was a member of the Muslim Brotherhood and that he was instructed to hire criminal elements and prepare Molotov cocktails for use against the vehicles of security forces. According to the Government, "*the arrested persons admitted during the investigations that they had been involved in setting fire to a police vehicle*". The Government maintained that the mandatory legal steps were taken to issue arrest warrants and to place the minor in pre-trial detention.

Finding

The WGAD found that the deprivation of liberty of the minor was arbitrary. First, it noted that the minor had been detained for four months at the Transfer Department of the Alexandria Security Directorate, and that "*irregular detention for such a long period in a security agency facility is a grave violation of the requirements relating to any form of pre-trial detention*". In this vein, the WGAD reminded Egyptian authorities that deprivation of liberty of a child shall be used only as "*a measure of last resort and for the shortest appropriate period of time*".

Moreover, the order of pre-trial detention had been rendered by a Prosecutor, so the minor was never taken before any judicial authority that could verify the legality of his arrest and detention. According to the WGAD, detainees must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power before 24 hours from their detention in case of juveniles. Nevertheless, a prosecutor cannot be considered as an "officer exercising judicial power" under Article 9.3, as this kind of power must be exercised by an authority which is "*independent, objective and impartial in relation to the issues dealt with*".

Finally, the WGAD expressed grave concern about the "*systemic and widespread arbitrary detentions of young individuals*" (emphasis added), and noted that these violations of the fundamental right to be free from arbitrary deprivation of liberty "*will render subsequent convictions unsafe*".

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion No. 53/2015 **UN Doc. No. A/HRC/WGAD/2015/53**
Date: 6th April 2016 **Government reply**: 3rd July 2015

Victims

Two minors whose names were not disclosed by the Working Group.

Facts

The first minor was arrested on 22nd February 2014 by several security forces, who stormed and searched his house without showing a warrant. The minor was subsequently blindfolded, handcuffed, forced into a military vehicle and brought to Atoka police station, where he was subjected to torture during three days. He was charges with affiliation to the Muslim Brotherhood, arson and participation in illegal demonstrations. His detention was renewed by the Public Prosecutor for 15 days. He was not brought before a judge, and the Prosecutor failed to show any piece of evidence that could justify his continued detention. He is held with adult detainees and has been denied medical care.

The second minor is the first minor's brother. He was arrested by security officers on 3rd January 2015 at his home. Officers did not show any arrest warrant. He was 13 years old at the time of his arrest. Like his brother, he was brought to Ataka police station and charged with affiliation to the Muslim Brotherhood, incitement to riot and participation in illegal demonstrations. He was tortured for 2 days and his detention has been renewed every 15 days, despite the fact that he is being held together with adult detainees. He has not been brought before a judge, and no evidence exists that could justify his detention.

The second minor was released four months after his arrest, in May 2015, while the first minor continued being detained with adults in a police station.

Finding

The WGAD found that the deprivation of liberty of both minors was arbitrary as it contravened articles 9 of the ICCPR and Article 37 of the Convention on the Rights of the Child (CRC). Article 37 of the CRC recognises that every child deprived of his liberty should have the right "*to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action*". In contrast, the two minors were detained without access to legal assistance and were deprived of the possibility to challenge the lawfulness of their detention before a judge, as they were never brought before a judicial authority.

Additionally, the WGAD made reference to the Egyptian Child Law, which states that children under 15 years old cannot be in preventive detention for over a week. In contravention of this law, the second minor was detained in a police station for four months.

Finally, the WGAD concluded that Egyptian authorities had failed to investigate the allegations of torture and to guarantee any of the requirements on the juvenile justice established in Article 40 of the CRC. In any case, according to the Working Group, "*pre-trial detention of juveniles should be avoided to the fullest extent possible*".

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion No. 17/2015 (Egypt) **UN Doc No.: A/HRC/WGAD/2015/17**

Date: 7th August 2015 **Government reply:** 6th March 2015

Victim

A minor whose name was not disclosed.

Facts

On 18th May 2014, members of the Central Security Forces arrested a minor while he was leaving his job and brought him to the Central Security facility of Banha. He was subjected to incommunicado detention, without access to his family or lawyer, "despite their repeated requests". As a matter of fact, his family did not receive any notification of his arrest, and was informed by witnesses to it. According to the minor's lawyer, he was charged with "*belonging to a terrorist group*" and having "*torn up a poster of Al-Sisi*". Eight months after his arrest, the minor has not been brought before a judge and "*no court hearings have been scheduled in his case*".

In its response, the Government explained that the minor was arrested "*together with others, in flagrante delicto and with their faces masked while committing the offence of setting off fireworks and destroying posters promoting the election of presidential candidates*".

Finding

The WGAD found that the minor's deprivation of liberty was arbitrary and in contravention of Articles 9 and 14 of the ICCPR, falling into category III of arbitrary detention. First, the WGAD highlighted that the Central Security facility of Banha is a detention centre for adults, and that the deprivation of liberty of a child is a measure of last resort and shall be used for the shortest appropriate period of time.

The minor had spent almost a year in detention, and according to the WGAD, "*the irregular detention for such a long period in a security agency facility is a grave violation of the requirements related to any form of pre-trial detention*". Moreover, the minor was never brought before a judicial authority to verify the legality of his deprivation of liberty, which is in contravention of Article 9 of the ICCPR.

Finally, the Working Group considered that holding a minor in incommunicado since the date of his arrest for almost a year, without any rights to visit being granted to his family or his lawyer "*is generally to be regarded as a violation of article 7 and 9 of the Covenant. Furthermore, the refusal of the prosecutor to provide medical assistance to the minor and initiate effective investigation, after the minor reported on 19 May 2014 that he had been beaten up at the time of arrest and showed the subsequent marks on his body, amounts to violation of article 2 in conjunction with article 7 of the Covenant*".

UNITED NATIONS WORKING ON GROUP ARBITRARY DETENTION

Opinion 30/2017 **UN Doc No. A/HRC/WGAD/2017/30**
Date: 22nd June 2017 **Government reply**: 10th April 2017

Victim

Mohamed Serria, former university professor at the Faculty of Medicine at Mansoura University. He underwent a liver transplant as a result of a hepatitis B virus infection, so he was living in France for medical reasons. In October 2014, he travelled to Egypt to visit his mother.

Facts

Mr. Serria was arrested on 28th October 2014 in the Faculty of Medicine of Mansoura, while he was filming four young individuals who were holding sticks. The arrest was conducted by civilians—the campus security personnel—for no apparent reason and without any evidence that would justify the detention.

He was transferred to Al-Mansoura First Police Station without having been informed of the reasons of his arrest or of any charges against him: he spent 36 hours "*without any investigation, charge or trial*". Immediately after Mr. Serria's detention, the President of the University referred to him as "*a dangerous terrorist*" in comments that were broadcast on Egyptian television. His comment changed the situation and the treatment Mr. Serria received from the police officers.

On 30th and 31st October 2014, he was interrogated by the police and the prosecutor, respectively, and on 5th November—a week after his detention—he was brought before a judge for the first time. The judge ordered a 15-days long preventive detention, which was extended in a subsequent hearing on 24th November. Mr. Serria's detention continued illegally beyond the 15 days ordered by the judge, until 13th December 2014, and then the court held weekly hearings until 8th January, when the case was transferred to a military court, as according to new legislation all university premises are considered military institutions in Egypt.

Mr. Serria was subsequently charged and tried for a series of crimes, including "*participating with other unknown people on a criminal plot to intentionally destroy public buildings and belongings*", "*terrorizing people and disseminating horrifying notions to cause chaos within society*", "*gathering with more than five people and intending to attack people and sabotage public buildings using violence and possessing rudimentary weapons that are deadly when used*", and "*participating in an unauthorized demonstration*". Nevertheless, at the time of the arrest there was no demonstration on the University.

Mr. Serria was charged alongside other four people, who were arrested in different places and times, but with whom the prosecutor maintained that Mr. Serria was in association to attack other four individuals "*and damage public and private property using violence and aggression*". According to the Government's response, Mr. Serria alongside the other defendants, participated in demonstrations without informing competent authorities, dropped "*incendiary materials and fireworks that set the buildings on fire*" and injured four individuals.

On 3rd September 2015, the Sixth District Criminal Martial Court found Mr. Serria guilty of the charges and sentenced him to seven years of imprisonment with hard labour. The appeal was rejected by the Court in second instance, thus rendering the verdict final.

Nevertheless, after being detained for almost two years and a half, Mr. Serria was released in mid-March 2017. However, the charges against him remain in his criminal record—which impeded him get a visa to return to France—, and he has not received compensation "*for the mental and economic damage caused during his imprisonment*".

Findings

The WGAD concluded that Mr. Serria's arrest, detention and deprivation of liberty were arbitrary, and fell within categories I and III.

First, the WGAD replicated the source's claim that the arrest was carried out "*without any evidence in support of the accusations, making it impossible to frame them under the legal basis used to justify them*". In this regard, for the Working Group, the fact that Mr. Serria was held for 36 hours without having been provided with information regarding the reasons of this arrest or the charges against him constitutes a breach of Article 9 of the ICCPR. Moreover, the WGAD noted that Mr. Serria was brought before a judge seven days after his arrest, and that he remained under pre-trial detention well beyond the 15-day period authorized by the court "*not just once, but twice*". For all these reasons, the WGAD found "*significant gaps in the review of the legality of Mr. Serria's continued detention*", which renders the detention arbitrary under category I.

Second, with regards to Mr. Serria's right to a fair trial, the WGAD criticized the fact that Mr. Serria was tried before a military court. The Group complained about the Government of Egypt's failure to justify why Mr. Serria's case was transferred to the military jurisdiction if he was arrested in University premises—which could never be considered of a military character—and did not attack military personnel. Consequently, the WGAD concluded that Mr. Serria, having been tried before military court being a civilian, did not receive a fair trial. Additionally, the WGAD highlighted the problematic absence of evidence to substantiate the charges, noting that the Government of Egypt failed to provide any information with regards the identity of the persons the defendants had allegedly attacked or any documentation demonstrating that such attack took place. Finally, the WGAD expressed concern at the lack of respect of the principle of presumption of innocence in Mr. Serria's case, as the statement by the President of Mansoura University could have had an adverse impact on the proceedings and therefore, on Mr. Serria's right to a fair trial. In this vein, the Working Group reminded Egyptian authorities that:

"*it is a duty of all public authorities to refrain from prejudging the outcome of a trial, for example by abstaining from making public statements affirming the guilt of the accused*".

The right to receive <u>compensation:</u>

543. Despite widespread allegations of arbitrary arrests and detention, compensation for detainees who have been abused or mistreated "*is seldom reported,*"[560] and even when it has been granted, the Ministry of Interior has, in some of those cases, "*failed to pay.*"[561]

544. It must be noted that since the military coup d'état of July 2013, the Working Group on Arbitrary Detention (WGAD) has issued 15 opinions concerning the arrest and detention of 47 Egyptian citizens. In all the 47 cases, the WGAD found that the deprivation of liberty was arbitrary and that Egyptian authorities had breached their obligations under Articles 9 and 14 of the ICCPR.

545. The 15 opinions have been summarised and exposed in this report. The following table highlights basic information about all the cases:

Opinion No.	Victims	Date	Government reply	Category arbitrary detention
39/2013	Former President of Egypt and six (6) of his advisors: Mohammed Mohammed Morsi Eissa El-Ayyat, Ahmed Abdel Atty, Essam Al-Haddad, Khaled El-Kazaz, Abdelmageed Meshali, Asaad El-Sheikha and Ayman Ali	4th April 2014	None	Category III
10/2014	Twelve (12) Egyptian nationals who were demonstrating in front of the Governorate of Suez building, including Mohamed Essayed Ali Rasslan, Mohamed Mohamed Abdo Abdullah, Ahmed Hussein Ali, Ahmed Mohamed Tohamy, Motaz Ahmed Motwali, Mohamed Mohamed Abduh, Assayed Mohamed Ezzat Ahmed, Assayed Saber Ahmed Suleiman, Ahmed Hassan Fawaz Atta, Mohamed Abdel Hamid Abdel Fattah Abdel	23rd July 2014	None	Categories II and III

	Hamid, Sayyed Ali Abdel Zaher, and Mahmoud Abdel Fattah Abbas.			
35/2014	Five (5) members of the Muslim Brotherhood, including Khaled Mohamed Hamza Abbas, Adel Mostafa Hamdan Qatamish, Ali Ezzedin Thabit, Zain El-Abidine Mahmoud and Tariq Ismail Ahmed.	21st November 2014	None	Category III
14/2015	One (1) minor whose name the WGAD did not disclose.	5th August 2015	18th February 2015	Categories I and III
17/2015	One (1) minor whose name the WGAD did not disclose.	7th August 2015	6th March 2015	Category III
49/2015	Three (3) human rights activists: Ahmed Saad Douma Saad, Ahmed Maher Ibrahim Tantawy and Mohamed Adel Fahmi.	29th March 2016	25th July 2014	Categories II and III
52/2015	Yara Sallam, Transitional Justice Officer at the Egyptian Initiative for Personal Rights.	6th April 2016	7th May 2015	Categories II and III
53/2015	Two (2) minors whose names were not disclosed by the Working Group	6th April 2016	3rd July 2015	Category III
6/2016	Alaa Ahmed Seif al Islam Abd El Fattah, human rights defender and the co-founder of the blog aggregator Manalaa, which promotes free speech and human rights.	20th October 2016	20th April 2015	Categories I, II and III
7/2016	Nine (9) Egyptian journalists, including Abdullah Ahmed Mohammed Ismail Alfakharany, Samhy Mostafa Ahmed Abdulalim,	14th June 2016	None	Categories II and III

	Mohamed Mohamed Aladili, Waleed Abdulraoof Shalaby, Ahmed Sabii, Youssouf Talat Mahmoud Mahmoud Abdulkarim, Hani Salheddin, Mosaad Albarbary and Abdo Dasouki. Some of them are also human rights defenders. All of them were prosecuted in a mass trial known as the "Rabaa Operations Room" case.			
41/2016	Journalist Mahmoud Abdel Shakour Abou Zeid Attitallah, alias Shawkan	1st November 2016	None	Categories I, II and III
42/2016	Student at the University of Cairo, Ahmed Yousry Zaky	6th December 2016	None	Categories I and III
54/2016	Mohamed Hamed Mohamed Hamza, a military officer in the Egyptian army.	30th January 2017	None	Category III
60/2016	A student, Omar Abdulrahman Ahmed Youssef Mabrouk	24th January 2017	None	Categories I and III
30/2017	Mohamed Serria, former university professor at the Faculty of Medicine at Mansoura University.	22nd June 2017	10th April 2017	Categories I and III

546. The Working Group found that when considered all together, these cases indicate "*systemic and widespread arbitrary detentions*" of individuals, particularly in the context of "*peaceful protests.*"[562] In this vein, the WGAD highlighted the "*pattern of violations that has occurred in Egypt*" [563] and a high number of cases concerning the arbitrary deprivation of liberty of persons that the Group had received "*during the past three years.*"

547. Consequently, the WGAD reminded Egyptian authorities that widespread or systematic imprisonment in violation of international law may be constitutive of crimes against humanity[564] and give rise to international criminal responsibility.[565] In particular, it highlighted that the duty to comply with international human rights obligations "*rests not only on the Government, but on all officials of the State, including judges, the police, security officers and prison officers with relevant responsibilities.*"[566]

548. Worryingly, the Working Group claimed that despite all these concerning remarks, the Government of Egypt had shown a "*poor record of cooperation with the Working Group*", as it had failed to provide a reply to most communications. The Group publicly reiterated its request to visit Egypt, so it could engage with the executive "*more constructively and offer assistance in addressing concerns relating to the arbitrary deprivation of liberty."*[567]

Torture and Conditions of Detention

549. The problem of arbitrary and excessive pre-trial detention has been aggravated by both the widespread practice of torture and the deplorable conditions of detention existing in Egyptian jails.

550. Due to the increasing policies of criminalisation, the *de facto* presumption in favour of pre-trial detention, and the corresponding growth in the detainee population, Egyptian prisons and police stations are severely overcrowded: in 2015, Human Rights Watch noted that while jails were at 160% capacity, police stations tripled its capacity.[568] This was considered a deeply concerning problem, as Egyptian police stations are frequently ill-equipped to hold detainees.

551. Detainees, including women and children, complain about the lack of access to medicines, unhygienic conditions, food in bad conditions, and limited drinking water.[569] Some high-profile prisoners, belonging to groups in the political opposition, have even been held in 'dark' cells and prevented, or at least significantly restricted any from having any of communication.[570] Survivors have recounted that rising summer temperatures and the spread of disease in the winter "*led to a "natural" increase in detainees' deaths.*" [571] These conditions are in breach of the Basic Principles for the Treatment of Prisoners[572] and constitute a violation of the prisoners' human rights.

552. Human Rights Watch analysed the conditions of detention in a single prison, the Tora Maximum Security Prison, known as "the Scorpion."[573] The Scorpion Prison "*re-emerged as the central site for those deemed enemies of the state, a designation that now includes the Muslim Brotherhood, al-Sisi's primary political opposition.*"[574] According to the Human Rights Watch's report:

> "*Authorities there have banned inmates from contacting their families or lawyers for months at a time, held them in degrading conditions without beds, mattresses, or basic hygienic items, humiliated, beaten, and confined them for weeks in cramped "discipline" cells – treatment that probably amounted to*

torture in some cases – and interfered with their medical care in ways that may have contributed to some of their deaths. The near total lack of independent oversight in Scorpion, documented in this report, has exacerbated these abuses and contributed to impunity". [575]

553. In this context, Egyptian prisoners have organised a significant number of hunger strikes[576] and organised collective complaints, which have often been "*violently repressed*" [577] by security forces.

554. The report commissioned by the State Litigation Authority briefly acknowledges criticisms related to "*poor sanitary conditions and poor medical services*" that have led to an elevated number of deaths in custody, "*both in prisons and police stations.*"[578]

555. Moreover, several deaths have occurred as a result of the torture of prisoners and detainees.

556. Torture is systematic in Egyptian prisons and police stations.[579] The report commissioned by the State Litigation Authority of Egypt echoed NCHR's statement that "*the torture of the accused persons in still continuous especially at the initial centres*" and noted that even the Ministry of Interior has acknowledged that torture "*is still very common.*"[580]

557. In preparation for the last Universal Periodic Review (UPR) on Egypt, the Worldwide Movement for Human Rights, Human Rights Watch, Alkarama Foundation, the Arab Penal Reform Organization, the Islamic Human Rights Commission, and the Egyptian Initiative for Personal Rights, reported a concerning number of torture cases. According to these organisations, torture is so systematic in Egyptian jails that it has become "*a usual practice of various Egyptian authorities, police, military and prison authorities.*"[581] According to the most recent reports, lawyers from the Egyptian Coordination for Rights and Freedoms have received 830 torture complaints.[582]

558. Torture is targeted at everyone, men, women, and even children.[583] Testimonies of torture survivors are devastating[584]: they narrate being blindfolded, seriously beaten, subjected to electric shocks[585], raped and forced nakedness[586].

559. Sexual torture is prevalent in Egyptian jails, FIDH having identified "*a surge in sexual violence perpetrated by the security forces*" since July 2013.[587] In its report "Exposing State hypocrisy: sexual violence by security forces in Egypt,"[588] FIDH documented numerous cases of *sexual harassment,* rape and sexual assault, rape with objects, anal and vaginal 'virginity tests', and even electrocution of genitalia, *"perpetrated by police, state security and military personnel*" against both men and women. Children have been raped by adult prisoners with whom they share detention[589], noting that even without the commission of such horrendous offences, the detention of juveniles with adults is contrary to international standards; further, FIDH identified an orchestrated campaign against LGBT people.

560. According to the report, campaigns against homosexuals have "*become more frequent*" since October 2014. Once arrested, LGBT people are subjected to "*forced anal examinations by forensic medics, constituting a form of torture.*"[590]

561. Relevantly, the President of FIDH claimed that factors such as the scale of sexual violence during detention in Egypt, the absolute impunity provided to its security forces, and the similarities of the methods used in different prisons, point to the existence of an organised State-sanctioned policy.[591]

562. In this vein, after reviewing hundreds of allegations of torture provided by different organisations in the last years, and after completing an inquiry into the situation in Egypt based on Article 20 of the Convention against Torture, in June 2017, the UN Committee against Torture published a report concluding that torture is "*practiced systematically*" in Egypt, as the cases studied reflect "*trends regarding the perpetrators, methods and location of torture in Egypt, as well as the trend of impunity for perpetrators.*"[592] According to the Committee, the systematic character of torture in Egypt can be inferred from the fact that the cases "*have not occurred*

fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory." [593]

563. Similarly, Human Rights Watch has found that the practice of torture is so systematic and "*epidemic*" that it "*likely constitutes a crime against humanity,*"[594] and thus deserves punishment under international criminal law.

564. Worryingly, far from prosecuting these crimes, Egyptian courts have relied on testimonies and confessions extracted under torture to sentence a number of individuals in Egypt.[595] As a matter of fact, after analysing 20 cases of torture, Human Rights Watch found that "*police and officers of the National Security Agency regularly use torture during their investigations to force perceived dissidents to confess or divulge information, or to punish them"*[596] (emphasis added), which coincide with the findings of the Working Group on Arbitrary Detention.[597]

565. Article 7 of the ICCPR declares that "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*" The same standard can be found in Article 5 of the African Charter on Human and Peoples' Rights, which recognises that every individual "*shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status*" and prohibits "*all forms of exploitation and degradation*", including torture as well as cruel, inhumane or degrading punishment and treatment. Moreover, Egyptian ratified the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in 1986, and thus, its content is binding for Egyptian authorities, who should be held accountable for violations of its precepts.

566. The international prohibition of torture is absolute and cannot be subject to any derogation or exception. It is considered a *jus cogens* norm in international law, a peremptory rule that apply to all countries in all cases, irrespective of the treaties that the country has ratified. For all of these reasons, the prohibition of torture is considered by many as being the most sacrosanct principle in International Human Rights Law.

567. Despite the absolute prohibition of torture and of cruel, inhumane and degrading treatment, the report commissioned by the State Litigation Authority seeks to reduce the responsibility of the current Egyptian regime for this situation by alleging, first, that the poor conditions in Egyptian jails has been a recurrent and permanent problem in Egypt in the last 60 years, and consequently, that current Egyptian authorities have just "*inherited*"[598] the problem; and second, that the current Ministry of Interior has taken "*significant steps*" to solve the problem. In this vein, the report cites a report drafted by the Ministry of Interior - not available online - which lists the police stations and prisons that are being improved, a number of legal controls and care rules for detainees, as well as some books and instructions circulated by the Ministry "*to guarantee the proper treatments of detainees at the police stations and centres.*" [599]

568. Nevertheless, none of these arguments are valid.

569. First, although it is true that the problems of torture and deficient conditions of detention have been persistent in Egypt, the situation has been aggravated since mid-2013 and the arrival of President Sisi to power.

570. As exposed in the aforementioned FIDH, the number of allegations of sexual torture has escalated in recent years, and according to the UN Committee Against Torture the practice of torture "*has allegedly been facilitated by a significant increase in arrests by the authorities since July 2013, as well as by the practice of detaining protesters at unofficial places of detention*"[600] (emphasis added).

571. A recent report on torture in Egypt, published by Human Rights Watch in September 2017, notes that since the military overthrow of Mohammed Morsi, "*torture has returned as the calling card of the security forces.*"[601] The organisation has, more particularly, identified a 'notable' increase in the practice of enforced disappearances, mistreatment in prison, extrajudicial killings and torture, since March 2015, "*when al-Sisi appointed Interior Minister Magdy Abd al-Ghaffar, a three-decade veteran of the SSI and National Security Agency.*"[602]

572. This astonishing increase in the number of arrests, has also further exacerbated the problem of overcrowding of Egyptian jails since mid-2013, thus severely aggravating the already deplorable conditions of detention in the country. While according to World Prison Brief, the Prison population was of 66,000 individuals in 2011,[603] the Arabic Network for Human Rights Information (ANHRI) reported that by mid-August 2016, the number of prisoners reached around 106,000 people, "*including 60,000 political prisoners.*"[604]

573. Consequently, although the problem of conditions of detention has been 'inherited' from previous Egyptian governments, the current military regime has further aggravated these conditions and therefore the problem, by overcrowding prisons and detention centres.

574. With regards to the second argument espoused in the report commissioned by the State Litigation Authority, namely, the 'significant steps' taken by the Egyptian Ministry of Interior to solve the problem, far from demonstrating a real commitment to improve conditions of detention and eradicate torture since the ouster of Morsi, Egyptian authorities have constantly avoided its responsibilities and failed to take effective measures to either improve conditions of detention or bring an end to torture in Egypt.

575. It must be noted, that in 2016 the Arabic Network for Human Rights Information (ANHRI) published a report on the evolution of detention conditions and prisons in Egypt. This report noted that even if it is true that the current military regime has built more detention centres, severe problems of overcrowding persist in Egyptian prisons.[605]

576. The ANHRI concluded that after analysing all the information available, the construction of new prisons in Egypt is not aimed at alleviating and improving the situation of detainees, but rather, prisons have been built to continue and deepen the

> "*policy of random arrests, unfair trials and unjust laws passed after July 3, 2013, such as, the anti-protest law and the decision to increase pre-trial*

detention periods, as well as the widespread impunity policies." As a matter of fact, the report argues, the increase in the number of prisons has not led to "*improvements in the condition of prisoners,"* as even in the new prisons there are still a great number of "*complaints and protests on a day-to-day basis from abuse and neglect of medical and health care, as well as complaints regarding the rising phenomenon of enforced disappearance.*" [606]

577. With regards to torture, current Egyptian authorities have been unwilling to effectively stop its practice. For example, during the last Universal Periodic Review on Egypt, the delegation representing the Government refused to ratify the Optional Protocol to the Convention Against Torture and establish mandatory independent visits to all jails and detention centres,[607] thus opting for maintaining a very low level of transparency and impeding international supervision of detention centres. Alarmingly, during the last UPR session, Egyptian authorities even claimed that there was "*no torture in prisons.*"[608]

578. Moreover, Egyptian authorities have shut down the Nadeem Centre for the Rehabilitation of Victims of Violence and Torture, which was aimed at documenting and treating torture victims; at the same time that they have opened investigations "*against judges and lawyers who have drafted anti-torture legislation.*"[609]

579. Additionally, in 2014, the Egyptian government refused to cooperate with the inquiry being conducted by the UN Committee against Torture. They not only questioned the reliability of the information submitted by human rights organisations, but also did not permit the Committee to send a delegation to conduct a country visit.

580. Meanwhile, the Egyptian National Council for Human Rights has also accused the Ministry of Interior of obstructing prisons' inspection and concealing evidence of abuses.[610] Members of the Council complain that they are obliged to obtain permission from the Ministry before visiting detention centres, that they have been prevented from meeting tortured detainees, and that the Ministry has impeded council

members "*to enter the prison's cells or hospital to inspect prisoners' living conditions.*" [611]

581. This opacity obstructs a profound analysis of the allegations of torture from being undertaken, and perpetuates the impunity of security forces and law enforcement agents, who are able to continue using torture as a measure of terror, oppression and punishment.

582. In this vein, it simply cannot be concluded that Egyptian authorities have taken any "*significant step*" to stop torture, as issuing books and general instructions cannot be possibly considered a sufficiently effective measure to stop the deeply-installed practice of torture in the country.

583. The most fundamental tool in the fight against torture is accountability. Criminal sentences against torturers could ensure justice for the victims and provide the correct incentives for security forces to stop this abusive practice.

584. However, there have been almost no investigations into the systematic practice of torture in Egyptian jails. While in the last UPR process, Egyptian authorities alleged that "*all allegations of torture and ill-treatment are investigated,*"[612] the overwhelming majority of human rights organisations and legal experts held that, in reality, torture complaints are left apart and prison officers enjoy a *de facto* immunity from prosecution.[613]

585. According to the UN Committee against Torture, perpetrators of torture "*almost universally enjoy impunity, although Egyptian law prohibits and creates accountability mechanisms for torture and related practices, demonstrating a serious dissonance between law and practice*" [614] (emphasis added). The Committee also noted that prosecutors and judges have facilitated - and been instrumental in - the widespread practice of torture in Egyptian jails, on the basis that they have failed "*to curb practices of torture, arbitrary detention and ill-treatment or to act on complaints.*"[615]

586. As a matter of fact, Human Rights Watch could only identify six cases since July 2013 in which officers from the Minister of Interior charged with torture were finally declared guilty. Moreover, none of those verdicts had been confirmed on appeal at the time the organisation analysed the information. Consequently, the human rights organisation notes that "***to date, no court in modern Egyptian history has issued a final guilty verdict against an SSI or National Security officer for committing abuse***"[616] (emphasis added). In conclusion, according to Human Rights Watch, "*the lack of punishment for [the routine practice of torture] has helped define the authoritarianism of President Abdel Fattah al-Sisi's administration.*"[617]

587. As a result of the deplorable conditions of detention, as well as the widespread practice of torture, human rights organisations estimate that dozens of people have died in police custody since mid-2013.

588. In January 2015, Human Rights Watch complained that Egyptian authorities had failed to investigate the death of "*scores of Egyptians*" in government custody during 2014, "*many of them packed into police stations in life-threatening conditions.*"[618] According to the organisation, the "*mounting death toll*" was the "*wholly predictable consequence*" of the prisons' overcrowding and torture.[619]

589. Human Rights Watch documented at least nine deaths in custody during 2014 as a result of beatings, the refusal of necessary medical care, and even continued detention of terminally-ill inmates who were sent back to prison "*despite doctors' recommendations to send him to another hospital.*" The human rights organisation also referred to another investigation conducted by *Al Watan* newspaper – and based on statistics of the Justice Ministry's Forensic Medical Authority (FMA) – that reported the death of at least 90 detainees in just the governorates of Cairo and Giza during the first ten and a half months of 2014. According to the Nadeem Centre of the Rehabilitation of Victims of Violence, 35 citizens died in custody just in the first 100 days after the coup[620], and the Egyptian Commission for Rights and Freedoms reported at least 121 deaths in 2014.[621]

590. According to Human Rights Watch, these figures represent an **increase** of nearly 40% over the number of deaths in custody documented the year before, mainly due to overcrowding. However, by the time, Egyptian authorities had only filed one case in relation to the death of detainees since mid-2013, which investigated the death of 37 detainees whilst they were being transported to Abu Zaabal prison on August 18, 2013. Although in 2014 a court sentenced one police officer to 10 years' imprisonment and three other officers to one-year suspended prison sentences for these 37 deaths, in August 2015 the appeals court reduced the prison sentence to 5 years and confirmed the one-year suspended prison sentences for the three other officers.[622]

591. Deaths in custody continued in 2015. Human Rights Watch reported 6 deaths in custody in the Tora Maximum Security Prison, "*when all visits were banned.*"[623] According to the organisation:

> "*Relatives and lawyers of three of the six inmates told Human Rights Watch that the authorities had refused to consider conditionally releasing them on medical grounds, prevented them from receiving timely treatment, and failed to seriously investigate their deaths. In one case, prosecutors withheld a burial permission form until a relative of the deceased inmate promised not to file a complaint about the lack of medical care.*" [624]

592. Prison officials refused to supply inmates with medicines provided by the families, and the degree of negligence of the guards is so severe that prisoners had to establish a system to check on each other's health. Most leaders of the Muslim Brotherhood, including Khairat al-Shater, Deputy Supreme Guide, are held in the "Scorpion" prison.[625]

593. Meanwhile, the Al-Nadeem Centre for Rehabilitation of Victims of Violence reported 640 individual cases of torture, 36 of mass torture, and 137 deaths in detention in

2015;[626] further, the human rights organisation Alkarama documented 323 cases of death in detention between August 2013 and September 2015.[627]

594. These high figures contrast with the ones exposed by the report commissioned by the State Litigation Authority of Egypt, which notes that the National Commission of Human Rights in Egypt identified only nine complaints in respect of deaths in custody in 2015, and that all these cases were "*addressed by either the Ministry of Defence and/or Ministry of Interior.*"[628] In this vein, the report only refers to a single case, of July 2016, in which the Qena Criminal Court sentenced "*six policemen to up to seven years in prison over the death of a detainee in the southern city of Luxor as well as ordering the Ministry of Interior to award 1.5 million Egyptian pounds ($170,000) in compensation to the victim's family.*"[629] However, the report fails to mention that seven other officers or soldiers were acquitted in the case.[630] Moreover, one single investigation and prosecution is not constitutive of a practice, as the deaths of hundreds of Egyptian prisoners remain unpunished.

Enforced Disappearances

595. While countless prisoners have died in custody, others have been forcibly disappeared by security forces. Although some were later found in secret detention centres where they faced frequent torture,[631] the fate and whereabouts of hundreds of disappeared are still unknown.

596. According to General Comment No. 35 of the Human Rights Committee, enforced disappearances "*violate numerous substantive and procedural provisions of the Covenant and constitute a particularly aggravated form of arbitrary detention*". Enforced disappearances constitute a particularly heinous violation of international law, as it affects a great number of human rights and prolongs the suffering of the families.

597. Human rights organisations have reported an increasing number of cases of enforced disappearances of detainees[632] "*with little to no action or response by the Egyptian authorities."*[633] Between April and June 2015, human rights groups reported the disappearance of 163 people.[634] The victims were forcibly taken without having been shown arrest warrants and subsequently, police officers denied *"knowledge of their whereabouts."*[635] The 'Stop Forced Disappearances' campaign documented 215 cases,[636] and by mid-October, the whereabouts of more than 152 of these disappeared were still unknown.

598. The National Council for Human Rights, which keeps a conservative position with regards to statistics of human rights violations, documented 276 cases of enforced disappearance in its 2015-2016 report.

599. Such is the seriousness and gravity of the problem of enforced disappearances, and its widespread and systematic character, that the head of the National Council for Human Rights declared that it could be constitutive of crimes against humanity.[637] However, the State of Egypt has not ratified the Rome Statute, as a consequence, the International Criminal Court cannot investigate these serious criminal allegations unless the UN Security Council refers the situation to the ICC.

600. According to Human Rights Watch, enforced disappearances are not isolated incidents, but part of an "*assembly line of abuse"* aimed at preparing "*fabricated cases against suspected dissidents.*"[638] The organisation held that the abusive process begins with an arbitrary arrest, followed by the torture and interrogation of the detainee during periods of enforced disappearance, and concludes:

> "*with presentation before prosecutors, who often pressure detainees to confirm their confessions and take no measures to investigate the violations against them. In several cases documented by Human Rights Watch, prosecutors abetted abuse by affirming fraudulent arrest dates provided by National Security officers who falsely claimed to have arrested suspects the*

day before their presentation to the prosecutor, effectively erasing the official record of the enforced disappearance."[639]

601. The report commissioned by the State Litigation Authority echoed the figures provided by the National Council for Human Rights and noted the growing condemnation over the "*increasing numbers of enforced disappearances.*"[640] Moreover, the report included a reference to a study published in July 2016, by Amnesty International, titled "Egypt: 'Officially, you do not exist' – Disappeared and tortured in the name of counter-terrorism."[641] In this report, Amnesty International claimed that taking into account factors such as the number, range and diversity of victims; the broad consistency of their testimonies and of their families' accounts of their efforts to obtain official acknowledgement of detainees' arrests and learn where they were held, "*there can be no doubt that enforced disappearances are now being used as an element of state policy in Egypt, irrespective of the government's denials.*"[642]

602. The report commissioned by the State Litigation Authority of Egypt responds to these allegations with three arguments.

603. First, the report holds that the Egyptian Ministry of Interior has responded in detail to the allegations made by the Council about enforced disappearances. According to the report, the Ministry stated that the Council had referred 266 cases since 2016 and that it had been able to clarify the situation in 238 of these cases, finding that the disappeared "*were either in prison pursuant to a "General Prosecution" resolution and then released, or who were still in prison awaiting trial*". Forty-four individuals would have wilfully disappeared to join "*terrorist organisations*".

604. This numbers differs not only from the statistics on cases of enforced disappearances provided by national and international human rights groups, which have identified around 1,000 disappearances,[643] but also from the numbers published by the UN Working Group of Enforced or Involuntary Disappearances (WGEID). According to

the last report of the WGEID, published on July 31, 2017,[644] the Working Group transmitted 122 cases of enforced disappearances to the Government of Egypt during the reporting period (from May 2016 to May 2017), of which the Government had only clarified 43. Thus, contrary to what was exposed in the report commissioned by the State Litigation Authority, most cases remained unsolved. Notably, while at the beginning of the period under review there were 226 outstanding cases in the WGEID, at the end of the same period, there the figure had risen to 258 cases.

605. The WGEID also confirmed that out of the 431 cases of enforced disappearance reported to the Group, 121 people were later found "*in detention*". However, the fact that the detention of these people was confirmed at a later date, does not render the detention lawful. As a matter of fact, the crime continues being defined as an enforced disappearance: in most cases police arrested citizens without respecting the aforementioned standards listed in Article 9 of the ICCPR and denied the families from knowing of either the arrest or of the whereabouts of the disappeared individuals, thus placing them outside of the protection of the law. For example, the Ministry of Interior denied on numerous occasions that Israa al-Taweel, Sohaib Saad, and Omar Mohamed Ali had been arrested and placed in police custody. Sixteen days after their disappearance, they were found in two prisons in Cairo.[645]

606. The WGEID reminded the Government of Egypt that that accurate information on the detention of persons deprived of their liberty and their place or places of detention, including transfers, "*should be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information*" [646] according to Article 10 (2) of the Declaration on the Protection of All Persons from Enforced Disappearance.

607. Second, the report commissioned by the State Litigation Authority notes that the Ministry "*took several measures*" to solve the problem of enforced disappearances in the country. Among these measures, the report highlights that the Ministry has created a working group and a point of contact to the NCHR to investigate allegations of

disappearance, and that it had sought to investigate cases reported by local NGOs. According to the report, the Ministry:

> "*has sought to address and further investigate each instance of enforced disappearance that has been brought to its attention by the bodies as outlined above, which should be perceived as positive and effective measures undertaken by the country. Such measures outlined in the MOI Report also reveal a serious attempt on the part of Egypt to comply with its international obligations.*"[647]

608. Nevertheless, the same report acknowledges that Egyptian authorities usually deny the occurrence of enforced disappearances in the country by making reference to a statement issued by the Egyptian Minister of Interior Magdy Abdel Ghaffar, who in March 2016 said that the country "*had zero forced disappearance cases.*"[648] It is not possible to address or solve a problem when there is not recognition of it.

609. Furthermore, contrary to the position held in the report, Egyptian authorities have failed to take powerful and efficient steps to identify the reasons behind the problem of enforced disappearances. For example, in its last report, the WGEID highlighted that the Government of Egypt had not provided a positive response to its reiterated request to visit the country to investigate disappearances.[649]

610. As a matter of fact, although the Minister claimed to be collaborating with national organisations to investigate reports of enforced disappearance, the reality is that the head, and members, of the staff of the Egyptian Commission for Rights and Freedoms were arrested and detained after launching an "stop enforced disappearance" campaign to mobilise Egyptian public opinion and protect victims.[650]

611. Third, the report commissioned by the State Litigation Authority of Egypt reiterates an argument made by the Ministry of Interior defending that "*the rise of the claims of enforced disappearance coincided with the rise of terrorist attacks in Egypt*" and portraying most disappeared as terrorists. At the same time, the Ministry held that the "*unfounded and mistaken*" claims of enforced disappearance were an attempt by the

Muslim Brotherhood to manipulate the situation and spread false rumours about Egypt.

612. Similar allegations were made against Amnesty International. Egypt's foreign Minister said that Amnesty International's study was biased and partial, that it was motivated *"by political stances*" and aimed at tarnishing Egypt's image. The Minister even accused Amnesty International of working in concert with the Muslim Brotherhood. The report commissioned by the State Litigation Authority exposed all these comments and confirmed that the "*credibility*" of Amnesty International had been questioned in previous occasions, thus reducing the relevance of their allegations.[651]

613. Amnesty International maintained that its members had contacted Egyptian public authorities to inform them about the reports of disappearance that they had identified. However, the authorities repeatedly denied the allegations and failed to provide "*factual evidence to corroborate their denials.*"[652] Consequently, after having contacted the authorities and given them the opportunity to defend their position, it is difficult to accuse Amnesty of bias.

614. Additionally, it must be noted that the allegations of enforced disappearance are not based on the claims and the evidence presented by a single organisation or political group, but from a wide range of human rights institutions, including the National Council of Human Rights, which have identified a systematic pattern of violence and repression against political opponents and human rights defenders. Despite the existence of mounting evidence of these abuses, and the fact that more than 200 cases remain outstanding before the WGEID, Egyptian authorities continue to deny that enforced disappearances is a problem in the country. Instead of investigating these crimes, the Egyptian regime has opted for criminalising and attacking those who report on them and silencing dissent, portraying the victims as 'terrorists'. This concerning position deepens the serious problem of impunity in the country and contravenes the obligation that Egyptian authorities have under international law, to investigate and provide accountability for these crimes. As a matter of fact, in its

report, Amnesty International discovered that Egyptian judicial authorities were complicit in the abuses:

> "*The repeated failure of prosecutors to investigate detainees' allegations of torture together with their ready acceptance of allegedly coerced "confessions" and their failure to address the falsification of arrest dates by NSA officers to conceal the duration of detention indicates too that Egypt's judicial authorities are complicit in these serious human rights violations.*"[653]

615. Relevantly, in this vein, Egypt has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance yet[654].

Chapter 7:
Criminalisation of Democratic Rights

616. Human rights organisations and legal experts have expressed concern about the increasing use of the criminal law, and associated procedures, to punish human rights defenders and political opponents in Egypt. After analysing numerous judicial cases, they agree that the Egyptian judiciary is current being used as 'a tool of repression'[655] to suppress dissent.

617. Egyptian criminal law is being modified and manipulated to target the opposition, human rights defenders, journalists and more generally, anyone who seeks to criticise the new military regime's institutions or expose their human rights abuses. The use of the courts and the wider criminal justice system to impose baseless and disproportionate sentences against perceived dissenters provides a false veil of legal pseudo-legitimacy to what now constitutes a years-long formal policy of abuses, censorship, and crackdown against the opposition.

618. The manipulation of Egyptian criminal law and the judicial system has drastically impacted on the most basic democratic rights of Egyptian citizens, particularly on freedom of expression and freedom of the media, but also on the rights to peaceful assembly or association.

619. According to the ICJ, since July 2013:

> "*judges and prosecutors in Egypt have become to be seen as at the forefront of a crackdown on human rights, due to the prosecution and conviction of thousands of political opponents, journalists, lawyers, human rights defenders, pro-democracy campaigners and individuals exercising their right to freedom of expression and assembly*"[656] (emphasis added).

620. Similar statements were issued by a group of African and UN human rights experts, who noted the "*continuing and unacceptable mockery of justice that casts a big shadow over the Egyptian legal system.*"[657]

621. In order to understand the seriousness of these allegations, it would be convenient to provide some relevant figures, and analyse the situation of politically-based arrest and detention in the country.

622. In 2015, Amnesty International estimated that over 41,000 people were arrested, indicted or sentenced in Egypt,[658] of which 36,478 were detained or indicted for participating in political events; and other 1,714 on terrorism charges.[659]

623. The same organisation reported that around 1,300 people had been arrested across Egypt just between April and May 2016 "*in attempts to quell protests,*"[660] and some were subsequently produced before the court for trial. The result, is that thousands of Egyptian citizens have been arrested or imprisoned for having merely expressed dissent while peacefully exercising their rights to freedom of expression, association and assembly.[661] As a matter of fact, it is not a coincidence that approximately 22,000[662] of those detained are either members of the Muslim Brotherhood or perceived supporters of Morsi's government, and thus they are persecuted on political grounds.[663] As espoused in previous chapters, after their arrest, members of the Muslim Brotherhood have been deprived of due-process rights and *"courts have handed down shocking, mass death-penalty verdicts*"[664] against them.

624. The significant number of arrests and associated judicial proceedings could not take place without a well-established policy to crackdown upon dissent and the opposition; a policy that has systematically targeted the political opposition of the country after the ouster of Morsi, but also journalists, students[665], human rights defenders and activists. As a matter of fact, Human Rights Watch portrayed this policy of criminalisation of legitimate dissent as a "*war on civil society.*"[666]

625. The use of the criminal justice system to suppress criticism towards the new military government has been the subject of several studies and investigations. For example, in

June 2015, Amnesty International published its report "Generation Jail: Egypt's Youth go from Protest to Prison". In this publication, the organisation denounced that Egyptian authorities were systematically jailing "*the country's youth for protesting, for their political activities, or their human rights activism.*"[667]

626. The organisation argued that the approval of new criminal legislation, such as the Protest Law - which will be analysed in following sections of this chapter - had worsened the crackdown, and that authorities were using its provisions to detain thousands of citizens "*on copy-cat accusations of 'protesting without authorization', taking part in political violence and committing public order offences.*"[668] In this vein, Amnesty International concluded that the judicial system was being manipulated to target "*perceived political opponents and critics"*[669] and that judicial proceedings against them *"appear to be increasingly politically motivated – aimed more at penalising dissent rather than achieving justice.*"[670] In 2014, the UN High Commissioner for Human Rights had already reached the same conclusion, expressing concern about "*reports that numerous people have been arrested in connection with protests.*"[671]

627. The legal reasoning behind the arrests and detentions is frequently arbitrary or unreasonable, as they are based on "*fabricated illegal justifications to rationalize the unlawful detention.*"[672] Egyptian citizens usually face either broad and general charges of "*possession of weapons, destroying public and private property and inciting violence"*[673] or the highly-politicised charges of *"spreading false rumours, providing information to foreign countries and espionage, and 'showing (sic) force' with the aim of terrorising citizens and hampering public interests.*"[674]

628. While previous chapters have analysed procedural rights, this chapter will focus on the content of the judicial cases and the legislation applied, placing particular emphasis on four factors that demonstrate the trend of criminalisation of democratic rights in Egypt:

a. The imprisonment of journalists.

b. The characterisation of the Muslim Brotherhood as a terrorist group and the imprisonment of its leadership.

c. The Protest Law and the judges' systematic application and refusal to refer constitutional challenges to abusive legislation to the Supreme Constitutional Court.

d. The partiality of the Egyptian judicial system, which has prosecuted thousands of opponents to the new military regime while perpetuating the impunity of security agents responsible for human rights violations.

Criminalisation of Journalists

629. The report commissioned by the State Litigation Authority of Egypt analyses international and national legal obligations that recognise the right to freedom of expression and freedom of the media. The analysis includes references to Article 19 of the Universal Declaration of Human Rights; Article 19 of the International Covenant on Civil and Political Rights; Article 2 of the African Charter on Human and Peoples' Rights; the Declaration of Principles on Freedom of Expression in Africa; the Arab Charter on Human Rights—which Egypt has not ratified yet—; the Johannesburg Principles on National Security, Freedom of Expression and Access to Information; the Cairo Declaration on Human Rights in Islam; and Articles 65, 70, 71 and 72 of the Constitution of Egypt of 2014.

630. All these legal instruments recognise the right to freedom of expression and independence of the media, so national authorities should act according to the principles enshrined in these documents. In this vein, the report commissioned by the State Litigation Authority concludes its analysis by noting that

> "*having signed and ratified the core international and regional conventions, Egypt has pledged to take positive steps to protect the full scope of the right to freedom of expression and, as an auxiliary component, the independence of the media*"[675] (emphasis added).

631. Nevertheless, despite Egypt's ratification of these human rights treaties, and despite having accepted obligations that are binding on Egyptian authorities, democratic rights - including freedom of expression and freedom of the media - in Egypt are in a deplorable condition in practice. As exposed in previous chapters, there are great disparities between Egypt's international obligations concerning human rights and its domestic legislation and practical application.

632. Although the report commissioned by the State Litigation Authority of Egypt acknowledges restrictions to freedom of expression and freedom of the media, it maintains that these restrictions are necessary and proportional, as they must be read "*in context of the unprecedented security challenges faced in Egypt today.*"[676] Consequently, according to the report, the criminalisation of dozens of journalists would be justified in national security concerns and in efforts to "*prevent further individuals and youths from joining terrorist ranks by ensuring responsible reporting by media outlets.*"[677] The report thus replicates arguments held by Egyptian authorities, who have justified the detention of journalists on the basis of stability and security of the country[678], particularly on the need to fight terrorism[679].

633. The reality, according to Reporters Without Borders, is that there are currently 15 journalists[680] – and one citizen journalist[681] – imprisoned in Egypt.[682] This figure represents the 8% of the total of journalists imprisoned worldwide.

634. At present, Egypt as a country, is second in the list of those whom have imprisoned the highest number of journalists in the world.[683] Unsurprisingly, Egypt has been ranked 161 in the 2017 World Press Freedom Index, having lost two positions since 2016.[684] In its general description of the country, Reporters Without Borders defines the situation of media freedom in Egypt as "*extremely worrying,*"[685] as Egypt is now "*one of the world's biggest prisons for journalists,*"[686] with reporters having spent years in detention without being charged or tried, or facing long jail terms, including life imprisonment "*in iniquitous mass trials.*"[687]

635. Although the report commissioned by the State Litigation Authority of Egypt argues that Egypt's "press freedom status" has continuously faced low ratings over the past two decades, Reporters Without Borders insisted on the radical deterioration of the situation of journalists since Sisi's arrival to power:

> "*Under Gen. Sisi's leadership, the authorities have waged a witch-hunt since 2013 against journalists suspected of supporting the Muslim Brotherhood, and have orchestrated a "Sisification" of the media.*"[688]

636. Freedom House has also categorised the country as "Not Free" in its Freedom in the World 2017[689], Freedom of the Press 2017[690] and Freedom of the Net 2016[691] indexes. The country has received extremely low ratings in the sphere of political rights (6/7), civil liberties (5/7), legal (26/30), political (34/40) and economic environment (17/30) for the press is below average. The organisation also identified a sharp deterioration of the situation for media workers since the arrival of Sisi to power: "*conditions for the media in Egypt grew worse during 2014 as Abdel Fattah al-Sisi, the army chief who overthrew President Mohamed Morsi in a July 2013 coup, consolidated his power.*"[692] Interestingly, in June 2015 the Committee to Protect Journalists announced that Egypt had reached the highest number of journalists behind bars since the organisation started keeping records, "*most of them accused of affiliation with a banned group.*"[693]

637. International law and its jurisprudence have established certain requirements and criteria in order to legitimately impose limitations on human rights and freedoms. In summary, restrictions must be **provided by law** and must be **justified and necessary in a democratic society**. The term "necessary" means that there must be a causal link between the legitimate restrictions and the threat or the public interest they vindicate. Moreover, there are three additional requirements:

a. Legitimate aim: the threat to national security, public order, public health or morals must be serious;

b. Proportionality: the restriction must be the least restrictive means and proportionate to the legitimate aim pursued; and

c. Democratic society: the restriction must be compatible with democratic principles, which means that the reasons behind the restriction must be relevant and sufficient.[694] In this regard, it must be mentioned that the European Court of Human Rights has repeatedly concluded that a democratic society is one characterised "*by pluralism, tolerance and broadmindedness.*"[695]

638. Detaining and jailing journalists in the exercise of their work and criminalising the normal activities of the press could hardly be justified following these requirements.

639. Nevertheless, according to the report commissioned by the State Litigation Authority of Egypt, the imprisonment of journalists and those other restrictions imposed on freedom of expression are legitimate and justified in the interests of security and public order. According to its authors, the dissemination of false information may lead to "*incitement of crime, violence or mass panic that threatens national security or public order*", and therefore would warrant intervention "*in the protection of freedom of expression.*"[696]

640. In order to justify this position, the report makes reference to the case *Colombani and Others v. France* before the European Court of Human Rights[697] (ECHR), which analysed the case of two French journalists who had been found guilty of insulting a foreign head of State - the King of Morocco - and sentenced to fines of 5,000 French francs each. The journalists had authored a series of articles indicating the implication of Moroccan authorities in cannabis trafficking. French courts had concluded that even if the information exposed by the journalists was based on a report of the Geopolitical Drugs Observatory commissioned by the European Union, the articles were "*not entirely innocent*", since they were "*tainted with malicious intent*":

> "*The articles in question contained "accusations of duplicity, artifice and hypocrisy that were insulting to a foreign head of State". The circumstances taken as a whole excluded good faith on the part of the journalist: he had not established that he had "sought to check the accuracy of the OGD's comments"; instead, he had simply reproduced its unilateral account of events, thus "propounding a theory that contained serious accusations", without leaving any room for doubt about the reliability of the source.*"[698]

641. Following this argument, French authorities alleged that the interference concerning the "*defamatory*" activities of the journalists had been "*necessary in a democratic society*" and justified by "*certain limitations inherent in the exercise of freedom of communication*", which sought to punish the applicants "*for their malicious accusations and lack of journalistic rigour.*"

642. Nevertheless, the report commissioned by the State Litigation Authority of Egypt fails to mention that the ECHR found that there was a violation of Article 10 of the European Convention of Human Rights in this case. First, the ECHR reminded the "*essential role*" that the press plays in a democratic society, taking into account its vital function as "*public watchdog*" and its duty to impart information and ideas "*on all matters of public interest*". Accordingly, although certain limits can be imposed, the ECHR interpreted that "*exceptions to freedom of expression must be interpreted narrowly*"[699] (emphasis added).

643. The ECHR found, first, that the general public had a legitimate interest in being informed of a problem such as drug production and trafficking. Moreover, the court argued that the journalists were acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism, and criticised French legislation for shielding heads of State from criticism: such a special privilege, according to the Court, "*cannot be reconciled with modern practice and political*

conceptions." For all these reasons, the ECHR concluded that the reasons relied on by the respondent State were:

> *"not sufficient to show that the interference complained of was "necessary in a democratic society". Notwithstanding the national authorities' margin of appreciation, the Court considers that there was no reasonable relationship of proportionality between the restrictions placed on the applicants' right to freedom of expression and the legitimate aim pursued. Accordingly, it holds that there has been a violation of Article 10 of the Convention.*"[700]

644. In conclusion, far from supporting the arguments held by the report commissioned by the State Litigation Authority, this judgment of the ECHR confirms that according to regional human rights jurisprudence, the imprisonment of journalists in Egypt is a measure that breaches international standards of justice.

645. It must be noted that the journalists detained and prosecuted were not publicly inciting crime, violence, or mass panic to, *"threaten national security or public order",* as the report sought to portray, but informing citizens about a concerning situation of violence and repression in the context of a coup d'état that has been widely criticised by the international community. As a matter of fact, some of the jailed journalists, such as Shawkan, were not even writing opinions about the situation, but simply taking photographs of the demonstrations organised to oppose the coup.

646. Article 19 of the ICCPR, to which Egypt is a State party, guarantees the right of freedom of expression including the 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 <u>any other media of his choice</u>*" (emphasis added). In its General Comment No. 34, the Human Rights Committee underlined the paradigmatic relevance of a "*free, uncensored and unhindered press or other media*", and of the need to encourage an "*independent and diverse media*" as one of the "*cornerstones of a democratic society*", essential to ensure freedom of opinion and expression.[701]

647. Consequently, the use of the criminal law and the judicial process to prosecute journalists in Egypt cannot be perceived to be a measure justified and necessary in a democratic society. As exposed by several human rights groups and experts from the United Nations, the arrest and imprisonment of Egyptian journalists responds to an intent to silence dissent, impede the documentation of human rights abuses and dominate public narratives in Egypt. According to the Human Rights Committee, the penalisation of journalist solely for being critical of the government or the political social system espoused by the government "*can never be considered to be a necessary restriction of freedom of expression.*"[702]

648. The situation for the Egyptian media is so grave that it has attracted widespread international attention. In 2014, the UN High Commissioner for Human Rights expressed alarm at the "*increasingly severe clampdown*" on the media in Egypt[703] and two months later, the Special Rapporteur on the situation of human rights defenders expressed concern "*about violence and intimidation, arbitrary arrests and judicial harassment against journalists and media workers in relation to their peaceful and legitimate work in denouncing human rights violations.*"[704] Relevantly, the UN High Commissioner for Human Rights highlighted the "*role of the judicial system in this clampdown.*"[705]

649. Several human rights organisations have echoed these concerns and during the Universal Periodic Review, they expressed consternation about the continuous "*attacks on freedom of expression and on journalists*", noting the numerous judicial processes against media professionals on charges of "*offense to the judiciary.*"[706]

650. Meanwhile, the Working Group of Arbitrary Detention reviewed the arrest and imprisonment of several journalists in Egypt and concluded that their deprivation of liberty was arbitrary and in breach of international human rights rules and fair trial standards. In its conclusions, the WGAD drew attention to a "*systemic problem of arbitrary deprivation of liberty of journalists in Egypt*" (emphasis added), who have been detained for "*peacefully exercising their rights to freedom of opinion and expression.*"[707]

UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION

Opinion No. 7/2016 (Egypt)
Date: 14th June 2016

UN Doc No. A/HRC/WGAD/2016/7
Government reply: the Egyptian Government only forwarded a copy of the verdict issued by the Cairo Criminal Court in this case. The Working Group considered that the Government's submission "*did not respond to any of the allegations made by the source*".

Victims

Nine Egyptian journalists, including Abdullah Ahmed Mohammed Ismail Alfakharany, Samhy Mostafa Ahmed Abdulalim, Mohamed Mohamed Aladili, Waleed Abdulraoof Shalaby, Ahmed Sabii, Youssouf Talat Mahmoud Mahmoud Abdulkarim, Hani Salheddin, Mosaad Albarbary and Abdo Dasouki. Some of them are also human rights defenders. All of them were prosecuted in a mass trial known as the "Rabaa Operations Room" case.

Facts

The nine journalists were arrested on different dates and places, from 16th August 2013 to 2nd April 2014. They were all covering and investigating the events occurred on 14th August 2013, during the dispersal of protesters from Rabaa al-Adawiya Square, where hundreds of protesters lost their lives at the hands of Egyptian security forces. Some of them worked for media channels or newspapers allegedly affiliated to the Muslim Brotherhood. Some of them were arrested while conducting these investigations and meeting witnesses and victims of the dispersal.

The nine journalists were prosecuted in a mass trial known as the "Rabaa Operations Room" case. There were accused of several charges, including "spreading false information" or "spreading chaos". They were also accused of having allegedly created the Rabaa Operations Room", an operations room "*to the Muslim Brotherhood to defy the Government during their coverage of events at Rabaa al-Adawiya Square*". On 11th April 2015, the Cairo Criminal Court sentenced eight of the nine journalists to life imprisonment and one to death. They were held in detention for over 2 years and suffered torture.

Their stories include allegations of:

Failure to present warrants where the journalists were arrested.

Threats to family members during arrest.

- Failure to inform them about the charges against them for months. As a matter of fact, the charge of belonging to the "Rabaa Operations Room" was brought six months after their arrest. The charges were very vague, which according to the source "*suggests that they were arrested to impede them from independently and impartially carrying out their work as journalists*".
- Change of the dates of arrest "*to hide the time spent by the journalists in incommunicado detention*".
- Incommunicado detention.
- Pre-trial detention alongside convicted criminals
- Impossibility to challenge the lawfulness of detention, as they were forbidden to speak to the judge.
- Impossibility to communicate with their lawyers during trial and to be entirely present during trial as they were placed in soundproof glass cages.

- Tried with undue delay: the first hearing of the case took place seven months after the arrest, and the trial was "*held over the course of one year owing to regular and vaguely justified postponements by the judge or the prosecution*"

Violations of fair trial standards, as most of the evidence was secret evidence brought by the intelligence services and not communicated to the journalists' lawyers. Charges were changed without explanation, as initially some of the journalists were accused with "disturbing the peace". There was no evidence to substantiate that the journalists had formed a group aimed "*at undermining the Government of Egypt in an attempt to overthrow it*".

Lack of impartiality of the court: only prosecution witnesses testified in court and therefore, only the evidence provided by these witnesses was considered.

Solitary confinement, torture and ill-treatment during both arrest and detention. However, the Prosecutor dismissed all the reports made regarding torture. Some journalists claimed to have been held in cells that were so overcrowded that they were forced to stand up. They were beaten, forced to remain naked and sleep in the floor without mattresses, deprived from sleep, and received death threats. Other claimed to have been placed under solitary confinement for six months and forbidden to leave his cell. Other journalist is no longer able to stand up as a result of torture. They have been denied medical care and treatment.

Some journalists were sentenced *in absentia*, as not all of them were at the courtroom at the moment that the verdict was announced.

On 3rd December 2015, o appeal, the Court of Cassation ordered a retrial of the nine journalists.

Finding

The WGAD found that the deprivation of liberty of the nine individuals is arbitrary and in contravention of Articles 5, 9, 10, 14 and 19 of the ICCPR. The Working Group called upon Egyptian authorities to release the victims, accord them "*an enforceable right to compensation*", and investigate and prosecute those responsible for the violation of their rights.

According to the WGAD, the fact that the journalists accounts are similar despite having been arrested in different times and places, "*lends credibility to their allegations*". The Working Group thus found a "*systemic problem of arbitrary deprivation of liberty of journalists in Egypt*", who have been detained for "*peacefully exercising their rights to freedom of opinion and expression"*. In this vein, the WGAD made reference to a joint statement issued by the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression and on the situation of human rights defenders, in which they expressed "*grave concern at the situation of fear and intimidation of journalists and human rights defenders which inhibit the legitimate exercise of their rights and the performance of their work in Egypt*". The statement noted that there were dozens of reporters in custody in Egypt. Consequently, it was possible to conclude that "freedom of expression is under attack in Egypt".

The WGAD confirmed that the Government had failed to provide information to rebut "the prima facie reliable assertion" that the journalists had been detained and sentenced for "peacefully exercising their right to freedom of opinion and expression" or that the allegations of violations of fair trial were unsubstantiated. Therefore, the WGAD concluded that their deprivation of liberty fell within categories II and III of arbitrary detention.

Finally, the WGAD expressed particular concern about the torture and ill-treatment of the journalists, some of them having been held in solitary confinement for long periods of time. Therefore, the Working Group referred the situation to the Special Rapporteur on Torture.

UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION

Opinion No. 41/2016 (Egypt) **UN Doc No. A/HRC/WGAD/2016/41**
Date: 1st November 2016 **Government reply:** None

Victim

Journalist Mahmoud Abdel Shakour Abou Zeid Attitallah, alias Shawkan.

Facts

On 14th August 2013, Shawkan was arrested while he was covering the violent dispersal of the Rabaa al-Adawiya Square. Thousands of Egyptian citizens had been demonstrating in the Square against the military coup d'état of June 2013, which had ousted Mohamed Morsi, the first democratically-elected president of Egypt. Almost a thousand citizens lost their lives as a result of the expressive and disproportionate force used by security forces during the dispersal.

The police officers who arrested Shawkan neither presented a warrant nor explained the reasons for his arrest. They conducted the arrest although he had told them that he was a journalist covering the event.

During detention Shawkan was constantly beaten, held in an overcrowded cell, threatened, and deprived from food and drinks for three days. However, he did not receive any medical treatment for the injuries caused by torture. Afterwards, he was transferred to prison together with dozens of detainees. During the transfer, Shawkan was handcuffed and left in a van for "*seven hours without water, food or fresh air, when the outdoor temperature was above 30°C*".

On 16th August 2013, he was interrogated by a prosecutor in the absence of his lawyer, and in September, he was accused of "possession of weapons", "illegal assembly", "murder" and "attempted murder". According to the source, the accusations were not official charges and *"were identical to those levelled at more than 700 other individuals accused in the same "Rabaa sit-in dispersal" case, without any consideration for Mr. Attitallah's individual criminal responsibility*".

Shawkan's lawyers could neither access the documentation presented by the prosecutor, nor visit Shawkan, nor assist him on several interrogation sessions. Thus, Shawkan was either denied access to his lawyer for long periods of time, or had only limited access, as their meetings were not conducted in private. In December 2013, he was transferred to Tora Prison, where he was placed again on an overcrowded cell. He was held in solitary confinement for four days in February 2016, and although he was diagnosed with hepatitis C, he has been denied medical treatment.

Since his detention in August 2013, his pre-trial detention has been systematically extended every 45 days, sometimes in the absence of Shawkan—who did not receive any notification about those meetings—and never in the presence of his legal counsel. The first time he was taken to court and permitted to speak to a judge was in May 2015. In August 2015, his lawyers requested his immediate release, as Shawkan had been more than two years in pre-trial detention—the maximum period, as established in the Egyptian Criminal Code—. That month, Shawkan's case was transferred to a criminal court for trial, but his detention was further extended. He was going to be tried in a mass trial alongside 700 other defendants, "charges in relation to the "Rabaa sit-in dispersal" case", but the hearing was adjourned due to lack of enough space in the courtroom.

Finally, in March 2016—more than two years and a half after his arrest—during the first trial hearing, Shawkan was formally charged with "joining a criminal gang", "murder", "attempted murder", "participating in a gathering with the purpose of intimidation and creating terror and exposing people's life to danger", "obstructing public utilities", "overthrowing the regime through the use of force and violence, a show of strength and the threat of violence", "resisting the authorities", "obstructing the implementation of laws, surveillance" and "disturbing public space". These charges may be punished with death penalty. Although some trial sessions have taken place, the court has persistently adjourned the trial until the present day.

Finding

The WGAD concluded that Shawkan's detention was arbitrary, falling within categories I, II and III of arbitrary detention. It fell within category I as the circumstances and reasons of arrest were not clear, even if he was allegedly arrested *in flagrant delicto*. Moreover, Shawkan was held in custody longer than two years—the maximum duration of pre-trial detention—and consequently, there were no legal basis to justify his continued detention.

The case also falls within category II as, according to the WGAD, Shawkan was detained for the exercise of freedoms guaranteed under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights; and finally, it is also a category III arbitrary detention because Egyptian authorities breached Shawkan's right to a fair trial. In order to justify this conclusion, the WGAD makes reference to the fact that Shawkan is being tried alongside 700 other accused *en masse,* which makes it difficult "*to hold each accused individual criminally responsible*", and that some hearings took place in his absence or in the absence of his lawyers, who were also precluded from attending certain interrogations.

651. Apart from these two cases, the *Marriot Cell case*, also known as the Al-Jazeera case - which has already been examined in Chapter 8 of this report - stands out as an egregious example of the use of criminal law against journalists to suppress dissent and symbolised *"Egypt's renewed crackdown on free speech."*[708] The Al-Jazeera workers were arrested for "*the false broadcasting of media reports which threatened national security and their coordination with members of the Muslim*

Brotherhood."[709] However, Mohamed Fahmy, Baher Mohamed and Peter Greste are not the only Al-Jazeera journalists who have been prosecuted for their activities, as several of its workers have been subjected to long trials[710] for allegedly "*aiding a terrorist group*" and "*harming the national interest*"[711], including Mohamed Badr, a cameraman working for Al Jazeera Mubasher Masr, and Abdallah El Shamy, a correspondent who was arrested "*for covering violations by the Egyptian authorities.*"[712]

652. The report commissioned by the State Litigation Authority of Egypt argues that taking into account the impact of Al-Jazeera and the sensitivity of the security situation in Egypt, the dissemination of what Egyptian authorities defined as "*false information*", could constitute a serious threat to the national security of the country with the objective to "*undermine national unity and to serve the Muslim Brotherhood.*"[713]

653. It must be noted that Decree Law No. 94 of 2015 on counterterrorism, passed in August 2015, institutionalised a policy of prosecution of the Egyptian media being critical of the regime while intending to control the publication of information about terrorist attacks.[714] In this vein, Article 35 of the law punishes with a fine of no less than LE200,000, the act of reporting "false" news about terrorist attacks that "*contradicts the Defence Ministry's official statements*"[715] (emphasis added), thus creating a system of censorship[716] of non-official narratives[717]. Journalists will have to face incarceration if unable to pay the fine.

654. The report commissioned by the State Litigation Authority of Egypt justifies this legal provision against journalists with a series of arguments. First, the report calls for an interpretation of this provision taking into account "*the inherent difficulties of combating terrorism, along with the political tension caused by terrorist acts in the region,*"[718] as well as the fact that the dissemination of false news has been linked to "*an increase in attacks on security forces.*" Consequently, according to the report, the Egyptian public considered the law as a "*necessary precaution*" given the "*very real existence of the terror threat in Egypt, and its impact on ordinary civilians.*"

655. This has no basis in either fact or law.

656. In contrast, in its General Comment No. 34, the Human Rights Committee referred explicitly to the media coverage of terrorist activities by highlighting the "*crucial role*" that the media plays in informing the public about acts of terrorism, and therefore, that "*its capacity to operate should not be unduly restricted.*"[719] In this regard, the Committee notes, journalists *"should not be penalized for carrying out their legitimate activities.*"[720]

657. This situation is particularly concerning in Egypt because - as will be exposed later in this chapter - the main political group in the opposition, the Muslim Brotherhood, has been officially labelled and characterised as a terrorist organisation. Consequently, informing about human rights abuses against the opposition, and more particularly, against the Muslim Brothers - actions that could be depicted as 'counter-terrorist' actions by the Egyptian regime - entails criminal consequences.

658. Second, the report commissioned by the State Litigation Authority of Egypt notes that the law only seeks to prevent "*intentional acts of misreporting which connotes a degree of knowingness and repetition and an absence of verifying the truth of the contents.*"[721] Consequently, according to its authors, Egyptian authorities only seek to limit "*the very real use of the media to promote terrorism.*"[722]

659. However, the legal provision included in the counter-terrorism law does not require a degree of *knowingness* or *repetition* for conviction. It simply punishes the authors of "*false news*" when they are considered as such by an Egyptian judge. Moreover, this alleged limited scope of the law contrasts with the cases analysed by the Working Group on Arbitrary Detention that were shown above. Far from constituting exceptions and extreme cases of an intentional and fraudulent *"absence of verifying the truth of the contents",* journalists in Egypt have been prosecuted for the legitimate exercise of their work.

660. As exposed above, a number of journalists have been specifically targeted for having reported, and criticised the excessive force used by security forces to disperse the

demonstrations of Raba'a and al-Nahda squares in 2013. It is estimated that around 1,000 people died during that violent action, and other reputed international organisations, after conducting their own detailed investigations on the events, concluded, similarly, that the dispersal is likely constitutive of a crime against humanity.[723] Therefore, the information given by the journalists was credible. As a matter of fact, it is likely that journalists were not reporting lies, but an uncomfortable truth for the new regime that could entail criminal consequences for its leadership.

661. Finally, the report commissioned by the State Litigation Authority of Egypt highlights that similar provisions against journalism exist in other countries within the region, including Bahrain and Jordan. In similar terms, the authors of the report also justified the criminalisation of journalists critical to Sisi regime by listing a number of states that "*have adopted "false news provisions", which place a duty on journalists to report truthfully or to avoid one-sided, distorted or alarmist reports".* These countries are *"Saudi Arabia, Bahrain, UAE and Oman.*"

662. 'False news' laws are rare in established democracies but are often found in repressive countries. These provisions are frequently formulated in a manner that suggests that the foundation is based on a journalist's duty to report the truth and avoid alarmist stories, yet the true objective is to limit the freedom of expression and avoid criticism of an authoritarian regimes.

663. The fact that other countries in the same region include similar provisions, and anti-terror laws, does not legitimise their existence. A simple analysis of the situation in any of the countries listed serves to demonstrate the violation of human rights these provisions represent. Turkey, for example, has a long history of using the criminal justice system to prosecute journalists for doing their work by misusing terrorism laws.[724] In what has been categorised as a "*ruthless assault on press freedom*", it is said that the government is not only killing journalists, but "*journalism in its entirety*"[725] in an effort to prevent public scrutiny according to Hugh Williamson, Europe and Central Asia director at Human Rights Watch. Arne König, president of the European Federation of Journalists said that in Turkey "*there is currently no*

distinction being made between terrorism and journalism. (...) Anybody who writes could find themselves under suspicion. That is not an environment in which the media will feel free to report independently or journalists feel able to do their jobs". Citing Turkey as an example for their fight against terror along with their respect for the freedom of expression was not convenient when the country has been christened as a prison for journalists.[726]

664. Other fellow African Union members that also include fake news provisions in their laws unfortunately find themselves in analogous situations. Such is the case of Ethiopia, where experts like Rona Peligal have said that the "*vague and broad anti-terrorism law was open to abuse and it is being abused,*" concerning the unsubstantiated convictions for supporting terrorism of two Swedish journalists, one of many similar sham trials.[727] The UN Special Rapporteur on human rights defenders commented on the debacle taking place in Ethiopia saying that the "*Anti-Terrorism Law severely restricts the rights to freedom of opinion and expression of human rights defenders, because of its overly broad definition of "terrorist acts," which include acts of peaceful protest that result in the disruption of any public services.*"[728] Cameroon also demonstrates the crushing reality that these provisions included in their so-called anti-terror law are a sharp tool of fear, which results in the abuse of freedom of expression. The result is that most journalists "*in the private media are free to report only what the government wishes to see,*" as was said by a newspaper owner too afraid of retaliation to give his name.[729]

665. In light of these human rights violations, the Human Rights Committee, in charge of interpreting the ICCPR, has expressed the "*importance under the covenant of 'uninhibited expression' with respect to debate concerning public officials in the political domain and public institutions.*" This is extremely relevant, for the prosecuted journalists are targeted for news that contradict the official statement of the government, especially regarding their policies or leaders. This news tends to be the truth hidden by the articles perfectly crafted, censored and edited by the government, that they wish to remain hidden. Still, even if it turns out that what is said is not the whole truth, the government should not have the power to repress their

freedom to say it, nor should they be allowed to punish it using criminal law. Regarding this, Joe Stork, Human Rights Watch deputy director of the Middle East and North Africa said, "*There is no legitimate reason to jail journalists simply for publishing news that turns out to be wrong. Instead, authorities should simply deny such stories and set the record straight*.[730]"

666. Despite the evident affront to human rights, an international court has yet to consider the issue of the legitimacy of false news provisions under international law. Nevertheless, the UN has not remained silent about the issue. The UN Human Rights Committee has reiterated in several occasions that fake news provisions "*unduly limit the exercise of freedom of opinion and expression,*" even concerning laws that limit fake news which cause a threat to public unrest. This same Committee, with regards to the domestic legal system of Cameroon, remarked that "*the prosecution and punishment of journalists for the crime of publication of false news merely on the ground, without more, that the news is false, [is a] clear violation Article 19 of the Covenant."*[731]

667. The opposition to fake news laws arises from the need to guarantee the liberty of journalists to report what they believe is the truth without fearing incarceration. It must be understood that often the truth is a matter of opinion, and even facts that are considered to be well established can be subject to change or other considerations. Freedom of speech must be protected at all cost, especially when there are situation of violence and political instability.

668. Given the precedent, when laws such as these exist, the decision of which news is allowed or not falls squarely on the shoulders of the government and its authorities. This gives them the power to censor unfavorable opinions and endanger democracy in the country. Given the extremely vague nature of these provisions, the false news laws cause a landslide that allow the imprisonment of citizens based on the opinion of the current government.

669. As a matter of fact, when analysing the charges against the three journalists in the Al-Jazeera case, the former UN High Commissioner for Human Rights Navi Pillay declared she was "*shocked and alarmed*" by these verdicts and highlighted the broad and vague nature of the "*fake news*" charges and provisions:

> "*the charges levelled against the journalists, which include harming national unity and social peace, spreading false reports, and membership of a 'terrorist organization,' are far too broad and vague, and therefore reinforce the belief that the real target is freedom of expression.*"[732]

670. The protection of freedom of expression cannot be determined by the political climate at the time, for that would limit the freedom in itself. The ban of certain news to protect the truth is contradicting, for allowing only one version of the truth to exist, limits the knowledge citizens have of the current situation and leads to a carefully curated government lie.

671. In this vein, although States have a margin of appreciation "*in cases which concern public emergencies, national security interests, or public morals,*"[733] as argued by the report commissioned by the State Litigation Authority, according to the ECHR, the necessity for any restriction on freedom of expression "*must be convincingly established*", and there must be a "*pressing social need*" for the restriction.[734]

672. From a legal perspective, these false news provisions do not comply with the minimum requirements, and legal standards established by international jurisprudence to impose restrictions on freedom of expression. As mentioned earlier, international case law defined, under strict criteria, that for a restriction on the media to be lawful, it must be legal, justified, and necessary in a democratic society in pursuit of a legitimate aim, and proportional.

673. In this vein, Article 19 of the ICCPR recognises that the exercise of the rights to freedom of expression and of the media may be subject to certain restrictions, "*but*

these shall only be such as are provided by law and are necessary: *(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.*"

674. Although the imposition of false news provisions, and the criminalisation of reports on terrorist acts contradicting the official statements of the Ministry of Defence are both legislative measures approved by law, they cannot be considered necessary and justified for the protection of national security.

675. First, there are credible doubts about the real objective behind these legal provisions. Although it could be considered that there is a real terrorism threat in Egypt, it must be noted that even the UN Special Rapporteur on human rights and counter-terrorism has publicly criticised the measures taken by Egyptian authorities against journalists. In a common statement with the UN Special Rapporteur on freedom of expression in August 2017, she raised grave concerns over the "*expanding list of websites shut down or otherwise blocked by authorities for 'spreading lies' and 'supporting terrorism.'*"[735] According to the UN experts, such measure "*deprives all Egyptians of basic information in the public interest*" and has been done with opacity and lack of public record. Relevantly, the experts raised doubts about the true objective of the measure, which used the counter-terrorism narrative as an excuse to silence criticism:

> "*limiting information as the Egyptian Government has done, without any transparency or identification of the asserted 'lies' or 'terrorism', looks more like repression than counter-terrorism.*"

676. Similar arguments can be applied to the counter-terrorism legislation criminalising the work of journalists when informing about terrorist events. As a matter of fact, the UN Special Rapporteurs urged the Government of Egypt to release all journalists and end "*its ongoing assault on freedom of expression.*" In this vein, in its 2014 report, the UN Special Rapporteur criticised the fact that in some jurisdictions, "*authorities have used broadly worded counter-terrorism laws to charge journalists and members of*

the political opposition with, inter alia, "encouraging terrorism", thereby imposing an unjustified limitation on their right to freedom of expression."[736]

677. In May 2016, three UN Special Rapporteurs had already reported that Egypt was using national security provisions and counterterrorism legislations "*to target individuals exercising their rights, in particular journalists and human rights activists*"[737]:

> "*Security concerns should not be used as a pretext to harass journalists, lawyers and protestors and ban peaceful political opposition, which will undermine not only public debate and fundamental rights, but security and long-term stability.*"

678. Consequently, experts in international criminal law have already expressed doubts about the alleged "legitimate aim" of these counter-terrorism provisions against media.

679. In this vein, the measure must be interpreted taking into account the general context with regards to the media in Egypt. The third report of this series already analysed the difficult situation of Egyptian journalists, who "*have faced increasing dangers and restrictions*"[738] since the forceful removal of Mohammed Morsi from the country's presidency. Although detailed information about these events are available in that report, it must be noted that immediately after the coup d'état, the new regime closed media outlets and channels close to the Muslim Brothers, including Al-Jazeera Mubasher Misr, Al Yarmouk, Al Quds and Ahrar 25[739], and arrested some of their workers and directors.[740] The argument behind this decision was, once again, that these channels were "*spreading false information which threatened the national security and disturbed the public order.*"[741] This ideological partiality in the actions against certain media outlets - including ostracism by pro-government media - is indicative of both their repressive nature and of the lack of legal justification. It must be noted that the movement 'Journalists against the Coup' was prohibited from

attending certain demonstrations[742]; that Al-Jazeera journalists were expelled from official press conferences[743]; that Al-Ahram, a state-owned publishing house, confiscated Al-Masreyoun newspaper because its content contradicted the Army's interests[744]; and that there have been restrictions on the "*filming and coverage of the trials of the Muslim Brotherhood and Morsi.*"[745]

680. Worryingly, apart from these limitations, the strategy consisting of the arrest, detention, and imprisonment of journalists, and the use of criminal law to attack their activities has been complemented by direct attacks upon the personal and physical integrity of media workers. Amnesty International have documented cases in which security forces "*apparently deliberately targeted media workers while dispersing protests:*"[746] photographer Ahmed Assem died *"after being shot by a sniper while he was filming him the incident in front of the Republican Guards Headquarters on 3rd July 2013,*"[747] and at least other four journalists were killed during the dispersal of the sit-ins in Raba'a and al-Nahda in August 2013.[748] Moreover, in November 2014, twelve journalists were assaulted by police forces while working[749].

681. The imprisonment of journalists cannot be considered a proportional measure either. The UN Special Rapporteur on Freedom of Opinion and Expression issued a statement in 2000 concerning these laws, saying that

> *"In the case of offences such as […] publishing and broadcasting "false" or "alarmist" information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights."*[750]

682. It must be noted, that in practice, journalists are not only charged with "spreading lies" – a charge that, according to the counter-terrorism law, does not entail a sentence of imprisonment – but with a series of other criminal offenses. For example, the photojournalist Shawkan has spent more than two years in pre-trial detention formally

charged with "joining a criminal gang", "murder", "attempted murder", "participating in a gathering with the purpose of intimidation and creating terror and exposing people's life to danger", "obstructing public utilities", "overthrowing the regime through the use of force and violence, a show of strength and the threat of violence", "resisting the authorities", "obstructing the implementation of laws, surveillance" and "disturbing public space" for taking photographs during the dispersal of the sit-in at Raba'a square.

683. While some restrictions to the work of journalists have been accepted in International Human Rights Law, such measures usually consist of the imposition of fines or obligations to compensate the persons damaged by the information, but could hardly justify criminal prosecution leading to sentences of imprisonment. In this vein, in Başkaya and Okçuoglu v. Turkey, the European Court of Human Rights declared to be "struck by the severity of the penalty imposed on the applicants" consisting of sentences of imprisonment of twenty months, and five months respectively.[751]

684. This case deserves further analysis, as it provides useful guidance on the ECHR's interpretation of the balance between freedom of expression and "national security" interests. In this case, the applicants, Mr Fikret Başkaya and Mr Mehemet Selim Okçuoğlu, Turkish citizens, were convicted under the Prevention of Terrorism Act of 1991 for "*disseminating propaganda against the indivisibility of the State*" [752] after publishing a book about the "*Kurdish problem*". The court unanimously found that such conviction constituted a violation of the applicants' right to freedom of expression.

685. For comparative purposes, it must be noted that even though the court had regard to the sensitivity of "*the security situation in south-east Turkey and to the need for the authorities to be alert to acts capable of fuelling additional violence,*"[753] it considered that the measure was not necessary in a democratic society as it was neither justified nor proportional. According to the ECHR, the Turkish authorities did not have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey "*irrespective of how unpalatable that perspective may*

be for them."[754] This pluralism and diversity of opinions is, actually, what Egyptian courts have attacked with the implementation of false news provisions.

686. Additionally, when analysing restrictions on the right to freedom of expression in the case Thorgeir Thorgeirson v. Iceland, the ECHR took into account whether the particular measure was "*capable of discouraging open discussion of matters of public concern,*"[755] and in Marônek v. Slovakia, it provided stronger protection as the matter was of 'general interest'.[756] Undoubtedly, terrorist acts and the dispersal of protests are matters of the utmost general interest that should be open to public discussion.

687. Finally, with regards to the situation of freedom of expression in Egypt, the report commissioned by the State Litigation Authority highlights some efforts made by Egyptian authorities to rectify the problem of the criminalisation of journalists. To support its position, the report notes first, that the present regime has not restricted criticisms towards the government in relation to the manner in which Egyptian security forces conducted investigations following the murder of Giulio Regeni; and second, that in November 2016, President Sisi pardoned 82 prisoners, including one television presenter. None of these arguments are legally relevant nor rationally valid.

688. First, the investigation of the disappearance and death of Giulio Regeni was characterised by oppressive criminal tactics. On September 13, 2017, the British newspaper, The Guardian published an article informing that a lawyer investigating Regeni's murder was facing prosecution "*after being forcibly disappeared at Cairo airport*"[757] while en route to a meeting with the United Nations Working Group on Enforced Disappearances.[758] According to the newspaper, the lawyer -Ebrahim Metwally Hegazy - was charged with "*managing an illegal group, spreading false news … [and] cooperating with foreign organisations.*"[759] In any case, admitting criticisms with regards to the conduct of security forces in a particular case should not be an exception, but the rule.

689. Second, as previously mentioned in this report, presidential pardons - in the case of the mentioned journalist, issued one month off the conclusion of his sentence - are

irrelevant to determine whether Egyptian courts are using criminal law to target journalists in the exercise of their legitimate activities. Moreover, the liberation of prisoners does not exempt the Egyptian state from compensating grave violations of due process rights, as well as arbitrary and politically motivated incarcerations.

The Muslim Brotherhood and Counterterrorism Policies

690. After a car bomb incident at a police station that resulted in at least 14 casualties on the December 21, 2013, the Muslim Brotherhood was deemed a terrorist organisation by the interim Prime Minister, Hazem el-Beblawi.[760] This declaration was made even though an unaffiliated Sinai-based terror group claimed responsibility for the attack, and despite the fact that there was no evidence of the Muslim Brotherhood's guilt. It resulted in the prohibition of the biggest opposing political party and Egypt's oldest Islamist movement, and the imminent downfall of not only its leaders, but also their supporters. As exposed in the third report of this series, banning the Muslim Brotherhood served as a tool to target not only its members, but also hundreds of non-Islamist youth who have been prosecuted for belonging to a banned organisation and under the same pretext of "fighting terrorism."[761]

691. The Special Rapporteur on counter-terrorism and human rights, has reiterated on many occasions the importance of attributing a strict definition of the concept of terrorism in order to limit its scope.[762] Despite this, given the vague definition of terrorism in international law, world leaders and media continue to use it as a catch-all term, allowing for misleading interpretations.

692. Given its excessively wide interpretation, world leaders can deliberately use courts and the criminal punishment of terrorist actions to delegitimise a political opponent. Sisi's government's insistence on denominating the Muslim Brotherhood is a flagrant example of this technique. Counter-terrorism legislation has provided a veil of legality and legitimacy to the crackdown against the Muslim Brotherhood in Egypt, a crackdown that has been implemented at court level. As Human Rights Watch notes,

"*by rushing to point the finger at the Brotherhood without investigations or evidence, the government seems motivated solely by its desire to crush a major opposition movement.*"[763]

693. This brand had a strong political impact, as it delegitimised the main political opponent of the current regime. Despite the lack of evidence to substantiate the allegations of terrorism, once marked by the terrorism criminal stigma, the political goals or protests of the Muslim Brotherhood were rendered moot, for they remain unknown or unaddressed by being automatically discredited out of fear. This system is extremely beneficial to the labelling party for it shifts the attention of the civilian population away from controversial policies.

694. It also serves as justification for the violent crackdown against the group and for its judicial persecution. As noted in the first two reports in this series, the Muslim Brotherhood is a democratic Islamist party that has historically distanced itself from terrorist organisations by embracing non-violent methods of political participation in public affairs. As a matter of fact, the group raked the most votes in the first democratic elections celebrated in Egypt.

695. The regime executed this plan by way of Royal Decree on the 7th of March of 2014, that even made sympathising with the group criminally prosecutable.[764] This abuse of power caused a landslide, for it allowed the government to prosecute thousands of citizens who had expressed their opposition by accusing them of sympathising with the Muslim Brotherhood, whether true or not, thus censoring the voice of the citizens and spreading fear.[765]

696. Mohamed Badie, the party's Supreme Guide, was first sentenced to death in prison for his alleged involvement in the deaths that took place at a police station in 2013. Along with him, another 182 Muslim Brotherhood supporters were also sentenced to death in one of the mass trials in Minya.[766] In what has been called an "*unprecedented crackdown on dissent and opposition, trampling over fundamental freedoms and*

rights"[767], security forces detained and sentenced thousands of people between July 2013 and April 2014.[768]

697. Former President Morsi has fared no better than the other leaders of his group since his military removal. He has been accused of multiple crimes, such as a prison break and collusion with foreign armed groups, and was sentenced to death in May of 2015 along with 106 Muslim Brotherhood supporters.[769]

698. The death sentence was later overturned, substituted with life imprisonment. Nevertheless, in the four years that he has been incarcerated in deplorable conditions, he has been in and out of courtrooms suffering gross due process violations and disregarding for his worsening health. As a matter of fact, in both the so-called Espionage Case and the Ittehadeya Case, Morsi and the rest of co-defendants were obliged to remain in a soundproof cage during their trial,[770] and the UN WGAD determined that his detention was arbitrary.[771]

699. Article 19 of the Universal Declaration of Human Rights states that freedom of expression is the "*fundamental right to seek, receive and impart information and ideas through any media regardless of frontiers*". By attacking participants of peaceful demonstrations, and members of a political group, Egyptian authorities are not only attacking the right to protest or freedom of association through the abuse of their power, but violating the right to freedom of expression at its very core without any legitimate reason.

Implementation of Legislation Contrary to Democratic Rights and Freedoms

700. Nevertheless, these counter-terrorist policies are not the only instrument routinely applied by the Egyptian judiciary that are contrary to public freedoms. According to the ICJ, since the arrival of Sisi to power, hundreds of individuals "*have been tried and convicted for the peaceful exercise of their rights to freedom of expression and assembly, on the basis of laws that are inconsistent with rights enshrined in the 2014 Constitution and in international treaties to which Egypt is party*" [772] (emphasis added).

701. Legal instruments passed since 2013, such as the Law No. 107 of November 24, 2013 on the Right to Public Meetings, Processions and Peaceful Demonstrations, known as the "Protest Law" have been subjected to significant criticism by international human rights organisations and institutions. In July 2014, the African Commission on Human and Peoples' Rights called upon Egyptian authorities to "*review its laws on demonstrations and public rallies on the use of rearms against protesters to bring them in line with international standards.*"[773] The UN Rapporteur on the situation of human rights defenders also stated that the law heavily restricts *"the right to freedom of assembly and has a deleterious impact on the work of human rights defenders in the country.*"[774] In its Opinion 6/2016 the UN WGAD declared that Law No. 107 seemed "*contrary to international law*" and that such legislation appeared to be used "*as a tool for cracking down on peaceful demonstrations.*"[775] According to the same group, the law has led to "*systemic and widespread arbitrary detentions of individuals in the context of peaceful protests.*"[776]

702. Additionally, both Zeid and Pillay, the two last United Nations High Commissioners for Human Rights, have published statements criticising the law[777] as part of the "*increasing restrictions on the right to freedom of assembly and criminalization of peaceful protests*"[778] in Egypt.

703. The Protest Law imposes a legal obligation on the organisers of demonstrations or marches of more than ten (10) people to send a written notification three (3) days in advance to the police, "*whose jurisdiction includes the public meeting's location*", which can in turn, prohibit, postpone, or change the location of the protest if there is a threat to security or peace; thus leaving great discretion to the police to determine what constitutes such a threat.[779]

704. The system is currently designed as a mechanism of *de facto* prior authorisation by the Ministry of Interior[780], and therefore, it is not only incompatible with international standards regulating the right to peaceful assembly but also unconstitutional[781]. It provides the government with complete power to effectively ban demonstrations critical with the new military regime[782], and consequently, it has been described as a tool to control expression of political dissent.

705. In his statement of June 20, 2014, the Special Rapporteur on Human Rights Defenders in Africa deplored the fact that this law required organisers of public demonstrations

> "*to obtain prior authorisation and notify the public authorities about slogans to be used*". According to the Rapporteur, such an action "*gives discretionary powers to the authorities to decide the fate of the peaceful demonstrators in disregard of international standards concerning freedom of assembly.*"[783]

706. Second, human rights groups have also criticised this law for granting excessive discretion to security forces to use lethal force to disperse protests, as it creates the "*legal framework for the use of excessive force against any protesters*"[784] and uses extremely vague terms to authorise the use of lethal force. It must be noted that Article 11 of the law permits security forces to disperse protests in the event of a crime, without determining the severity, gravity, or type of crime; while Article 13 allows for "*escalatory measures"* if security forces fail to disperse gatherings through peaceful methods, "*proportionality*" being the only reference to determine the

lawfulness of the use of force. Violence, thus, seems to be not a tool of last resort, but an ordinary tool of repression of peaceful protests.

707. A last point of criticism, comes from the fact that the law criminalises peaceful protests[785], as the system of prior notification indirectly delegitimised peaceful, spontaneous demonstrations[786] in Egypt. The law criminalises the wearing of masks during demonstrations, and the participation in peaceful, but unauthorised protests, or in protests organised next to places of worship.[787] Moreover, in breach of the criminal principle of legality, the law uses extremely broad and vague wording to define offenses under the law.[788]

708. The third report in this series includes a detailed analysis of the Protest law[789], as well as of its practical consequences with regards to the number of protests and the level of violence used to disperse them – including some relevant and paradigmatic cases - that will not be reproduced here. However, it must be noted that the law was passed by interim President Mansour prior to the establishment of a legislative chamber and of the approval of the 2014 Constitution. Consequently, it is pre-constitutional and lacks democratic legitimacy.[790]

709. Nevertheless, the Protest Law is not the only instance of Egyptian legislation being internationally criticised for its repressive character and its lack of compliance with international human rights standards.[791] As previously referred to in this chapter, in August 2015, a new counter-terrorism law was enacted through Decree Law No. 94 of 2015, which was described as "*the most flagrant legislative assault on public freedoms and human rights initiated by the security apparatus in 37 years*"[792] and "*another nail in the coffin of the rule of law.*"[793] According to Amnesty International, the law was designed "*to facilitate the authorities' crackdown on members and supporters of the [Muslim Brotherhood];*"[794] prosecutors having accused thousands of Brotherhood members "*of terrorism or membership in a terrorist group.*"[795]

710. The law has several characteristics that make it contrary to international legal standards. In summary:

a. Although the report commissioned by the State Litigation Authority states that this law was designed to provide "*definitions and further clarity;*"[796] the reality, is that it broadened the definition of terrorism and terrorist activities[797] using terms that are so vague so as to breach the principle of legality, and provide "*blanket powers to ban groups.*"[798]

b. The law criminalises activities that, in principle, should not be considered terrorist, including "*private expressions of opposition to the government"* and "*civil disobedience*"[799] protected by the principle of freedom of expression, or even protests organised in the vicinities of government buildings.[800]

c. It facilitates violations of due process rights, as Egyptian prosecutors are given

> "*expanded powers to detain suspects 'without judicial review', hold detainees for eight days without a warrant, order pre-trial detention up to two years, and authorize 'wide-ranging and potentially indefinite surveillance of terrorist suspects without a court order'.*"[801]

d. The law also exempts security forces from criminal prosecution for the use of force in defence of *"property*"[802], which is completely contrary to international standards. According to the Egyptian Initiative for Personal Rights and the Cairo Institute for Human Rights Studies this provision is "*tantamount to giving law enforcement a green light to use lethal violence while guaranteeing they will not be held criminally accountable.*"[803]

e. Finally, the law permitted a *de facto,* permanent and unlimited state of emergency.[804]

711. Consequently, it can be concluded that the law is unconstitutional and in breach of international human rights obligations.

712. The relevant point - taking into account the content and objective of this report - is that members of the Egyptian judiciary have routinely applied this abusive legislation without challenging its content before the Supreme Constitutional Court, and used its provisions to impose lengthy sentences of imprisonment against opposition leaders and human rights defenders, particularly against Morsi's supporters and secular critics to the government.[805] The Egyptian Organisation for Human Rights listed 200 youths arbitrarily imprisoned under the Protest law[806], and the Egyptian Initiative for Personal Rights identified provisions in the Counter-terrorism Law that had previously been declared unconstitutional by the Supreme Constitutional Court.[807]

713. Criminal legislation that is manifestly incompatible with constitutional provisions and international standards of justice and human rights has been used by Egyptian courts without restrictions, despite the numerous requests submitted by defence counsel to challenge the constitutionality of these laws. As a matter of fact, the ICJ has documented some cases in which this request was made and subsequently rejected by Egyptian judges, who declared that the constitutional defence was not serious enough to file a communication before the Supreme Constitutional Court or that it was only aimed at "*prolonging the trial:*"[808]

> "*the defence counsel challenged the constitutionality of Articles 7, 8, 19 and 21 of the Demonstration Law on the basis that they contradict the right to peaceful assembly, as enshrined in Article 73 of the Constitution, and Articles 375 and 275 bis of the Criminal Code because they contradict the principle of individual criminal responsibility. The Heliopolis Misdemeanour Court did not examine the substance of these challenges. Instead of referring the issue to the SCC for consideration, it referred to its own discretionary power to assess whether the constitutional defence is "serious" enough to grant the parties the right to present it before the SCC."*[809]

714. This refusal of Egyptian Judges to refer these laws to the Supreme Constitutional Court as well as the systematic application of laws that are manifestly in breach of international obligations and to the Egyptian Constitution constitutes to be a grave affront to justice, and suggests the judiciary's collaboration in the repressive strategy in Egypt.

Lack of Equality Before the Courts

715. The use of courts and criminal legislation to silence dissent as well as to target political opponents and human rights defenders can also be inferred from the pronounced selectivity in the cases investigated and prosecuted by Egyptian prosecutors and judges.

716. Whilst thousands of Egyptian citizens have been prosecuted for baseless charges following abusive legislation – and without evidence to prove the criminal allegations against them - security forces responsible for serious violations human rights often remain unpunished. In this vein, while 1,100 citizens were arrested during the dispersal of the sit-ins of Raba'a and al-Nahda[810], the violent reaction of security forces has been met with impunity. This impunity is particularly worrying following the rise in political and public violence - in the form of arbitrary detentions, torture, extrajudicial killings and enforced disappearances - since the arrival of Sisi to power, as it gives *carte blanche* to security forces to continue abuses.

717. The lack of accountability for security forces and public workers responsible for the commission of human rights abuses has been the subject of common concern in international human rights bodies and organisations. For example, the ICJ underlined the "*routine failure"* to ensure that those responsible for human rights violations are brought to justice due to

> *"the failure of prosecutors to ensure that prompt, effective, thorough and independent and impartial investigations are carried out into such violations and to prosecute those reasonably suspected to be responsible.*"[811]

718. According to the organisation, most human rights cases have been characterised by delays and lack of impartiality, and have been closed due to "*lack of evidence,*" [812] leading either to acquittals or to "*disproportionately lenient sentences.*" [813] To exemplify this, the ICJ analysed certain paradigmatic cases of blatant impunity. First,

the case brought against former President Hosni Mubarak, former Interior Minister Habib Al Adly, and six of Al Adly's security officials "*on charges of complicity to commit premeditated and attempted murder of protesters*" [814] during the January 2011 revolution. After a lengthy judicial process, Al Adly and all his security officials were acquitted, and the Court of Cassation ordered the re-trial of Hosni Mubarak. Therefore, six years later, the crimes against the protestors of the January revolution remain unpunished.

719. The ICJ also highlighted the case of four officials prosecuted for their responsibility in the death of 37 detainees on August 18, 2013, after firing tear gas into the police van in which the detainees were being transferred. Ironically, the report commissioned by the State Litigation Authority of Egypt presented the same case as an example of accountability efforts led by Egyptian authorities, as the judicial process led to criminal sentences: "*the investigation of security officials depicts the willingness of state prosecutors to conduct independent investigations.*"[815] Nevertheless, the report fails to mention that despite the gravity of the crime - during which the lives of 37 people were lost, bringing about widespread international condemnation - the prosecutor charged the officers only with misdemeanour offences of "*involuntary manslaughter*" and "*extreme negligence*". At the end of the judicial process one of the officers received a ludicrous sentence of five years' imprisonment, while the other three were given one-year suspended sentences.

720. The report commissioned by the State Litigation Authority of Egypt holds that international criticism towards the Egyptian judiciary fail to take into account existing investigations. In order to support this position, its authors made reference to the establishment in December 2013 of an independent fact-finding mission to investigate events "*which occurred in connection with the ousting of former President Morsi.*"[816]

721. However, the report issued as a result of the investigative work of this mission was widely described as opaque and "*falling short of expectations*"[817] by international human rights organisations, which also noted that there has been "*no actual accounting for what happened or any credible judicial investigations or prosecutions,*

much less actual accountability."[818] A year after the death of approximately 1,000 protesters in the dispersal of the Raba'a and al-Nahda sit-ins, prosecutors have not brought charges against a single member of the security forces. According to Human Rights Watch, the lack of accountability for this crime expanded to all branches of State power, which have refused to acknowledge their responsibility in the August 2013 massacre:

> "*The police and government to date have refused to acknowledge any wrongdoing on the part of security services in their violent dispersal of the sit-ins or other attacks on protesters. In a news conference on August 14, Interior Minister Ibrahim said that his ministry successfully had carried out the dispersal of the Rab'a and al-Nahda sit-ins "without losses," and referred to a non-existent "international standard death rate of 10 percent in the dispersal of non-peaceful sit-ins." Days later, the Interior Ministry provided all officers that participated in the dispersal with a bonus for their efforts. Until February, authorities failed to even acknowledge that they had used live ammunition in the Rab'a and al-Nahda dispersals. Other members of the government have similarly praised security forces and failed to acknowledge any wrongdoing on the part of security forces.*" [819]

722. The Egyptian Initiative for Personal Rights (EIPR) also noted the lack of prosecutions for the killing of over 100 prisoners in five prisons between January 29 and February 20, 2011.[820] The organisation found that investigations led by prosecutors were inadequate and insufficient:

> "*policemen remain above the law and immunised from criminal accountability. In documenting the performance of the Public Prosecution and the judiciary in cases where police personnel are charged with murder or torture, the EIPR has observed clear pro-police bias on the part of the prosecution, which has taken action to immunize police from punishment. The*

EIPR has also observed that the Public Prosecution does not charge or at times even question policemen – contrary to what is common practice in similar cases where civilians are being investigated - and relies on the investigations of the accused security body to close the case or refer it to court without naming any police personnel as defendants."[821]

723. The selectivity in the cases investigated, and the lack of judicial oversight of law-enforcement authorities, is indicative of the partiality of the Egyptian judiciary and prosecution, and constitutes a breach of the principle of equality before the law.

724. Nevertheless, inequality has been reflected not only at charging and sentencing stages, but also when applying legal protections. In this vein, the Egyptian Initiative for Personal Rights noted that Article 143 of the Code of Criminal Procedure – which establishes the statutory maximum of two years of pre-trial detention - has been applied selectively by Egyptian courts:

"*For example, former President Hosni Mubarak benefited from the provision when a court ordered his release after he had spent two years in pre-trial detention. Another court did the same in the case of politician Abu al-Ela Madi, the head of the Wasat Party. But in most cases, judges disregard defence attorneys' requests to release their clients after they have spent the maximum allowable term in pre-trial detention, typically simply ordering such requests to be entered into the court record.*"[822]

725. Taking into account all these factors, it can be concluded that the Egyptian judiciary has been used as a tool to supress democratic freedoms in Egypt. The approval of new legislation criminalising certain political groups or the publication of certain information critical with the new political regime, imposes unduly and extraordinary limits to freedom of expression and freedom of association in the country. As a result

of this new criminal law policy, Egyptian courts have imposed criminal sentences upon dozens of journalists and political opponents following judicial processes that have been severely criticised by the international community.

726. Although Egyptian authorities have attempted to justify these measures using counter-terrorism arguments, the analysis included in this chapter has demonstrated that the measures are not consistent with international standards established in international jurisprudence, as the reference to national security does not justify the disproportional measures taken by Egyptian courts. Moreover, the widespread nature of attacks against journalists and political opponents questions the real aim behind such counter-terrorism narratives, as exposed by several UN human rights experts.

Chapter 8: Use of the Death Penalty

727. The report as commissioned by the State Litigation Authority of Egypt does not seek to enter into the death penalty debate, on the basis that Egypt is a retentionist State, and therefore it appears to make suggestion that criticism is irrelevant, as human rights activists/lawyers etc. will always oppose the use of the death penalty on the basis of the underlying principle that it should be outlawed *per se*.

728. The reality however, is that particularly when considering Egypt, any analysis of the legal system and its practice would be incomplete without consideration of the death penalty given the manner in which it is implemented.

729. The authors of this report highlight for the purposes of full disclosure, that on a personal level they are opposed to the use of the death penalty in any given situation, however, that does not infer that any criticism of Egypt is from a biased perspective, and it is the facts of the situation that are analysed, rather than personal, that are viewed.

730. Much of the fair trial procedure - or lack thereof - and accordingly, whether procedural safeguards etc. are adhered to, is discussed in alternative chapters of this report. However, it is appropriate that they are given an element of further consideration here so as to give the issue context.

731. As a preliminary concept, the risks and consequences involved in miscarriages of justice where the death penalty is to be imposed, are particularly stark, given the sentence is irreversible in nature.

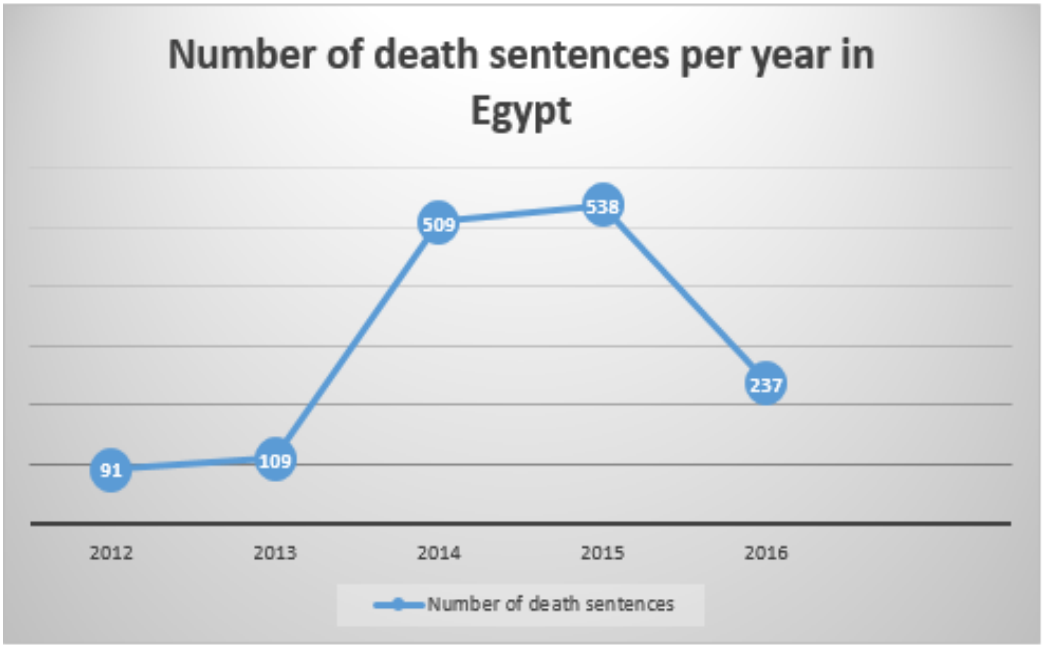
732. As a consequence, it is incumbent on the judiciary to an even greater extent, to prevent any miscarriage of justice. To rehearse a principle that has been espoused throughout this report therefore, justice must be rational, impartial, restore balance, and give closure to victims.

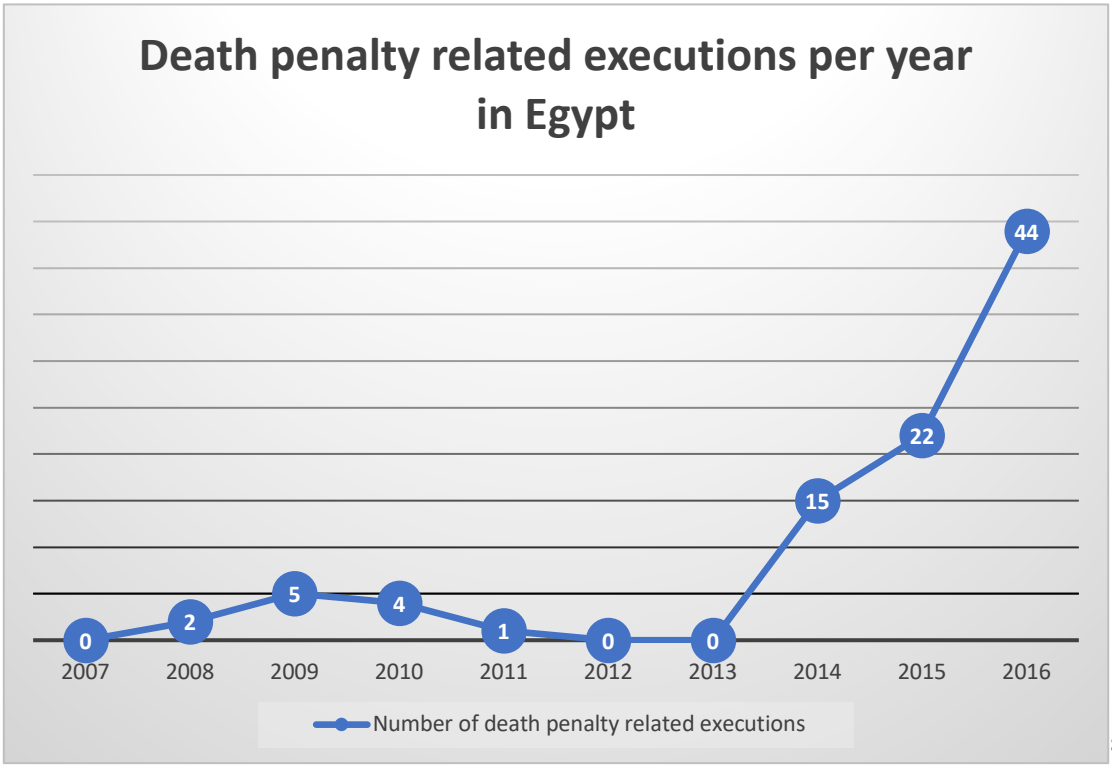
733. A number of retentionist States whom retain the imposition of the death penalty for ordinary crimes, deem the abolishment of the death penalty as being incompatible with Sharia Law, with, to a greater or lesser extent, their penal codes being derived, or at least taking influence from, principles of Sharia.

734. Again, for the purposes of this report, issue is not taken with the law taking influence from principles of Sharia or its application as a general principle.

735. The central thrust of the criticism of Egypt, however, is that it has now become the 'poster child' of a government that uses capital punishment as a tool to purge political opposition and silence those it deems dissidents, such as journalists, activists, opposing political parties, and any other individual who disagrees with the current Government.

736. Not only does Egypt retain the death penalty, but it has also escalated significantly, its use of capital punishment throughout the years, as per the below illustrations:





823

737. These graphs demonstrate the exponential increase in both death penalty sentences, and the frequency with which those sentences are carried out.

738. They must, however, be considered with the caveat that given the veil of secrecy surrounding matters related to the judiciary in general, and to the death penalty in particular, the numbers are the minimum numbers, and very likely to significantly understate the true expanse of the issue.

739. The first graph shows that it is clear that the frequency with which the death penalty has been imposed has increased over the years, doubling, and on occasion, increasing by 500% since 2013.

740. The situation is even more stark in the second graph, where executions and therefore, the 'carrying out' of the sentence, has increased by 4400% from 2013, in comparison with the position from 2011-2013, where just one (1) individual was executed.

741. The turning point in both these graphs, is no coincidence in that the dramatic increase seen, follows the commencement of the presidency of Sisi.

742. Again, it must be re-affirmed, that the above are the numbers that the international community have been able to glean, it is unlikely in the extreme that they show the true extent of the use of the death penalty, especially when we take into account the appetite of the Egyptian judiciary for mass trials, and sentencing *en masse*.

Legal Context in Egypt

743. Egypt's 2014 Constitution does not expressly allow the death penalty, but, it refers in Article 2 that Sharia law will be the principle source of legislation and this includes capital punishment.

744. It is the criminal code that is used to regulate the circumstances under which such punishment is permissible.

745. The following crimes are punishable by death under the Penal Code of Egypt:

a. Felonies are liable to the death penalty (Article 10 PC) "Capital punishment shall also be the penalty inflicted on any felony or misdemeanour prescribed in this part once the felon's intent is to assist the enemy or harm the armed force's military operations, and is liable to realise the said purpose."

b. Attack on the external security of the State (articles 77 to 80 PC):

   i. Article 77: Any person who commits premeditatedly a deed that leads to affecting the country's independence, unity and integrity of its territories shall be punished with a sentence of death.

c. Attack on the internal security of the State (Article 83 PC):

   i. Article 83 A: Capital punishment shall be the penalty inflicted on any of the crimes prescribed in Part 2 of this book if it falls with the intent of affecting the country's independence, unity or the integrity of its territories, or if.

d. Crimes and offences coming under the "anti-terrorist" legislation (Articles 86 to 102 PC):

   i. Article 86: Terrorism, in applying the provisions of this law, small mean all use of force, violence, threatening or frightening, to which a felon resorts in execution of an individual or collective criminal scheme, with the aim of disturbing public order, or exposing the safety and security of society to danger, if this is liable to harm the persons, or throw horror among them.

   ii. Article 86 A: Capital punishment or permanent hard labour shall be the penalty prescribed in the first clause of the previous Article, if terrorism is one of the methods used in realising or executing the purposes called for by the association, corporation, organisation (…) the same penalty shall be inflicted in whoever provides them with information while being aware of what they call for (…).

   iii. Article 90: Whoever deliberately destroys public buildings or property appropriated for governmental departments, public utilities, general organisations, or associations that are considered legally as public utilities. (…) capital punishment shall be the inflicted penalty if the crime results in the death of a person who has been in those places.

e. Premeditated murder (Articles 230 to 235 PC):

   i. Article 233: Killing with substances.

   ii. Article 235: Accomplices are liable to the same punishment.

f. Abduction and rape of a person of the female sex (Article 290 PC).

g. Perjury leading to the sentencing and execution of a person charged with an offence (Article 295 PC).

h. Violations of the law on drugs: In accordance with Law No. 182 of 1960 as amended by Law No. 122 of 1989. Article 33 of this law stipulates the death penalty for the import of drugs without prior authorisation. Growing, producing, selling, keeping and transporting, all come under the crime of drug trafficking and are punishable by death. Any person who fits out and uses premises for drug-taking incurs the same penalty - crimes and offences relating to keeping weapons and ammunition (Law No. 394 of 1954). Keeping weapons, ammunition or explosives without prior authorisation is punishable by forced labour for a fixed period or for life. The penalty incurred is capital punishment if the arms are being kept in order to attack the public order and security or to undermine the establishment, the principles of the constitution, or the fundamental system of the institutions, national unity, or the social peace.

746. The range of crimes for which the death penalty can be imposed therefore is inappropriately wide, and leaves far too much open to interpretation.

747. Having established the legal context in which Egypt seeks to impose the death penalty, the relevant procedure must be considered.

748. The ICCPR (to which Egypt is a State party), at Article 14[824] states the following:

> *"1. (...) everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (...) any judgement rendered in a criminal case or in a suit at law shall be made public (...).*
>
> *2. (...) right to be presumed innocent until proved guilty according to law.*
>
> *3. In the determination of any criminal charge against him, (...) following minimum guarantees:*
>
> *(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*

(b) (…) adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his choosing; to be informed, if he does not have legal assistance, of this right; to have legal assistance assigned to him, (…) and without payment if he does not have sufficient means;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law (…).

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance (…).”

749. Though the ICCPR does not allow the death penalty in Article 6, it also demands that due process and fair trial principles above must be followed.

750. In this respect, the Human Rights Committee stated that the country that has violated an individual's right to due process may not go through with the execution.[825]

751. Though Article 14 is not included in the covenants list of non-derogable rights of Article 4(2), Article 6, concerning the death penalty, is.

752. The significance of this nuance, is that any trial that may lead to a death penalty sentence, even in a State of Emergency, must follow the provisions of the ICCPR, including the entirety of the guarantees in Article 14.[826]

753. As per a report of the Office of the United Nations High Commissioner, "*The only thing that distinguishes capital punishment – as possibly permitted under international law – from arbitrary execution is full respect for stringent due process guarantees."*[827]

754. It therefore falls for us to consider whether Egypt violates its citizens' right to due process, in the context of the imposition of the death penalty.

755. When referring to the **right to be tried by a competent, independent and impartial tribunal**, the competence of the courts in Egypt is irrelevant due to the clear lack of impartiality and independence. There is no true separation of powers with the executive as has been explained in previous chapters, *"Egypt's justice system remains highly politicised, characterised by due process violations"* according to Joe Stork, deputy Middle East director of Human Rights Watch.[828]

756. Concerning this, Said Bernabia, the ICJ Director of the Middle East and North Africa Programme declared that, "*trials with heavy-handed sentences should not be used to repress and intimidate political opponents.*"[829] However, this is precisely the position we have witnessed in Egypt, a position developed by the judicial branch since the coup d'état that removed the democratically elected president at the time.

757. In addition, many civilians have been tried by military court, which is in itself, a violation of their right to a fair trial before a competent, independent and impartial tribunal, as well.[830]

758. In a study done in November of 2015 by Reprieve, a non-profit organisation that defends human rights, it was found that in 72% of the cases, the death penalty was imposed for attending pro-democracy protests,[831] and therefore clearly, being used as a weapon against dissent.

759. Thus, once the lack of an impartial and independent tribunal is made apparent, it is impossible to ever state that due process has been respected.

760. The **right to be informed of the charges presented** against an individual has not been upheld at any point, even less during the arrest.

761. During the mass trials that have we have seen being used with increasing frequency, defence lawyers that were allowed to attend only had knowledge of the general bulk of charges that were presented, and during the trial, the charges were not individualised. This presents obvious issues when the lawyer's client is one amongst 683 in a trial where the entire proceedings last less than an hour.

762. The international community has recognised this, amongst a plethora of other deficiencies, UN experts from the High Commissioner's Office for Human Rights noting, "*we are appalled by the lack of clarity of the charges under which each individual was sentenced to death.*"[832]

763. **The right to a proper defence** is also undermined. In the first instance, many defendants are denied access to a lawyer during detention, with some being held isolated for months.[833] The accused who have access to lawyers[834], do not have an unfettered, or even appropriate access, with them often meeting right before the trial or the appeal for a few minutes. Not only that, but the free communication with their lawyer is problematic because they are not allowed to speak confidentially, and any sensitive information the accused unveils can be used against him.

764. Human Rights Committee's jurisprudence is clear.[835] In all trials, particularly those *"involving capital punishment, it is axiomatic that the accused is effectively assisted by a lawyer at all stages of the proceedings"* as stated in the General Comment No. 32, paragraph 38, of the ICCPR.

765. The presentation of an accused's defence is made an even more arduous task, in hearings lasting less than an hour wherein hundreds of people at a time are convicted.[836] Even if they allow more than a few seconds to each person's case, most of the time the defendants cannot hear the trial and are not even given a chance to speak.[837] It is all too often the case where the defendants are placed in soundproof glass cages[838], and the only way to hear them is through a microphone over which the judge has control. This in practice has meant that thousands of convicted citizens in Egypt were not allowed the chance to speak at their own trial.

766. From a lawyer's perspective, the situation is equally as worrisome. Lawyers are not given access until the last moment, afforded virtually no time to consult with their client in private, and are sometimes used to represent all the defendants, whose circumstances are unique and different between them, in a mass trial that can have hundreds of people accused.

767. Further, they must defend that multitude of people in a hearing that is sometimes only 30 minutes long, wrestling for the opportunity to speak, let alone present evidence. Moreover, the defence is sometimes allowed only 24 hours to present their written legal motions[839] after the trial. This along with the added fact that the trials are attended by numerous police agents, sometimes wearing masks that intimidate not only the defendants but their counsel too, makes the lawyer's job in the realms of impossible. It must not be forgotten that numerous lawyers have been incarcerated for trying to defend human rights in Egypt. Under these circumstances, some defence lawyers have gotten to the point where they refuse to attend the trials and participate in what they believe to be a "*travesty of justice.*"[840]

768. Trials involving the death penalty sentences are often mass trials, where hundreds of people are convicted in one sitting, in hearings that last as little as 30 minutes. Although international law has not *per se* called them 'mass trials', the international community has often referred to them as such and the label can be found in reports from Amnesty International and Human Rights Watch, among others. Still, the trials where a multitude of people are jointly found guilty of a crime without allowing each individual to participate in their defence in the trial have been condemned by the UN Office of the High Commissioner for Human Rights as a violation of fair trial guarantees.

> "*Once again, Egypt's judiciary has abdicated its fundamental responsibility to uphold the rule of law and human rights, instead resorting to unfair mass trials and death sentences as a technique to suppress dissent and to crack down on critics of the military and Government*," explained Said Benarbia, Director of the ICJ MENA Programme.[841]

769. Such is the number of people convicted at once that the cages and the court room could not accommodate all the defendants, leading them to the decision to build a court in the Wadi Natrun prison[842] exclusively for these types of procedures.

770. Of those mass trials, the two most reported took place in the Minya Criminal Court at the beginning of 2014. These trials automatically caused alarm in the international community due to the massive number of defendants tried in each one; the first being on the March 24, with 529 defendants, and the other being on the April 28, with 683. Both were presided over by the same judge that sentenced 1,212 people to death in trials that lasted less than an hour.[843]

771. In the report commissioned by the State Litigation Authority of Egypt, it states that the United States is a notable retentionist country, trying to compare both judicial systems, but even the Obama administration[844] condemned these judgments alleging they violated "*even the most basic standards of international justice*". Due to the

pressure exerted by the international community, these convictions resulted in "*all but 37 of the previous death sentences*" being commuted to life imprisonment, which, although a vast improvement, is still astonishing for trials that could not afford even a few seconds for the defence of each defendant, accused for the alleged murder of a policeman.

772. Attempting to compare, and therefore justify the procedures adopted in Egypt, is nonsensical in the extreme as there is no comparison, and therefore, no justification.

773. Egypt tried to excuse itself by seeking to blame Judge Saeed Youssef, stating that he no longer sits in criminal trials due to his actions. This judge, albeit agreeably being irrational and inconsiderate towards human life, was used as a scapegoat to justify the mass trials, and in seeking to suggest that that the judge was acting wholly independently, is incredible in the extreme.

774. A judge who sentenced more than a thousand civilians to death, in short hearings that flagrantly disregarded all principles of a fair trial, was not criminally punished and was allowed to work as a judge, just not in criminal court. In reality, he was performing according to the government's wishes. If the judge were independent, and acting in a 'rogue' capacity, there would have been no further instances; in the first two years of Sisi's presidency, at least 15 mass trials were carried out[845] and many more since then.

Presumption of Innocence

775. The UN Humans Rights Committee states in its general comments of the ICCPR number 32, as well as in its jurisprudence[846], that

> "*the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving that the accused has the benefit of the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.*"[847]

It then explains that presenting the accused in a way that may indicate they are dangerous, such locking them in cages, undermines the presumption of innocence,[848] for which the public authorities must refrain from prejudging the outcome of the trial.

776. The **presumption of innocence** is also undermined throughout the proceedings, albeit the principle being guaranteed in Egypt's constitution. Even before the trial, detention of the defendants is used as a technique to punish and restrict their freedom,[849] disregarding the requirements that must be met to validate taking defendants into custody, and thereby treating them as if they had already been convicted of the crime. During trial, as has been explained before, the defendants are kept in cages, which automatically prejudices the court towards the accused's guilt. The defendants are sent to trial and prosecuted based on vague allegations and circumstantial evidence, ignoring that guilt must be proved beyond a reasonable doubt, according to the law in Egypt. Furthermore, an even stricter adherence to fair trial and evidential standards must be had when the death penalty may be imposed or sought.

777. During these mass trials, defendants are often not given room to speak, and are usually given the same sentences as the dozens or hundreds of people with them, without determining who did what and when, sometimes convicting people of

murders they were unable to commit because they were already imprisoned by the Egyptian authorities. The ICJ reviewed many of the court judgments found a "*systematic failure of the courts to establish individual guilt of each accused based on credible guilt.*"[850]

778. Closely related to the presumption of innocence is the **right not to be compelled to confess against himself or admit guilt**, an extremely important principal in criminal law, as it goes towards the prohibition on torture with the intention of extracting a confession. As explained in previous chapters of this report, many defendants facing the death penalty are tortured when in custody, sometimes resulting in the person's death prior to trial.

779. This in itself is a direct violation of Article 52 of Egypt's constitution that clearly says that, "*all forms of torture are a crime with no statute of limitations*" and the succeeding Article 55 that sustains that prisoners "*may not be tortured, terrorised, or coerced. They may not be physically or mentally harmed, or arrested and confined in designated locations that are appropriate according to humanitarian and health standards.*"

780. Still, despite innumerable defendants stating they had been tortured and that their confessions had been obtained under duress, these incidents are never investigated, even when the defendant recants his confession.[851] This attitude has gone undeterred by the fact that the constitution demands the perpetrator of the acts be punished under any circumstance. This element of the constitution appears to simply be ignored.

781. The inhumane treatment has gotten to the point that when defence lawyers have asked for medical examinations of the wounded and dead, their requests have been denied by the prosecution under the pretence that "*the medical treatment would have caused unacceptable delay.*"[852]

782. The **right to be tried in his presence** is protected by Egypt's legal system but irrelevant in practice. According to the report on human rights issued by the government, those convicted in absentia have the right to a re-trial but they are also

given the "*maximum statutorily allowed sentence*", infringing Article 10 of the Universal Declaration of Human Rights.

783. In the mass trial conducted in April of 2014, it is known that at least 40 of the 183 that faced the death penalty sentence were convicted in absentia.[853] The same thing happened to three people in the trial of February 8, 2015[854]; to eight people on April 20, 2015[855], with eight of the 22-people convicted; to six people on September 12, 2015,[856] and so on.

784. This means that a large group of people facing the death sentence were tried without being allowed to attend their own trial, mostly because they were still incarcerated or were out of Egypt and feared for their safety if they returned.[857] To not be tried in their presence has further implications for it renders any defence impossible and is almost automatically conducive to a guilty verdict.

785. The **right to present witnesses and examine witnesses against him** can be denied by the judge, but only in limited and specific circumstances.

786. Egypt's procedural code allows for judges to deny the attendance or evidence of witnesses, if the defence did not provide details of who they were seeking to call, in advance. This in itself is not normally an issue, but, given the frequency of the occurrence of forced disappearances and torture-based questioning, defence lawyers explain they sometimes decide against presenting witnesses in advance for fear of what the National Security agents might do to them.[858] Nevertheless, in practice, judges can also decide if they consider it relevant to listen to the defendant's witnesses or not, meaning there are no assurances even if strict protocol is followed by the defence lawyer.

787. Initially, the first known mass trial of March 4, 2014, 529 defendants were sentenced to death. The defence lawyers who assisted were not allowed to call their witnesses, nor were they allowed to cross examine the prosecution's witnesses.[859] Virtually no evidence was presented by the prosecution, save for the little circumstantial evidence they had, leaving the accused no room to defend themselves.[860] Defence lawyers were

also impeded from cross examining the witnesses presented by the prosecution, nor were they allowed to question evidence, to examine the documents in the case file, nor present evidence that may have contradicted the prosecution's narrative.

788. It is further imperative that we consider the impact of military jurisdiction and the impact of its widening scope with specific reference to the death penalty.

789. In 2014, Law 136 for the Securing and Protection of Public and Vital Facilities was enacted. This placed all public and vital facilities under the military jurisdiction.[861] In essence, the decree enlarged the already unjustifiably broad military jurisdiction; the result being, that power was given to try civilians, for almost anything that happens in the street or somewhere that is state owned or provides a general service. This measure was taken in spite of the fact that trying civilians, under any circumstance, in a military jurisdiction is direct violation of the African Charter on Human and People's Rights, ratified by Egypt in 1984.[862]

790. Military courts are being used so as to circumvent as many of the due process features as possible, and therefore impose a swift death sentence.

791. Here, not only are appeals ineffective, but they are also not a guaranteed right, as the Military Supreme Court can deny the defendant's right to appeal without any legal basis.

792. Even when allowed an appeal in military proceedings, it is not guaranteed that it is actually considered, as was the position in the 'Arab Sharkas' case, where six of nine defendants were sentenced to death. Although the Court of Administrative Judiciary was reviewing the case, the execution of the men was unusually sped up and carried out two months before the Egyptian Military Court's death sentence was confirmed.[863]

793. This happened despite Egypt's reassurances that sentences, especially those involving the death penalty, cannot be carried out until they are 'final'.[864]

794. Again, this demonstrates that the legal safeguards that are constantly referred to, are nothing but a defensive smokescreen that lacks any guarantee of citizen's rights.

795. The role of the Grand Mufti is often referred to as being a form of appeal in that he is seen as the arbiter. He must review the case in order to decide upon it, but is held under no specific standards since it is not a court proceeding. Further, the process is strictly confidential, meaning there is a complete lack of transparency and control over it. Still further, even if the Grand Mufti found the accused innocent or not deserving of the death sentence, his advice is not legally binding.[865] This results in his verdict being nothing more than an instrument that may be used by the judiciary, when convenient, to support their arbitrary decisions, continuing with the oppression of the right to a free trial. The referral of the case to him has been considered by experts at the Office of the UN for the High Commissioner of the Human Rights as a "mockery of justice".

796. A final avenue of appeal to be considered is that of a 'Pardon'.

797. The right to be considered for a presidential pardon is guaranteed, but it cannot be considered a legal safeguard as the president is not even required to answer the request for a pardon. If he has not answered in two weeks it is considered that the pardon has not been granted, meaning that there is no way of knowing if the request has been reviewed.

798. It is therefore a system that is ripe for abuse, and one that on numerous occasions merely pays lip-service to the principle.

799. In such circumstances, it can in no way be suggested to be a 'procedural safeguard'.

800. The reality of the matter therefore is that with specific reference to the use of the death penalty, not only is it being used with demonstrable increasing frequency, but further, the safeguard that are said to be in place are being eroded, ignored, or otherwise manipulated so as to make it easier for such a sentence to be imposed.

Chapter 9: Conclusion

801. The report that this seeks to respond to, is the fourth in the series published by the Egyptian State Litigation Authority, and much like the previous three reports, it seeks to justify the policies of oppression, and the removal of fundamental democratic rights and freedoms, that we have seen become apparent in Egypt following the removal of its first democratically elected president, President Morsi.

802. '*Egypt Courts and Some Recent Challenges*' states that it will "*address a number of headline issues concerning human rights in Egypt*", and that it will demonstrate "*...the developing state of the human rights programme of the government in today's Egypt that has had to cope with problems of the past and turbulence in recent years, as it establishes a modern democracy*".

803. It is correct to say that the report does address a number of the 'headline issues'; however, the manner in which it seeks to address those issues, rather than allay any concerns that may exist, does in fact exacerbate the problem.

804. The report purposely ignores the true extent of the problems facing Egypt, and specifically its legal system, and rather than give a true objective analysis of those concerns that have been highlighted internationally, it merely manipulates the position to suit its own ends, by way of the selective use of facts, and thus it hopes to mislead the reader by its deliberate obfuscation.

805. The truth of the matter, is that the Egyptian legal/judicial system, is broken, and rather than exercising its function - namely the interpretation and implementation of the law, as well as providing a mechanism for the resolution of dispute - it now exists as an arm and a weapon of the State.

806. The judiciary, and therefore the judicial system, is one of the three branches of State, and as per the principle of the 'Separation of Powers', part of its function is to exist as

part of the system of 'checks and balances' against any over-reaching or attempted over-reach of the executive.

807. The opposite of this principle now exists in Egypt however, rather than existing as a system of protection - as this report has shown - in Egypt undergoing a system and period of oppression more acute than that which has gone previously, including that under Mubarak. The judicial system is, in fact, its main protagonist.

808. Importantly however, on a superficial analysis of the position, the Egyptian system does not immediately give rise to a concern, given that, its constitution, enacted domestic legislation, and its position as a state party to a number of international human rights instruments, purportedly provides for fair trial guarantees and protections.

809. It is a superficial analysis however that the State Litigation Authority has undertaken, and relied on the theoretical position, rather than the reality of it.

810. As this report has demonstrated, there mere existence and acceptance of these rules does not guarantee that they are complied with.

811. The State Litigation Authority report advances the position that the Egyptian judiciary is independent, and further, that fair trial rights are guaranteed and observed, on the basis that the Supreme Constitutional Court has taken certain decision that may be deemed to be detrimental to the interests of the executive, and thus is indicative of independence; and further, that the appeals mechanisms in the lower courts have on occasion overturned what it has deemed to be unfair convictions on appeal, and thus again, the systems in place are independent; and where right trial rights may not necessarily have been upheld initially, the appellate courts have done so, and therefore exercised their function.

812. This is however, not a justifiable conclusion to be drawn, and further, the evidence points to the exact opposite.

813. Egyptian courts are not independent from the executive interests; and further, appointments to the higher courts are evidently highly politicised, and fulfil the interests of the current military-led government.

814. We need to look closely at the process, and consider all of that evidence available, rather than seize upon a singular example that may support an espoused position.

815. Having regard to the evidence available, including the use of mass trials, the ignorance of evidential standards, and ordinary fair trial rights; such as the right to call evidence, the right to challenge evidence, and the right to take an active part in proceedings; the argument that the judicial system in Egypt has been corrupted and manipulated for political ends - and is therefore partisan and unfair - is irrefutable.

816. The Judicial Authority Law No. 46 of 1972 is acknowledged by the State Litigation Authority to "*allow the executive a role in judicial appointments, transfers, inspections and the administration of justice, which impacts upon the courts independence.*"

817. The position has not developed for the better since its enactment.

818. In February 2014, the International Bar Association Human Rights Institute, in its report "Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt, concludes that despite the protections previously referred to, the "*Ministry of Justice is given wide powers over judges which provide scope for abuse.*"

819. This position was followed in September 2016 by the ICJ which notes that the Egyptian regime, by virtue of its law, policies and practices, "*impede the ability of the judiciary to function in an independent and impartial manner.*"

820. The central conclusion to both those reports, and indeed this, is that the Egyptian executive occupies an overwhelming role in those key aspects that affect the independence of the judiciary, including judicial appointments, assignments, promotions, secondments, disciplinary proceedings, and the normal functioning of the courts. It is a natural progression therefore to conclude that given the level of

influence within these spheres, such influence would also hold a substantial position in the very functioning of those judges, and therefore their respect for fair trial rights or otherwise.

821. The fact that this report has drawn a similar conclusion on issues that have been also been considered by various NGOs and governmental institutions, is likely, for some, to give rise to a suggestion of bias, as this would appear to be the 'stock' reaction of the Egyptian Government to any form of criticism. The international community, however, ought not to buy in to what is an obvious attempt to switch the focus from the actual issue, but continue to look at the evidence and draw its conclusions accordingly.

822. The tactic of misinformation is one that is utilised regularly by dictatorial and oppressive regime.

823. This use of misinformation and misdirection is the basis upon which the entire State Litigation Authority report appears to be predicated; perhaps the starkest example being the position it adopts concerning fair trial rights, and whether such rights are observed in Egypt.

824. The only conclusion that can be drawn in respect of fair trial rights, is that they are not observed; and further, despite the relevant constitutional and legislative protections in place, the judiciary, and therefore the 'system' as a whole, appear to be deliberately ignoring a defendant's right to a fair trial; particularly for those before the courts who have, or are perceived to have, an association with a political group other than that of President Sisi; and therefore again, demonstrative of the pervasiveness of executive interference with the judicial system.

825. The State Litigation Authority report in what appears to be an effort to be seen as transparent, and prepared to acknowledge where there are problems, accepts that there have on occasion, been breaches of fair trial rights; however, it suggests, that due to the complexity of the analysis, the situation must be assessed on a 'case by case' basis.

826. In approaching it on this basis however, it demonstrates an abject failure to acknowledge the serious and systematic failure of the judicial system to maintain, and uphold the fair trial, and due process rights of those that appear before it.

827. Further, the report goes on to suggest that the evidence would lead to the conclusion that where there are procedural irregularities, these are being /corrected' during appeal proceedings, as "*the Court of Cassation has acted to quash convictions and order retrials.*" This position however, fails to acknowledge the systematic breach of fair trial rights, that the right to compensation for miscarriages of justice has not been afforded in the majority of cases, and that despite there being 'some' acquittals, hundreds, if not thousands of citizens continue to be imprisoned, and in a number of cases, having been sentenced to death, following unfair trials. Moreover, in violation of internationals norms, civilians are being systematically tried before military courts, courts that have been constantly criticised for falling short of international standards of fairness.

828. A common theme of this report, and a position referred to throughout, is that a legitimate decision does not legitimise an otherwise illegitimate process.

829. These fair trial rights are being infringed at their most basic level, even before the trial begins, namely the 'right to be presumed innocent'.

830. Article 14.2 of the ICCPR notes that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty, and that this presumption is 'one of the most *fundamental principles of fair trial*', and that accordingly, as per General Comment No. 32, the UN Human Rights Committee explicitly stated all public authorities must refrain

> "*from prejudging the outcome of a trial e.g., by abstaining from making public statements affirming the guilt of the accused,*" and therefore, defendants should *"not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals.*"

831. Despite this clear position, various defendants in Egypt have been forced to stand trial whilst being held in opaque and soundproof cages, including former president Morsi, and thus, such individuals are prevented from taking an active part in proceedings, as well as having the principle of the presumption of innocence infringed upon them.

832. From this position, the majority of other fair trial standards are ignored; defendants are prevented from accessing their legal counsel, they are prevented from challenging evidence, and thus they are prevented from putting their defence before the court.

833. It also ought to be noted, that even where defendants have been allowed to instruct legal counsel, those counsel are often intimidated, detained, investigated, prosecuted, and made subject to physical assaults, merely for acting in accordance with their professional obligations.

834. Again therefore, a fair trial in which a defendant is allowed to take an active part in proceedings, is albeit impossible.

835. The question therefore, is what conclusions can be drawn from the evidence discussed in this report? On a simplistic basis, the only conclusion to be drawn, is that to suggest that Egypt adheres to any form of fair trial standards is nonsensical; such a position cannot be maintained following any form of objective assessment of the available of evidence.

836. The truth of the matter, is that the judicial system behaves at the whim of the executive, who, following the coup d'état to remove President Morsi, have ensured that they wield influence and power, over all elements of State, including those that ought to be fiercely independent, such as the judiciary.

837. This is in turn, has allowed the executive to turn the judiciary, and therefore the Egyptian legal system, into a weapon for it to wield against those it deems as its enemies, namely, any citizen who may dare to subscribe to a different position than that adopted by the Government.

838. To suggest that Egypt subscribes to the rule of law, and recognised standards of fairness, in the manner espoused by the State Litigation is deliberate manipulation, and in essence, is nothing more than an exercise in propaganda in an effort to deflect attention and mask the true position.

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