Egypt's Judiciary: A Tool of Repression

Lack of Effective Guarantees of Independence and Accountability

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International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

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INTRODUCTION

In this time of crisis in Egypt, one of the last lines of defence, the judiciary, is failing in its essential task of upholding the Rule of Law and protecting human rights.

In May 2014, following a second wave of mass death sentences, a group of UN independent experts highlighted the "continuing and unacceptable mockery of justice that casts a big shadow over the Egyptian legal system".[1] Two months later, the African Commission on Human and Peoples' Rights issued a resolution "[d]eploring the blatant disregard for the most basic guarantees of fair trial and due process by courts and tribunals as well as the lack of independence of the judiciary" in Egypt.[2]

This report examines how longstanding interference by the executive power in the judicial system in Egypt and legal provisions that bolster such interference have undermined the judiciary's ability to act as independent and impartial arbiters of justice, upholding human rights.

Following the overthrow of the autocratic regime of Hosni Mubarak in February 2011, through widespread popular protests, those that have served as the authorities have consistently failed to uphold the Rule of Law and enact reforms that are consistent with respect for human rights.

The vacuum of power left by President Mubarak's departure was initially filled by the army, in the form of the unelected and unaccountable Supreme Council of Armed Forces (SCAF), which ruled through a series of unilateral decrees, called "Constitutional Declarations". Parliamentary elections were held in January 2012 but six months later were ruled unlawful by the Supreme Constitutional Court. The People's Assembly, Egypt's lower parliamentary chamber, was dissolved, thereby consolidating power in the hands of the military.

Following, the election of President Mohamed Morsi in June 2012, executive decrees continued to be used as the basis to rule the country and a series of legal struggles between President Morsi and the courts ensued, including President Morsi attempting to immunize his decrees from judicial review and, in response to frustration over the lack of successful prosecutions of those responsible for human rights violations, to reopen investigations into the attacks on protestors that occurred in the context of the 2011 uprising.

A flawed constitution-drafting process resulted in the Constitution that was adopted in a referendum held in December 2012. Six months later, in another significant decision, the Supreme Constitutional Court ruled that the Constituent Assembly, which drafted the Constitution, and Egypt's upper parliamentary chamber, the Shura Council, were unlawful on the basis that the electoral law violated the principles of equality and non-discrimination; however, the Court authorized the Shura Council to continue to sit until the election of a new legislative body.

Mass protests against President Morsi culminated in July 2013 when the army ousted him from power. Additionally, the the 2012 Constitution was suspended and the Chief Justice of the Constitutional Court, Adly Mansour, was installed as interim President. Days after taking power, Mansour's government dissolved the Shura Council, concentrating power, once again, in the Executive.

Decrees issued by interim President Mansour paved the way for another flawed constitution-drafting process, which culminated in the adoption of a new Constitution in January 2014. The presidential elections that followed, in May 2014, resulted in the election of the former head of

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1 "Egypt: Justice and reconciliation increasingly failing after second wave of mass death sentences", 15 May 2014, joint press release of African and UN human rights experts.

2 Resolution on Human Rights Abuses in Egypt, No. 287, African Commission on Human and Peoples' Rights, 16th Extraordinary Session held from 20 to 29 July 2014.

the army, Abdel Fattah el-Sisi, as President. Both Presidents Mansour and Sisi have used their unchecked power to crackdown on political dissent, including by introducing draconian restrictions on fundamental freedoms and expanding the jurisdiction of military courts to try civilians.

Judges and prosecutors have not escaped 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. At the same time, judges and prosecutors have been targeted by armed groups. For example, in June 2015, the Prosecutor-General, Hisham Barakat, was assassinated.

Amid this backdrop, on 5 December 2015, the results of elections for a new House of Representatives was announced, with 94% of parliamentarians reported as supporting President Sisi. It remains to be seen whether the new legislature can help engender a return to the rule of law and foster much needed reforms to bolster the independence of the judiciary.

Through this report, the International Commission of Jurists (ICJ) strives to contribute to the efforts of those who seek the enhancement of human rights and the rule of law in Egypt, including by developing and strengthening the independence and impartiality of the Egyptian judiciary and reforming the national legal framework in line with international standards.

The fundamental right to a competent, independent and impartial tribunal established by law, is widely recognized in international law and standards, including Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 7 of the African Charter on Human and Peoples' Rights. In addition, any individual accused of a criminal offence has the right to a fair trial before such a court.[3]

Egypt has ratified the ICCPR, the African Charter on Human and Peoples' Rights and the CRC.[4] In addition, pursuant to Article 93 of the Constitution, international treaties ratified by Egypt are binding and have the force of law. Egypt is therefore obligated to respect and ensure respect for these rights as well as to provide for necessary legislative and other safeguards to secure their realization.[5]

This report also relies on declaratory instruments such as the United Nations Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors and the Principles and Guidelines on the Right to Legal Assistance and Fair Trial in Africa that, although these are not legally binding in themselves, they are widely accepted as authoritative and reflect or elaborate upon legal obligations of the States under treaty or customary international law.

Both treaties and declaratory instruments are important sources for international human rights monitoring mechanisms, such as the United Nations Human Rights Committee (the body of independent experts mandated by the ICCPR to monitor State's Parties implementation of that treaty), the United Nations Human Rights Council and its expert special procedures, and the African Commission on Human and Peoples' Rights.

This report was written on the basis of research carried out by the ICJ in Egypt from 2011 to 2015. In September 2012, April and August 2013 and January 2015, the ICJ met with a range of officials, including government ministers, members of parliament, heads of the Cassation

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3 In situations where an individual is under the age of 18 at the time of the alleged crime specific rights, including those enshrined in Articles 37 and 40 of the Convention on the Rights of Child (CRC), also apply.

4 Egypt ratified the ICCPR on 14 January 1982, the African Charter on Human and Peoples' Rights on 20 March 1984 and the CRC on 6 July 1990.

5 ICCPR, Article 2.

Court, Supreme Constitutional Court and the State Council, other judges, members of the National Council for Human Rights, as well as representatives of Egyptian non-governmental organizations focusing on human rights, lawyers, and families of victims of human rights violations.

Analysis of individual cases were conducted by reviewing case files and through meetings with judges, lawyers, trial observers and victims of human rights violations.

This report builds on three earlier papers published by the ICJ, 'Upholding the Rule of Law and Human Rights Following the Ouster of President Morsi', 'the Draft Egyptian Constitution in Light of International Law and Standards' and 'Egypt's new Constitution: a flawed process; uncertain outcomes'.[6]
As described in Chapter One of this report, "The judiciary in times of crisis", instead of introducing much needed reforms to buttress the independence of the judiciary, the various authorities in power since the ouster of President Mubarak in February 2011 have continued their attempts to control and use the judiciary to gain political advantage. With reference to specific cases. Chapter One also highlights how the period from February 2011 onward, in particular since the ouster of President Mohamed Morsi in July 2013, has seen both civilian and military courts preside over unfair trials and impose punishment on political opponents, journalists and human rights defenders, often for the peaceful exercise of their rights to freedom of expression, association and assembly. This Chapter also highlights how judges who have dared to speak out in favour of judicial independence and the rule of law have been subjected to unfair disciplinary proceedings resulting in transfers or dismals from office.

Chapter Two of the report provides a brief overview of the court system in Egypt and the subsequent chapters analyse the legal framework under which the Egyptian judiciary operates in light of international standards that aim to safeguard the independence of the judiciary and the role of prosecutors.[7] They highlight how constitutional provisions, laws, policies and practices impede the ability of the judiciary to function in an independent and impartial manner and makes recommendations to amend them. These chapters concern: The High Judicial Council, the Judicial Authority Law, the Supreme Constitutional Court, the Office of the Public Prosecutor, and Military and Emergency Courts.

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6 ICJ Position Paper, 13 January 2014, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/01/Egypt_PolicyPaper_13-Jan.pdf ; ICJ Legal Briefing Paper, 14 December 2012, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Legal-Briefing-Paper-FINAL-14.12.12.pdf ; ICJ report, 13 November 2012, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/11/EGYPT-CONSTITUTION-REPORT-w-COVER.pdf

7 Under the Constitution and Egyptian law prosecutors are considered to be an "integral part of the judiciary" (2014 Constitution, Art. 189). In this report however, the term "judges" does not include prosecutors.

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

Judiciary in times of crisis

Given the fundamental role played by the judiciary in upholding the rule of law and human rights, the right to a fair and public hearing by a competent, independent and impartial tribunal is clearly enshrined in international law and standards, including Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which Egypt is party.[8] This right is absolute and is not subject to any exception. Egypt is obligated to respect and ensure respect of this right as well as to provide for necessary safeguards to secure its realisation.[9]

In times of crisis, the judiciary should act as a check on the arbitrary exercise of power by the other branches of government, in particular by ensuring that laws and measures adopted to address the crisis comply with the rule of law and human rights.

Instead of respecting and reinforcing this role, since the overthrow of President Mubarak in February 2011, Egyptian governing authorities, both civilian and military, have attempted to control and use the judiciary for political gain, including by expanding the jurisdiction of military and emergency courts, unilaterally dismissing the Prosecutor-General, and attempting to immunize executive decrees from judicial review. Such decisions have served to further undermine the independence of Egypt's judiciary and erode human rights protections.

Egypt's judiciary has frequently failed to fulfil its essential role in upholding the rule of law and safeguarding human rights throughout the transition period. An analysis of recent cases, in particular those initiated or decided since the overthrow of President Morsi, demonstrates that Egypt's judges and prosecutors have become to be seen as a primary tool in the repression of political opponents, journalists and human rights defenders.

Furthermore, an examination of individual cases demonstrates that criminal proceedings against political opponents, journalists and human rights defenders have been marred by a litany of violations of internationally recognised rights. More specifically, prosecutions have been initiated by prosecutors and, in many instances, continued by judges, where the charges are unfounded. A presumption in favour of pre-trial detention has routinely been applied by both prosecutors and judges, as seen in the cases of *Yara Sallam and 22 others* and *Alaa Abdel Fattah and 24 others*.

The accused in many cases have not been given adequate time and facilities to prepare a defence, for example in the case of *Alaa Abdel Fattah and 24 others*, the first accused was restricted to meeting his lawyers once every 30 days and was denied any confidential access to them. In addition, judges have refused to refer constitutional challenges to laws to the Constitutional Court and have instead applied laws that violate human rights, notably the Demonstration Law (Law No.107 of 2013).

Judges have also failed to ensure equality of arms and rights of defence during trial and to ensure public hearings in such trials. Convictions have frequently been based on a lack of credible evidence of the individualized guilt of each of the accused despite the absence of proof beyond a reasonable doubt. Thousands have been convicted following unfair trials and, of them, hundreds have been sentenced to death in violation of the right to life. As such, some of the most egregious examples of fair trial violations have involved trials involving hundreds of accused, dozens or hundreds of whom have been sentenced to death or life imprisonment.

At the same time, judges who are considered to be opponents of the current regime and/or have

8 Egypt ratified the ICCPR on 14 January 1982.

9 ICCPR, Article 2.

spoken out against attacks on the rule of law and human rights violations, have been subjected to unfair disciplinary proceedings. These proceedings have frequently been pursued in violation of judges' rights to freedom of expression, association and assembly and have been marred by due process violations and well as violations of the right to a fair hearing.

Urgent measures are required to prevent a complete collapse of the rule of law in Egypt, including measures to ensure that the judiciary is independent and serves to safeguard human rights, such as the right to a fair trial and the right to life. To this end, the Egyptian authorities must ensure that:

i. **Executive interference in judicial affairs ends, including the unilateral removal of prosecutors and the imposition of restrictions on the jurisdiction of ordinary courts aimed at immunizing Executive decisions from judicial review.**
ii. **The use of military courts to try civilians ends, and that Presidential Decree No. 136 of 27 October 2014 is abolished.**
iii. **The convictions and sentences of all civilians tried by military courts and those of individuals convicted following unfair trials in civilian courts are quashed. Those against whom there is reasonable suspicion that they have committed a recognizable criminal offence (under national and international law) should be afforded a retrial within a reasonable time before an independent and impartial civilian tribunal in proceedings that meet international standards of fairness.**
iv. **Prosecutorial guidelines require prosecutors:**
    a. **To perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights;**
    b. **Not to initiate or continue prosecutions where an impartial investigation shows the charges are unfounded.**
v. **A code of judicial conduct and ethics, established by judges, includes obligations on judges to:**
    a. **ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected; and**
    b. **safeguard and uphold human rights.**
vi. **The Code of Criminal Procedure, including Articles 125, 233 and 374, is amended to ensure that the law enshrines the rights of all persons suspected or accused of an offence to:**
    a. **access to legal counsel as soon as they are deprived of their liberty and on an ongoing and regular basis;**
    b. **adequate time and facilities to consult their lawyer in confidence;**
    c. **the right to have their lawyer present and to assistance of their lawyer, including during all questioning by the authorities;**
    d. **the right to adequate time and facilities to prepare their defence;**
    e. **that those charged with a criminal offence or their lawyers are given access to documents and other evidence in sufficient time, including all materials the prosecutor intends to rely on and exculpatory evidence;**
    f. **sufficient notice for the accused and their legal counsel of the dates, time and location of court hearings.**
vii. **Judges refer challenges to laws on constitutional grounds to the Supreme Constitutional Court and do not apply laws that are in conflict with either the Constitution or with international human rights treaties to which Egypt is party.**
viii. **The Code of Criminal Procedure is amended to clearly enshrine the right of the accused to be present during criminal proceedings and assisted by defence counsel of his or her choosing or in cases where the interest of justice requires, appropriately qualified and experienced appointed counsel, free of charge where the individual does not have sufficient means to pay.**
ix. **The Code of Criminal Procedure is reformed to fully enshrine the principle of equality of arms and to ensure this principle is recognized and enforced by judges.**
x. **The Criminal Code of Procedure is amended to fully enshrine the presumption of innocence and individual criminal responsibility in law such that any individual**

is presumed innocent and treated as such until his or her individual guilt for the crime(s) he or she is charged with are proven beyond reasonable doubt through admissible evidence in the course of fair proceedings.

xi. Egyptian law is amended to abolish the use of the death penalty and, until the death penalty is abolished, an immediate moratorium on all executions is imposed.

xii. Disciplinary proceedings initiated against judges for the legitimate exercise of their right to freedom of expression, association and assembly should be dropped and sanctions imposed pursuant to such proceedings and to proceedings that failed to ensure judges' right to a fair hearing should be quashed.

High Judicial Council

The United Nations Human Rights Committee, interpreting the requirements of Article 14 of the ICCPR, has noted the obligation on States to protect "judges from any form of political influence in their decision-making" by "establishing clear procedures and objective criteria" in matters relating to the careers of judges.[10] Furthermore, the Human Rights Committee and the UN Special Rapporteur on the independence of judges and lawyers have raised concerns about the involvement of the Executive in such matters and have recommended that an independent body undertake these decisions.

Although Egypt's High Judicial Council (HJC) is mandated by the Constitution to be the primary body tasked with oversight of the judiciary, it falls short of the mark of a safeguard of judicial independence. Rather, the HJC predominantly acts as a rubber stamp for the Minister of Justice, whose control over the courts and careers of judges in Egypt, as prescribed by law, is inconsistent with respect for the independence of the judiciary.

While, most decisions relating to appointments, assignments and disciplining are subject by law to the final consent of the HJC, the HJC's role is largely limited to providing approval to the Minister's decisions.

The Minister of Justice is legally empowered to assign judges to specific courts, to the Office of the Public Prosecutor and to non-judicial posts. The Minister of Justice also determines the membership and rules of the Judicial Inspection Department, an administration within the Ministry of Justice that acts under his direct authority and is charged with investigating and appraising the work of judges for the purposes of promotion, transfer and disciplinary decisions. By law, the Minister of Justice can also request the Prosecutor-General to initiate disciplinary proceedings against judges and prosecutors and is tasked with implementing the disciplinary decisions issued by the disciplinary board against judges.

Aside from its powers of approval, the HJC is tasked, by law, with interviewing judicial candidates, conducting investigations into and deciding whether a written warning against a judge is well-founded and ordering the commencement of an investigation in disciplinary cases against judges. The HJC must also be consulted on draft laws concerning the judiciary and the prosecution service.

The composition of the HJC, although made up entirely of judges is not, as international standards recommend, freely chosen by judges and widely representative of the judiciary. The members of the HJC are assigned by virtue of their official positions. None of them are elected by their peers, nor are the members required to meet any objective criteria. The HJC is presided over by the Chief Justice of the Court of Cassation. The six other members are the Prosecutor-General, the President of the Cairo Court of Appeal, the two most senior vice-presidents of the Court of Cassation, and the two most senior presidents of the other appellate courts. No woman has ever served on the HJC; women have been predominantly excluded from judicial office.

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10 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.19.

In order to strengthen the HJC and its capacity to safeguard the independence of the judiciary and of individual judges, laws governing the High Judicial Council should be amended to ensure that:

i. **The independence of the HJC is guaranteed in law.**
ii. **The composition of the HJC is such that at least half the members are judges who are elected by their peers.**
iii. **The powers of the Minister of Justice with regard to managing the careers of judges, including selection, appointment, assignment, secondment and discipline, are transferred to the HJC.**
iv. **The Judicial Inspection Department is considered an element of the HJC, and is supervised by the HJC rather than by the Ministry of Justice.**
v. **The HJC has sufficient staff and resources to carry out its duties with regard to the selection and appointment of judges and the management of their careers, including the disciplining of judges.**
vi. **The HJC is responsible for initiating and conducting any disciplinary proceedings against judges.**

Judicial Authority Law

All aspects of the careers of judges are governed by the Judicial Authority Law (JAL) of 1972, last amended in 2008.[11]

The JAL grants the Ministry of Justice extensive powers to take decisions affecting both courts and individual judges, especially in terms of appointment, assignment, judicial inspection, and discipline, that undermine the independence of the judiciary.

As explained by the UN Human Rights Committee the requirement of an independent judiciary set out in Article 14 of the ICCPR encompasses "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."[12] To comply with Article 14, the Human Rights Committee affirmed that States should establish "clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them."[13]

The absence of specific criteria or a prescribed and transparent procedure in the JAL for the appointment of judges to the bench makes the appointment process both vulnerable to political taint and overly dependent on personal connections, or nepotism, which the ICJ was told is pervasive and systematic.

The fact that the Office of the Public Prosecutor is the primary avenue for individuals to become judges means that there is a very close relationship between the two functions, to the detriment of the independence of both. Indeed, prosecutors are considered part of the judiciary in Egypt. The fact that the Minister of Justice, pursuant to the JAL, controls and administratively supervises the Office of the Public Prosecutor and all its members further undermines judicial independence when these prosecutors are appointed to the bench.

The under representation of women in the judiciary and their complete absence from the HJC is also

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11 Law No.192 of 2008, amending Law No.46 of 1972, the Judicial Authority Law (JAL).

12 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

13 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

inconsistent with international standards that guarantee equality and freedom from discrimination. This also undermines the credibility as well as the independence and impartiality of the judiciary. Even though the Egyptian legal framework does not prohibit women from appointment to the judiciary, the number of women judges is shockingly low. Women were first appointed to judicial office as a result of a unilateral decision of the government in 2006. Between 2006 and 2015 there were less than 45 female judges across Egypt, for a population of 90.2 million. In June 2015, 28 additional women were appointed as judges.

The disciplinary process for judges and the way this process is implemented, is also inconsistent with the requirement, found both in the Egyptian Constitution and international standards, that the authorities guarantee and ensure the independence of the judiciary. With regard to the procedure, the Minister of Justice chooses the staff of the Judicial Inspection Department, which investigates and appraises the work of judges. The Inspection Department is under the Minister's authority.

Further, the Minister can request the Prosecutor-General to initiate disciplinary proceedings against judges. The rules stipulating proceedings in disciplinary matters also do not guarantee a fair procedure. Judges who are subject to them are not guaranteed the right to legal representation of their choice and adequate time and information to prepare a defence.

The disciplinary system in Egypt has been used to punish judges who publicly raised concerns about the human rights situation and lack of respect for the rule of law in Egypt, including the lack of the independence of the judiciary, in violation of their rights, under international standards, to freedom of expression and association.

With a view to ensuring respect for and enhancing the independence of the judiciary, the ICJ recommends that the Judicial Authority Law should be amended to ensure that:

- **i. There are fair, open and transparent procedures for appointing judges, which are overseen by the HJC.**
- **ii. The process for the appointment of judges is non-discriminatory and is based on objective merit-based criteria and on redressing past discrimination that has resulted, among other things in the under representation of qualified women and individuals from diverse socio-economic backgrounds on the bench.**
- **iii. Assessments, promotions as well as transfers of judges are based on objective criteria and follow fair and transparent procedures, and are carried out under the authority of the HJC.**
- **iv. All assignments, secondments and other transfers of judges are based on the consent of the judge and the court President concerned, such consents shall not be unreasonably withheld, and decision-making power is vested in the HJC.**
- **v. The Minister of Justice's powers to appoint and supervise the Judicial Inspection Department are transferred to the HJC.**
- **vi. A code of ethics and judicial conduct that is consistent with international standards is established by the judiciary and used as the basis on which judges are disciplined and subject to removal from office.**
- **vii. The Disciplinary Board and Superior Disciplinary Board are overseen by the HJC.**
- **viii. Disciplinary proceedings are held before an independent and impartial body and afford the judge concerned a fair hearing that is consistent with international standards of due process, guaranteeing that the judge concerned:**
  - **a. is given sufficient notice of the allegations of misconduct;**
  - **b. has the right to adequate time and facilities to prepare and present defence, including the right to be represented by counsel of choice; and**
  - **c. has the right to appeal any adverse decision and sanction to an independent judicial body.**
- **ix. Sanctions against judges are proportionate to the misconduct in question that a judge may only be removed from office, including by way of dismissal, forced retirement and transfer to non-judicial positions, on proven grounds of incapacity or behaviour that renders the judge unfit to discharge the duties of his or her judicial office.**
- **x. The rights of judges, to freedom of expression, association and peaceful assembly,**

exercised in a manner that is consistent with preservation of the dignity of their office and the independence and impartiality of the judiciary, are respected and protected.

Supreme Constitutional Court

Where a Constitutional Court determines "any criminal charge" or "rights and obligations in a suit at law" it must meet the requirements set out at Article 14 of the ICCPR, namely competence, independence and impartiality. Procedures and qualifications must therefore be put in place regarding the appointment, promotion, security of tenure, transfer and disciplining of judges of such courts.

Given the role played by the Supreme Constitutional Court (SCC) in Egypt, the SCC must meet the requirements of Article 14.

Prior to the 2012 Constitution, the Supreme Constitutional Court (SCC) was composed of a flexible number of judges; however, the 2012 Constitution restricted judges on the SCC to 11, resulting in the automatic removal of seven judges, including the Court's only female judge. The 2014 Constitution reinstated the former situation of a Court President and a "sufficient number" of Vice-Presidents. At present the Court comprises 12 judges, all of whom are male.

The General Assembly of the Court selects the judges of the SCC, who are then appointed by a Presidential decree. Although judges of the Court must meet certain age and seniority requirements, SCC 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. The absence of any women on the SCC is inconsistent with international standards and undermines the credibility of the SCC.

In addition, the basis on which decisions can be made to investigate allegations of misconduct against judges of the SCC is both broad in scope and ill-defined. The disciplinary process grants a wide discretion to decision-makers as to whether disciplinary proceedings should be instituted and whether a judge has engaged in misconduct, and is therefore open to being abused.

Under the SCC Law, the SCC has the power to review the constitutionality of laws and regulations, interpret legislative texts, and adjudicate in disputes between judicial bodies and agencies. It cannot review the constitutionality of laws *ex ante*.

In the long-running battle between the military and the Muslim Brotherhood, the SCC issued several important court decisions that shaped the transition process. In June 2012, following the parliamentary elections of November 2011 resulting in a plurality victory for the Muslim Brotherhood's Freedom and Justice Party, the SCC found that the law on parliamentary elections was unconstitutional and the formation of the People's Assembly null and void. It also held that the amendments to the political exclusion law, which would have banned individuals who had served in the Mubarak regime from standing as candidates for election in the presidential elections, were unconstitutional. In July 2012, shortly after the election of the Freedom and Justice Party candidate, Mohamed Morsi, as president, it suspended President Morsi's decree reinstating the People's Assembly. In June 2013, a few weeks before the ouster of President Morsi by the army, the SCC ruled that both the Shura Council and the second Constituent Assembly, the body that drafted the 2012 Constitution, were unconstitutional.

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.

Under the 2014 Constitution, the SCC's General Assembly, rather than the President of the Republic, chooses the Chief Justice from among the three most senior vice-presidents of the Supreme Constitutional Court. While this can serve as a safeguard for the judges from political pressure, the lack of diversity in the judiciary, including on the SCC, has resulted in the SCC being viewed as isolated from the general concerns and realities of the population at large.

This is particularly so because, under the SCC Law, individuals have no direct access to the Court. Instead, only lower tribunals may refer a question concerning the constitutionality of a law to the SCC. The lower courts therefore function as gate-keepers to the SCC. As a result, this system is very much dependent on the willingness of lower courts to exercise their considerable discretion to raise constitutional questions. As a number of recent cases highlight,[14] lower courts have frequently proved reluctant to exercise their discretion to refer cases involving challenges of constitutionality of provisions alleged to violate human rights to the SCC.

In light of the above, the SCC Law should be amended to ensure that:

i. **There is a transparent and open procedure for the appointment of members of the SCC and members of the Commissioner's Board.**
ii. **The process for the appointment of members of the SCC and the Commissioner's Board is based on objective merit-based criteria and on redressing past discrimination.**
iii. **Any decrease in the number of SCC judges is only given prospective effect.**
iv. **Without prejudice to ex post review, the SCC has jurisdiction to review ex ante the constitutionality of laws and their compliance with international standards.**
v. **There is a clear and transparent procedure for bringing constitutional challenges before the SCC and that the standard applied by lower courts in referring cases is not unduly burdensome or restrictive.**
vi. **Any decision by a lower court not to refer a case is subject to review by an independent body, either by another court or a different panel of the same court.**
vii. **The law provides avenues for individuals to directly petition the SCC without having lower courts act as "gatekeepers".**
viii. **Individuals or organizations who are not parties may participate as interveners or amicus curiae, provided they show a sufficient expertise or interest in a legal issue before the court.**
ix. **The SCC is required to issue reasoned judgments in a timely manner.**

The Office of the Public Prosecutor

The independence and impartiality of the Office of the Public Prosecutor (OPP) is crucial to respect for the rule of law, the administration of justice and upholding human rights. Under international standards prosecutors are required to carry out their functions impartially, protect the public interest and not to initiate or continue prosecution, or to make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded. They are also under a duty to refuse to use evidence known or believed to have been obtained by recourse to torture and ill-treatment or other unlawful means and must take steps to ensure that persons responsible for the use of such unlawful means are brought to justice.

Prosecutors in Egypt are appointed by presidential decree upon the approval of the HJC. Aside from basic eligibility criteria, which broadly mirror those for judges, there is a lack of objective and merit-based criteria for prosecutors. The law is also silent as to the criteria and procedure for the promotion of prosecutors. This is inconsistent with international standards which require the selection and promotion of prosecutors to be based on objective criteria and fair and impartial procedures.

The 2014 Constitution marked a step forward by removing the President of the Republic's power to select the Prosecutor-General and transferring this to the HJC, which must select from among high-level judges and prosecutors. However, once again, no selection criteria are enshrined in law.

Under Egyptian law, prosecutors are considered part of the judicial corps. As with judges, there is no code of conduct for prosecutors upon which they can be held accountable to.

Organizationally, the OPP is part of the Ministry of Justice, which is responsible for the administrative

14 For example, the case of *Ahmed Maher, Ahmed Douma and Mohamed Adel* and the case of *Yara Sallam and 22 others*, detailed in Chapters One and Five.

supervision of the OPP and also retains ultimate control over all criminal investigations. In certain circumstances, the Ministry of Justice may remove investigations from the OPP. The Minister of Justice may also transfer prosecutors to other positions and can refer cases of allegations of misconduct against prosecutors to the Prosecutor-General to initiate disciplinary proceedings. Thus all aspects of the work of the OPP and conduct of prosecutors appears to be subject to the influence of the Executive. Such a system runs contrary to the requirement in international standards that the lines of authority for the prosecution service must be clear and transparent and that prosecutors should be impartial in carrying out their duties.

The lack of independence of the OPP from the Ministry of Justice has, for decades, resulted in a lack of investigations into serious human rights violations by law enforcement agents and the military. Despite the overthrow of former President Mubarak, officials suspected of involvement in serious human rights violations committed under the Mubarak regime and during the uprising, including unlawful killings of and injuries to protesters, have still not been investigated and prosecuted.

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. The OPP has also systematically failed to effectively investigate and prosecute past and ongoing cases of serious human rights violations committed during the transition period and under the rule of President Sisi.

In Egypt, the requisite safeguards for the functional independence and impartiality of the prosecutorial system are currently inconsistent with international standards. Reforms should be introduced, to the JAL and Code of Criminal Procedure, to:

- **i. Establish fair, clear and transparent procedures set out in law for the selection of prosecutors and remove the role of the Minister of Justice in setting and administering the exam for Assistant Prosecutors.**
- **ii. Establish additional merit-based criteria for the selection of prosecutors to ensure that individuals who are appointed have appropriate training and qualifications in law, ability, integrity and experience.**
- **iii. Ensure that selection criteria embody safeguards against appointments based on partiality or prejudice and that selections are free of discrimination on any ground.**
- **iv. Require appropriate training, including training on the rights of the suspect and the victim, and of human rights and fundamental freedoms enshrined in national and international law.**
- **v. Establish clear criteria for promotion based on objective merit-based factors, in particular professional qualifications, ability, experience and integrity.**
- **vi. Ensure that decisions on promotions are made the context of fair and impartial procedures by a branch of the HJC composed predominantly of prosecutors.**
- **vii. Ensure that prosecutors are able to perform their functions independently and objectively and are protected from intimidation, hindrance, harassment, and improper interference, including by:**
  - **a. Rescinding the authority of the Minister of Justice to remove investigations from the OPP and to request the Court of Appeal to assign an investigative judge;**
  - **b. Ensuring that the Minister of Justice has no authority to interfere with prosecutorial decision-making in individual cases;**
  - **c. Ensuring that the Minister of Justice has no role in investigating or disciplining of prosecutors; and**
  - **d. Ensuring the President of the Republic has no role in identifying and selecting prosecutors for secondment to foreign governments or international bodies;**
- **viii. Guarantee a clear separation of the prosecutorial function from that of judges and preserve the independence of prosecutors and investigative judges, including by:**
  - **a. Adopting clear and transparent criteria to define the circumstances in which the Prosecutor-General can request an investigative judge be assigned to any particular case or type of crimes;**

b. Amending Article 64 of the Code of Criminal Procedure to ensure that the decision to assign a particular investigative judge to a case is taken by the General Assembly of the Court; and

c. Removing the power of the Minister of Justice to temporarily assign Court of Appeal judges to the prosecution service.

ix. Ensure that any decision by a prosecutor not to prosecute or to close a criminal investigation may be challenged by an interested party before a court in the context of an independent and impartial judicial review.

x. Prohibit the use of illegally obtained evidence, including confessions obtained through illegal means, including torture or other ill-treatment or conduct that amounts to unlawful coercion.

In addition to the specific reforms to the JAL and the Code of Criminal Procedure, the Egyptian authorities should:

i. Ensure that clear and transparent prosecutorial guidelines are established that require prosecutors to give due attention to the prosecution of crimes committed by public officials, including corruption, human rights violations, and crimes under international law.

ii. Provide for the development and adoption of a code of conduct for prosecutors that is consistent with international standards, with the active participation of prosecutors themselves, as well as defence counsel and judges.

Military and Emergency Courts

Under international law, everyone has the right to be tried by an ordinary court and not an exceptional court.[15] Furthermore, the rights under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), that are minimum requirements for fair trials that State's Parties to this treaty, such as Egypt, are required to respect and ensure, extend to all courts, including military and emergency courts.[16]

While Article 14 is not included in the list of non-derogable rights under the ICCPR, the Human Rights Committee has noted that the fundamental principles of fair trial, including the right to be tried by an independent and impartial court, may never be suspended and "guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights".[17]

Due to concerns that military courts frequently are not independent or impartial and that proceedings before them fail to respect fair trial guarantees that are applicable to criminal proceedings before all courts, there is a growing consensus that the jurisdiction of military courts should be limited to the trial of military personnel for military related offences, to the exclusion of human rights violations and other crimes under international law.[18]

Furthermore, there has been a push by some scholars and experts of international law to expand international standards to argue that that military courts should not have jurisdiction over civilians.[19]

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15 UN Basic Principles on the Independence of the Judiciary, Principle 5.

16 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 22.

17 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007, para. 6.

18 Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle L(a); IACHR Annual Report 1997, OAS Doc. OEA/Ser.L/V/II.98, doc. 6 rev., 13 April 1998, Ch. VII Recommendation I; Draft Principles Governing the Administration of Justice through Military Tribunals, UN Doc. E/CN.4/2006/58 (hereafter "Decaux Principles"), Principle 9.

19 Reports of the Special Rapporteur on the independence of judges and lawyers: UN Doc. A/68/285, para.54; and UN Doc. E/CN.4/1998/39/Add.1, paras. 78-79. See also, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle L(c); Decaux Principles, Principle 5. And see Human Rights Committee Concluding Observations: Slovakia, UN Doc. CCPR/C/79/Add.79 (1997), para. 20; see also Concluding Observations: Lebanon, UN Doc. CCPR/C/79/Add.78 (1997), para. 14; http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/CHL/CO/5, (2007), para. 12; Tajikistan, UN Doc. CCPR/CO/84/TJK (2004), para. 18; Ecuador, UN Doc. CCPR/C/ECU/CO/5 (2009), para.5.

Special courts, including military and emergency courts have long-existed in Egypt and have been used by a succession of regimes as a means to evade many of the guarantees of due process applicable in the ordinary court system. The Military Justice Law and the Emergency Law provide for civilians to be tried by military or emergency courts in a wide variety of circumstances.

Although the Mubarak regime used military and emergency courts during the continuous state of emergency that characterized his rule, the use of military courts has actually increased after his relinquishment of power. Under the Supreme Council of Armed Forces (SCAF), nearly 12,000 civilians were tried in such courts in a seven-month period. Attempts under President Morsi to limit the use of military and emergency courts were largely ineffective. By Presidential Decree, President Sisi expanded the jurisdiction of military courts to encompass all crimes committed on public property or at public facilities resulting in the referral of thousands more civilians to military courts.

The military and state emergency courts are not independent and flout due process guarantees. Contrary to international standards safeguarding judicial independence, judges of these courts are subject to the control of either military authorities or the Executive. The guarantees of the right to defence are very limited and often include only a short notice period before the first trial hearing, which is far from meeting the right under international standards to adequate time and facilities to prepare and present a defence. In practice, confidential access to counsel is frequently denied and reliance on evidence obtained through torture and other ill-treatment is reported to be often used in obtaining convictions. Furthermore, the right to appeal is limited in military courts and is non-existent in state emergency courts.

In light of the above, Egyptian authorities should annul Presidential Decree No.136 of 2014 and amend the Military Judiciary law to ensure that:

- **i. The jurisdiction of military courts is limited to trials of military personnel only for breaches of military discipline.**
- **ii. Military courts do not have jurisdiction over crimes under international law or other human rights violations, such as torture or enforced disappearance or unlawful killing.**
- **iii. Military courts have no jurisdiction to try civilians, even where the victim is a member of the Armed Forces or equivalent body or the conduct is alleged to have occurred in territory controlled by the military.**
- **iv. The law safeguards the independence and impartiality of judges sitting on military courts, including by:**
  - **a. Establishing clear criteria for the selection of military judges to ensure that individuals who are appointed are chosen on the basis of legal training, qualifications, integrity and merit; and an open, fair and transparent appointment procedure;**
  - **b. Ensuring that they are outside the military chain of command and military authority in respect of matters concerning the exercise of their judicial functions; and**
  - **c. Ensuring that the procedures and criteria relating to the conditions of tenure and disciplining of military judges guarantee their statutory independence vis-à-vis the military hierarchy and avoid any direct or indirect subordination.**
- **v. Proceedings against all persons before military courts are carried out in a manner consistent with minimum guarantees of fair trial, including by:**
  - **a. Ensuring a person arrested or detained has immediate, regular and confidential access to and assistance of an independent and suitably qualified and experienced lawyer following arrest, during questioning, and prior to, during and following trial and appeal;**
  - **b. Ensuring and respecting the right to adequate time and facilities for the preparation of their defence; and**
  - **c. Ensuring that decisions limiting disclosure of "classified" information to the defence are made by a judge and that restrictions on disclosure are exceptional and do not unduly prejudice the rights of the defence or the**

overall fairness of the proceedings.

vi. **All persons have the right to appeal a conviction and sentence on all grounds, both evidentiary and legal, to a higher independent and impartial civilian tribunal that has the power to reverse the conviction and sentence.**

In addition, given the documented flaws of the Emergency Law and the emergency state security courts, the Emergency Law should be amended to:

i. **Preclude the establishment of all types of emergency state security courts.**
ii. **Require that all civilians arrested during a state of emergency are tried before ordinary, independent and impartial courts in proceedings that meet international standards of fairness, including the right to appeal a conviction and sentence before a higher independent and impartial tribunal.**
iii. **Explicitly prohibit the use or reliance on statements or other evidence claimed to have been extracted under torture or other ill-treatment or duress, unless such allegations of ill-treatment or duress are proven not to be true.**

GLOSSARY

CRC	Convention on the Rights of the Child
ESSC	Emergency State Security Courts
HJC	High Judicial Council
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
JAL	Judicial Authority Law
MJL	Military Judiciary Law
NDP	National Democratic Party
OPP	Office of the Public Prosecutor
SCAF	Supreme Council of the Armed Forces
SCC	Supreme Constitutional Court
SCJN	Supreme Council for Judicial Bodies
UN	United Nations

CHRONOLOGY

2011

11 February	President Hosni Mubarak resigns as a result of popular protests and hands over power to a council of military leaders called the Supreme Council of the Armed Forces (SCAF).
13 February	The SCAF issues a Constitutional Declaration suspending the 1971 Constitution.
10 March	The SCAF issues a decree amending the Penal Code to include the offences of "hooliganism, terrorizing, and thuggery".
18 July	The SCAF issues a decree that restricts the pool of candidates for the President's appointment of chief justice of the Supreme Constitutional Court (SCC) to the three most senior members and also requires the agreement of the Court's General Assembly for the appointment to proceed.
12 September	The SCAF passes an executive decree increasing the number of acts that fall under emergency law provisions and are subject to trial in the emergency courts.
30 November	Parliamentary elections are held and a plurality of seats are won by members of the Muslim Brotherhood's Freedom and Justice Party. Together with representatives of other Islamist groups, they dominate the People's Assembly.

2012

23 January	The People's Assembly holds its first session.
24 January	The SCAF announces partial lifting of the state of emergency, while maintaining the use of emergency State Security Courts in cases of "thuggery".
10 April	The Supreme Administrative Court dissolves the first Constituent Assembly for being constituted in violation of the 30 March 2011 Constitutional Declaration.
23 May	The first round of presidential elections is held.
31 May	The state of emergency is ended.
2 June	Former President Hosni Mubarak is sentenced to a term of life imprisonment following conviction for failing to prevent protester deaths. Other officials are acquitted. The Court also dismisses corruption charges against the former President and his sons.
13 June	A Minister of Justice decision expands the military's law enforcement powers, despite lacking authority to do so.
14 June	The SCC declares the parliamentary electoral law unconstitutional and invalidates the results of the election of the People's Assembly. It also declares unconstitutional changes to the political exclusion law which would have banned individuals who formerly served in the Mubarak regime from standing for election.
15 June	Based on the SCC's 14 June decision, the SCAF issues a decree dissolving the People's Assembly.
17 June	The SCAF issues a Constitutional Declaration amending the March 2011 Constitutional Declaration and strengthening its own legislative and executive powers.
24 June	Mohamed Morsi, the candidate of the Freedom and Justice Party, is elected President.

26 June	The Supreme Administrative Court suspends the decision of 13 June 2012 issued by the Minister of Justice.
30 June	President Morsi takes the oath of office before the SCC.
8 July	President Morsi issues a Presidential decree reinstating the People's Assembly.
10 July	The SCC suspends the Presidential decree of 8 July.
11 July	President Morsi issues statement affirming his respect for the Constitution and the judiciary.
13 July	A presidential committee is tasked with reviewing sentences handed down by military courts on civilians, since 25 January 2011, and recommends that civilians convicted by military courts be pardoned.
24 July	President Morsi announces that the state of emergency has ended and the law will not be reinstated.
12 August	President Morsi issues a Constitutional Declaration abrogating the SCAF's Constitutional Declaration of 17 June 2012 and transferring powers from the SCAF to the President. He chooses General Abdel Fattah el-Sisi, the head of military intelligence, as his new Defence Minister. He also appoints a senior judge, Mahmoud Mekky, as Vice-President.
22 September	The Supreme Administrative Court affirmed the 14 June 2012 ruling by the SCC that had dissolved the People's Assembly.
22 September	By Presidential Order, Morsi appoints 3,649 judges to Emergency Supreme State Security Courts.
10 October	A Cairo Criminal Court acquits 24 defendants, including Mubarak-era officials, for orchestrating the 2 February 2011 "Battle of the Camels", when plain-clothed individuals mounted on camels attacked protestors in Tahrir Square, resulting in the deaths of nearly a dozen people.
11 October	In the context of public concern regarding successive failures of the Office of the Public Prosecutor to successfully prosecute officials charged in connection with the deaths and injury of protestors, President Morsi attempts to dismiss Abdel Maguid Mahmoud as Prosecutor-General by naming him as ambassador to the Vatican. Mahmoud, a Mubarak-era appointee, refuses to leave his position, citing a law that bars the President from firing the prosecutor or other judicial officials.
21 November	President Morsi issues a Constitutional Declaration calling for the reopening of investigations into attacks on protesters and shielding presidential constitutional declarations, laws, and decrees from judicial review. He replaces Abdel Maguid Mahmoud, naming Talaat Ibrahim Abdellah as Prosecutor General. Morsi also orders retrials for Mubarak and others accused of killing civilian protesters during the 2011 uprising.
9 December	President Morsi issues a Constitutional Declaration voiding the November Constitutional Declaration and maintaining that all constitutional declarations are immune from challenge in any court.
15 & 22 December	Constitutional referendum is held, resulting in the approval of a new Constitution that had been drafted by the Constituent Assembly.
25 December	The new Constitution is signed into law by President Morsi.

2013

10 January	The Office of the Public Prosecutor (OPP) announces the establishment of the "Revolution Protection Prosecution" unit within the OPP.
13 January	Court of Cassation overturns the conviction of former Hosni Mubarak, the Interior Minister and six aides in relation to the killing protestors during the 2011 uprising and orders a re-trial.
27 March	Court of Appeal overturns the Presidential decree dismissing Abdel Maguid Mahmoud as Prosecutor-General.
8 May	Court of Cassation rejects appeal by the Prosecutor-General of the acquittals in "Battle of the Camels" case.
2 June	SCC rules that the Shura Council and the Constituent Assembly are unconstitutional. The SCC authorizes the Shura Council to remain seated until the election of a new People's Assembly. The ruling was based on the SCC's finding that the electoral law violated the principles of equality and non-discrimination.
28 June	Mass protests calling for President Morsi's resignation begin and continue for several days.
2 July	Court of Cassation rejects appeal by Prosecutor-General Abdallah against the March Court of Appeal ruling that reinstated Mahmoud as Prosecutor-General. The Court of Cassation, in a separate case, also rejects Mahmoud's challenge to the November 2012 Constitutional Declaration.
3 July	Defence Minister Sisi and the SCAF, in an announcement read on state television, suspend the Constitution and oust President Morsi from office. Morsi's supporters call it a *coup*. The SCAF installs an interim government presided over by Adly Mansour, the former Chief Justice of the SCC. Morsi and leaders of the Muslim Brotherhood are arrested.
5 July	Following his reappointment, Prosecutor-General Mahmoud announces his resignation.
6 July	The interim government issues Constitutional Declaration dissolving the Shura Council, the upper house of Parliament.
8 July	The interim government issues Constitutional Declaration detailing a transition plan for a national referendum on a new constitution and parliamentary elections.
14 August	More than 1,000 protestors are killed during the dispersal of pro-Morsi encampments in Cairo. General Sisi declares a new state of emergency.
22 August	Hosni Mubarak is removed from prison and transferred to house arrest at a military hospital after a court rules that he can no longer be incarcerated.
23 September	The Cairo Court for Urgent Matters orders the dissolution of the Muslim Brotherhood and the confiscation of its assets.
4 November	President Morsi is tried with charges of inciting the murder of protesters in December 2012. Outbursts in court lead to the trial being adjourned until January.
24 November	The interim government issues the Demonstration Law, criminalizing the holding of a public meeting, march or protest of 10 people or more without prior authorization from the police.
22 December	Interim President Mansour issues a Presidential decree forming a fact-finding committee for violence since 30 June 2013.

22 December The Abedine Misdemeanour Court convicts and sentences to three years' imprisonment Ahmed Maher, Ahmed Douma and Mohamed Adel in relation to violence that broke out when supporters of Alaa Abdel Fattah attempted to attend his trial.

24 December A government spokesman labels the Muslim Brotherhood a terrorist organization.

2014

14 & 15 Jan. In a constitutional referendum, 98% of Egyptians are reported to have voted in favour of a new constitution.

24 March The Criminal Court in Minya sentences 528 suspected members or supporters of the Muslim Brotherhood to death following an unfair mass trial in relation to attacks on the Matay police station in the summer of 2013.

26 March General Sisi announces his resignation from the army and his intent to run for President.

7 April The Cairo Court of Appeal dismisses the appeal of Ahmed Maher, Ahmed Douma and Mohamed Adel convicted on 22 December 2013.

28 April The Criminal Court in Minya sentences 683 suspected members or supporters of the Muslim Brotherhood to death following an unfair mass trial in relation to attacks on Adwa police station in the summer of 2013. The Court also affirms 37 of the 528 the death sentences it had imposed on 24 March and sentences 491 to life imprisonment.

21 May Hosni Mubarak and his two sons are convicted and sentenced to terms of imprisonment. Three years for Hosni Mubarak and four years for his sons, regarding embezzlement.

26 & 27 May Presidential elections are held but turnout is low. Abdel Fattah el-Sisi is declared the winner with 97% of the vote. Foreign observers say the election fell short of international standards.

7 June Four police officers that were charged with negligence over the death of 37 detainees who were killed when a teargas canister was shot into the police van transporting them have their sentences overturned by an Appeals Court.

11 June The Cairo Felonies Court convicts Alaa Abdel Fatah and 24 others, *in absentia*, and sentences them to 15 years' imprisonment in relation to a demonstration against military trials of civilians.

21 June The Criminal Court in Minya affirms death sentences against 183 of the 683 accused convicted in the case that concluded on 28 April 2014.

23 June The Giza Felonies Court convicts three Al Jazeera journalists on charges of falsifying news and supporting and belonging to a terrorist organization and sentences them to terms of imprisonment of between 7 and 10 years. Three other foreign journalists, tried *in absentia*, are also convicted and sentenced to 10 years' imprisonment.

26 October The Helopiolis Misdemeanour Court convicts and sentences to three years' imprisonment Yara Sallam and 22 others in relation to a demonstration that took place in June 2014.

27 October President Sisi enacts Presidential Decree No.136 of 2014 expanding the jurisdiction of military courts to encompass all crimes committed on public property or at public facilities.

29 November The Cairo Appeals Court drops all charges relating to the deaths of protestors during the 2011 uprising against former President Mubarak, former Minister of Interior, Habib al Adly, and six aides and drops various corruption charges against Hosni Mubarak, his two sons and a business partner.

2 December The Giza Felonies Court convicts and sentences 188 individuals to death following a mass unfair trial in relation to attacks on the Kerdasa police station in Giza that took place in August 2013.

28 December The North Cairo Court of Appeal upholds the conviction of 26 June of Yara Sallam and 22 others and reduces the sentence from three to two years' imprisonment.

2015

1 January The Court of Cassation orders re-trial of case against three Al Jazeera journalists accused of falsifying news and supporting and belonging to a terrorist organization.

13 January The Court of Cassation overturns convictions of 21 May of former President Mubarak and his sons for embezzlement and orders a retrial.

22 January The Court of Cassation orders a re-trial of the four police officers charged with negligence over the death of the 37 detainees killed when tear gas was shot into the police transport van they were in.

24 January The Court of Cassation orders a re-trial for 152 individuals, including 37 sentenced to death, in the Matay police station case heard before the Minya Felonies Court.

25 January At least 17 people were killed across Egypt in the context of pro-democracy protests to mark the anniversary of the 2011 uprising.

26 January Alaa and Gamal Mubarak, sons of President Hosni Mubarak, are released from jail pending their retrial for embezzlement.

27 January The Court of Cassation rejects the appeal of Ahmed Maher, Ahmed Douma and Mohamed Adel regarding their conviction of 22 December 2013.

2 February The Giza Felonies Court affirms the death sentences from the trial of 2 December 2014 against 183 of the 188 convicted and sentenced in relation to attacks on Kerdasa police station in August 2013.

4 February Ahmed Douma and 229 other individuals are convicted and sentenced to life imprisonment following an unfair mass trial and 39 juveniles were sentenced to 10 years imprisonment, on charges relating to pro-democracy protests in December 2011.

9 February The Alexandria Misdemeanours Court sentences 10 individuals, including human rights lawyers and journalists to two years in jail for storming the Al-Raml police station in Alexandria and attacking its officers as well setting alight the Muslim Brotherhood headquarters in March 2013.

11 February The Court of Cassation overturns the death-sentences of 36 individuals imposed by the Minya Felonies Court on 21 June 2014 in relation to the Adwa police station case and orders a re-trial.

23 February The Cairo Felonies Court convicts Alaa Abdel Fattah and 22 others in the re-trial of the case of 11 June 2014. Two are sentenced to 5 years' imprisonment and a fine, 22 were sentenced to 3 years' imprisonment and a fine.

24 February	The Terrorist Entities Law is promulgated. It lists entities or persons that can be subject to a range of restrictions by the authorities, including closure of premises, asset freezes, travel bans and prohibitions on occupying public positions.
14 March	The Disciplinary Council forcibly retires 41 judges in two separate sets of disciplinary proceedings: the "July Statement" case and the "Judges for Egypt" case.
16 March	Mohamed Badie and 16 others are sentenced to death in the so-called "Rabaa Operations Room" case on charges of planning hostile actions against the State.
11 April	The Giza Felonies Court convicts 51 individuals in an unfair mass trial, known as the "Rabaa Operations Room" case in relation to protests that took place following the ouster of President Morsi in July 2013. The court sentenced 14 to death, including Muslim Brotherhood leader, Mohamed Badie, and sentenced 37 to life imprisonment.
21 April	Mohamed Morsi and 14 others are convicted in relation to the dispersal of protesters outside the Presidential Palace in December 2012. Morsi and 12 others were sentenced to 20 years' imprisonment. The other two defendants were sentenced to 10 years' imprisonment.
9 May	The Cairo Criminal Court convicts Hosni Mubarak and his two sons in the re-trial of the 21 May 2014 trial in relation to embezzlement. Hosni Mubarak is sentenced to three years' imprisonment and his sons are sentenced to four years' imprisonment.
17 May	Following an unfair trial before a military court, 6 convicted men are executed.
31 May	Human Rights lawyer, Mahiennour Al Masry, and seven other accused are sentenced to one year and three months imprisonment on charges of among others, demonstrating without authorization, assaulting security forces and damaging a police station.
11 June	The police officer accused of killing the political activist, Shaimaa Al Sabbagh, during a peaceful demonstration, is sentenced to 15 years' imprisonment.
29 June	Prosecutor-General, Hisham Barakat, is assassinated.
16 June	The Cairo Criminal Court affirms the death sentences for over 100 persons, including former President Morsi, following their earlier conviction on 16 May 2015 after an unfair trial.
11 August	Over 700 accused are referred to trial in the "Dispersal of Rabaa" case. The charges include: premeditated killing, carrying weapons in a public gathering and blocking roads.
17 August	A Counter-Terrorism Law is promulgated. The ICJ and other civil society actors condemn its adoption as a further erosion of the rule of law and human rights in Egypt.
19 September	President Sisi appoints Nabel Sadeq as Prosecutor-General, following his selection by the HJC.
23 September	President Sisi pardons more than 100 prisoners, including three Al Jazeera journalists and human rights defenders Yara Sallam and Sanaa Seif.
12 October	The Court of Cassation annuls death sentences imposed on six defendants in relation to attacks on the Kerdasa police station in August 2013 and orders a re-trial.
25 October	Amendments to the Prison Act are enacted, setting out the circumstances in which force can be used against detainees and extending the permitted length of solitary confinement.

4 December	Election results for the House of Representatives are declared with pro-government candidates reporting to have won over 90 per cent of the seats.

2016

10 January	The House of Representatives is sworn in.
3 February	The Court of Cassation overturns the death sentences of 149 defendants previously convicted of killing policemen in Kerdasa in 2013.
14 February	The Court of Cassation orders a re-trial of the police officer convicted in June 2015 of the killing of Shaimaa Al Sabbagh.
21 March	The Supreme Disciplinary Board forcibly removes 15 judges from their offices in the Judges for Egypt Case.
28 March	Supreme Disciplinary Board forcibly removes 32 judges from their office in the "July 2013 Statement Case".
28 March	Hisham Gueinena, head of the central audit agency, is dismissed from his office by President Sissi over comments regarding corruption in Egypt.

CHAPTER ONE : THE JUDICIARY IN TIMES OF CRISIS

For decades, the independence and impartiality of the Egyptian judiciary has operated under intense strain. Though frequently undermined through executive interference in judicial decision-making, the judiciary has, nevertheless, managed to exercise a limited check on some of the excesses of executive power.

In recent years, however, and especially since the overthrow of President Mubarak, judicial independence and impartiality has declined dramatically.

Since the 2011 uprising, Egyptian authorities have continued their attempts to control and use the judiciary to gain political advantage. Similarly, since the uprising Egypt's judiciary has frequently failed to uphold the rule of law and safeguard human rights, in part due to Executive interference in judicial affairs. Judicial rulings and the lack of legislative and other safeguards protecting judicial independence has led to judges, as well as prosecutors, being seen as tools of repression and facilitators of impunity for human rights violations, rather than independent and impartial arbiters of justice.

At the same time, those judges willing to speak out in favour of judicial independence as well as those who are considered to be opponents of the regime have faced repercussions including disciplinary proceedings, especially since the ouster of President Morsi. Such proceedings have not only violated those judges' rights to freedom of thought, expression, association and assembly but have also had a chilling effect on the exercise of those rights by other judges and the independence and impartiality of the judiciary. The judges that remain have either voluntarily aligned themselves with the interests of the regime, or dare not speak out for fear of being dismissed, like their colleagues have been.

I. ATTACKS ON THE INDEPENDENCE OF THE JUDICIARY SINCE 2011

In times of crisis in a country, an independent judiciary has a key and special role in upholding the rule of law, acting as a check on the arbitrary exercise of power by political, military and other actors, and ensuring that laws and measures taken to address the crisis comply with the rule of law and human rights.

Since the overthrow of President Mubarak in 2011, each of the governing authorities in Egypt (both civilian and military) have attempted to control and use the judiciary for political gain. This control has undermined the ability of the judiciary to safeguard the rule of law and human rights throughout the transition period.

During the rule of the Supreme Council of Armed Forces (SCAF) from February 2011 until June 2012, in contravention of international standards, ordinary courts were subverted by the widespread use of military and emergency state security courts to try civilians. For example, the SCAF extended the state of emergency, which paved the way for the referral of cases, at the discretion of the SCAF, to Emergency State Security Courts (ESSC).[20] The SCAF also increased the number of offences that automatically fell within the jurisdiction of the ESSC.[21] In addition, the SCAF expanded the law enforcement role of the armed forces, including granting military officers broad powers to arrest and increased the use of military courts to try civilians.[22] Although the Administrative Court suspended

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20 The state of emergency did not end until 31 May 2012 when the People's Assembly did not renew it. The Emergency States Security Courts are provided for under the Emergency Law (Law No.162 of 1958) and are described in more detail in Chapter Seven below.

21 Through Decree No.193 of September 2011, the SCAF increased the crimes falling within the jurisdiction of the ESSC to include, "bullying cases…stopping transports, cutting roads, broadcasting wrong news or rumours intentionally".

22 March Constitutional Declaration, Art. 53/2; Ministerial decision No.4991 of 2012 of 14 June 2012. Deci-

the implementation of the military's expanded powers of arrest,[23] over 11,000 civilians were tried by military courts during the rule of the SCAF.[24]

During his term as President, Mohamed Morsi also made a number of attempts to exert control over the judiciary and to limit the scope of judicial review. For example, in October 2012, following public outrage over the acquittal of supporters of former President Mubarak for their alleged role in violent attacks on protestors, President Morsi attempted to remove the Mubarak-appointed Prosecutor-General, Abdel Maguid Mahmoud from office by naming him as ambassador to the Vatican; however, Maguid Mahmoud refused to resign. The following month, President Morsi issued a "constitutional declaration" (the November 2012 Declaration) which granted President Morsi extensive powers, including the ability to appoint a new Prosecutor-General.[25] After this declaration, President Morsi appointed Talaat Abdallah as Prosecutor-General.

The November 2012 Declaration also provided that declarations, laws, and decrees issued by the President were final, binding, and immune from judicial review.[26] Although President Morsi annulled the November 2012 Declaration in December 2012 following widespread protests, the new declaration, issued in December 2012, maintained that all his "constitutional declarations" were immune from legal challenge.[27]

Since the army's seizure of power on 3 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.[28] In a number of instances, the decision to transfer the trial location was not published until after the first hearing, and often the counsel for the accused would only find out about the change in location after arriving at the court building.[29] More recently, the Minister of Justice has chosen to transfer all cases being heard by two particular judges from ordinary court buildings to police academies.[30] The consequence of these transfers is that members of the public, including the media and family members of the accused and others wishing to observe the proceedings, may not have access to enter the building without acquiring special permission from the judge to access the court hearings.

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sion No.4991 of 2012, empowered military intelligence officers and military police to arrest civilians for a wide variety of crimes, including "shouting or singing in order to provoke or cause strife", "intentionally spreading false information with the purpose of affecting national security, terrorising people or causing prejudice against the general interest" and "publicising in Egypt by any means to change the fundamental principle of the Constitution or the fundamental social systems, or to allow for the domination of social class over others or the destruction of a social class, or changing the state's fundamental social and economic systems, or the destruction of the basic system of the society whenever the use of force or terror or any other illegal means were observed in such acts".

23 On 26 June 2012 the Administrative Court suspended the implementation of Decision No.4991.

24 Press conference of General Adel Morsi of the SCAF, 5 September 2011. See also Human Rights Watch, *Egypt: Retry or Free 12,000 After Unfair Military Trials*, 10 September 2011, available at http://www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials

25 Constitutional Declaration, Official Gazette No. 46(bis) of 21 November 2012.

26 Constitutional Declaration, Official Gazette No. 46(bis) of 21 November 2012.

27 12 December 2012 Constitutional Declaration.

28 See, for example, Decision No.2128 of 2014 of the Minister of Justice transferring the Case No. 1343/2013, Alaa Abdel Fattah and 24 others from the Cairo Felonies Court to the Institute of the Guardians of the Police.

29 For example, in the case of *Yara Sallam and 22 others*, Case No 1343/2014, when defence counsel arrived at the Misdemeanour Court building they were told that the hearing would be held in the Institute of the Guardians of the Police in Tora. The Ministerial decision transferring the location of this court was signed three days prior to the first hearing but not made public until over a week after the first trial hearing. See also Case No. 1343/2013, *Alaa Abdel Fattah and 24 others*, in which the Minister's decision was only made public on 31 March 2014, over a week after the first hearing had begun on 23 March 2014. And see the case of *Ahmed Maher, Ahmed Douma and Mohamed Adel,* Case No. 9593/2013. The Minister's decision transferring the case was signed on the first day of the trial and was said to enter into force on the same day. However, it was not made public until a week after the trial had begun.

30 Minister of Justice Decision No.5960/2015, issued and entered into force on 3/8/2015, published in Official Gazette No.192 of 23/8/2015, transferring all cases entrusted to Judge Nagy Shehateh and Judge Mohamed Shirin Fahmy to a Cairo Police Academy.

In October 2014, five months following his election, President Sisi issued a decree expanding the jurisdiction of military courts.[31] Consequently, between 27 October 2014 and 24 March 2015, over

3,000 cases involving civilians are reported to have been tried before military courts.[32]

Each of these acts by the Egyptian authorities, including expanding the jurisdiction of military and state security courts to try civilian and unilaterally dismissing the Prosecutor-General, considered, along with other prosecutors to be a member of the judiciary, in the absence of fair proceedings, undermine the independence of the judiciary and violate international human rights standards. Furthermore, the Egyptian authorities have taken steps to immunize Presidential decisions from judicial review and have transferred trials from ordinary court buildings to closed premises under the control of the Ministry of Interior, which also go against violated international human rights standards and prevent the judiciary from being fully independent.

The right to a fair and public hearing by a competent, independent and impartial tribunal is enshrined in international law and standards, including Article 14 of the International Covenant on Civil and Political Rights (ICCPR), of which Egypt is party.[33] Egypt is therefore obligated to respect and ensure respect for these rights as well as to provide for necessary legislative and other safeguards to secure their realisation.[34] Furthermore, the right to trial before a competent, independent and impartial court and fundamental guarantees of fair trial are not subject to any exception, *including during states of emergency*.[35] The Human Rights Committee (the body of independent experts mandated by the ICCPR to monitor State's Parties implementation of that treaty) has clarified that:

> [J]udicial independence 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…. 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.[36]

The Executive, as well as other branches of the State, must respect, ensure and preserve the independence and effective functioning of the judiciary, including during times of crisis.[37] Under no circumstances should the authorities invoke a situation of crisis to restrict the competence or capacity

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31 Presidential Decree No. 136 of 2014 on 'Securing and Protection of Public and Vital Facilities', 27 October 2014. This decree is discussed in further detail in Chapter Seven.

32 "*3000 civilians tried in military courts in 5 months: No to Military Trials campaign*", 24 March 2015, Mada Masr http://www.madamasr.com/news/politics/3000-civilians-tried-military-courts-5-months-no-military-trials-campaign ; and "*3000 Egyptians have faced military trials in last 5 months*", 24 March 2015, Middle East Eye http://www.middleeasteye.net/news/3000-egyptians-have-faced-military-trials-last-5-months-250042398
See also, "*Egypt: Surge of Military Trials*", Human Rights Watch, 18 December 2014, available at http://www.hrw.org/news/2014/12/18/egypt-surge-military-trials

33 Egypt ratified the ICCPR on 14 January 1982.

34 ICCPR, Article 2.

35 This has been clarified by the UN Human Rights Committee, the body of independent experts mandated by the ICCPR to monitor states' implementation of this treaty, in General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), paras 19 and 6 respectively. The International Court of Justice has clarified that the interpretations of treaties by treaty monitoring bodies, including the Human Rights Committee are authoritative: *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment of the International Court of Justice, (30 November 2010) paras 66-68.

36 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.19.

37 Legal Commentary to the ICJ Geneva Declaration, 2011, Principle 2, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf

of the judiciary, or to circumvent, control or review judicial proceedings.[38] In particular, judges must retain their authority, within the scope of their jurisdiction, as final arbiters of what the law provides and must have the sole capacity to decide upon its jurisdiction and competence to adjudicate a case.[39] Judicial oversight of the constitutionality or legality of the acts of the Executive is a requisite of the rule of law and restricting this power is "tantamount to impairing the independence of justice".[40]

Restricting the jurisdiction of ordinary courts by expanding that of military and/or state security courts and immunizing executive decrees and decisions from judicial review, restrict the competence of the judiciary and undermine its independence. In addition, the use of military and state security courts to try civilians in Egypt violates the right to a fair trial before an independent, impartial and competent tribunal enshrined in Article 14 of the ICCPR. This is due, in part, to the fact that the military judges that sit on both military and state security courts are not independent seeing as they are appointed by the Minister of Defence and remain subject to the military chain of command. In addition, rulings of military courts are not subject to full appeal, including on questions of fact, before a civilian court.[41] (Other fair trial violations which arose in some of these proceedings are highlighted below).

Under international standards, including the UN Basic Principles on the Independence of the Judiciary, removal proceedings against members of the judiciary, which for Egypt includes prosecutors, must be determined in accordance with established standards of judicial conduct that are consistent with international standards. This means that the proceedings must guarantee the right to a fair and transparent hearing and the removal proceedings must also be subject to an independent review. Furthermore, members of the judiciary may only be removed on grounds of incapacity or serious grounds of misconduct that renders them unfit to discharge their duties.[42] The Human Rights Committee has further clarified that "the dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary."[43] The unilateral removal and replacement of the Prosecutor-General is in direct contravention of such standards.

Executive decisions transferring the location of court hearings to police academies also undermine the independence of the judiciary as well as the right to a public trial. The UN Basic Principles on the Independence of the Judiciary make clear that the judiciary is both entitled and required to ensure that judicial proceedings are conducted fairly and the rights of the parties are respected.[44] Further, the

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38 Legal Commentary to the ICJ Geneva Declaration, 2011, Principle 3, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf.

39 Legal Commentary to the ICJ Geneva Declaration, 2011, Principle 1, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf.

40 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2004/60, 31 December 2003, para. 29.

41 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), paras 19 and 22; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report following mission to Egypt, UN Doc A/HRC/13/37/Add.2 (2009) paras 32-35; Human Rights Committee Concluding Observations: Egypt, UN Doc CCPR/C0/76/EGY(2002) para 16 (b); Committee on the Rights of the Child, Concluding Observations UN Doc CRC/C/EGY/CO/3-4 (2011) para 86(g) and 87(f).

42 UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereafter "UN Basic Principles on the Independence of the Judiciary"), Principles 17-20; Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 20.

43 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 20.

44 UN Basic Principles on the Independence of the Judiciary, Principle 6. See also the Draft Universal Declaration on the Independence of Justice (hereafter "Singhvi Declaration"), para.37. The Singhvi Declaration formed the basis for the UN Basic Principles on the Independence of the Judiciary and was formally recommended to States by the Commission on Human Rights in Resolution 1989/32, UN Doc. E/CN.4/RES/1989/32.

Executive must not control the judicial functions of the courts and responsibility for the administration of courts should rest with the judiciary.[45]Although in some narrowly defined circumstances restrictions can be imposed on the public's access to court hearings, any decision to exclude all or part of the public from part or all of the proceedings must be made by the court and be for one of the specified reasons set out at Article 14(1) of the ICCPR, which include: morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so require.[46] These exceptions must be strictly construed. (Restrictions on public access to court hearings is considered in more detail below in Chapter One, Section II.)

II. THE JUDICIARY AS A TOOL OF REPRESSION

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.

Such proceedings before both ordinary and military courts have been marred by a litany of violations of internationally recognised rights.

Prosecutions have been initiated by prosecutors and are often continued by judges, even where the charges were unfounded. A presumption in favour of pre-trial detention has routinely been applied by both prosecutors and judges and the accused in such cases have not been given adequate time and facilities to prepare a defence.

In addition, judges have refused to refer constitutional challenges to laws and decrees to the Supreme Constitutional Court and have instead applied these laws even if they violate human rights standards. Judges have also failed to ensure equality of arms and rights of defence during trial and to ensure public hearings in such trials. Judges have frequently handed down convictions despite a lack of credible evidence against each of the accused parties, even when there is not proof beyond a reasonable doubt, thereby violating the presumption of innocence. Thousands have been convicted following unfair trials and, of them, hundreds have been sentenced to death in violation of the right to life.

Some of the most egregious examples of fair trial violations have involved mass trials where hundreds of accused are tried together resulting in dozens or hundreds being sentenced to death or life imprisonment. Cases involving the trial of civilians before military courts have, in addition to many of the above violations, also undermined the accused's right to trial before an independent and impartial tribunal.

These issues are discussed in more detail below, including by reference to specific cases. However, difficulties in accessing military court proceedings and their judgments has limited the ICJ's ability to provide detailed analysis of cases of civilians tried before such courts.

A. PRE-TRIAL ISSUES

i. Prosecutors initiating and judges continuing prosecutions when the charges are unfounded

Since July 2013, numerous prosecutions have been initiated against individuals despite a clear lack of evidence that these individuals have committed the criminal offence they are charged with. In some instances, such prosecutions appear to have been initiated with the sole purpose of intimidating and silencing witnesses of human rights violations. The case of *Azza Soliman and 16 others* described below is illustrative of this pattern.

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45 Singhvi Declaration, paras 5(h) and 32.

46 See also, Principle 36(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principles A(1) and (3) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

Prosecuting individuals despite a lack of evidence to support the charges is contrary to both Egyptian law and international law and standards.

Articles 61 and 154 of Egypt's Code of Criminal Procedure state that the prosecution or investigative judge must terminate the case if there is no basis to continue with the prosecution or if the act is not a crime or the investigative judge finds that the evidence is insufficient.[47]

Principle 14 of the UN Guidelines on the Role of Prosecutors states that "[p]rosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded".[48] Such prosecutions without evidence are also contrary to the requirement on prosecutors to protect the public interest, act with objectivity and pay attention to all relevant circumstances, whether they are to the advantage or disadvantage of the suspect.[49]

CASE STUDY

In the case of Azza Soliman and 16 others, the accused were prosecuted under the Demonstration Law, in relation to a reportedly peaceful march that took place on 24 January 2015 to Cairo's Tahrir Square to commemorate those who had been killed four-years earlier during the January 2011 uprising.

According to her testimony, Azza Soliman, who is a lawyer and founder of an NGO, the Centre for Egyptian Women's Legal Assistance, was sitting with friends and family in a café when she heard chants from protestors. She stepped outside the café to see what was going on and witnessed members of the security forces shooting tear gas and shotguns. She also saw a body in the street, which she subsequently learnt was that of Shaimaa Al Sabbagh, a member of a political opposition party who was killed while participating in the march. Ms Soliman went to the prosecutor's office that day to present herself as a witness to the killing and to make a statement.

The prosecutor is reported to have initially refused to take the statement and warned Ms Soliman that if she insisted she would face prosecution herself. However, she did insist and was made to wait and was questioned for several hours before finally giving her testimony.

On 23 May 2015, Ms Soliman's status was changed from "witness" to "defendant" and she was prosecuted under the Demonstration Law together with 16 other accused. Two of the accused were also reportedly not involved in the march, including a doctor who offered first aid to Ms Shaimaa Al Sabbagh after she had been shot and a bystander who carried Ms Al Sabbagh to a nearby café.

All 17 were acquitted on 23 May 2015. The judge stated that the primary reason was that the event would not fall under the Demonstration Law and therefore could not be considered to be a crime.

On 26 May, the prosecutor appealed the acquittal. On appeal, the judge reportedly instructed defence lawyers to restrict their pleadings to the qualification of the demonstration and the legality of the police report. However, fol-

47 Law No.150/1950 on the Code of Criminal Procedure.

48 See also, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle F(j).

49 UN Guidelines on the Role of Prosecutors, Principle 13(b).

lowing the assignment of a new judge to the case, the accused were asked to prepare their defence anew. On 24 October 2015, the Court of Appeal upheld the acquittal of all the accused.

The ICJ believes that Azza Soliman was both threatened, and later prosecuted, in an attempt to prevent her from providing witness testimony regarding the killing of Ms Shaimaa Al Sabbagh by law enforcement officials.

Prosecutions to intimidate witnesses into withdrawing their testimony in cases involving human rights violations is a clear breach of Principles 13b and 14 of the UN Guidelines on the Role of Prosecutors, as well as Articles 61 and 154 of Egypt's Code of Criminal Procedure. Such prosecutions are also contrary to the prosecutors' obligation to uphold human rights, carry out their functions impartially and give due attention to the prosecution of crimes committed by public officials, including grave violations of human rights.

In addition, bringing and continuing a spurious case against the accused is inconsistent with the obligation on prosecutors not to initiate prosecutions when an impartial investigation shows the charge to be unfounded and the duty of judges to protect the rights of the parties.

The prosecution of all of the accused for their alleged involvement in a peaceful march under the Demonstration Law is contrary to the right to freedom of peaceful assembly, as guaranteed by Article 21 of the ICCPR. (A fuller analysis of the Demonstration Law's incompatibility with international standards is set out below in the section entitled "Rights at trial", Chapter One, Section II(B)).

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Once the case has been referred to trial, judges in Egypt have also failed to dismiss cases where there is a clear lack of evidence to support the charges against the individuals being prosecuted.

Under international standards, judges are required to be independent, to decide matters impartially on the basis of the facts and according to the law and to "ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected". Judges should therefore dismiss cases brought against witnesses of human rights violations to prevent them from testifying as well as cases where there is a clear lack of evidence to support the charges.

CASE STUDY

In the case of Yara Sallam and 22 others, the 23 accused were all arrested in the vicinity of a protest on 21 June 2014. The first accused, Yara Sallam, has repeatedly stated that she was not participating in the protest. All the accused were subsequently charged with various crimes under the Criminal Code, the Demonstration Law and the Procession Law, including participating in a demonstration with the aim of assaulting people and influencing public authorities in their duties, as well as deliberately damaging public and private property.

According to information obtained by the ICJ, there was no specific evidence

placing each of the 23 accused at the demonstration. In particular, video evidence that was relied upon by the prosecution only placed five of the accused at the scene and none of the other accused appeared in the footage. The video also reportedly showed the police using excessive force against protestors, not the other way round, and counsel argued that individuals seen carrying weapons in the footage and identified by the prosecution as protestors were in fact members of the security forces in plain clothes.

Instead of dismissing the charges against individuals on the grounds that there was insufficient evidence of them having been involved in the protest, or having committed any crime, in October 2014, the Heliopolis Misdemeanour Court convicted all of the accused. To support the convictions, the Court stated, "based on what has been presented, it is clear to the Court after looking closely at the case file and after it has balanced the incriminating and exculpatory evidence that the accused have committed the crimes they have been charged with". The Court's judgment referred only to one piece of evidence - the statement of an officer present at the scene – in order to find the accused guilty of the crimes. The Court did not discuss the video evidence, or the culpability of each individual accused, nor did it address any of the substantive challenges presented by the lawyers.

The failure of the judge to dismiss the charges against those accused against whom there was a clear lack of evidence is contrary to the obligation of judges to ensure the rights of the parties are respected. In addition, the conviction of all of the accused without credible evidence of guilt and without individual findings of guilt is contrary to the presumption of innocence, a fundamental fair trial guarantee enshrined in the ICCPR, which must be respected at all times. This issue is discussed in further detail below under "Rights at Trial", Chapter One, Section II(B).

On appeal, the North Cairo Court of Appeal affirmed the findings and conviction of the first instance court. Once again, the Court of Appeal failed to specify in its judgment the basis on which each of the accused was found guilty, contrary to the presumption of innocence. The Court reduced the accused's' sentence from three to two years imprisonment and from three to two additional years of police monitoring. No explanation was given for the reduced sentence. An appeal to the Court of Cassation was lodged; however, in September 2015, the 23 accused were part of a group of 100 individuals who were granted a presidential pardon.

The decision of the first instance and appeal court were also condemned by the Special Rapporteur on the situation of Human Rights Defenders in Africa, the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the UN Special Rapporteur on the situation of human rights defenders, who highlighted the lack of evidence and inconsistencies in police reports as well as other fair trial concerns.

ii. Incommunicado detention

Following the ouster of President Morsi in July 2013 and the crackdown against perceived opponents of the regime, numerous individuals have been held in incommunicado detention, without access to the outside world.

Incommunicado detention constitutes a particularly egregious violation of the right to liberty.[50] The

50 Report of the Working Group on Arbitrary Detention, 24 December 2012, A/HRC/22/44, para.60.

right to liberty for persons arrested or detained suspicion of a criminal offence, includes the right to notice of the reasons for their arrest or detention and to be promptly informed of any charges.[51] As set out below, such individuals must also be brought before a judge or judicial officer promptly (generally within 48 hours) and must have the right to challenge the legality of their detention.[52] In addition, from the outset of their detention, detainees have the right to access a lawyer.[53] Where an individual does not have a counsel of choice, a lawyer should be appointed to represent them, free of charge if the individual lacks sufficient resources to pay.[54] The accused must also be able to contact family members or have them informed of his or her arrest and also provide his or her family members the location of their detention.[55] Each of these rights is at risk when the individual is held incommunicado rendering the detention unlawful and arbitrary. In addition, the UN Working Group on Arbitrary Detention and the Human Rights Committee have affirmed that prolonged incommunicado detention facilitates the perpetration of torture and other cruel, inhuman and degrading treatment and may itself amount to such treatment.[56] Holding a person accused of a crime incommunicado, without access to their lawyer or a court, is likely to effect the fairness of the criminal proceedings against him or her, particularly if it lasts more than a few days.

The UN Committee against Torture (the body charged with monitoring the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) recommended in 2002 that Egypt abolish incommunicado detention.[57] The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism repeated this recommendation in 2009.[58] Furthermore, the UN Special Rapporteur on torture has recommended that security personnel who do not respect provisions protecting the right to liberty and guarding against incommunicado detention should be disciplined.[59]

However, as the following cases demonstrate, since the ouster of President Morsi, individuals have continued to be held incommunicado for months and denied all access to legal counsel.

For example, in a case known as the *Ansar Beit Al Maqdis case* (Case No. 423 of 2013 before the Cairo Felonies Court), more than 200 accused were charged with serious crimes, including the mur-

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51 Article 9(2) of the ICCPR; African Charter on Human and Peoples' Rights, Article 6. See Principle M(2) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

52 Article 9(3) and 9(4) of the ICCPR; African Charter on Human and Peoples' Rights, Article 6. See Principle M(3)-M(5) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

53 Article 17(2)(d) of the Convention on the Protection of All Persons from Enforced Disappearance; Article 37(d) of the CRC. See Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, paras. 34 and 35; Principle 1 of the Basic Principles on the Role of Lawyers; Principle 3 and Guideline 4 of the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems; Guideline 20(c) of the Robben Island Guidelines; Principles A(2)(f) and M(2)(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

54 Article 16(4) of the Arab Charter on Human Rights. See, Principle 17(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principle 3 and Guideline 3; para. 43(b) of the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

55 Principle M(2)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Human Rights Committee Concluding Observations: *Thailand*, UN Doc. CCPR/CO/84/THA (2005), para.15; *Amnesty International and Others v Sudan* (48/90, 50/91, 52/91 and 89/93), African Commission, 13th Annual Report (1999), para.54.

56 Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para 56. Report of the UN Working Group on Arbitrary Detention, UN Doc. A/HRC/16/47 (19 January 2011), para. 54; Human Rights Committee Communications: *Aboufaied v. Libya*, UN Doc, CCPR/C/104/D/1782/2008, paras. 7.4, 7.6;, *El-Megreisi v. Libyan Arab Jamahiriya*, UN Doc. CCPR/C/50/D/440/1990 (1994) para. 5.4; *Berzig [Djebrouni] v. Algeria*, UN Doc. CCPR/C/103/D/1781/2008 (2012) para. 8.5; *Penarrieta et al v Bolivia*, Communication No. 176/1984UN Doc, CCPR/C/OP/2 at 201 (1990).

57 Committee against Torture, Conclusions and recommendations, UN Doc. CAT/C/CR/29/4 (2002), para.6(h);

58 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/13/37/Add.2 (2009), para.55.

59 Report of the Special Rapporteur on the question of torture, UN Doc. E/CN.4/2003/68 (2002), para.26(g).

der of 50 police officers, the attempted assassination of the Interior Minister and espionage on behalf of the foreign organization Hamas, for which the accused could be sentenced to death. According to information obtained by the ICJ, the majority of the accused were denied access to counsel and held incommunicado for between four and six months. This treatment prevented the accused from being promptly brought before a judge and being able to access a court to challenge the legality of their detention. It also violated the accused's right to counsel as guaranteed under the ICCPR and; is inconsistent with ensuring the accused's rights to adequate time and facilities to prepare a defence; is inconsistent with the accused's rights to be free from torture and other cruel, inhuman or degrading treatment or punishment, and is likely to effect the overall fairness of the trial against them.

In two separate cases against Mohamed Morsi and other senior officials from the Muslim Brotherhood (the *Foreign Espionage Case* and the *Prison Break Case*), the accused were charged with a range of offences including: murder, carrying out acts that compromise the independence of the country, abduction of police officers, collusion with a foreign organization to carry out terrorist activities in Egypt and carrying heavy weapons to resist the Egyptian state. Many of the accused were denied access to both counsel and to their family members during the detention, and some of the accused were held incommunicado for months. For example, Mohamed Morsi's whereabouts were unknown from 3 July 2013 to November 2013. The UN Working Group on Arbitrary Detention, found the treatment of Mohamed Morsi and several of his aides to have constituted arbitrary detention in violation of Egypt's obligations under Articles 9 and also to have violated the right to a fair trial guaranteed under 14 of the ICCPR.[60]

iii. Presumption in favour of pre-trial detention applied by prosecutors and judges

In the vast majority of cases brought against political opponents, journalists and human rights defenders since July 2013, most of the accused arrested by the authorities have been remanded in custody pending trial, initially on the order of the prosecutor and subsequently by judges.

Under international standards, including Article 9(3) of the ICCPR, individuals arrested or detained in connection with a criminal offence must be "brought promptly before a judge or other officer authorized by law to exercise judicial power".[61] The Human Rights Committee has clarified that such a hearing should usually take place within 48 hours and should be conducted by a judge or other authority that is independent, objective and impartial.[62] A public prosecutor is therefore not considered to meet the requirements of Article 9(3).[63]

Article 9(3) of the ICCPR, as well as other international standards, also requires, in accordance with the right to liberty and the presumption of innocence, that there is a presumption that people charged with a criminal offence will not be detained while awaiting trial.[64] Article 9(3) states in part that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

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60 Opinion No.39/2013 (Egypt) of the Working Group on Arbitrary Detention, adopted on 13 November 2013, A/HRC/WGAD/2013/39, para.28. The Working Group on Arbitrary Detention found that Mohamed Morsi and his advisors were "not given any legal basis to justify their detention; were not notified of the charges against them; had not been brought promptly before a judge; were placed under house arrest at the premises of the army and under high security; and, were unable to communicate with their families or lawyers" (para.23).

61 ICCPR, Article 9(3); African Charter on Human and Peoples' Rights, Article 6. Principle M(3) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

62 Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, paras.32 and 33.

63 *Id.*, para. 32.

64 Article 9(3) of the ICCPR; Article 37(b) of the Convention on the Rights of the Child (CRC). Principle M(1)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Thus, as the Human Rights Committee has clarified, in accordance with Article 9(3), the authorities, including prosecutors and judges in Egypt, must ensure that it is not general practice to subject accused persons to pre-trial detention.[65] Detention pending trial may only be lawfully ordered where there is reasonable suspicion that the particular individual has committed an offence that is punishable by imprisonment[66] and a genuine public interest exists which outweighs the particular right to personal liberty that make detention both necessary and reasonable.[67] For example, there must be substantial reasons for believing that, if released, the individual would: abscond;[68] commit a serious offence; interfere with the investigation or the course of justice;[69] or pose a serious threat to public order.[70]

The relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Pre-trial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances. The period of pre-trial detention should be based on a determination of necessity and not based on the potential sentence for the crime charged. Additionally, there must be no alternative measures that would adequately address these concerns[71] and the necessity and reasonableness of detention must be regularly and periodically reviewed. In accordance with its obligations under the Convention on the Rights of the Child, Egypt must also ensure that detention of any person who was under the age of 18 at the time the alleged crime was committed is only used a measure of last resort, and for the shortest appropriate time.[72]

Although the Egyptian Constitution guarantees the right to "personal freedom", and requires that the accused to is brought before the authorities within 24 hours of the restriction of his or her freedom, this meeting is held before the "investigating authority".[73] The Code of Criminal Procedure states that the prosecutor or investigating judge may conduct such hearings. The prosecutor can then order a detention period of four days, after which the accused must be brought before a judge.[74] 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.[75]

Pre-trial detention can be ordered by the investigative judge where the accused is charged with a crime punishable by at least one-year imprisonment, if the evidence is sufficient and either:

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65 Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para. 38.

66 *Id.* See also, *Barreto Leiva v Venezuela*, Inter-American Court of Human Rights (2009), para.122; *Peirano Basso v Uruguay* (12.553) Inter-American Commission of Human Rights (2009), para.110.

67 Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para. 38; Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 30.

68 *Peirano Basso v Uruguay* (12.553), Inter-American Commission of Human Rights (2009), paras. 81, 85; European Court of Human Rights: *Letellier v France* (12369/86), (1991), para.43, *Patsuria v Georgia* (30779/04), (2007), para. 69.

69 *Patsuria v Georgia* (30779/04), European Court of Human Rights (2007), para.71; *Peirano Basso v Uruguay* (12.553), Inter-American Commission of Human Rights (2009), para.131.

70 *Letellier v France* (12369/86), European Court of Human Rights (1991), para.51.

71 Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para. 38. See *Patsuria v Georgia* (30779/04), European Court of Human Rights (2007), paras. 75-76. And see Amnesty International, Fair Trial Manual – Second Edition, 9 April 2014, Chapters 5.3 to 5.4.

72 Article 37(b) of the Convention on the Rights of the Child. Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para. 38.

73 2014 Constitution, Article 54. Article 54 also guarantees the right to challenge any detention before a court and to determination of this claim within one week of its submission or to release.

74 Articles 201 and 202 of the Code of Criminal Procedure.

75 Articles 134, 142 and 143 of the Code of Criminal Procedure.

> 1. 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;
>
> 2. There is a fear of the accused absconding
>
> 3. There is a fear that the interests of the investigation will be compromised either by influencing the victim or witnesses or tampering with evidence or by reaching agreements with the remaining accused to distort the truth; or
>
> 4. It is necessary to prevent grossly compromising security and public order as a result of the magnitude of the crime.[76]

The accused can also be placed under preventive detention if he does not have a known address in Egypt and the crime is either a misdemeanour or a felony that is punishable with imprisonment.[77]

These provisions do not comply with Egypt's obligations under international standards, including the requirement to bring an accused before a judge or judicial officer within 48 hours and the presumption against pre-trial detention. Egyptian law permits prosecutors to conduct such hearings and to order detention for periods of up to 4 days.

Furthermore, Egyptian law contains no requirement to demonstrate substantial reasons for believing the conditions requiring detention have been met, and has no requirement that all alternative measures to detention are considered prior to issuing a detention. In addition, the requirement of reasonable suspicion that the accused has committed an offence is not clearly set out in law. Further, the fact that the crime was committed in *flagrante delicto* and judgment must be enforced upon issuance is not, in and of itself, a sufficient reason for holding the accused in pre-trial detention. As the Human Rights Committee has clarified a determination of the necessity for detention must in all cases be assessed in the light of the individual circumstances of each case.[78]

The application of the law by judges and prosecutors has also fallen short of international standards.

For example, in the aforementioned case of *Yara Sallam and 22 others,* all of the accused were remanded to custody on 21 June 2014, following their arrest, on the orders of the prosecutor. Two days later the prosecutor ordered the continued detention of all but one of the accused. At the first trial hearing on 29 June, the Heliopolis Misdemeanour Court ordered that the detention all of the accused continue despite the lack of evidence against the accused individually. As a result, they remained in detention from their arrest through the trial (a period of four months in total) before being convicted and sentenced to three-years imprisonment.

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76 Article 134 of the Code of Criminal Procedure.

77 Article 134 of the Code of Criminal Procedure.

78 Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para. 38.

CASE STUDY

In the case of Alaa Abdel Fattah and 24 others, following a demonstration, on 26 November 2013, against a provision in the draft constitution permitting the trial of civilians in military courts, police forcibly dispersed protestors. To accomplish this goal, the policy used both water cannons and tear gas. While the protestors state that the protest was peaceful, the prosecution has disputed these claims.

Police arrested 24 individuals on the day of the protest and the first accused, Alaa Abdel Fattah, two days later. All of the accused were remanded in custody on the order of the prosecutor. Their continued detention was subsequently ordered by a judge. On 4 December 2013, all of the accused were released, except for Alaa Abdel Fattah and one other accused, Mr Rahman. Despite repeated applications for release by defence counsel to the Prosecutor-General and the main Criminal Court in Cairo, it was not until 23 March 2014, the first hearing in the case, that their bail application was heard and they were released.

The accused were charged with various crimes including: "participating… in a procession of more than five people that endangers public security…", "stealing a wireless device" and "assaulting policemen". Alaa Abdel Fattah was also charged with organizing the demonstration.

All of the accused were convicted in absentia by the Cairo Felonies Court on 11 June 2014 after 3 hearings that dealt with procedural matters only. On the day of the hearing, Alaa Abdel Fattah arrived at the building where the trial was taking place at 9:30am, with his father, who was also one of his lawyers. His father and another lawyer were permitted to enter the building, but Alaa Abdel Fattah was refused entry and went to a café directly outside the compound with two other accused to wait for permission to enter. At 11:00am the three accused were told by police officers that their hearing was due to start. At the Court building they were informed that the in absentia judgment had been handed down at 10:30am and that they were under arrest. They were taken into custody immediately.

The fact that the in absentia judgment was decided after procedural hearings only, while defence lawyers were in the building and three of the accused were denied entry, is contrary to both the presumption of innocence, which requires guilt to have been proved beyond reasonable doubt, and the right of the accused to be tried in their presence. Trials in absentia may only be permissible if the accused has been informed of the charges, date and place of proceedings sufficiently far in advance, but has declined to be present, and all necessary steps have been taken to ensure the observance of defence rights and the basic requirements of fair trial. These conditions were clearly not observed in the present case, especially considering the fact that the accused had already presented themselves at the court building and were subsequently denied entry.

An immediate application for review of the judgment and for release on bail was made by defence lawyers, but they were informed that the Judge had left the building and neither application would be considered. While following hearings took place on 6 August and 10 September 2014, bail was refused with no reasons given. Bail was, however, subsequently granted on 15 September 2014.

> The ICJ believes that the detention of four of the accused, including Alaa Abdel Fattah on two occasions (for 115 days and 96 days respectively), breaches their right to liberty and to the presumption of innocence. The failure to respond to applications to release Alaa Abdel Fattah and Mr Rahman for almost four months undermined their right to challenge the lawfulness of their detention. Furthermore, the ICJ is concerned that there were no substantial reasons provided to justify the detention of these men; especially considering the fact that the Court failed to provide any reasons for repeatedly denying bail.

iv. Failure to respect the right to counsel and to ensure adequate time and facilities to prepare a defence

a) Failure of prosecutors and judges to ensure access to defence to all relevant information and adequate time and facilities

In many cases since July 2013 the accused's rights of defence and right to equality of arms has been restricted in a number of ways by both prosecutors and judges leading up to trial.

In particular, the accused's access to legal counsel has been restricted: individuals accused of crimes have been denied both adequate access to their lawyers and confidential communications with their legal counsel. For example, orders have, on occasion, been issued by security service officials prohibiting access to detention centres for lawyers and others. In other instances, judges have refused to allow meetings between lawyers and their clients, or have severely restricted access to such meetings. When access is granted, security service or detention centre officials are frequently present in the same room and within earshot.

Prosecutors have also failed to provide all relevant information to defence counsel, including evidence on which the prosecutor subsequently relies upon in the course of the proceedings against the accused. This therefore impedes the ability of the accused and his or her lawyer to prepare and present a defence.

Courts have in some instances refused requests by the defence council to order the prosecution to disclose evidence and have required that defence counsel wait to view the evidence during proceedings, rather than ensuring that the defence council receives adequate time and facilities to respond to such evidence. Courts have even required that the defence to submit their pleadings, on the newly presented evidence, immediately afterwards.

The Egyptian authorities are required to ensure that any person suspected or accused of a criminal offences has adequate time and facilities to prepare their defence, including adequate time and opportunities to communicate confidentially with their legal counsel.[79] This includes the right to have access to and assistance of their lawyer, including during questioning by the authorities.[80]

In the case of arrested or detained persons, access to counsel should be granted as soon as the indi-

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79 Article 14(3)(b) of the ICCPR. This right is also enshrined in many other international standards including, among others, Principle N(3) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; and Principle 7 and Guidelines 4, para. 44(g), 5, para. 45(b) and 12, para. 62 of the Principles on Legal Aid.

80 Article 17(2)(d) of the Convention on Enforced Disappearance, Article 16(4) of the Arab Charter on Human Rights. Principle 1 of the Basic Principles on the Role of Lawyers; Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principle 3 and Guideline 4 of the Principles on Legal Aid; Guideline 20(c) of the Robben Island Guidelines; Principles A(2)(f) and M(2)(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

vidual is deprived of his or her liberty.[81] The right to counsel includes ensuring adequate time to consult a lawyer in confidence. Where security needs require, consultations may take place within sight, but they should not within hearing distance of law enforcement officials.[82]

The right to adequate time to prepare a defence depends on the nature of proceedings and the circumstances of each case.[83] It is for counsel to request an adjournment if they feel the time for preparation of the defence is insufficient and all reasonable requests for adjournment should be granted, particularly when the accused is charged with a serious criminal offence and additional time is needed for preparation of the defence.[84]

As the Human Rights Committee has clarified, "'adequate facilities' must include access to documents and other evidence, including all materials that the prosecution plans to offer in court against the accused or that are exculpatory".[85] Both the Principles and Guidelines on the Right to a Fair Trial in Africa and the UN Basic Principles on the Role of Lawyers clarify that, "[i]t is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time."[86]

Under Egyptian law, Article 54 of the 2014 Constitution prohibits the interrogation of any detainee in the absence of their lawyer, and Article 98 of the 2014 Constitution guarantees the right of defence in general terms. The Code of Criminal Procedure grants the lawyer the right to examine "the investigation" the day before the accused is questioned or brought before witnesses or other accused and prohibits the "separation" of the accused and his lawyer during investigation.[87]

Although access to some information and access of the accused to his or her lawyer is enshrined in the law, these provisions lack clarity and are not sufficiently comprehensive to conform with Egypt's obligations under the ICCPR standards. For example, it is not clear whether the defence's right to examine "the investigation" includes all evidence the prosecution intends to rely on and all exculpatory evidence, as the Human Rights Committee has clarified is required under Article 14(3)(b) of the ICCPR.[88] Likewise, the fact that access is granted only the day before the accused is questioned or brought before witnesses and not at the earliest appropriate time, may not provide the defence with adequate time to prepare.

Further, while under the law an accused's right of access to legal counsel continues during the investigation phase, the law does not clearly guarantee access to counsel throughout the detention of an accused prior to and during trial. In addition, the law does not guarantee the confidentiality of com-

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81 Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para 35. Principle 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principle 3 and Guidelines 3, para. 43(b) and (d) and 4, para. 44(a) of the Principles on Legal Aid; Guideline 20(c) of the Robben Island Guidelines.

82 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 34. Principle 8 of the Basic Principles on the Role of Lawyers; Principle 18(4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Rules 61, 119-120 of the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the UN General Assembly in resolution 70/175 on 17 December 2015.

83 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.32.

84 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.32..

85 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 33.

86 UN Basic Principles on the Role of Lawyers, principle 21. Principle I(d) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.

87 Article 125 of the Code of Criminal Procedure.

88 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 33.

munications between a person and his or her legal counsel.

Recent cases, such as the case of Alaa Abdel Fattah and 24 others (highlighted below), demonstrate that rights of defence guaranteed by the 2014 Constitution and under international law and standards are frequently flouted in practice.

For example, in some cases unreasonable sums of money are requested as "fees" for the disclosure of documents. For example, in the case of Mohamed Fahmy, Baher Mohamed and Peter Greste, the three Al Jazeera journalists, the prosecution reportedly requested defence counsel to pay a fee of 1.2 million Egyptian pounds (USD 169,000) to obtain copies of 5 CDs of evidence being relied upon against the defendants.[89] In another case, known as the Ansar Beit Al Maqdis case, the ICJ has been informed that defence counsel had to pay around 15,000 pounds (USD 1,900) to obtain a full copy of the case file.[90]

In the case of *Yara sallam and 22 others*, according to information received by the ICJ, the defence did not initially have adequate time and facilities to prepare for the first hearing of the trial. The ICJ has been informed that the procedure leading up to trial went very quickly in order to put pressure on the defence. The accused were arrested on 21 June 2014, referred for trial four days later and the first hearing in the trial took place on 29 June. In addition, only part of the case file was disclosed to the defence. Key evidence, including video and photo evidence, police reports and investigation reports were not disclosed prior to the start of the trial. At the first hearing, defence counsel requested a delay, which was granted and the hearing was adjourned until 13 September.

CASE STUDY

In the case of Alaa Abdel Fattah and 24 others, during Alaa Abd El-Fattah's two periods of detention, access to his lawyers was restricted by the prosecutor to one meeting every 30 days and was later increased to one meeting every 15 days. In addition, according to information obtained by the ICJ, the lawyers were never granted confidential access to the accused while he was in detention. Law enforcement personnel were present and within earshot throughout their discussions.

The ICJ considers that these restrictions on the frequency of meetings permitted between the accused and defence counsel as well as the lack of respect for and facilities to ensure the confidentially of the communications between the accused and lawyer violated the right of the accused's access to legal counsel as well as the duty of the authorities to respect and protect the confidentiality of lawyer-client communications. This undermined efficacy of the right of the accused to have access to legal counsel and to have adequate time and facilities to prepare a defence.

Defence counsel were also unable to obtain three CDs of evidence upon which the prosecution relied, despite requesting copies of this evidence from the prosecution and the Court. On 6 August 2014, the Court refused this request. The CD evidence was played to the Court on 10 September 2014. During this hearing, all of the accused were held in a glass, soundproof cage. Lawyers could not take instructions from the accused regarding the evidence following the screening. It is also not clear how much of the evidence could be seen or heard by the accused in the cages. (Further information regarding the use of these cages is discussed below at Chapter One, Section II(B), "Rights at Trial".)

89 See, for example, Amnesty International, *Egypt: Journalists jailed or charged for challenging the authorities' narrative*, https://www.amnesty.org/en/documents/mde12/1573/2015/en/

90 Case No. 423 of 2013 before the Cairo Felonies Court.

The inability for the accused or their counsel to obtain a copy of key evidence and for counsel not to be able to take instructions from the accused following the screening of the evidence in court violated the rights of the accused to adequate time and facilities to prepare a defence.

The above cases demonstrate a consistent failure of the Egyptian judiciary to respect the rights of the accused to adequate time and facilities to prepare a defence, including by denying access to relevant information, charging exorbitant fees for its disclosure or delaying access until the trial has started. The failure to ensure regular and confidential access by the accused to defence counsel and the inability for defence counsel to take instructions during trials due to the widespread use of soundproof cages in recent trials violate the authorities' duty to respect and protect the right to counsel and also undermine the accused's rights of defence.[91]

b) Counsel routinely not informed of the dates or location of hearings in advance

Rights of defence have also been undermined by courts failing to inform defence lawyers of the dates and location of court hearings in sufficient time.

The right to adequate time to prepare a defence, the right to be present and the right to have the assistance of legal counsel during trial hearings guaranteed under the ICCPR require the Egyptian authorities, including the judiciary, to ensure that the accused and defence counsel are notified, in sufficient time of the date and location of the hearings.[92] If the proceedings are re-scheduled, the accused must be informed of the new date and place of trial.[93]
Under the Egyptian Code of Criminal Procedure, notice of the date of the hearing must be provided to the parties one day in advance for contraventions and three days for misdemeanours and, to the accused and witnesses eight days in advance for felony trials.[94] However, in misdemeanour and contravention cases where the accused was caught in *flagrante delicto* or is held in "preventive detention", the notice need not contain a date. In cases where the notice does not contain a date, an accused who attends the hearing can request an adjournment of three days.[95] The law does not specify whether the location of the hearing must be provided.

By failing to require the notice to include the location of court hearings in all cases and the date of the hearing in misdemeanour and contravention cases where the accused is caught in *flagrante delicto* or is held in preventive detention, the Code of Criminal Procedure fails to adequately protect the right of the accused to be present and to be assisted by legal counsel during proceedings by ensuring that both the accused and counsel are aware of when and where the next hearing will take place.

In addition, the one and three day notice periods for contraventions and misdemeanours respectively are not sufficient to ensure the accused, in all such cases, will have adequate time to prepare a defence.

In numerous misdemeanour and felonies cases defence counsel have not received any formal notice of the date and location of court hearings. For example, in the case of *Alaa Abdel Fattah and 24 others,* according to information obtained by the ICJ, defence counsel were routinely not informed of the

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91 Further violations regarding the use of sound-proof glass cages are examined below at Section II(B), "Rights at Trial".

92 Article 14(3)(b) and (d), ICCPR. Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.36; *Osiyuk v Belarus*, Human Rights Committee, UN Doc. CCPR/C/96/D/1311/2004 (2009), para. 8.2-9.

93 *Osiyuk v Belarus*, Human Rights Committee, UN Doc. CCPR/C/96/D/1311/2004 (2009), para. 8.2-8.3.

94 Articles 233 and 374 of the Code of Criminal Procedure.

95 Article 233 of the Code of Criminal Procedure.

dates of hearings in advance and often found out only the day before via media reports.

The ICJ has also been informed that in the case of *Yara Sallam and 22 others,* when defence counsel arrived at the Heliopolis Misdemeanour Court building on the first day of the trial, they were told that the hearing would be held in the Institute of the Guardians of the Police in Tora, a police training academy. The Ministerial decision to transfer the location of this court was signed three days prior to the first hearing but the Court did not inform the lawyers of the change in location and the information was not made public until over a week after the first trial hearing.[96]

The failure of the Court to provide counsel with sufficient notice of the dates and/or location of court hearings, undermines both the right to adequate time to prepare a defence, the right to be present at trial and the right to have the assistance of defence counsel during trial proceedings.

B. RIGHTS AT A TRIAL

i. Judges' application of laws that violate human rights and refusing to permit constitutional challenges

Since July 2013, 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.
Indeed, in July 2014, the African Commission on Human and Peoples' Rights called on the Egyptian authorities "to respect and uphold provisions of the African Charter and other regional and international human rights instruments which it has ratified" and further urged the authorities "to guarantee the right to peaceful protest, association and assembly and to refrain from disproportionate use of force against protesters" and to "review its laws on demonstrations and public rallies on the use of firearms against protesters to bring them in line with international standards".[97]

Pursuant to Article 93 of the Constitution, international treaties ratified by Egypt are binding and have the force of law.

However, despite Egypt's obligations under international treaties, judges, in the course of proceedings, have dismissed arguments from defence counsel challenging the legality of these laws on grounds of their incompatibility with the Constitution and the ICCPR. In addition, judges have dismissed requests to refer the issue of the compatibility of these laws to the Supreme Constitutional Court (SCC).[98]

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96 Decision No. 4821 of 2014 of the Minister of Justice, 26 June 2014. The decision was not published in the Official Gazette until 10 July 2014.

97 African Commission on Human and Peoples' Rights, 16th Extraordinary Session, July 2014, Resolution 287 on Human Rights Abuses in Egypt, paras.4 and 8. See also African Commission on Human and Peoples' Rights, 14th Extraordinary Session, July 2013, Resolution 240 on the Human Rights Situation in the Arab Republic of Egypt, para (c).

98 This topic is discussed in further detail in Chapter 5. However, according to Law No. 48 of 1979, (the SCC Law), art. 29(a), a court may voluntarily refer matters to the SCC if it determines that a question regarding the constitutionality of a law or regulation is involved in the case, or, pursuant to SCC Law, art. 29(b) it may do so at the request of one of the parties if it finds that the issues raised are serious.

CASE STUDY

The Demonstration Law – Law No.107 of 2013

On 23 November 2013, interim President Mansour promulgated a new law on "the right to organize public meetings, processions and peaceful demonstrations," known as the Demonstration Law. The Demonstration Law requires that anyone organizing a public meeting, march or protest of ten or more people submit prior written notification to the police. Security officials may prohibit, postpone, or change the location of a planned meeting if they believe there is evidence showing a "threat to security or peace". The determination of what would constitute such a threat is left to official discretion. Although organizers may appeal the decision before a court of first instance, there are no provisions for a timely decision. Furthermore, there are no exceptions for spontaneous assemblies.

The law establishes a range of criminal offences (found in Articles 17-21), including ones for those who participate in demonstrations that jeopardize "security and public order" (Articles 19 and 7).

The law also provides that security officers, after first issuing verbal orders, may resort to the use of force on an escalating basis. Stating that if "water cannons, batons, and tear gas" fail to disperse protesters, officers are permitted to fire warning shots, smoke bombs, rubber bullets, and finally non-rubber bullets.
Article 73 of Egypt's Constitution recognises the right of "citizens" to peaceful assembly "by serving a notification as regulated by law". The Demonstration Law is inconsistent with this provision, since, although the law refers to notifications, it is in fact clear that the law establishes a regime of prior authorization and criminalizes those that fail to obtain such authorization.

In addition, both the Demonstration Law and Article 73 of the Constitution are inconsistent with Egypt's obligations under international standards for several reasons. First, the right to freedom of peaceful assembly, as guaranteed by Article 21 of the ICCPR, is not restricted to citizens, as is the case under Article 73 of the Constitution. In addition, only those restrictions that are "necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others," and are proportionate thereto are permitted. The European Court of Human Rights has repeatedly emphasized, in the context of interpreting the parallel provision of the European Convention on Human Rights, that a democratic society is one characterized by pluralism, tolerance and broadmindedness.

Criminal provisions that are vague so as to give no notice as to what might constitute a threat to "security and public order", as is the case with Articles 19 and 7 of the Demonstration Law, also violate the principle of legality, which requires States to ensure that criminal offences are clearly and precisely defined within the law. This principle is satisfied when an individual can know from the wording of the legal provision, as interpreted by the courts, what acts and/or omissions would make him or her criminally liable.

Further, the requirement for "notification", under the Constitution, and prior approval from the authorities for any gathering of more than ten people, under the Demonstration Law, runs counter to the presumption in favour of the right to hold a peaceful assembly, which "should, insofar as possible, be

enjoyed without regulation. Anything not expressly forbidden in law should be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so." In a press release relating to the Alaa Abdel Fattah and 24 others case the Special Rapporteur on Human Rights Defenders in Africa deplored the fact that the Demonstration Law requires prior authorization for demonstrations and highlighted that the authorities' discretionary powers to decide the fate of the peaceful demonstrators was "in disregard of international standards concerning freedom of assembly".

The lack of a provision for spontaneous assemblies is contrary to recommendations of the Special Rapporteur on the rights to freedom of peaceful assembly and association. The Special Rapporteur and the Human Rights Committee has emphasised that "freedom is to be considered the rule and its restriction the exception", and that "restrictions must not impair the essence of the right".

Human rights bodies and mechanisms have also clarified that States have a positive obligation to protect peaceful assemblies and disbanding a "peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly". Furthermore, under the Demonstration Law, participation alone renders someone criminally liable, even if he or she participates peacefully. The Special Rapporteur on the rights to freedom of peaceful assembly and of association has clarified that assembly organizers and participants should not be considered responsible (or held liable) for the unlawful conduct of others and should not be made responsible for the maintenance of public order.

Finally, the Demonstration Law permits the use of a range of forceful measures, including lethal force, in order to disperse protestors, even if those protests are entirely peaceful. This provision is inconsistent with international standards, which clarify that any resort to force by law enforcement officers must be strictly necessary and proportionate. Furthermore, lethal force may only be used when strictly unavoidable in order to protect life. The Special Rapporteur on extrajudicial, summary or arbitrary executions has clarified that the only circumstances warranting the use of arms, including during demonstrations, is the imminent threat of death or serious injury.

In *Yara Sallam and 22 others,* 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.[99]

The Court found that the arguments were not sufficiently serious, without any explanation as to why.[100] The Court of Appeal took the same approach, adding only that the requests aimed at compromising the criminal case against the accused, who had failed to give the Court reasons to accept the

99 Judgment of Heliopolis Misdemeanours Court of 26 October 2014, p.3.

100 Judgment of Heliopolis Misdemeanours Court of 26 October 2014, p.4.

challenge and interrupt the case until the SCC had ruled on the arguments.[101] The Special Rapporteur on Human Rights Defenders in Africa condemned the ruling of the appeal court as running counter to the principles of the African Charter on Human and Peoples' Rights and other regional and international instruments ratified by Egypt and stated that the judgement was in violation of the accused's fundamental rights.[102]

Similar constitutional arguments were also raised in the case of *Alaa Abdel Fattah and 24 others* regarding the Demonstration Law and Article 375 *bis* of the Penal Code (highlighted above on pages 44 and 45). The Cairo Felonies Court dismissed these challenges and found that there was no contradiction between the Demonstration Law and the 2014 Constitution arguing that the Demonstration Law merely organizes the way to exercise the right and its restrictions are lawful.

CASE STUDY

In the case of Ahmed Maher, Ahmed Douma and Mohamed Adel, on 30 November 2013, Ahmed Maher went to the Abeddine Courthouse in response to a summons for questioning in relation to the trial of Alaa Abdel Fatah and 24 others. Ahmed Douma and Mohamed Adel, together with other individuals from the "6 April movement", an activist youth group, accompanied Ahmed Maher to show their support.

According to information available to the ICJ, Ahmed Maher and other individuals were permitted to enter the building with lawyers. When other supporters also wanted to enter, the police forcibly prevented them from doing so, including by beating the supporters and using tear gas against them.

Consequently, Ahmed Maher, Ahmed Douma and Mohamed Adel were charged with various offences under the Demonstration Law, the Procession Law, the Criminal Code and the Law on Weapons and Ammunitions, including "participating in a demonstration that jeopardized security, public order, disrupted the interests of citizens and put them in danger, prevented them from exercising their work and rights and influenced the course of justice…" and "displaying and using force against members of the police entrusted with security the Court building in Abedine and the inhabitants of the area..."

To support their defence, their counsel argued, among other things: that Ahmed Douma and Mohamed Adel were in the courthouse building at the time the events took place; that the video footage relied on by the prosecution showed the first accused, Ahmed Maher, assisting the police in trying to restrain protestors and assisting an injured policeman; and that the footage showed the security forces (not the civilians present) committing the violence. Furthermore, their counsel argued that injuries to the police caused by tear gas were as a result of tear gas deployed by the police themselves. They also relied on the testimony of a witness who reportedly stated that the three accused were not involved in the damage to his shop.

Before the Abedine Misdemeanour Court, the defence counsel also raised

101 Judgment of North Cairo Court of Appeal of 28 December 2014, p.8.

102 Press Release by the Special Rapporteur on Human Rights Defenders on the Appeal Verdict in the Case of Yara Sallam and Sanaa Seif of the Special Rapporteur on the situation of Human Rights Defenders in Africa, 8 January 2015. See also, Press release on the upcoming verdict in the trial against Ms. Sana Seif, Ms. Yara Sallam, together with 21 other individuals of the Special Rapporteur on the situation of Human Rights Defenders in Africa, 24 October 2014; and Joint Press Release on the Verdict against Sanaa Seif, Yara Sallam and 21 Other Co-accused in Egypt of the Special Rapporteur on the situation of Human Rights Defenders in Africa, the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the UN Special Rapporteur on the situation of human rights defenders, 4 November 2014;

constitutional challenges against Articles 7, 8, 19 and 21 of the Demonstration Law and Articles 2 and 3 of the Procession Law. In response, the court stated that constraints on the right to assembly in the Demonstration Law stem from "the idea that legislation is a set of rules that govern the behaviour of individuals in society […] this is a guarantee against leaving matters related to citizens' daily life and livelihood vainly in others' hands under the guise of freedom." The court also stated that the Demonstration Law does not aim at denying citizens their right to peaceful assembly but is designed to organize this right in accordance with the articles of the Constitutional Declaration (at this time the 2014 Constitution had not yet entered into force). The Court concluded by stating that the constitutional challenge was "not serious as it aims at prolonging the trial." The court did not refer the challenge on to the Supreme Constitutional Court. On appeal, the Court of Appeal referred back to the judgment of the Court of First Instance.

Both the Court of First Instance and the Court of Appeal failed to consider the legality of the Demonstration Law in light of international treaties to which Egypt is party, including Article 21 of the ICCPR and Article 11 of the African Charter on Human and Peoples' Rights, although in accordance with Article 93 of the 2014 Constitution these provisions are part of Egypt's laws. As outlined above, the Demonstration Law does not conform to Egypt's obligations to respect the right to freedom of peaceful assembly under the ICCPR or African Charter on Human and Peoples' Rights, not least because it places unjustified restrictions on the right to freedom of assembly and undermines the principle of legality with its vague wording. The Courts of First Instance and Appeal appear to have assumed that any restriction on the right to freedom of assembly is permissible if it is for the purpose of organizing the right, regardless of whether the restrictions are necessary for one of the prescribed reasons.

In addition, the three accused were convicted of all charges despite a lack of evidence that each of the accused was involved in unlawful conduct. In this regard, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted that, "assembly organizers and participants should not be considered responsible (or held liable) for the unlawful conduct of others… [and, together with] assembly stewards, should not be made responsible for the maintenance of public order".

Despite this, the first instance court sentenced each of the accused to three-years imprisonment. Both the Court of Appeal and the Court of Cassation rejected their appeals, thereby confirming their three year-prison sentence.

Courts in Egypt have routinely applied the Demonstration Law and other laws that undermine human rights, while dismissing human rights challenges and refusing to permit referral of cases to the SCC. These rulings have frequently failed to provide substantive reasoning to support such decisions and have instead rejected referral requests on the basis that the referral simply aims to "prolong proceedings" or that the particular case at issue is "not serious", despite the serious human rights concerns raised and the lengthy prison sentences faced by the accused.

The reliance on laws in clear breach of Egypt's human rights obligations, despite constitutional provisions that recognize the binding and directly applicable nature of ratified human rights treaties, and the failure of the judges to refer discrepancies between national law and the Constitution or Egypt's international treaty obligations to the SCC is contrary to judges' obligation to safeguard and uphold human rights.[103]

103 Principle 1(b) of the Singhvi Declaration; Principle 10(b) of the Beijing Statement on the Independence

ii. Judges' failure to ensure the presumption of innocence, equality of arms, rights of defence and right to be present

a) Holding the accused in soundproof cages during trial proceedings

In most trials held in police academies, including cases such as *Mohamed Morsi and others (the Espionage Case), Mohamed Morsi and others (the Ittehadeya Case), Alaa Abdel Fattah and 24 others* and *Ahmed Douma, Ahmed Maher and Mohamed Adel,* the accused have been held in a soundproof glass cage during some or all of the trial hearings. Such cages violate both the presumption of innocence, by painting the accused as violent, and the equality of arms, by preventing confidential communication between the accused and their counsel and severely restricting the accused's communication with the court.

In these cases, microphones are located in both the courtroom and in the cage. The microphone in the courtroom is linked to speakers in the cage and the microphone in the cage is linked to speakers in the courtroom; however, the judge controls when the accused can be heard in the courtroom by activating the sound system from the cage to the courtroom. It is also the ICJ's understanding that the accused in the cage can only hear what is said in the courtroom when people in the courtroom speak directly into a microphone.

Trial observers in the case of *Alaa Abdel Fattah and 24 others,* noted that, in that case, the use and quality of microphones was not consistent and that at times it was difficult to hear what was being said in the courtroom and by whom. Trial observers also noted that several times the accused made clear that they could not hear proceedings by banging on the glass.[104]

In addition, in some cases the ICJ understands that the accused, who are in the cage throughout the proceedings, are not able to be heard at all. In such cases, the accused have to be escorted outside the cage to give testimony, when permitted to do so by the presiding judge. In other cases, the ICJ has observed that a microphone was present in the cage, but the quality was poor and the accused was required to shout for anything to be heard in the courtroom.

Further, in a number of cases, the cage in which the accused has been placed was opaque such that the accused could not be seen. For example, in the case of *Alaa Abdel Fattah and 24 others* the cage consisted of multiple layers of glass which made it impossible to see the accused clearly. Indeed, in some cases, lawyers have informed the ICJ that it is not possible to tell whether there is anyone in the cage at all. It is presumed that in such cases the accused cannot see anything outside the cage clearly either.

It is not clear who ordered the use of soundproof cages. It is possible that they were ordered as a result of an order of the executive, the HJC or a decision of each judge overseeing the case. It is also unclear what basis, if any, has been given for the use of such cages.

Even in trials where a glass cage is not used, the accused, in all criminal cases in Egypt are, as a matter of course, held in a metal cage throughout the trial.[105]

The Human Rights Committee has clarified that respect for the presumption of innocence, which is enshrined in Article 14(2) of the ICCPR as well as in Article 7(1)(b) of the African Charter on Human

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of the Judiciary in the LAWASIA Region; and Chapter VII.59 of the Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities. See also Principle 6 of the UN Basic Principles on the Independence of the Judiciary.

104 EMHRN Trial Observation Report, Second Interim Report, *Public Prosecution v. Alaa Abd El-Fattah and Twenty-four others,* October 2014, page 24.

105 On 11 June 2015 the Minister of Justice reportedly issued a decree abolishing the use of metal cages in all misdemeanor and contravention cases. However, this decree was not published in the Official Gazette and lawyers have reported that in practice the accused are continuing to be held in metal cages in all cases.

and Peoples' Rights and is considered to be a non-derogable and fundamental element of a fair trial, imposes on authorities, including judges, the duty to ensure that all persons charged with a criminal offence are treated in accordance with the right to be presumed innocent until proven guilty in fair proceedings, according to law. It has stated that accused persons should not normally be kept in cages or shackled during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals.[106]

The use of metal cages in all cases and the use of glass cages in trials held in police academies are contrary to the presumption of innocence since both present the accused as dangerous.

The right to equality of arms between the parties in a case is also an essential element of the right to a fair hearing.[107] The Human Rights Committee has clarified that, among other things, the right to equality of arms is necessary to ensure that the defence has a genuine opportunity to prepare and present its case and to contest arguments and evidence put before the court on an equal footing with the prosecution.[108] Equality of arms includes the right to adequate time and facilities to prepare a defence, to have access to, confidential communication with and assistance of legal counsel, to challenge evidence, to call witnesses and to be present at the trial.[109] Furthermore, at no stage of the proceedings must any party be placed at a substantial disadvantage *vis-à-vis* the opposing party.

The right of the accused to fair trial, to defend him or herself in person or through a proxy is guaranteed by the 2014 Constitution. So too is the right to equality before the law; however, the limited guarantee of this right to "citizens" only is contrary to international standards.[110] The Code of Criminal Procedure contains various provisions that state the circumstances in which the accused must attend the trial as well as when the accused may be excluded for causing a disruption.[111] Under the Code of Criminal Procedure, it is the President of the Court, who is entrusted with managing and administering hearings.[112]

The use of sound-proof cages during trial proceedings, which prevent the accused from being heard and where all sounds from the cage must be transmitted via microphones controlled by judges meaning that the sounds let into the cage are limited to those spoken directly into designated microphones (the quality and use of which are variable) undermines the right to equality of arms under international standards and rights of defence enshrined in both binding international treaty law and the Egyptian Constitution.

In particular, these cages drastically limit any communication between the accused and their counsel during the proceedings and prevent counsel and the accused from communicating in confidence during proceedings, and thereby limiting the ability for the accused's counsel to adequately present a defence.[113] Where the cage is also opaque, it renders any communication (even visual) between the

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106 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 30.

107 Principle A(2)(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

108 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para.13. See also, Amnesty International, Fair Trial Manual – Second Edition, 9 April 2014, para.13.2.

109 Principle N(6)(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. European Court of Human Rights: *Jasper v the United Kingdom* (27052/95), Grand Chamber (2000), para.51; *Foucher v France* (22209/93), (1997), para.34; *Prosecutor v Tadić* (IT-94-1-A), ICTY Appeals Chamber (1999), para.47; *Nahimana et al v The Prosecutor* (ICTR-99-52-A), ICTR Appeals Chamber (28 November 2007), para.181; Advisory Opinion OC-17/2002, Inter-American Court of Human Rights (2002), para.132.

110 Articles 53, 96 and 98, 2014 Constitution.

111 Articles 243, 270, 388, and 732 of the Code of Criminal Procedure.

112 Article 243, Code of Criminal Procedure.

113 Article 14(3)(b) of the ICCPR. Principle N(3)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

accused and his or her counsel almost impossible. The cage impedes the ability for the accused to follow the proceedings and prevents the accused from participating in proceedings and communicating with the court if the microphones are not activated.

In some cases, such as *Alaa Abdel Fattah and 24 others*, evidence has been shown to the accused and their legal counsel for the first and only time during Court proceedings – despite prior requests by counsel to be provided with a copy of the evidence. In this case, because of the opaque glass, the accused is not only unable to see the evidence presented, but also unable to instruct defence counsel on afterwards because of the sound-proof cage. Such a situation clearly undermines rights of defence of the accused as well as equal access to records, documents and evidence forming part of the case dossier.

In addition, the ICJ believes that placing accused persons in sound-proof glass cages from which they are unable to directly and confidentially communicate with counsel and from which some are unable to see or hear what is happening in the courtroom throughout the proceedings has undermined the ability of the accused to be truly present during proceedings. The use of cages in the circumstances described above is inconsistent with the right of everyone charged with a criminal offence to be tried in their presence so that they can hear and instruct counsel and have an opportunity to rebut the prosecution case and present a defence.[114]

In this regard, the ICJ also notes with concern that the quality of the microphones and speakers is often poor and the fact that judges do not always permit the accused to hear what is happening in the courtroom. Instead, only noises and speech transmitted or spoken directly into the designated microphone is picked up and the use of opaque glass prevents the accused from clearly seeing who is speaking or reviewing evidence, including video or physical evidence, during proceedings.

b) Harassment and intimidation of lawyers for the discharge of their duties

i. Lawyers abused, investigated and detained for attending police stations to defend clients

The equality of arms and rights of defence have also been undermined as a result of the harassment and intimidation of defence lawyers who have attended police stations in order to defend their clients. The harassment has included subjecting lawyers to verbal and physical abuse by members of the police, as well as investigation and in some instances, their arrest, detention and/or prosecution.

As noted above, under international standards, the right to equality of arms includes, among other things ensuring that the accused has access to legal counsel.[115] The right of detained, suspected and accused persons to have access to legal counsel is also a standalone right, which is an essential element for a trial to be considered fair.[116] The Human Rights Committee and the African Commission on Human and Peoples' Rights have clarified that the right to the assistance of a lawyer, including during detention, questioning and preliminary investigation is required for the meaningful exercise of the

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114 Article 14(3)(d) of the ICCPR. Principle N(6)(c) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. See also Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 36.

115 Principle N(6)(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. European Court of Human Rights: *Jasper v the United Kingdom* (27052/95), Grand Chamber (2000), para.51; *Foucher v France* (22209/93), (1997), para.34; *Prosecutor v Tadić* (IT-94-1-A), ICTY Appeals Chamber (1999), para.47; *Nahimana et al v The Prosecutor* (ICTR-99-52-A), ICTR Appeals Chamber (28 November 2007), para.181; Advisory Opinion OC-17/2002, Inter-American Court of Human Rights (2002), para.132.

116 Article 17(2)(d) of the Convention on the Protection of All Persons from Enforced Disappearance; Article 16(4) of the Arab Charter on Human Rights. Principle 1 of the Basic Principles on the Role of Lawyers; Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principle 3 and Guideline 4 of the Principles on Legal Aid; Guideline 20(c) of the Robben Island Guidelines; Principles A(2)(f) and M(2)(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

right to justice and a fair trial.[117]

International standards aiming to safeguard the role of lawyers, clarify that states have a duty to ensure that lawyers are able to perform their 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 recognized professional duties, standards and ethics".[118] Where the security of lawyers is threatened as a result of discharging their functions they must be adequately safeguarded by the authorities.[119] Further, lawyers must not be associated with their clients or their clients' causes as a result of discharging their functions.[120] The UN Basic Principles on the Role of Lawyers specifies that "Lawyers must also 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."[121]

The 2014 Constitution guarantees the "independence of the lawyer's profession and the protection of its interests as a guarantee to protecting the right to defence". In addition, it prohibits the arrest of a lawyer while he or she is exercising the right to defence, except in *flagrante delicto* crimes.[122]

Under Egypt's Lawyer's Profession Law, a lawyer can carry out the defence as he or she sees fit and must be respected by courts.[123] If a lawyer, through statements or writings made during and as a result of carrying out his or her work, compromises the order of a hearing, commits any other act during a hearing that requires him or her to be held to account or commits the crimes of insulting, defaming and wrongly accusing, he or she cannot be arrested or placed under preventive detention. Instead, the situation must be referred to the Prosecutor-General who decides whether to refer the lawyer to disciplinary proceedings before the Bar Association, which shall be held secretly, or to criminal proceedings.[124]

The protections afforded to lawyers under the 2014 Constitution and the Lawyer's Profession Law 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.

In practice, lawyers are regularly subject to harassment and intimidation, often by the authorities, and have even been arrested for actions carried out in their professional capacity in a manner that is inconsistent with respect for the rights of the accused and the independence of lawyers as enshrined in international standards, and also seemingly in contravention of Article 50 of the Lawyer's Profession Law.

In addition, the Egyptian Initiative for Personal Rights has documented a number of cases involving lawyers attending police stations to assist their clients being subjected to physical or verbal assault

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117 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 10; Human Rights Committee Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (1997), para.27, Netherlands, UN Doc. CCPR/C/NLD/CO/4 (2009), para.11; *Liesbeth Zegveld and Mussie Ephrem v Eritrea* (250/2002), African Commission, 17th Annual Report (2003), para.55.

118 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 32; UN Basic Principles on the Role of Lawyers, principle 16(a) and (c); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle I(b)1.

119 UN Basic Principles on the Role of Lawyers, Principle 17, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle I(f).

120 *Id.*, Principle I(g).

121 UN Basic Principles on the Role of Lawyers, principle 20; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa , Principle I(e).

122 Arts. 98 and 198.

123 Art.47, 49 of the Lawyer's Profession Law, Law No. 17 of 1983.

124 Arts.49 and 50 of Law No. 17 of 1983.

and the failure of the authorities to permit complaints about the treatment from being filed.[125] For example, on 2 July 2014, lawyer Mohamed Abdel Baset was reportedly beaten by a police officer and briefly detained in the Montazah 2nd police station in Alexandria after he attempted to view the paperwork related to Syrian refugees detained there. Police officers at the station reportedly refused to permit Mr Abdel Basset to file a police report about his ill-treatment.[126]

In another reported case, on 25 January 2014, lawyer Amr Imam was reportedly threatened at gunpoint by a police officer at the Maadi police station for inquiring about detainees arrested in the context of demonstrations commemorating the third anniversary of the 2011 uprisings. Mr Imam was reportedly hit in the chest with a rifle-butt and told to leave or else risk being shot.[127]

On 9 August 2015, a verdict was reportedly issued in a case against 22 lawyers for "insulting the judiciary" as a result of their alleged involvement in a demonstration, including creating a cordon outside a court house following harsh sentences imposed on their clients. Eight of the lawyers were reportedly sentenced *in absentia* to life imprisonment, one lawyer who was present was sentenced to three years imprisonment; however, the 13 others were acquitted.[128]

By verbally or physically abusing, detaining, investigating and prosecuting lawyers who are attempting to attend the interrogation of their clients, or access information and assist their clients in the preparation of their defence, the client's right to counsel, and adequate time and facilities to prepare a defence have been violated. These actions against the client's lawyer prevent him or her from counsel from performing his or her functions and such arrests and prosecutions are likely to have a chilling effect on other lawyers acting for such client or in similar cases.

This abuse also undermines the rights of lawyers to carry out their functions without harassment and improper interference and their right not to be associated with their clients causes. Such treatment of lawyers, who are fundamental pillars of the justice system, is counter-productive to the establishment of a functioning and effective justice system, which is consistent with human rights and the rule of law in Egypt. Instead of acting to prevent and safeguard against such abuse as required by international standards, the Egyptian authorities, including judicial police and prosecutors, frequently appear to be the arbiters of the harassment.

ii. Lawyers referred for criminal investigation by judges

In addition to the harassment of lawyers attempting to attend and assist their client in detention, judges have also referred lawyers to investigation during trial proceedings. In some cases, such investigations have seemingly been initiated in response to lawyers attempting to uphold the human rights of their clients.

Under international standards individuals charged with a crime must at all times have the right to be represented by a lawyer. The primary reason for this is the role of the lawyer in guaranteeing respect for the accused's right to receive a fair trial by an independent and impartial tribunal throughout proceedings. It is the duty of the lawyer to challenge the court's independence and impartiality as appropriate and to ensure the accused's rights are respected.[129] As affirmed by the UN Basic Principles on the Role of Lawyers, lawyers must "seek to uphold human rights and fundamental freedoms recognized by national and international law and at all times act freely and diligently in accordance with

125 EIPR paper, violations against lawyers, October 2014, http://eipr.org/node/2243.

126 EIPR paper, violations against lawyers, October 2014, http://eipr.org/node/2243.

127 EIPR paper, violations against lawyers, October 2014, http://eipr.org/node/2243.

128 After conflict with police, lawyers face new crisis with judiciary following verdicts, Daily News Egypt, 10 August 2015, available at http://www.dailynewsegypt.com/2015/08/10/after-conflict-with-police-lawyers-face-new-crisis-with-judiciary-following-verdicts/

129 UN Basic Principles on the Role of Lawyers, principle 1. See also, ICCPR, Article 14(3)(d); African Charter on Human and Peoples' Rights, Article 7(1)(c).

the law and recognized standards and ethics of the legal profession".[130]

In addition, lawyers have the right to carry out their professional functions free from intimidation, hindrance, harassment or improper interference.[131] As highlighted above, both The UN Basic Principles on the Role of Lawyers and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa make clear 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…".[132] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa also provide that lawyers "shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics".[133]

As noted above, the 2014 Constitution does not contain adequate safeguards in line with international standards guaranteeing rights of defence. Although the Constitution recognizes the independence of the legal profession and the need to protect rights of defence, and the Lawyer's Profession Law requires lawyers to be respected by courts and able to pursue the path he or she sees fit to carry out a defence, these provisions lack clarity and adequate safeguards.[134] For example, while the arrest and detention of lawyers is restricted on various grounds, the Egyptian law still permits lawyers to be referred to disciplinary or criminal proceedings for statements or written pleadings made during and as a result of carrying out their work, compromising the order of a hearing, committing any other act during a hearing that requires them to be held to account or committing the crimes of insulting, defaming and wrongly accusing.[135]

In the case of *Ahmed Douma and 268 others*, in which the accused were charged with vandalism and other violence during the December 2011 protests, three defence lawyers, Basma Zahran, Mahmoud Bilal and Oussama Al Mahdi, were referred by the presiding judge, Judge Mohamed Nagi Shehata, for investigation on 3 September 2014. The basis for the referral was alleged to be "disrupting and causing trouble" during the trial proceedings which stemmed from their insistence that their client, the human rights activist Ahmed Douma, seated in a sound-proof glass cage, should be heard by the Court.

On 12 November, the same presiding judge referred defence lawyer, Khaled Ali, to investigation. The referral was likely the result of an altercation between Khaled Ali and the judge. During the trial proceedings, Khaled Ali requested that several documents be added to the case file relating to the assault and unlawful detention of protesters by military and law enforcement personnel. The judge was reported as having replied "Do you want military and police forces to be beaten up and not respond?" Khaled Ali then asked that this statement be included in the minutes of the session as demonstration of the court's bias. In response to this request the judge adjourned the proceedings and referred Khaled Ali to investigation for compromising the stature of the judge.

According to information obtained by the ICJ, the investigations into these four lawyers were subsequently dropped following the intervention of the Bar Association and discussions with the prosecutor's office.

These examples raise concerns regarding the court's respect for the rights of the accused to legal

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130 UN Basic Principles on the Role of Lawyers, Principle 14.

131 UN Basic Principles on the Role of Lawyers, Principle 16(a) and (c); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle I(b)1. Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, Principle I.1.

132 UN Basic Principles on the Role of Lawyers, principle 20; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle I(e).

133 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle I(b)(iii). See also, Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, principle I.4.

134 Art. 98 of the 2014 Constitution; Arts.47 and 49 of Law No. 17 of 1983

135 Art. 198 of the 2014 Constitution; Arts.49 and 50 of Law No. 17 of 1983.

counsel, equality of arms and to present a defence. By referring lawyers to investigation for attempting to carry out their functions – namely protecting the fair trial rights of their clients – judges appear to be trying to sanction lawyers for carrying out their professional duties. Such action on the part of the judiciary is both inconsistent with international standards and is likely to dissuade lawyers from carrying out their professional duty to advocate with a view to protecting their clients' rights.
In addition to violating the rights of the accused, the referral of lawyers to investigation for carrying out their duties also violates the rights of lawyers to carry out their professional functions free from intimidation, hindrance, harassment or improper interference.[136]

c) Denying or severely restricting the ability of the accused to present evidence, call defence witnesses and to cross-examine prosecution witnesses

Fair trial rights have also been undermined in numerous cases by judges who 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.

The right to equality of arms requires each party to have the same procedural opportunities available to them during the course of the trial and to be in ~~a~~ position to make their case under conditions that do not place them at a substantial disadvantage vis-à-vis the opposing party. In particular, witnesses for the prosecution and defence should be treated equally as far as procedural matters are concerned. Each party to proceedings should have the opportunity to refute and contest all arguments and evidence adduced by the opposing party and the prosecution and defence should be allowed equal time to present their evidence and arguments.[137]

Intrinsic to the right to equality of arms is the right of persons charged with a criminal offence to defend themselves in person or through a lawyer,[138] as well as the right of the accused to examine, or have examined, witnesses against them and to have witnesses appear and testify on their behalf under the same conditions as the witnesses who are testifying against them.[139] These rights are enshrined in the ICCPR to which Egypt is a party and, thus, should be considered to be part of Egyptian law.

The right to call witnesses is not unlimited but includes all witnesses that are relevant for the defence. Also part of the rights to equality of arms and to defence is the right of the accused to be present at trial. This is essential for the accused to hear and for the defence to be able to rebut the prosecution case and present a defence.[140]

Although the 2014 Constitution refers to the right to a fair trial, rights of defence and to equality before the law, and the Criminal Code of Procedure sets out the procedure for summoning witnesses, there is no specific reference to the right of the accused to present evidence, call witnesses and cross-examine prosecution witnesses on the same terms as the prosecution. [141] Pursuant to Article 93 of the 2014 Constitution, this gap in Egyptian law should be amended to bring it in line with Article 14(3)

136 UN Basic Principles on the Role of Lawyers, principle 16(a) and (c); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, principle I(b)1.

137 Human Rights Committee: *Jansen-Gielen v. The Netherlands,* Communication No. 846/1999, (3 April 2001), para.8.2; and *Äärelä and Näkkäläjärvi v. Finland,* Communication No. 779/1997, (24 October 2001), para.7.4. And see ICJ *Practitioners Guide No.5, Trial Observation Manual for Criminal Proceedings*, 2009, p.96.

138 Article 14(3)(d) of the ICCPR; Article 40(2)(b)(ii) of the CRC; Article 7(1) (c) of the African Charter on Human and Peoples' Rights. Principle N(2)(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

139 ICCPR, Article 14(3)(e); Article 40(2)(b)(iv) of the CRC. Principle N(6)(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

140 Article 14(3)(d) of the ICCPR. Principle N(6)(c) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. See also, Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 36.

141 Arts. 53, 96 and 98 of the 2014 Constitution and Art.277 of the Code of Criminal Procedure.

(e) of the ICCPR.
In the case of *Ahmed Douma and 268 others,* according to information available to the ICJ, the judge denied several evidentiary requests from the defence team, including permission to show videos relied on by the prosecution as evidence against the defendants and to call eye witnesses to testify on behalf of the accused, while also banning several documents that allegedly proved the excessive use of force by law enforcement officers against protesters from the proceedings.

In the *Matai police station case*, in which 528 accused were prosecuted for a range of charges, including possession of weapons, premeditated intentional killing and destruction of property, the trial before the Minya Felonies Court reportedly consisted of one session lasting less than an hour in which no evidence was put forward by the prosecution implicating any individual. In a second session, two days later, the verdict was announced. The defence were reportedly prevented from presenting a case or calling witnesses and several lawyers were even barred from attending the trial.

In another case stemming from an attack on a police station, the *Kerdasa police station case*, the Giza Felonies Court sitting in the Tora Police Institute reportedly refused to allow any defence witnesses to testify. In addition, defence counsel complained to the court that key prosecution witnesses were not present and could not be cross-examined. The court reportedly responded by stating that the witnesses could not be found. The court subsequently sentenced 188 individuals to death. On 3 February 2016, the Court of Cassation annulled the death sentence in relation to 149 of the accused and ordered a retrial.[142]

By denying, or severely restricting, the accused and their counsel's opportunity to adduce evidence, present a defence or call, question or cross-examine witnesses, as outlined in the above cases, Egyptian judges acted in a manner that was inconsistent with their duty to respect the rights of the accused to equality of arms, to defence and to call and examine witnesses. In addition, where the accused and counsel have been excluded from attending court proceedings, the right to be present during proceedings and to be represented by legal counsel has also been violated.

The Human Rights Committee has affirmed that trials where the accused and defence counsel have no right to be present or to examine witnesses violate the right to a public hearing and to defend oneself in person or through counsel.[143]

iii. Judges' failure to ensure a public hearing

As mentioned above, since 2013, the Minister of Justice has issued numerous decisions transferring individual criminal cases from ordinary court buildings to police academies. These buildings are under the control of the Ministry of Interior and are, in general, closed to the public, including members of the media and family members of the accused. For persons other than defence counsel to access court proceedings in police academies, permission must be obtained from the judge.
In most cases, family members, the media and the wider public have not been granted permission to access the hearings, despite requests.

The right to a fair trial requires that all trials in criminal matters must, in principle, be conducted orally and publicly.[144] A public hearing ensures transparency of justice; it is a safeguard for the right of the accused and provides the public with an opportunity to monitor how justice is being administered.[145]

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142 Individuals tried in absentia were not part of the appeal and their sentences remain in place.

143 Human Rights Committee: *Guerra de la Espriella v Colombia*, UN Doc. CCPR/C/98/D/1623/2007 (2010) para.9.3, *Becerra Barney v Colombia*, UN Doc. CCPR/C/87/D/1298/2004 (2006) para.7.2, *Rodríguez Orejuela v Colombia*, UN Doc. CCPR/C/75/D/848/1999 (2002) para.7.3; See Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC?32 (2007) para. 23.

144 Article 14(1) of the ICCPR. Principle A(1) and (3) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Principle 36(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

145 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and

The restriction of the public, including the media, from all or part of a trial is only permitted, under international standards, in specific and exceptional circumstances, on the order of the court. These exceptional circumstances are restricted to: when it is strictly necessary to protect the interests of justice; when the interests of the private lives of the parties so require, for example in the case of persons under the age of 18; or when it is strictly necessary for reasons of public order, morals or national security in an open and democratic society that respects human rights and the rule of law.[146] Any restriction must be justified and assessed on a case-by-case basis and its impact on the fairness of the proceedings must be subject to on-going judicial supervision.

The Human Rights Committee has clarified that, in order to guarantee the right to a public hearing, the courts are required to make information regarding the time and venue of the oral hearings available to the public.[147] The courts also have an obligation to 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.[148]

Article 187 of the 2014 Constitution guarantees the right to a public hearing unless the court decides otherwise for reasons of public order or public morals. Judgments must always be announced in public sessions. Article 268 of the Code of Criminal Procedure also requires hearings to be public except where the court orders them to be entirely or partially secret or for certain parties to be excluded from the hearing for reasons of public or moral order.

These provisions of Egyptian law are incompatible with international standards because, among other things, the exclusion of "certain parties" from hearings is not compatible with the right to a public hearing.[149] The Human Rights Committee has clarified that, "apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of person".[150]

The protections that exist in Egyptian law appear to have been flouted by the repeated issuance of executive orders transferring court proceedings to police academies and refusals by judges to grant permission to the public to attend these hearings.

For example, in the case of *Alaa Abdel Fattah and 24 others* (described above on pages 44 and 45), pursuant to a decision of the Minister of Justice, all trial hearings took place in the police training academy in Tora. Access to the compound was controlled by armed policemen, who only permitted access to the compound to those who had been granted permission to attend by the judge.

In the case of *Ahmed Maher, Ahmed Douma and Mohamed Adel*, the Minister of Justice ordered the relocation of the court hearings from the Abedine Misdemeanour Courthouse to the Institute of the Guardians of the Police.[151] Access to the court hearings was restricted to the accused and their lawyers. Neither the press nor the public were allowed to attend. With respect to members of the ac-

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tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 28.

146 ICCPR, Article 14(1).

147 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 28.

148 Human Rights Committee, *Van Meurs v. The Netherlands*, Communication No. 215/1986, para. 6.2.

149 In addition, to the extent that Egyptian law does not not require the authorities to protect the identify of people under the age of 18 at the time of the crime or otherwise to protect the private lives of children or other persons, it is inconsistent with the Convention on the Rights of the Child Article 40(2)(b)(V99) and see Article 16 of the Convention on the Rights of the Child; Principle O(n)(ix) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

150 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para.29.

151 Decision No.9844 of 2013 of the Minister of Justice, which entered into force on 8 December 2013. It was not published in the Official Gazette until 15 December 2013.

cused's families, on only one occasion were the wives of the first two accused granted permission by the Court to attend a hearing.

Imposing a presumption in favour of closed hearings by relocating trials to police academies and by restricting access to persons who have received express permission from the judge is contrary both to Egyptian law and to international standards. In particular, it contravenes the requirement that trials should, in principle, be public and the idea that restrictions should only be imposed by judges or the court in exceptional circumstances. Moreover, the exclusion of members of the media, family members of the accused and the wider public from some or all of the hearings in cases heard in police academies has not been justified on a case-by-case basis on the grounds of any of the permitted exceptions. Indeed, none of the exceptions would appear to apply to either of the cases discussed above.

iv. Judges' failure to ensure the presumption of innocence: convictions based on poorly reasoned judgments and without individual findings of guilt, and convictions in the absence of credible evidence of the guilt

a) Convictions based on poorly reasoned judgments and without individual findings of guilt

In many recent cases in Egypt, rushed trials have ended in speedy convictions based on poorly reasoned judgments. In addition, people have been found guilty despite seemingly insufficient evidence to demonstrate that each individual is guilty of the crimes that he or she is convicted of.

Egypt is obliged under Article 14(1) of the ICCPR, as elaborated by the Human Rights Committee, to ensure that a reasoned judgment is issued in all criminal trials and in all but prescribed exceptional circumstances (especially, in cases involving the interests of juveniles) is made public.[152] A reasoned judgment is necessary to prevent against arbitrariness. It requires that the court set out its essential findings, evidence and legal reasoning on which the tribunal or court based its judgment, even in cases in which the public has been excluded from all or part of the trial.[153]

In addition, the authorities in Egypt, including the members of judiciary, are obligated to respect and protect the right of all persons charged with a criminal offence to be presumed innocent and treated as such unless and until they are proven guilty according to law.[154] The duty to respect and protect the presumption of innocence, which is a fundamental principle of fair trial, applies in all cases at all times.[155] 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[156] and compromise the principle of individual criminal responsibility. The protection of individual criminal responsibility is also expressly, and separately, enshrined in the African Charter on Human and Peoples' Rights to which Egypt is a party.[157] The Inter-American Commission on Human Rights, (one of the treaty monitoring bodies of the American Convention on Human Rights), has underscored that the principle of

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152 Article 14(1) of the ICCPR. Human Rights Committee General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 29; Principle A(2)(i) of the Principles on Fair Trial in Africa.

153 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 29.

154 Article 14(2) of the ICCPR; Article 7(1)(b) of the African Charter on Human and Peoples' Rights. Principle N(6)(e) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Principle 36(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

155 Human Rights Committee General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 6.

156 See, Cases of *A.P., M.P. and T.P. v Switzerland* (71/1996/690/882) Judgment of the European Court of Human Rights (29 August 1997) para 48; *E.L., R.L. and J.O.-L. v. Switzerland*, Application No. 75/1996/694/886, Judgment of the European Court of Human Rights, 29 August 1997, para 53.

157 African Charter on Human and Peoples' Rights, Article 7.2. For permissible grounds of individual criminal responsibility, see ICC Rome Statute, Article 25.

individual criminal responsibility, which is also enshrined separately and expressly in Article 5(3) of the American Convention on Human Rights, is "among the most fundamental principles governing criminal prosecutions" that are protected under international human rights law.[158]

Article 96 of the 2014 Constitution, enshrines a fundamental tenant of the presumption of innocence: an accused person is innocent until proven guilty following a fair trial that guarantees all rights of defence. In its current form however, the Code of Criminal Procedure neither explicitly refers to the right to the presumption of innocence as such, nor does it state the requirement that convictions be based only on proof beyond a reasonable doubt of an individual's guilt and on the individual's own criminal responsibility. It does, however, state that the judge cannot rely in his judgment on evidence that was not discussed during the trial and that a judgment must be written, include the reasons in full and, to the extent possible, be issued within eight days of the decision.[159]

Despite the obligations on the Egypt's courts to respect and protect the presumption of innocence, its inherent requirement of acquittal in the absence of proof of an individual's guilt of the crime charged by the prosecution beyond a reasonable doubt, and the right to a reasoned judgment, courts have, nevertheless, recently handed down poorly reasoned judgments of conviction. Often, this is done without clear findings, based on sufficient specific admissible proof, of an individual's guilt beyond a reasonable doubt, particularly in trials involving dozens or hundreds of accused.

As highlighted above (discussed in "Pre-trial issues", Chapter One, Section (II)(A)), in the case of *Yara Sallam and 22 others*, the court convicted all of the accused of a range of offences under the Criminal Code, the Demonstration Law and the Procession Law.[160] In its judgment finding each of the accused guilty, the Court referred to only one piece of evidence, the statement of an officer present at the scene.

In its judgment, the Court did not discuss the culpability of each individual accused nor did it address any of the substantive challenges presented by the defence, including the fact that no evidence placed all 23 of the accused at the demonstration. Furthermore, the video evidence relied upon by the prosecution only placed five of the accused at the scene and showed the police using violence against protestors (not the other way round), and that individuals seen carrying weapons in the footage and identified by the prosecution as protestors were in fact members of the security forces in plain clothes. As a result, the Court's judgment does not meet the requirement of proof beyond a reasonable doubt against each of accused, which is inherent to the presumption of innocence.

In March and April 2014, the Minya Felonies Court ruled on two cases in quick succession relating to violent attacks on the Matai and Adwa police stations and the killing of police officers. These attacks took place in August 2013 and, in the riots that followed, the security forces' excessive use of force to disperse protest camps in Cairo resulted in the deaths of over 1,000 people. Hundreds of accused were charged in each case, 528 in the *Matai Police Station Case* and 683 in the *Adwa Police Station Case.* In both cases each of the accused faced multiple charges ranging from possession of weapons to premeditated intentional killing and destruction of property. In both cases some of the accused were charged with crimes punishable by death.

The judgments of the court in both cases were poorly reasoned, repetitive, frequently incoherent and used insulting and inappropriate language. For example, in the *Adwa Police Station Case,* the Court referred to the first and other accused as "the devil Mohamed Badie who has come out of the core of hell along with the other devil accused".[161]

The convictions also violated the accused's right to the presumption of innocence and the right to

158 Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 222 and 227.

159 Articles 302 and 312 bis Code of Criminal Procedure.

160 Case No 1343/2014.

161 Minya's Felonies Court, Case No. 300 of 2014, 21 June 2014, p.26.

a reasoned judgment in that they lacked adequate analysis of 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.

In the *Adwa Police Station Case,* all 683 of the accused were charged with the premeditated intentional killing of 9 individuals.[162] Initially, the Court convicted all 683 accused and sentenced them all to death. After receiving the opinion of the Grand Mufti, the Court confirmed the death sentences of 183 of the accused, sentenced five to 15 years or life imprisonment and acquitted the remaining accused.

The judgment does not explain how the evidence supports the conviction of the 188 accused. In particular, the judgment details the content of various pieces of evidence that place a small number of the accused at the police station on the day of the incident, such as witness statements from police officers and photos. None of the evidence appears to name or identify the individuals responsible for the killings. Instead, the judgment states that the "witness attributed the acts of killing to the accused" without specifying which accused the witness referred to. Furthermore, the court failed to specify any evidence that supported its findings that over 100 accused were involved in the killing in any way.

In addition, despite ultimately acquitting the majority of the accused, the court's judgment stated that it considered 681 of the accused charged with intentional killing to be collectively responsible for the crime.[163] According to the court, the "agreement between the third to the last accused to commit the intentional killings at that time and place, the type of relationship that binds them, the fact that the crime stemmed from one motive, the fact that the accused aimed in the same way to carry out that motive and the fact that they shared the same intention, makes each of them responsible for the crime of murder."[164] There was, however, no evidence cited by the court to support this finding. Indeed, none of the evidence listed by the court appears to demonstrate any complicity or conspiracy between the accused to carry out the killing.

In February 2015 the Court of Cassation struck down the Minya Felonies Court judgment in the *Adwa Police Station Case* due to the lack of legal representation of the accused. In its judgment, the Cassation Court also affirmed an argument of the prosecutor that the Minya court's judgment had failed to provide reasons for acquitting some of the accused.[165] However, in so doing, the Court made no reference to the lack of adequate reasoning regarding the convictions of the accused.

In the *Matai Police Station Case,* 528 individuals faced various charges. Some of these charges included: acquiring and possessing tools or weapons without a licence, such as firearms and ammunition, and possessing weapons during a public gathering with the aim of using them to compromise public order and security and with the intention of assaulting people.[166]

All 528 accused were initially convicted for one or more of a range of offences. Upon receipt of the Grand Mufti's opinion, the court confirmed the death sentence of 37 individuals and sentenced the remainder to life imprisonment.

All the accused were charged in relation to the possession of weapons. However, 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. Witness testimony and video footage described by the court in its judgment appears to identify a small number of accused as either having stolen or as

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162 Minya's Felonies Court, Case No. 300 of 2014, 21 June 2014, p.21-22.

163 Minya's Felonies Court, Case No. 300 of 2014, 21 June 2014, p.75.

164 Minya's Felonies Court, Case No. 300 of 2014, 21 June 2014, p.75.

165 Court of Cassation, Criminal Circuit, Judgment No. 27017 of 11 February 2015, p. 31.

166 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p.24.

having been seen carrying a "weapon", such as a wooden or metal stick.[167] In addition, in the list of evidence reproduced in the judgment, but not otherwise referred to in support of the convictions, a police report detailed items found on arrest and stated that 39 of the accused were carrying guns when arrested, and a police inventory indicated that 70 guns were missing from the police station after the incident.[168] However, nothing in the court's judgment identified its reasoning for its finding that particular accused possessed one or more particular weapons.

The rulings and judgments of the trial courts in these and other cases are illustrative of how some members of the Egyptian judiciary have acted in a manner that is inconsistent with the accused's fair trial rights by failing to uphold the presumption of innocence, by ensuring that individuals are only convicted on the basis of individual criminal responsibility - where there is proof beyond reasonable doubt that they committed each crime they have been convicted of. Furthermore, these cases illustrate the failure to respect the right of every accused person to an adequately reasoned judgment.

b) Convictions in the absence of credible evidence of guilt, including a failure to consider or take into account exculpatory evidence

In addition to the failure to provide a reasoned judgment and judges' willingness to convict in the absence of making individual findings of guilt, numerous criminal proceedings have resulted in convictions of individuals in the absence of proof beyond reasonable doubt that they committed the crimes in question. The cases below highlight instances where exculpatory evidence was not taken into account by the court in reaching a decision.

Egypt's duty to respect of the presumption of innocence, including under the ICCPR and African Charter on Human and Peoples' Rights, which are binding on it and in accordance with the Constitution form a part of national law, require that the prosecution bear the burden of proving the accused has committed the crime or crimes with which he or she is charged. Courts must not convict when the prosecution fails to prove, through admissible evidence, that the crime charged was committed by the accused beyond a reasonable doubt. This standard requires the court to ensure that the accused has the benefit of the doubt and that in reaching its verdict the court has duly taken into account exculpatory evidence.[169] Convictions that do not meet this standard violate the presumption of innocence,[170] which is an absolute right that can never be restricted or limited by law.[171]

As previously mentioned, while the 2014 Constitution recognizes that an accused is innocent until proven guilty following a fair trial, the Code of Criminal Procedure in its current form does not prescribe the level of proof required for a conviction.[172] Instead, under the Code of Criminal Procedure, the judge is seemingly granted complete discretion as to the level of proof required for a conviction. It only states that "[t]he judge decides the case based on the conviction that is freely formed in his mind and he should not base his judgment on any evidence that is not presented to him during the hearings, and any statement that is proven to have emanated from any of the accused or witnesses under duress or threats is null and shall not be taken into account."[173] As noted, however, in accordance with

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167 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p.62.

168 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p. 55 and 59.

169 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 30; Principle N(6)(e)(i) of the Principles on Fair Trial in Africa. See also, European Court of Human Rights: *Barberà, Messegué and Jabardo v Spain* (10590/83), (1988), para.77; *Telfner v Austria* (33501/96), (2001), para.15. And see, *Ricardo Canese v Paraguay*, Inter-American Court (2004), paras.153-154.

170 Article 14(2) of the ICCPR; Article 40(2)(b)(i) of the CRC; Article 7(1)(b) of the African Charter on Human and Peoples' Rights.

171 Human Rights Committee General Comment No. 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para.11; Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 6.

172 Art.96, 2014 Constitution.

173 Art.302, Code of Criminal Procedure.

the presumption of innocence as enshrined in the ICCPR and African Charter on Human and People's Rights, judges must be required to acquit an individual in the absence of proof (through admissible evidence) beyond a reasonable doubt of his or her guilt of the crime charged.

In the *Adwa Police Station Case,* referred to above, the evidence listed by the court in its judgment does not appear to support the numerous charges against the 188 individuals who were ultimately convicted. In addition, key exculpatory evidence, such as evidence demonstrating that many of the accused were not present on the day the events took place, was not examined in any depth and was summarily dismissed by the court. Instead, the court simply stated that it "rests assured on the evidence of guilt. Their defence does not have any basis in the documents, and shall not be taken into account by the court as it rests assured as to the credibility of the witnesses story that are bolstered by medical and technical reports that came to the attention of the court, so that there is a coherence between what has been said orally and the technical evidence; coherent as to the commission of the accused of the crimes that the court has listed before."[174]

An examination of the judgments of conviction by the Court in this case appear to demonstrate that convictions were handed down in the absence of proof beyond a reasonable doubt against the first accused, Mohamed Badie, Supreme Guide of the Muslim Brotherhood and the second accused, Mabrouk Mamdouh Abdel Wahab.

The two men were charged with various crimes, including organizing an illegal gathering, inciting all of the accused to attack Adwa police station by issuing instructions, helping them with money, weapons and tools, and incitement, agreement and assistance of crimes.[175] From the Court's description of the evidence in the judgment it appears that it relied on two documents in relation to the incitement charge. First, a police inquiry report, which refers to "secret sources" that allegedly indicate that the first accused gave instructions to carry out actions calling for the return of President Morsi to power. These instructions included staging protests, marching towards police centres and blocking roads. According to the police report, officials in the Muslim Brotherhood agreed to carry out these instructions in a meeting on 15 July 2013. The report also alleged that the second accused ordered a Brotherhood official in Minya to carry out these instructions.[176] The second piece of evidence was a document allegedly issued by the first accused on 19 July 2013 setting out the same instructions.[177]

As they are described by the Court in its judgement neither of these two documents, in the ICJ's view, appear to be sufficient to prove that each of the first two accused incited a violent attack on Adwa police station. Furthermore, no other evidence listed by the court in its judgment appears to support this charge against the first two accused. In the absence of proof beyond a reasonable doubt of the guilt on the charge of incitement of the attack on the police station, their conviction for this crime would violate each man's right to the presumption of innocence.

In the *Matai Police Station Case*, when describing the facts of the killing of Colonel Mostafa Rajab Al Atar as it found them, the court named *nine* accused who it claimed had found to have participated in the killing.[178] The court subsequently described witness testimony from one police officer who named *five* of the accused and stated that he saw them beating the victim to death.[179] The court also detailed witness testimony from a second police officer who stated that he saw *two* of the accused beating the victim while a third accused asked the police officer to leave because they intended to kill the Colonel.[180]

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174 Minya's Felonies Court, Case No. 300 of 2014, 21 June 2014, p.73.

175 Minya's Felonies Court, Case No. 300 of 2014, 21 June 2014, p.24.

176 Minya's Felonies Court, Case No. 300 of 2014, 21 June 2014, p.56.

177 Minya's Felonies Court, Case No. 300 of 2014, 21 June 2014, p.56-57.

178 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p.32.

179 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p.45.

180 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p.46.

However, the court did not state which accused the police officer had identified and the police officer stated that he did not witness the killing of the victim but learned about it later.[181] In addition, the court detailed the testimony of the wife of the Colonel who was not present at the scene, but learned of the killing from a phone call made by one of the witnesses. In describing her evidence, the court noted that the wife of the Colonel named *two* of the accused responsible for killing her husband.[182] One of the individual's named matched an individual identified by the first police witness. The other did not. The court also referred to a list of 20 individuals in the police reports, who were suspected of having participated in the killing.[183] However, details and findings of the police inquiries were not referred to by the court. In addition, the list of names in the police reports do not match the names given by either police officer. Finally, in its judgment, the court referred to medical reports, which indicated that the victim died due to repeated blows by solid tools.[184]

On the basis of the above-described evidence, the court concluded that nine of the accused killed the Colonel. It appears to have reached this decision despite the fact that the only eye witness to the killing testified that he saw five individuals taking part, that another witness only testified to having seen three unnamed individuals present at the scene prior to the killing and police reports contradict this testimony as they do not name the individuals identified by either of these witnesses.

The convictions at first instance by the Minya Felonies Court in both the Adwa and Matai cases handed down in the absence of reasoned judgments which detail proof beyond reasonable doubt and which fail to demonstrate that the court duly considered the available exculpatory evidence, are symptomatic of a willingness among some Egyptian judges to convict those who are considered opponents of the regime despite an insufficiency of evidence, thereby violating of the presumption of innocence; however, as noted above, the Court of Cassation has ordered a re-trial.

Achieving justice in relation to the crimes committed at both of these police stations demands that those accused receive a fair trial before independent, impartial court. No one should be convicted in the course of such proceedings in the absence of proof beyond a reasonable doubt of his or her guilt of a crime, and a reasoned judgment that sets out the essential findings, evidence and legal reasoning on which the tribunal or court based its judgment with respect to each charge against each of the accused.

v. Imposition of the death penalty following blatantly unfair trials

In marked contrast to repeated calls on Egypt to impose a moratorium on the death penalty by the African Commission on Human rights,[185] there has been an increase in the imposition of the death penalty by courts in Egypt and in executions carried out pursuant to such sentences since the ouster of President Morsi in July 2013.

For example, in 2012 Amnesty International reported at least 91 cases where death sentences had been imposed and no known cases of executions. In 2013, at least 109 death sentences were reportedly handed down, with no known cases of executions. In 2014, these figures increased to at least 509 death sentences and at least 15 executions,[186] and by 28 July 2015, 12 executions had been carried out according to Death Penalty Worldwide.[187] Many of the cases where death sentences have been

181 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p.46.

182 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p.44.

183 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p.53.

184 Minya's Felonies Court, Case No. 8473 of 2013, 28 April 2014, p.57.

185 African Commission on Human and Peoples' Rights, Resolution 297 *on the Deteriorating Human Rights Situation in the Arab Republic of Egypt* (2015), paras 4 and 5, available at: http://www.achpr.org/sessions/17th-eo/resolutions/297/; Resolution 287 *on Human Rights Abuses in Egypt*(2014), paras 5 and 6, available at: http://www.achpr.org/sessions/16th-eo/resolutions/287/

186 Amnesty Reports, *Death Sentences and Executions* 2012, 2013 and 2014.

187 Death Penalty Worldwide, available at http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Egypt#f13-2

handed down have been marred by a litany of fair trial violations and in some instances, individuals charged with crimes punishable by death have been under the age of 18 at the time of the crime. In many of these cases, the juveniles were initially been sentenced to death by the lower courts.

This increase is at odds with the growing trend regarding the death penalty. The overwhelming majority of states have either abolished the death penalty, or do not use it.And the numbers are increasing. International human rights standards as well as regional inter-governmental organizations, courts, human rights bodies and experts, including the African Commission, encourage abolition of the death penalty.[188] Egypt's conduct is also at odds with the call of the UN General Assembly on countries that retain the death penalty to impose a moratorium on the death penalty as a first step towards the abolition of the death penalty, and to reduce the number of offences for which this penalty may be imposed and to ensure compliance with international standards guaranteeing the rights of persons charged with a capital offence.[189]

The ICJ opposes the death penalty in all cases, and views it as a violation of the right to life and as a form of cruel inhuman and degrading treatment or punishment.

As a party to the ICCPR, Egypt must ensure that the death penalty may be imposed only for the most serious crimes.[190] The Special Rapporteur on extrajudicial executions has clarified that this means "capital punishment may be imposed only for intentional killing, and it may not be mandatory in such cases".[191]

Furthermore, any person charged with a crime punishable by death is entitled to the strictest observance of fair trial guarantees as well as to additional safeguards.[192] The Human Rights Committee has noted that "[t]he imposition of a sentence of death upon conclusion of a trial, in which the provisions of Article 14 of the [ICCPR] have not been respected constitutes a violation of the right to life (Article 6 of the ICCPR)."[193] The Special Rapporteur on extrajudicial executions has affirmed that:

> [P]roceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, as found in the pertinent international legal instruments. All defendants facing the imposition of capital punishment must benefit from the services of a competent defence counsel at every stage of the proceedings. Defendants must be presumed innocent until their guilt has been proved beyond a reasonable doubt, in strict application of the highest standards for the gathering and assessment of evidence. In

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188 Article 6(6) of the ICCPR. Articles 4(2) and 4(3) of the American Convention, the Second Optional Protocol to the ICCPR, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty and Protocol No.6 to the European Convention on Human Rights. UN General Assembly: resolution 32/61, para.1, resolution 67/176, paras.1, 3, 4-6; CHR resolution 2005/59, para.5(a); Human Rights Committee Concluding Observations: Chad, UN Doc. CCPR/C/TCD/CO/1 (2009) para.19, Cameroon, UN Doc. CCPR/C/CMR/CO/4 (2010) para.14, Russia, UN Doc. CCPR/C/RUS/CO/6 (2009) para.12; African Commission: resolution 136, (2008), para.3, *Interights et al v Botswana* (240/2001) (2003) para.52. See, Inter-American Court: Advisory Opinion OC-3/83 (1983) para.57, *Dacosta Cadogan v Barbados* (2009) para.49; Council of Europe Death Penalty Fact Sheet (2007).

189 UN General Assembly Resolution 67/176, UN Doc. A/RES/67/176 (adopted in December 2012).

190 Article 6(2) of the ICCPR. The same standard appears in Principle N(9)(b) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

191 Special Rapporteur on extrajudicial executions, UN Doc. A/67/275 (2012) para.67. See also, Special Rapporteur on extrajudicial executions, UN Doc. A/HRC/4/20 (2007) paras.53 and 65 and Human Rights Committee, General Comment No. 6 (Article 6), UN Doc. HRI/GEN/1/Rev.1 at 6 (1994), para.7.

192 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.59. Human Rights Committee, General Comment No. 6 (Article 6), UN Doc. HRI/GEN/1/Rev.1 at 6 (1994), para.7.

193 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.59; Principle N(1)(b) of the of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa

addition, all mitigating factors must be taken into account.[194]

Proceedings must also guarantee the right to appeal, which should include review of both the factual and the legal aspects of the case by a higher tribunal. The Human Rights Committee has noted that "the right of appeal is of particular importance in death penalty cases".[195] In addition, individuals must also have the right to seek pardon, commutation of sentence (substitution of a lighter penalty) or clemency.[196]

Furthermore, as a party to both the ICCPR and the Convention on the Rights of the Child (CRC), Egypt must ensure that no individual who is under the age of 18 at the time of the crime is sentenced to death.[197]

The right to life is not expressly guaranteed in the Egyptian Constitution. Contrary to international standards, under criminal law, the death penalty is not restricted to cases of intentional killing; it can be imposed for a wide variety of offences, including numerous broad and ill-defined "terrorism-related" offences, rape, kidnap, drug trafficking, drug possession for the purpose of trade, "treason" and "espionage".[198]

a) Unfair trials on death penalty charges before ordinary courts

Trials of individuals facing charges punishable by the death penalty have frequently fallen drastically short of fair trial standards. Such unfair trials have become increasingly common since the ouster of President Morsi given the increase in the numbers of individuals tried on capital charges.

In the *Matai Police Station Case*, in which all of the accused faced capital charges, only 70 of the 147 of the detained accused were brought to the court to attend the hearing. The trial of a total of 528 people reportedly consisted of two sessions. The first session is reported to have lasted less than an hour during which no evidence was put forward by the prosecution implicating any particular individual. In a second session two days later the verdict was announced. The defence were reportedly prevented from presenting a case or calling witnesses and several of the accused's lawyers were barred from attending the trial.

In the *Adwa Police Station case*, before the Minya Felonies Court, the vast majority of the 683 accused, who all faced capital charges, were reportedly not present for the first and only substantive hearing of the trial, which lasted for only a few hours. Defence lawyers boycotted the hearing on the basis that the trial could not be fair since it was heard before the same judge as the *Matai police station case*. The second hearing reportedly lasted only fifteen minutes, and only the Court's decision was presented convicting all 683 individuals and sentencing them to death. After the Grand Mufti's opinion was received, the Court upheld the death sentences of 183 of the accused.

In both the *Matai* and *Adwa police station cases* individuals under the age of 18 at the time the crime took place were charged with crimes punishable by death and were initially sentenced to death.

Furthermore, as outlined above, the judgment of the trial court in both cases was poorly reasoned and the convictions, including on charges carrying the death penalty and in relation to people sentenced

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194 Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996), para.111. See also, Safeguards guaranteeing protection of the rights of those facing the death penalty, para.5.

195 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.51.

196 Article 6(4) of the ICCPR. Principle N(10)(d) of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa; Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996), para.111.

197 Article 6(5), ICCPR; Article 37(a), Convention on the Rights of the Child (CRC) (Egypt ratified the CRC in 1990). Principle N(9)(c), Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

198 Criminal Code Law No. 58 of 1937, as amended, Articles 77-77(C), 78(A)-78(C), 80 (1), 81, 82(B), 83, 83(A) cum. 85-102(2) Bis, 102(B), 290; Arms and Ammunition Law No. 394 of 1954, as amended by Law No. 165 of 1981, Article 26; Narcotics Law, No. 182 of 1960, as amended, Articles 33, 34.

to death, did not appear to be based on proof beyond reasonable doubt of the guilt of each individual accused. UN and African human rights experts have repeatedly expressed their deep concern over the imposition of death sentences in these cases and have highlighted the procedural flaws in the trials, including a lack of precision in the charges, limited access to lawyers, trials in absentia and mass sentencing, noting that the conduct of trials in such conditions is in breach of the ICCPR and the African Charter on Human and People's Rights.[199] The experts have also expressed concern that the courts have "become instrumental in the arbitrary and politically motivated prosecutions by the State".[200]

The imposition of the death penalty by the trial judge following proceedings that failed to respect the rights of each of the accused was inconsistent with the right to life.

In the *Matai police station case,* of the 528 death sentences imposed in March 2014, 491 were subsequently commuted to life imprisonment by the Minya Felonies Court and 37 were ordered for retrial by the Court of Cassation. In the *Adwa police station case*, of the 683 sentenced to death in April 2014, 183 death sentences were affirmed by the Minya Felonies Court and 33 were ordered for retrial by the Court of Cassation.

CASE STUDY

In two cases against Mohamed Morsi and other senior members of the Muslim Brotherhood, known as the "Foreign Espionage Case", and the "Prison Break Case", death sentences were imposed on 16 and 107 accused respectively.

The charges in the Foreign Espionage Case included, "carrying out acts that compromise the independence of the country" and "collusion with a foreign organization to carry out terrorist activities in Egypt". In the Prison Break Case, the charges included, "murder", "abduction of police officers" and "carrying heavy weapons to resist the Egyptian state".

The trials in both cases violated numerous basic fair trial guarantees. Many of the accused's rights of defence were undermined due to the fact that they were denied access to counsel during detention, with some being held incommunicado for months. For example, Mohamed Morsi's whereabouts were unknown from 3 July 2013 to November 2013 and, according to information obtained by the ICJ, even after November 2013, lawyers and family members were prevented from visiting him. The incommunicado detention of many of the accused also violated their right to liberty and their right not to be arbitrarily detained. The Working Groups on Arbitrary detention considered that the violation of Mohamed Morsi and several of his advisors rights to be provided with the legal basis justifying their detention, notice of charges, to be brought promptly before a judge, holding them under high security house arrest in military premises, and violating their right to communicate with their families and lawyers was likely to affect the fairness of any subsequent proceedings against them.

The accused's rights of defence were also violated, including by denying the defence the right to call and to cross-examine witnesses during the trial.

The accused were convicted despite a lack of substantial and credible evidence proving individual guilt of each of the accused beyond reasonable doubt, in

199 Statement of UN human rights experts, 'Egypt: Mass death sentences – a mockery of justice', 31 March 2014. Statement of African and UN human rights experts, 'Egypt: Justice and reconciliation increasingly failing after second wave of mass death sentences', 15 May 2014.

200 See UN News Service, 'Outraged', UN experts urge Egypt to overturn largest confirmed mass death verdict, 30 June 2014, available at: http://www.refworld.org/docid/53b2a0df4.html (accessed 21 January 2016).

violation of the presumption of innocence.

In addition, the accused did not have the opportunity to have their conviction and sentence reviewed by a higher tribunal because, under Egyptian law, the Court of Cassation's review is limited to an examination of the proper application of the law by the lower court.

With respect to the accused in these cases who were charged with crimes punishable by death, and who in many instances were sentenced to death, the trials were not only inconsistent with their right to a fair trial, but also their right to life.

The violations of fair trial highlighted in the cases detailed in this section, as well as in other cases where the accused were charged with crimes punishable by death, are illustrative of the numerous violations of the right to life taking place in Egyptian courts. Far from ensuring "scrupulous respect of the guarantees of fair trial",[201] in death penalty cases, Egyptian judges have presided over proceedings that have failed to ensure essential elements of fair trial, including the presumption of innocence, rights of defence and the obligation to exclude evidence obtained by torture or other ill-treatment.

Furthermore, under Egyptian law, decisions of felony courts can only be challenged before the Cassation Court, which examines the proper application of the law by the lower court only and cannot review the merits of the case. As a result, all individuals sentenced to death by felony courts do not enjoy the right of appeal.

The African Commission on Human and Peoples' Rights, as noted above, as well as UN independent experts have repeatedly condemned "Egypt's disregard to regional and international fair trial standards", called for an immediate moratorium on death sentences in Egypt and in specific cases have called for the quashing of death sentences and re-trials.[202]

b) Unfair trials of civilians on death penalty charges before military courts

In other cases brought since the ouster of President Morsi, civilians have been sentenced to death and executed following convictions before military courts.

Military court judges in Egypt are appointed by the Minister of Defence and are subject to military disciplinary procedures. Consequently, such courts cannot be considered independent and impartial for the purposes of Article 14 of the ICCPR, or Articles 7(1)(d) and 26 of the African Charter on Human and Peoples' Rights, both of which Egypt is party to.

Furthermore, procedures followed by military courts do not conform to international fair trial standards. (For a more in-depth analysis of Egypt's military courts see Chapter Seven).

On 17 May 2015, six men, none of whom were members of the military, were executed following their conviction by a military court. The men were part of a group of nine individuals accused of participat-

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201 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.59.

202 African Commission on Human and Peoples' Rights: Resolution 287 on Human Rights Abuses in Egypt, July 2014; Resolution 297 on the Deteriorating Human Rights Situation in the Arab Republic of Egypt, February 2015. See also, joint statement of African and UN human rights experts: Egypt: Justice and reconciliation increasingly failing after second wave of mass death sentences, 15 May 2014, available at: http://www.achpr.org/press/2014/05/d204/ ; Press release on the execution of Mahmoud Hassan Abdel-Naby, by the African Commission on Human and Peoples' Rights and Working Group on Death Penalty and Extrajudicial, Summary and Arbitrary Killings in Africa, 10 March 2015, available at: http://www.achpr.org/press/2015/03/d252/; and UN OHCHR, Mass imposition of death penalty in Egypt outrageous: Pillay, 29 April 2014, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14543

ing in attacks on security services and killing two officers of the armed forces on 19 March 2014.

In this case, in addition to violating the accused's right to an independent and impartial tribunal by holding their trial before a military court, the trial was also marred by other fair trial violations. All of the accused alleged that they had been subjected to torture and other ill treatment; as a result of such treatment one of them was reported to have suffered a broken thigh and fractured knee. Rights of defence were also undermined, including the ability to have confidential communications with defence lawyers. There was furthermore evidence that three of the accused were reportedly already in detention at the time the attacks they were convicted of participating in took place.[203]

In addition to these fair trial violations, the accused also did not enjoy the right of appeal. Appeals in cases tried before military courts are restricted to only determining if the lower court properly applied the law. Therefore, the right of appeal is further undermined since there is no appeal to a higher civilian court; appeals are heard by military appeals courts, which are not independent.

c) Mass trials in death penalty cases

In addition to the fair trial violations outlined above, a particular phenomenon that has emerged since the overthrow of President Morsi in July 2013 is the use of mass trials to hear charges against individuals facing the death penalty. In many of these cases, judges have proceeded to impose mass death sentences or lengthy prison terms on dozens or even hundreds of people. Such mass trials have been used frequently to prosecute suspected supporters of the Muslim Brotherhood and Islamist groups.

As highlighted above, when any person is charged with a crime punishable by death he or she is entitled to the strictest observance of fair trial guarantees, including a competent, independent and impartial tribunal, the right to competent legal counsel at all stages of proceedings, full rights of defence and equality of arms, the presumption of innocence, strict application of the highest standards for the gathering and assessment of evidence and consideration of all mitigating factors.[204] In addition, each accused must enjoy the right to appeal, which includes review of both the factual and the legal aspects of the case by a higher independent and impartial tribunal[205] as well as the right to seek pardon, commutation or clemency.[206]

The authorities' obligation to respect the fair trial rights of each individual charged with a criminal offence applies equally when a group of individuals – no matter how large – are tried together.

In the *Matai Police Station Case*, (also described above on pages 65 and 67-72), 528 people were initially sentenced to death by the Minya Felonies Court in March 2014 following their prosecution and conviction in a flagrantly unfair mass trial on charges of incitement to violence, vandalism, unlawful gathering, the killing of one police officer and membership of an unlawful organisation, as well as charges relating to the acquisition and possession of weapons. The charges against each accused were not read out in court. The majority of the accused were not present during the trial proceedings. Some of the accused were in detention at the time but were not brought before the court, and 398 accused were tried *in absentia*. During the two-day trial, which included only one substantive hearing, the judge did not check to determine if each defendant had legal representation and there was not sufficient time for defence evidence to be presented or defence witnesses to be heard. After receiving

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203 ICJ, Egypt: Executions and mass death sentences a profound disregard for the right to life, 18 May 2015, available at http://www.icj.org/egypt-executions-and-mass-death-sentences-a-profound-disregard-for-the-right-to-life/

204 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.59. Human Rights Committee, General Comment No. 6 (Article 6), UN Doc. HRI/GEN/1/Rev.1 at 6 (1994), para.7. Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996), para.111. See also, Safeguards guaranteeing protection of the rights of those facing the death penalty, para.5.

205 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.51.

206 Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996), para.111.

the opinion of the Grand Mufti, as required by Egyptian law, the court confirmed the death sentences of 37 individuals, while it commuted the sentences of 491 individuals to life imprisonment. In January 2015 the Court of Cassation ordered a retrial in the case; however, the ICJ has been unable to access the court's judgment.

In the *Adwa Police Station case,* 683 individuals were initially sentenced to death by the Minya Felonies Court in April 2014 following their conviction in a grossly unfair mass trial on various charges, including premeditated intentional killing, destruction of property, unlawful gathering, assaulting public employees, vandalism, acquiring and possessing weapons and belonging to a banned group. As in the *Matai Police Station case*, the court permitted the trial to proceed despite the fact that the majority of the accused were not present. Although some of the accused were detained at the time, they were not brought before the court by the authorities. The hearing took place despite the absence of defence lawyers, who had boycotted the hearing on the basis that the presiding judge could not ensure a fair trial, seeing as he was the same judge who had presided over the unfair trial in the *Matai Police Station case.* The only substantive hearing in the case lasted a few hours, which was not sufficient for the consideration of all the evidence. After receiving the opinion of the Grand Mufti, the felonies court confirmed death sentences of 183 of the accused individuals. In February 2015 the Court of Cassation ordered a retrial. The Court noted that the accused did not all have legal representation during the hearing and overturned the decision on the basis that the court continued with the hearing without appointing lawyers for the accused who did not have counsel and without informing the accused of the requirement that they each be represented by a lawyer.[207]
In another case stemming from an attack on the Kerdasa police station and the killing of 11 policemen in August 2013, (the *Kerdasa Police Station Case)*, the Giza Felonies Court, sitting in the Tora Police Institute, sentenced 188 individuals to death, including 34 who were tried *in absentia,* following their conviction in a mass unfair trial. The court reportedly refused to allow defence witnesses to testify and key prosecution witnesses did not attend some of the hearings and therefore could not be subject to cross-examination. Following receipt of the opinion of the Grand Mufti, in February 2015 the court confirmed the death sentences against 183 of the accused. On 3 February 2016, the Court of Cassation annulled the death sentence in relation to 149 of the accused and ordered a retrial.[208]

Flouting the calls from international and regional human rights bodies, mass trials of individuals in death penalty cases have continued.[209]

On 5 March 2015, the Cairo Felonies Court began hearing the so-called *Ansar Beit Al Maqdis case,* involving 213 accused.[210] The accused are suspected members of the group previously known as Ansar Beit Al Maqdis (which has since reportedly sworn allegiance to the so-called ISIL and changed its name to 'ISIS - Sinai Province') and are charged with various crimes alleged to have been carried out by the group, some of which the group has claimed responsibility for. These crimes are said to have taken place across a four-year period in 15 governorates within Egypt as well as outside Egypt. They include the murder of 50 police officers, the attempted assassination of the interior minister and espionage on behalf of the foreign organization Hamas. Since the accused are not all charged with each crime, it is not clear on what basis these charges have been joined together in one single mass trial.

According to information obtained by the ICJ, the majority of the accused were held incommunicado for between four and six months, during which time they were denied access to counsel. Informa-

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207 Court of Cassation, Criminal Circuit, Judgment No. 27017 of 11 February 2015, p. 28. The Court also struck down the decision of the court to impose the death sentence on an accused who was a minor at the time of the commission of the acts, which the court stated is contrary to Egyptian law.

208 Individuals tried in absentia were not part of the appeal and their sentences remain in place.

209 Joint statement of African and UN human rights experts: Egypt: Justice and reconciliation increasingly failing after second wave of mass death sentences, 15 May 2014, available at: http://www.achpr.org/press/2014/05/d204/ ; and UN OHCHR, Mass imposition of death penalty in Egypt outrageous: Pillay, 29 April 2014, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14543

210 Case No. 423 of 2013. A number of cases have also been pursued in relation to other alleged members of the Ansar Beit Al Maqdis group. The case against the 213 accused is sometimes referred to as Ansar Beit Al Maqdis 2.

tion allegedly extracted through the use of torture and other ill-treatment was reportedly relied on as evidence in court.

As the cases above illustrate, numerous fair trial rights have been compromised in the course of mass trials involving dozens or hundreds of accused. Among other things, not all of the accused in these cases have had access to legal counsel. In addition, a number of accused held in detention have not been brought by the authorities to the court to attend the proceedings against them. Further, equality of arms and rights of defence have frequently been undermined by restricting each accused's ability to present a defence or to call and cross-examine witnesses. In addition, in some of these cases, convictions appear to have been imposed despite the lack of evidence of individual criminal responsibility, in violation of the presumption of innocence and in other cases convictions appear to be based on an assumption of collective guilt due to an alleged "shared intention" or "agreement".[211]

In addition, mass trials in which the accused have been sentenced to death, which have not scrupulously respected the individuals' fair trial and other internationally recognised rights have also violated the accused's right to life.

III. DISCIPLINE AND PROSECUTION OF JUDGES

Since the ouster of President Morsi in July 2013, the independence of the judiciary has been compromised as a result of the pursuit of disciplinary and criminal proceedings against numerous judges who are suspected of opposing the authorities for the peaceful exercise, and in violation, of their rights to freedom of expression, association and assembly.

The disciplinary and criminal proceedings have also frequently been marred by violations of the right to fair procedures.

International standards safeguarding the independence of judges make clear that disciplinary action against judges should be based on established standards of judicial conduct, following fair proceedings before an independent body.[212]

A judge may only be suspended or removed from office for reasons of incapacity or behaviour that renders the individual unfit to discharge judicial duties, following a fair procedure in which his or her rights have been respected, including the right to appeal to independent and impartial judicial body.[213]

In times of crisis the stability and continuity of the judiciary is particularly important. Consequently, judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches.[214] (A more detailed analysis of international standards and the Egyptian law and procedure on the disciplining of judges is set out at Chapter Four.)

As a party to the ICCPR and the African Charter on Human and People's Rights, the authorities in Egypt are obligated to respect and protect the rights of all persons, including judges, to freedom of expression, belief, association and assembly.[215] Indeed, given the role of judges as guarantors of human rights and the rule of law, respect for and protection of these rights for judges is particularly important. As the UN Basic Principles on the Independence of the Judiciary clarify, in exercising these rights, judges must conduct themselves in such a manner as to "preserve the dignity of their office

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211 Minya's Felonies Court, Case No. 300 of 2014, 21 June 2014, p.75.

212 UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle A(4)(q). Council of Europe Committee of Ministers Recommendation (2010)12, para. 69.

213 UN Basic Principles on the Independence of the Judiciary, Principle 18.

214 Legal Commentary to the ICJ Geneva Declaration, 2011, Principle 5.

215 Articles 18, 19, 21 and 22 of the ICCPR; African Charter on Human and Peoples' Rights, Articles 8, 9, 10 and 11. Principle A(4)(s) and (t) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

and the impartiality and independence of the judiciary".[216]

In Egypt, the largest disciplinary case against judges in recent years was initiated in response to a public statement reportedly endorsed by 75 judges and read out on 24 July 2013 by the deputy president of the Court of Cassation, Mahmoud Mahieddine, in Rabaa Square, Cairo, following the ouster of President Morsi (the July Statement).

The July Statement noted the removal of Egypt's elected President, the suspension of the Constitution, the dissolution of the elected parliament, the closure of media outlets without judicial decisions and the thousands of deaths and injuries to individuals. The July Statement also reaffirmed the role of the judges in upholding and protecting "citizens' rights and freedoms" from every infringement and declared that the judges endorsing the statement:

- are not involved in politics and do not support any particular side;
- reject the destruction of the democratic gains since the revolution of 2011 including the election of a President and adoption of a Constitution by fair and transparent popular vote;
- call for the reinstatement of the Constitution;
- call on the State and all political factions and parties to engage in a dialogue within the framework of constitutional legitimacy; and
- call for respect of the right to peaceful demonstration while rejecting violence in all its forms.[217]

On the same day, the Presidents and some members of the "Judges' Club" and the "Committee for the Protection of Judges", two Egyptian judges' associations, filed a complaint with the Public Prosecutor against Judge Mahmoud Mohieddine. The Public Prosecutor referred the complaint to the High Judicial Council (HJC).

A separate complaint was made the following day by Judge Abdel Jawad Moussa, President of the technical chamber of the Court of Cassation, who referred the incident – the reading of the July Statement during the Rabaa sit-in – to the Court of Cassation and the HJC.

On 28 July 2013, the HJC referred the matter to the Minister of Justice to delegate an investigative judge to examine the complaints. In turn, the Minister of Justice requested the President of Cairo's Court of Appeal to select an investigative judge.

On 2 August a travel ban was issued by the investigative judge against thirteen of the judges who had signed the statement.

However, it was not until 8 March 2014 that the investigative judge began his investigation. The judges were not formally informed of the investigation against them and initially learned of the proceedings from the media.

On 13 November 2014, the investigation closed and 56 judges from various courts across Egypt were referred to the Disciplinary Board for "unfitness" proceedings.[218] A total of six hearings were held in

216 UN Basic Principles on the Independence of the Judiciary, Principle 8; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A(4)(s). European Charter on the Statute for Judges, paragraph 1.7; Latimer House Guidelines, Guideline VII.3.

217 The signatories included vice presidents of the Court of Cassation, presidents of the prosecution at the Court of Cassation; presidents, vice-presidents and judges from courts of appeals; and presidents and judges of first instance courts. The statement can be found at: http://gate.ahram.org.eg/News/375922.aspx.

218 "Unfitness" proceedings are provided for at Art. 111 of the JAL and are described in more detail at Chapter Four below.

relation to the 56 judges.[219] On 14 March 2015, the Board found that 31 of the 56 judges were not fit to hold judicial office and in effect removed them from office by forcing them into retirement.[220] The remaining 25 judges were found not to have been involved in any impropriety and were not subject to any discipline.[221]

The ICJ believes that the proceedings against the 56 judges contravened the judges' right to a fair hearing, and that the sanction of forced retirement imposed on 31 of the judges, tantamount to removal, was inconsistent with international standards safeguarding the independence of the judiciary.

In the course of the proceedings against them, the judges' rights of defence were undermined in a variety of ways. In particular, the judges were not given prior notice of the hearings and many of the judges therefore resorted to waiting outside the hearing room every day in case a hearing in the case took place. In addition, the judges were denied adequate time and facilities to prepare the case; for example, despite requests, access to the case file was not provided in advance of the hearings and it was not until the fourth hearing that a copy was provided. During the hearings, pursuant to Egyptian law, the judges were restricted in their choice of counsel; they could only be represented by a judge or former judge, not a lawyer.[222] Although one judge initially began representing the accused judges, he withdrew his counsel after receiving a written warning regarding his conduct. While the purported misconduct was an alleged statement made about a law two years previously without permission from the HJC, the effect of the warning was to prompt the judge to withdraw his counsel and to warn other judges from representing the accused judges. After that, the judges had no legal representation and had to defend themselves before the Disciplinary Board. The right to equality of arms was also undermined seeing as only one of the 56 judges was permitted to make oral submissions and even then, the Board even restricted the permissible scope of such submissions to procedural matters. The other judges were permitted only to make written submissions.

In addition, to violating their rights to a fair hearing and being inconsistent with the respect for the independence of the judiciary, the ICJ also believes that the decision to remove the 31 judges by forcing them into retirement violated their right to freedom of expression and assembly.

In particular, the judgment of the Disciplinary Board criticized the judges for expressing political opinions and becoming involved in politics, contrary to Article 73 of the Judicial Authority Law. The Board considered that this provision prohibited a judge from "discussing or commenting on legislative and governmental decisions as long as it does not pertain to a case that he is looking into as part of his judicial function".[223] The Board found that the appearance of a judge during a demonstration meant that he had a visible opinion, which could undermine his credibility. The judgment of the Disciplinary Board also dismissed arguments based on judges' right to freedom of expression. The Board found that the July Statement discussed the political situation in the country, including the legitimacy of President Morsi "after he was expelled by his people in a large revolution that removed him and his regime". According to the Board, the July Statement had nothing to do with judges and judicial power.[224] The Board concluded that the judges' actions gave the impression that they were against the "revolution of 30 June" and that they supported the Muslim Brotherhood.[225]

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219 The six hearings were held respectively on: 17/11/2014, 27/11/2014, 15/12/2014, 29/12/201, 10/1/2015 and 26/1/2015.

220 Following a finding that a judge is "unfit" for office, the disciplinary board can either require the judge to retire or transfer the judge to perform non-judicial functions.

221 Case no. 1 of judicial year 9, unfitness, Judgment of 14 March 2015.

222 JAL, Art.106. The judges challenged Article 106 on the basis that it amounts to discrimination contrary to the Constitution. This argument was rejected by the Disciplinary Board since it argued that the rules put in place by the JAL are objective, serve the general interest of preserving the judicial function and does not arbitrarily compromise the rights and freedoms guaranteed by the Constitution. (See Case no. 1 of judicial year 9, unfitness, Judgment of 14 March 2015, p. 53-54.)

223 Case no. 1 of judicial year 9, unfitness, Judgment of 14 March 2015, p. 55-56.

224 Case no. 1 of judicial year 9, unfitness, Judgment of 14 March 2015, p. 59.

225 Case no. 1 of judicial year 9, unfitness, Judgment of 14 March 2015, p. 71.

The essence of the Board's findings was that the exercise by the judges of their rights to freedom of expression and the peaceful participation of a judge in a demonstration warrants discipline, indeed amounting to removal.

The Board's decision appears to not have taken into account the fact that the July Statement expressly declared that the judges were not supporting any side and called for the rule of law and human rights to be upheld. Instead, in reaching its decision, the Board itself appears to have made political findings regarding the nature of the ouster of President Morsi by calling it a "revolution".

On 12 April 2015, the judges who had been in effect dismissed as a result of the Board's decision, lodged an appeal before the Supreme Disciplinary Board. The ICJ has also been informed that the Prosecutor appealed the acquittal of the other judges.

Concerns however had been expressed about the fairness of the proceedings before the Supreme Disciplinary Board too. In particular, concern was expressed about the impartiality of the appeal panel, as one of the judges sitting on it signed a complaint against the judges. In addition, the panel has failed to ensure that the judges who have appealed were informed of the dates of the hearings; many were apparently not on more than one occasion. Furthermore, their rights to a defence have been compromised. The accused judges have been unable to find other judges to defend them in these appeal proceedings, due to such judges' fear of reprisals. Furthermore, at a hearing on 14 December 2015, a judge who had been waiting at the courtroom managed to gain access to the hearing and requested permission to make an oral submission. This was refused. Instead the judge was requested to make a written submission at the next hearing, which took place on 22 February 2016. On 28 March 2016 the Supreme Disciplinary Board confirmed the Disciplinary Board's decision against the judges.

Other judges suspected of endorsing the July Statement have also been subject to forms of harassment and disciplinary measures. For example, twelve judges who had been working at the Ministry of Justice were removed from their positions within the Ministry without being provided with any reason for their removal. Some of these judges were thereafter assigned to judicial posts that required them to travel frequently between judicial circuits.

In addition, disciplinary proceedings have been initiated against a group of 15 judges. They are accused of being members of a banned movement called "Judges for Egypt", which had called for the return of ousted President Morsi and is viewed by authorities as pro-Islamist. Some, but not all, judges in this group also signed the July Statement. Many of the judges deny that they are members of "Judges for Egypt".

Among the 15 judges are the former HJC President, Hossam Al Gheriani, former Minister of Justice, Ahmed Mekki, head of the Central Auditing Organization, Hisham Geneina, and former President of Egypt's Judges Club and one of the leading advocates for judicial independence in Egypt, Zakaria Abdelaziz.

The disciplinary proceedings against the 15 judges suspected of belonging to "Judges for Egypt" focused on their alleged involvement in politics, including by participating in an illegal group. Ten of the judges were forcibly retired as a result of the proceedings.[226] In coming to its decision the Disciplinary Board predominantly relied on statements given by the judges to the media or posted on social media, their alleged participation in demonstrations and their alleged participation in the work of "Judges for Egypt".[227] The Board found that "Judges for Egypt" had sided with one party against another and, among other things, supported one presidential candidate against another in the 2012 elections. According to the Board, as members of this group, the judges had involved themselves in politics.[228] The Board concluded that that involvement in politics compromises the eminence of the judiciary, its

226 Case no. 14 of judicial year 8, unfitness, Judgment of 14/5/2014, p. 69-70.

227 Case no. 14 of judicial year 8, unfitness, Judgment of 14/5/2014, p. 48.

228 Case no. 14 of judicial year 8, unfitness, Judgment of 14/5/2014, p. 48.

high stature and dignity.[229] The judges appealed the decision of the Disciplinary Board. The Supreme Disciplinary Board confirmed the Disciplinary Board's decision on 21 March 2016.

In addition to these proceedings against groups of judges, individual judges have also been subject to disciplinary and criminal proceedings. For example, between August 2013 and March 2015, 30 judges were dismissed or transferred to non-judicial functions following disciplinary proceedings (see Annex I for details).

The ICJ believes that, contrary to international standards, the vast majority of judges who have been the subject of complaints of misconduct and disciplinary proceedings since July 2013 have been targeted because they either spoke out in favour of judicial independence or otherwise peacefully exercised their rights to freedom of expression, peaceful assembly and/or association. According to information available to the ICJ, the accusations and findings in these disciplinary cases have not been based on clearly defined standards of judicial conduct – indeed there is no judicial code of conduct in Egypt - and thus, the findings in these cases are inconsistent with international standards aiming to safeguard the judiciary. Furthermore, many of them have been marred by numerous due process violations.

Such unfair proceedings and unjust disciplinary sanctions are likely to drastically undermine 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.

IV. RECOMMENDATIONS

The information highlighted above illustrates a range of ways in which the independence of the judiciary has been compromised since the overthrow of Hosni Mubarak and, in particular, since the army's ouster of President Morsi in July 2013.

Among other things, the decisions and cases highlighted illustrate how Executive authorities are exercising control over the judiciary rather than safeguarding its independence, how prosecutors have initiated and continued prosecutions despite a lack of evidence that the accused has committed a crime, and how judges have convicted individuals and imposed sentences on them - including death sentences - following proceedings that violate rather than comply with fair trial guarantees.

As a result, instead of being seen as independent arbiters of justice, ensuring respect for human rights and the rule of law, members of the Egyptian judiciary are viewed as tools of repression, and the judges who have dared to speak out in defence of the rule of law and respect for human rights, or who are perceived as opponents of the authorities in power, have been subjected to unfair disciplinary proceedings.

The current situation has developed in part due to existing laws and structure relating to the judiciary as well as historic practices that have facilitated the further deterioration of judicial independence in Egypt. (These issues are considered in detail in the subsequent chapters of this report).

In response to the current crisis, urgent measures are required to prevent a complete collapse of the rule of law and to ensure the separation of powers in Egypt.

Such measures must ensure that the judiciary is independent and safeguards rather than violates human rights, including the rights to freedom of expression, assembly and association, to a fair trial and right to life.

To this end, the Egyptian authorities must ensure that:

229 Case no. 14 of judicial year 8, unfitness, Judgment of 14/5/2014, p. 48.

i. **Executive interference in judicial affairs ends, including the unilateral removal of prosecutors and the imposition of restrictions on the jurisdiction of ordinary courts aimed at immunizing Executive decisions from judicial review.**
ii. **The use of military courts to try civilians ends, including by abolishing Presidential Decree No. 136 of 27 October 2014.**
iii. **Executive decisions ordering the transfer of criminal cases from court buildings are stopped and all decisions on restricting the public's access to all or part of a case against adults are made by judges in a fair and transparent procedure on grounds that are consistent with human rights standards binding on Egypt.**
iv. **The convictions and sentences of all civilians tried by military courts and those of individuals convicted following unfair trials in civilian courts are quashed. Those against whom there is reasonable suspicion that they have committed a recognizable criminal offence (under national and international law) should be afforded a retrial within a reasonable time before an independent and impartial civilian tribunal in proceedings that meet international standards of fairness. Any deprivation of liberty of such persons pending such retrial must be judicially ordered and both reasonable and necessary in the circumstances of the particular case, for such purposes as prevention of flight, the protection of the integrity of the investigation or the course of justice, and must be regularly and periodically reviewed.**
v. **Prosecutorial guidelines require prosecutors:**
    a. **To perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights; and**
    b. **Not to initiate or continue prosecutions where an impartial investigation shows the charges are unfounded.**
vi. **A code of judicial conduct and ethics, established by judges, includes obligations on judges to:**
    a. **ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected; and**
    b. **safeguard and uphold human rights.**
vii. **Article 134 of the Criminal Code of Procedure is amended to prohibit all automatic pre-trial detention and ensure that detention of an individual pending trial can only be ordered by a judge in circumstances where:**
    a. **there is reasonable suspicion that the individual has committed an offence that is punishable by imprisonment;**
    b. **a genuine public interest exists which outweighs the right to personal liberty; for example, when there are substantial reasons for believing that, if released, the individual would: abscond; commit a serious offence; interfere with the investigation or the course of justice; or pose a serious threat to public order; and**
    c. **there are no alternative measures that would address these concerns.**
viii. **The Code of Criminal Procedure, including Articles 125, 233 and 374, is amended to ensure that the law enshrines the rights of all persons suspected or accused of an offence to:**
    a. **access to legal counsel as soon as they are deprived of their liberty and on an ongoing and regular basis;**
    b. **adequate time and facilities to consult their lawyer in confidence;**
    c. **the right to have their lawyer present and to assistance of their lawyer, including during all questioning by the authorities;**
    d. **the right to adequate time and facilities to prepare their defence;**
    e. **that those charged with a criminal offence or their lawyers are given access to documents and other evidence in sufficient time, including all materials the prosecutor intends to rely on and exculpatory evidence; and**
    f. **sufficient notice for the accused and their legal counsel of the dates, time and location of court hearings.**
ix. **The practice of holding detainees incommunicado is ended.**
x. **Law No.107 of 2013, the Demonstration Law, is annulled.**
xi. **Judges refer challenges to laws on constitutional grounds to the Supreme Con-**

stitutional Court and do not apply laws that are in conflict with the Constitution or with international human rights treaties to which Egypt is party.

xii. The Code of Criminal Procedure clearly enshrines the right of the accused to be present during criminal proceedings and assisted by defence counsel of his or her choosing or in cases where the interest of justice requires, appropriately qualified and experienced appointed counsel, free of charge where the individual does not have sufficient means to pay.

xiii. The use of soundproof cages to hold the accused in criminal proceedings is ended.

xiv. Accused persons have the right and ability to communicate in confidence with their counsel throughout the proceedings and – in the absence of exceptional circumstances permissible under international human rights law – the ability to see, hear and participate fully in the proceedings against them;

xv. The Lawyer's Profession Law, Law No.17 of 1983 is amended to with a view to ensuring that:

- **a. lawyers may not be arrested, detained, prosecuted or subjected to any administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics;**
- **b. lawyers are not associated with their clients or their clients' causes as a result of discharging their functions; and**
- **c. lawyers enjoy civil and criminal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court.**

xvi. The harassment and intimidation of lawyers, including verbal and physical assault, arrest and detention, for exercising their professional duties is ended and that any such harassment or intimidation is subject to prompt, effective, thorough and impartial investigation and those responsible are brought to justice in fair proceedings.

xvii. All criminal proceedings pursued against lawyers for the exercise of their professional duties in accordance with internationally accepted professional standards and for statements made in good faith in written or oral pleadings are dropped.

xviii. The Code of Criminal Procedure is reformed to fully enshrine the principle of equality of arms and to ensure this principle is recognized and enforced by judges, including:

- **a. the opportunity to refute and contest all arguments and evidence adduced by the opposing party;**
- **b. for the prosecution and defence to be allowed an equal opportunity to present relevant evidence and arguments; and**
- **c. for the accused to examine, or have examined, any witnesses against them and the right to have witnesses appear and testify on their behalf under the same conditions as the witnesses who are testifying against him or her.**

xix. Article 268 of the Code of Criminal Procedure is reformed to ensure that any restrictions on holding all or part of the proceedings in public are ordered by a judge, are exceptional, are assessed on a case-by-case basis and are either:

- **a. strictly necessary to protect the interests of justice;**
- **b. in the interests of the private lives of the parties; or**
- **c. strictly necessary for reasons of public order, morals or national security in an open and democratic society.**

xx. The Criminal Code of Procedure is amended to fully enshrine the presumption of innocence and individual criminal responsibility in law such that any individual is presumed innocent and treated as such until his or her individual guilt for the crime(s) he or she is charged with are proven beyond reasonable doubt through admissible evidence in the course of fair proceedings.

xxi. The Criminal Code of Procedure is amended to ensure that in all criminal trials, judges are required to issue a public, reasoned judgment, including the essential findings, evidence and legal reasoning on which the court based its judgment.

xxii. Egyptian law is amended to abolish the use of the death penalty.

xxiii. Until the death penalty is abolished, the death penalty should be limited to crimes

involving intentional killing only, and an immediate moratorium on all executions is imposed.

xxiv. Disciplinary proceedings initiated against judges for the legitimate exercise of their right to freedom of expression, association and assembly should be dropped and sanctions imposed pursuant to such proceedings and to proceedings that failed to ensure judges' right to a fair hearing should be quashed.

CHAPTER TWO : OVERVIEW OF THE COURTS

Chapter three of the 2014 Constitution concerns the judiciary in Egypt. As noted previously, Article 94 states that "[t]he state is subject to the law, while the independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms" and Article 186 provides that the conditions and procedures for appointment, secondment, retirement and disciplinary accountability shall be governed by laws which ensure "the independence and impartiality of the judiciary and judges and shall prevent conflicts of interest".[230] The Constitution also provides that each judicial body "shall have an independent budget," and shall be "consulted on the draft laws governing their affairs".[231] Despite these protections, as detailed in Chapters Three to Seven below, the ICJ is concerned that the independence and impartiality of the judiciary is undermined by other legislation and through practice.

The Egyptian judiciary consists of judges sitting in ordinary, administrative, military, and emergency state security courts.[232] This chapter provides a brief overview of the Egyptian courts, including the different types of courts and how they are structured.

I. ORDINARY COURTS

Ordinary courts are divided into criminal and civil courts.

Each court has a General Assembly composed of all judges of that court.[233] The Office of the Public Prosecutor is also invited to attend meetings of the General Assembly and the opinion of the OPP is considered on issues that are related to prosecutorial work.[234] A court's General Assembly is tasked with, among other things: organizing and establishing the court's circuits and the composition of the circuits; distributing cases to the various circuits; determining the number, days and timings of hearings; and assigning judges of courts of appeal to work in felonies courts and judges of first instance courts to summary courts.[235]

Courts of first instance are located within each of the 27 governorates in Egypt and hear all civil and commercial cases and preside over criminal cases involving minor offences, "misdemeanours".

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230 2014 Constitution, Arts. 94, 184 & 186.

231 2014 Constitution, Art. 185.

232 Under Article 189 of the 2014 Constitution and Egyptian law prosecutors are considered to be an "integral part of the judiciary". In this report however, the term "judges" does not include prosecutors.

233 Law No. 46 of 1972, Judicial Authority Law (JAL), Art.31. The OPP is also invited to attend meetings of the General Assembly and its opinion is taken into consideration in all matters related to the OPP.

234 JAL, Art.31.

235 JAL, Art.30.

Eight appellate courts located throughout Egypt hear appeals from the courts of first instance, and serve as the court of first instance in relation to serious crimes known as "felonies".

The Court of Cassation is the high instance appellate court for all criminal, civil and commercial matters. The Court of Cassation is composed of a President and a "sufficient number" of judges, known as "Deputies" (vice presidents) and "Counsellors".[236] Separate sections of the Court address criminal, civil, commercial, personal status, and other matters. The Deputies of the Court of Cassation are appointed with the consent of the High Judicial Council, after nomination by the Court's General Assembly.[237]
The Supreme Constitutional Court (SCC) has jurisdiction, among other things, over questions about the constitutionality of laws and regulations and the interpretation of legislation.[238] The SCC is discussed in detail in Chapter Five.

II. ADMINISTRATIVE COURTS

The State Council ("Majlis il Dawla") is a quasi-judicial body. First established in 1946, it gives legal advice to the government, reviews draft contracts to which the State or a public authority is party, reviews and drafts draft laws and has jurisdiction over administrative cases, including disciplinary cases involving public officials.[239]

In the judicial section of the State Council, lower administrative courts hear cases in the first instance. The Administrative Judicial Court hears appeals from these courts. At the top of the judicial section is the Supreme Administrative Court, which hears appeals from the Administrative Judicial Court.[240] Administrative courts hear cases in which a state organ is a party.

The Supreme Administrative Court has played a pivotal role in shaping events since the 2011 uprising.

Shortly after President Mubarak stepped down from power, the Supreme Administrative Court issued a verdict dissolving the political party he chaired, the National Democratic Party (NDP).[241]

In April 2012, the Supreme Administrative Court dissolved the first Constituent Assembly. This was followed by a ruling in June 2012 nullifying a decision of the Ministry of Justice that would have allowed military police to arrest civilians.[242]

III. MILITARY AND EMERGENCY COURTS

Military and emergency courts exist in parallel to the ordinary court system.

They have been used by successive governments to try civilians in proceedings that afford less respect for the minimum guarantees of fair trial than afforded in the ordinary courts.

Since military courts are not part of the ordinary court system of Egypt, the rulings of military courts are not subject to review by the Court of Cassation. Additionally, because there is no right of appeal against any decision of any emergency court, there is also no review by the Court of Cassation for

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236 JAL, Art. 3.

237 JAL, Art. 44.

238 2014 Constitution, Art. 192.

239 2014 Constitution, Art. 190; Law No. 47 of 1972, Art. 2.

240 Law No. 47 of 1972, Art. 3.

241 *Egypt: Administrative Court- Dissolved NDP will not be reinstated*, in All Africa, 24 February 2013, available at http://allafrica.com/stories/201302240244.html.

242 *Egypt Supreme Court blocks arrest powers for military, hailed by experts*, in Ahram Online, 26 June 2012, available at http://english.ahram.org.eg/NewsContent/1/64/46250/Egypt/Politics-/Egypt-Supreme-Court-blocks-arrest-powers-for-milit.aspx.

cases heard in emergency courts.

During a state of emergency, emergency courts have jurisdiction over cases transferred to them by the President. The types of cases that can be transferred to such courts has varied over the years, to include, amongst others, offenses under the emergency law and those against the internal and external security of the State.

Military and emergency courts are discussed in detail in Chapter Seven.

CHAPTER THREE : HIGH JUDICIAL COUNCIL

I. CURRENT STATUS

The High Judicial Council (HJC), established by Law No. 35 of 1984, is designated both by this law, and the Constitution as the body overseeing the judiciary.[243]

However, since its establishment in 1984, its independence has been limited by the Executive branch's control over its composition and appropriation of its functions.

Although the 2014 Constitution has reduced the control of the Executive over the composition of the HJC, the independence of the functions of the HJC continue to be undermined by the broad powers granted to the Minister of Justice in relation to the judiciary and the careers of judges. In particular, while the HJC "approves" almost all decisions with regard to the management of judicial work and careers, many of the initial decisions relating to the appointment, transfer, promotion and disciplining of judges are taken by the Minister of Justice.

By law, the HJC has the following composition :

- the Chief Justice of the Court of Cassation (President);
- the Prosecutor-General; the two most senior vice-presidents of the Court of Cassation; and
- the two most senior presidents of the other appellate courts.[244]

The 2014 Constitution did not alter the composition of the HJC. However, it did alter the powers of the President over the appointment of the Chief Justice of the Court of Cassation and the Prosecutor-General, which in turn should ultimately bolster the independence of the members of the HJC.

Under the 1971 Constitution and Law No. 46 of 1972, the Judicial Authority Law (JAL) before being amended, the President of the Republic was given the power to appoint both the Chief Justice of the Court of Cassation and the Prosecutor-General.[245] The HJC could offer its opinion on these appointments, but had no power to reject them.[246]

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243 2014 Constitution, Art. 188. Law No.35 of 1984 established the High Judicial Council through a series of amendments to the Judicial Authority Law, Law No.46 of 1972.

244 JAL, Art. 77(bis)(1).

245 JAL, Arts. 44(2) & 119.

246 JAL, Art. 44.

The 2014 Constitution now provides for the Prosecutor-General to be chosen by the HJC and appointed by the President.[247] Although the Chief Justice of the Court of Cassation continues to be appointed by the President, the ICJ was informed that the candidate is appointed solely based on seniority from among the vice-presidents of the Court.

The 2014 Constitution contains limited reference to the functions of the HJC. Article 188 states that the "affairs of the judiciary are managed by a higher council whose structure and mandate are organized by law".[248] Duties of the HJC stipulated in the 2014 Constitution include the selection of the Prosecutor-General, and, along with other judicial bodies, the election of members to the National Elections Commission.[249]

Other functions of the HJC are set out in the JAL. The HJC has a role, although sometimes a limited one, in matters relating to the appointment, assignment, secondment and discipline of judges and members of the Office of the Public Prosecutor (OPP).

In relation to appointments, the HJC conducts interviews with prospective candidates prior to their appointment to the bench. In addition, other than the Chief Justice and Vice-Presidents of the Court of Cassation, the HJC must approve 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. [250] Following HJC approval, the candidate is formally appointed.

Regarding, promotions and assignments, the HJC is responsible for preparing the rules used by the Judicial Inspection Department, a body that is part of the Ministry of Justice and composed of judges selected by the Minister of Justice, in preparing the roster of judges eligible for promotion and assignment.[251] The HJC must also formally approve the assignment and secondment of judges.

The HJC's role is limited regarding the disciplining of judges. Specifically, the HJC is responsible for investigating and deciding whether the President or General Assembly of a court was justified in issuing a written warning to a judge of that court.[252] For more serious allegations of judicial misconduct, the HJC's role is limited to authorizing the commencement of the investigation.

The JAL also contains a general requirement that the HJC be consulted on draft laws concerning the judiciary and the Office of the Public Prosecutor. However, the JAL does not state at what stage of the legislative drafting process and by whom the opinion of the HJC must be considered.[253]

In contrast to the somewhat limited role played by the HJC, the Minister of Justice plays a significant role in the administration of the court system and the careers of judges. The courts are subject to the administrative supervision of the Minister of Justice.[254] The Minister of Justice makes decisions, which are subject to the consent of the HJC, about assigning judges to particular courts or transferring them to non-judicial work. Thus, the Minister of Justice, with the approval of the HJC, may assign appellate judges to be presidents of first instance courts, assign appellate judges to the Court of Cassation for short-term periods, transfer judges between courts, or assign judges to serve within the Office of

247 2014 Constitution, Art. 189.

248 2014 Constitution, Art. 188.

249 2014 Constitution, Arts. 189 & 209.

250 JAL, Art. 44; see also International Bar Association Human Rights Institute (IBAHRI), *Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt*, February 2014, p. 22, Arab Center for the Development of the Rule of Law and Integrity (ACRLI) *Report on the State of the Judiciary in Egypt*, 2007, p. 52. As detailed in Chapter Four below, judges of the Court of Cassation are chosen by the President of the Republic, Presidents of first instance courts are assigned by the Minister of Justice, and all other judges are selected by the chief judge of the relevant court.

251 JAL, Art. 77(bis)(4).

252 JAL, Art. 94. The procedure is set out in more detail at Chapter Three below.

253 JAL, Art. 77(2)bis.

254 JAL, Art. 93.

the Public Prosecutor or to other administrative posts within the Ministry of Justice.[255] It is also the Minister of Justice who, with the consent of the HJC, arranges the system and conditions under which judges and prosecutors receive health care and social welfare.[256]

A list of powers of the Minister of Justice under the JAL is set out in the table below.

Table 1: Powers of the Minister of Justice under the JAL

Article of the JAL	Power granted to the Minister of Justice
Article 9	Assignment of judges of the Courts of Appeal to preside over a Court of First Instance for up to one year, renewable, subject to the approval of the HJC.
Article 36	Requiring the General Assemblies of first instance courts to reconsider any of their decisions and discretion to refer the matter to the HJC for a decision.[40] General Assembly decisions relate to the organization and administration of courts, including the assignment of cases, designation of hearing dates and times and the assignment of judges to a case.[41]
Article 44	Nomination of one of two judges as candidates for the Cassation Court (The General Assembly makes the other nomination), the President of the Republic appoints and choice is approved by the HJC.
Article 45	Assignment of judges to administrative positions at the Ministry of Justice for a period of up to one year, renewable, subject to the approval of the HJC.
Article 46	Nomination of the assistant to the Minister in charge of judicial inspections and the directors and members of the Judicial Inspection Department, subject to the approval of the HJC.
Article 55	Assignment of a judge of the Court of Appeal to the Court of Cassation for a period of six months, renewable once, following consultation with the General Assemblies of the concerned Court of Appeal and the Court of Cassation and, subject to the approval of the HJC.
Article 55	Assignment of a judge of the Court of Appeal to another Court of Appeal for a period of six months, renewable once, after consultation with the General Assembly of the Court of Appeal from which the judge is assigned and subject to the approval of the HJC.
Article 57	Assignment of a judge of the Court of Appeal to work in the prosecution service for a period of up to six months, renewable once, after consultation with the General Assembly of the Court of Appeal from which the judge is assigned and subject to the approval of the HJC.
Article 58	Assignment of the presidents and judges of a Court of First Instance to another Court of First Instance for a period of six months, renewable once, after the approval of the HJC.
Article 62	Assignment of judges to carry out additional judicial and legal functions, on top of their existing workload, after consulting with the General Assembly of the court to which the judge belongs and the approval of the HJC.
Article 78	Elaboration of the rules of judicial inspection, subject to the approval of the HJC.

255 See generally JAL, Arts. 45 & 55-58.

256 JAL, Art. 92.

Article 91	Requesting the President of the Republic to force a judge into retirement in cases of physical incapacity as a result of which the judge has exceeded the days of sick leave provided for by the law, subject to the approval of the HJC.
Article 97	Requesting the Disciplinary Board to suspend a judge from carrying out his functions during the investigation and trial of an alleged crime.
Article 99	Requesting the Prosecutor-General to initiate disciplinary proceedings against judges.
Article 99	Assignment of one of the vice-presidents of the Court of Cassation, the vice-president of a Court of Appeal or the head of the relevant court to conduct an administrative or criminal investigation relating to alleged professional and/or criminal misconduct of a judge of the Court of Cassation or the Courts of Appeal.
Article 111	Requesting the Disciplinary Board to decide whether to require "unfit judges" to retire or to assign them to non-judicial functions, in cases other than physical incapacity.
Article 122	Delegating judges and prosecutors as the director and senior members of the Judicial Inspection Department, issuing the Statute of the Judicial Inspection Department and determining its competences, upon the suggestion of the Prosecutor-General and subject to the approval of the HJC.
Article 125	Control and administrative supervision of the Office of the Public Prosecutor and its members.
Article 129	Requesting the Prosecutor-General to initiate disciplinary proceedings against prosecutors.

Other laws also give the Minister of Justice wide powers to interfere in and to influence judicial matters. For example, Article 65 of the Code of Criminal Procedure empowers the Minster of Justice to request the General Assembly of the court of appeal to assign an investigative judge to a particular case or to specific types of crime.

Article 185 of the 2014 Constitution states that each "judicial body or organization" has an "independent budget, whose items are discussed by the House of Representatives" .[257] Once approved, each budget is incorporated in the state budget as a single figure.[258] Under the JAL, the HJC is responsible for preparing the budget of the judiciary with the Ministry of Finance, and distributing funds in coordination with the Ministry of Justice.[259]

II. ASSESSMENT IN LIGHT OF INTERNATIONAL STANDARDS

The Human Rights Committee has clarified that the duty of states to guarantee and respect the right to trial before an independent impartial court under Article 14 of the ICCPR imposes on States the obligation to "take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them".[260] Thus, the requirement imposed by the ICCPR on the authorities to respect and protect judicial independence, extends to all aspects of the management of the careers of judges and the judiciary.

An essential requisite of an independent and impartial judiciary is respect for the principle of separa-

257 The House of Representatives is Egypt's legislative power established pursuant to the 2014 Constitution, which replaced the previous bicameral parliamentary system.

258 2014 Constitution, Art. 185.

259 JAL, Art. 77(bis)(5).

260 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.19.

tion of powers, meaning that the executive, legislative and judicial branches are separate and independent from each other.[261]

Judicial councils, if they are truly independent and have been granted the necessary authority over the careers of judges, can play a key role in reinforcing the separation of powers and safeguarding the institutional independence of the judiciary and the independence of individual judges.

Thus, the Human Rights Committee has recommended the establishment of "an independent body charged with the responsibility of appointing, promoting and disciplining judges at all levels", and has raised concerns about the involvement of the Executive in the selection, promotion and disciplining or termination of judges.[262] Similarly, the UN Special Rapporteur on the independence of judges and lawyers and the Guidelines and Principles on the Right to a Fair Trial and to Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights also call for an independent body for the selection of judges. The European Charter on the Statute for Judges also recommends "the intervention of an authority independent of the executive and legislative powers" in respect of "every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge".[263]

The establishment of Judicial Councils to oversee the careers of judges are common in civil law countries. Typically they are "independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system".[264]

The composition, organization and functions of judicial councils must be consistent with the separation of powers and safeguarding the independence of the judiciary. This means that, where judicial councils are involved in such matters as setting the qualifications, selection, training, discipline, and tenure of judges, they must be constituted so as to ensure that the State fulfils its obligation to respect and preserve the independence of the judiciary.

Thus, international standards and human rights bodies and mechanisms have clarified that judicial councils should be bodies that are independent of the executive and legislative powers and a significant proportion of their membership should be judges who are chosen by their peers. The Committee of Ministers of the Council of Europe has stated that "at least half" of the members should be judges.[265]

The rationale behind this, as noted by the Special Rapporteur on the independence of judges and lawyers, is that "if the body is composed primarily of political representatives there is always a risk that these 'independent bodies' might become merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly".[266]

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261 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 18 ("It is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency"); Report of the Special Rapporteur on the situation of human rights in Nigeria, UN Doc. E/CN.4/1997/62/add.1, para. 71 (noting that "the separation of powers and executive respect for such separation is a sine qua non for an independent and impartial judiciary to function effectively"); Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/1995/39, para. 55. Judgment of 31 January 2001, Inter-American Court of Human Rights, Constitutional Court Case (*Aguirre Roca, Rey Terry and Revoredo Marsano v. Peru*), para. 73.

262 Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 17. See also Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, para. 16.

263 European Charter on the Statute for Judges, adopted by the participants at a multilateral meeting of the Council of Europe, Strasbourg, 8-10 July 1998, DAJ/DOC (98) 23, para. 1.3.

264 Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: independence, efficiency and responsibilities, para. 26.

265 Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: independence, efficiency and responsibilities, para. 27.

266 Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41,

Similarly, the Explanatory Memorandum to the European Charter on the Statute for Judges states that in order to avoid the "risk of party-political bias," the judges who are "members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the Executive or the Legislature".[267]

In Egypt, the composition of the High Judicial Council is determined by law. According to the law, it is composed of various judges and the Prosecutor-General. The direct influence of the Executive in the composition of the HJC has been reduced. Only the Chief-Justice of the Court of Cassation is selected by the President of the Republic now that the 2014 Constitution removes the President's power to select the Prosecutor-General. However, international standards recommend that at least half the members of a judicial council be chosen by their peers; some of them recommend that a majority of the members be elected.[268] At present, none of the judges on the HJC are elected by their fellow judges; instead, the composition is determined by law on the basis of the position and seniority of the individuals within the judiciary. This means that the HJC is not a truly representative body.

The review of the competences of the HJC and Minister of Justice set out above also indicates that the HJC has no autonomous decision-making capacity concerning important aspects of judicial careers, including appointments of some judges, assignment and transfer decisions and the disciplining of judges.

Rather, the HJC's ability to act independently of the Minister of Justice is severely limited. In decisions relating to the assignment of judges to specific courts or to the Ministry of Justice and the assignment of judges to carry out additional judicial or legal functions, it is the Minister of Justice that makes the decision while the HJC is restricted to approving the Minister's decision. In other areas, the Minister of Justice has exclusive competence. For example, it is the Minister of Justice who: determines the membership of the Judicial Inspection Department; can request the Prosecutor-General to initiate disciplinary proceedings against judges; and is responsible for supervising the implementation of disciplinary sanctions taken against judges, without the need for approval from the HJC.

Limits to the effectiveness of HJC's role and ability to safeguard the independence of the judiciary were demonstrated when the Morsi government took measures to amend the JAL so as to lower the age of mandatory retirement of judges. If the law had been passed, thousands of older judges would have been required to retire from the bench. The HJC opposed this proposal, but its opinion on this and other draft laws regarding the judiciary are not binding, and have been ignored by the Executive. In the end, while the proposal failed to be passed by the Legislature prior to Morsi's ouster, it served as a reminder that the Executive and Legislature retain the power to disregard the views of the HJC on draft laws relating to safeguards of the independence of the judiciary.

In order to meet its obligations to respect and safeguard the independence of the judiciary in Egypt, the authorities in Egypt must, among other things make the HJC into a more independent and autonomous body. This can be accomplished by amending the JAL, such that the powers of the Minister of Justice with regard to the appointment, disciplining, retirement, and secondment of judges are revoked.[269]

III. RECOMMENDATIONS

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para. 28.

267 Explanatory Memorandum to the European Charter on the Statute for Judges, Principle 1.3.

268 See, e.g., the European Charter on the Statute for Judges, Principle 1.3 ("at least one half of those who sit are judges elected by their peers"). The International Association of Judges, a professional association, also recommends "a majority of judges" elected by their peers. See IAJ 1st SC Conclusion 2003: The role and function of the high council of justice or analogous bodies in the organisation and management of the national judicial system. Para. 26(b) of the Singhvi Declaration provides that proceedings for judicial removal or discipline "shall be held before a Court or a Board predominantly composed of members of the judiciary."

269 JAL, Arts. 9, 99, 111 and 55-62.

The ICJ considers that in order to enhance the independence of the judiciary in Egypt, the law should be amended in a manner that increases the independence and autonomy of the HJC to regulate the career of judges.

To this end, the ICJ recommends that the JAL and other laws governing the HJC should be amended to ensure that:

i. **The independence of the HJC is guaranteed in law.**
ii. **The composition of the HJC is such that at least half the members are judges who are elected by their peers.**
iii. **The powers of the Minister of Justice with regard to the management of the careers of judges, including selection, appointment, assignment, secondment and discipline, are transferred to the HJC.**
iv. **The Judicial Inspection Department is considered an element of, and is supervised by, the HJC instead of the Ministry of Justice.**
v. **The HJC has sufficient staff and resources to carry out its duties with regard to the selection and appointment of judges and the management of their careers, including the disciplining of judges.**
vi. **The HJC is responsible for initiating and conducting any disciplinary proceedings against judges.**

CHAPTER FOUR : JUDICIAL AUTHORITY LAW

I. CURRENT STATUS

Much of the detail related to the appointment, careers and discipline of judges is set out in the law rather than the Constitution. The Judicial Authority Law (JAL), which was adopted in 1972, last amended in 2008, is the primary law that governs the appointment and careers of the judges who serve on the ordinary courts.[270]

As described in Chapter Three, this law gives the executive branch, specifically the Minister of Justice, significant power with regard to decisions concerning the management of the judiciary. (A list of powers granted to the Minister of Justice under the JAL is set out in **Table 1** above.)

i. Appointment and promotion

- Eligibility requirements for judges are established in Articles 38-43 of the JAL. The requirements for candidates for judicial office include:
- Egyptian citizenship with full civil capacity;
- minimum age requirements (these differ depending on the position);
- being a recipient of a law degree from an Egyptian university or an equivalent foreign degree and an equivalency exam;
- the absence of a criminal or disciplinary record; and
- good conduct and reputation.[271]

Although judges of first-instance courts may be appointed from a variety of institutions and positions, including faculties of law and the State Council,[272] the ICJ was informed that in practice, service in the Office of the Public Prosecutor is the primary avenue for initial appointment to the bench.[273]

The President of Egypt formally appoints most judges of ordinary courts. In addition, the President or

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270 Law No.192 of 2008, amending Law No.46 of 1972, the Judicial Authority Law.

271 JAL, Art. 38.

272 JAL, Art. 39.

273 JAL, Arts. 39 and 49. Official statistics are not available. However, numerous judges and lawyers have confirmed the practice. See also, International Bar Association Human Rights Institute ("IBAHRI"), *Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt*, February 2014, p. 23.

other members of the Executive have additional roles in the selection of some higher level judges.[274]

Procedures for appointment to the bench in ordinary courts vary depending on the level of the court. In accordance with the JAL:

- The President of the Republic appoints the Chief Justice of the Court of Cassation, who is also the head of the HJC, from among the vice-presidents of the Court.[275]
- Vice-Presidents of the Court of Cassation are nominated by the General Assembly of the Court of Cassation. The President of the Republic decides which nominee to appoint and formally appoints those he chooses.[276]
- For all other judges of the Court of Cassation, the Minister of Justice and the General Assembly of the Court of Cassation each nominate a candidate. The President of the Republic chooses one judge from among the nominees and formally appoints the judge he chooses, on the approval of the HJC.[277]
- Presidents of First Instance Courts are assigned to their post by the Minister of Justice from among the judges of the appellate courts, with the approval of the HJC.[278]
- Other judges, (Presidents, Vice-Presidents, and Judges of the Court of Appeals and Judges of First-Instance Courts) are selected by the chief judge of the court from a list of candidates established by the most senior judges of the court. The HJC approves the choice and the President formally appoints the judge.[279]

The law does not set out any further criteria or procedures for nomination or appointing individuals to the judiciary.

The procedure for the promotion of judges to a higher position within a court is opaque. According to the JAL, the judge's technical inspection record, issued by the Judicial Inspection Department, is taken into account by a designated "committee".[280] This committee was formerly established by a body known as the Supreme Council for Judicial Bodies (SCJB).[281] The committee of the SCJB was tasked with examining inspection reports of judges who receive above average grades.[282] However, the law which established the functions and composition of the "committee" was annulled in 2008 and the 2014 Constitution does not refer to the SCJB.[283] As of July 2016, the JAL, which has not been amended since 2008, continues to refer to the "committee" and the SCJB. The JAL contains no further criteria for or detailed procedure regarding how decisions about judicial promotions are made.

The ICJ has been informed that, in practice, judges are promoted automatically based solely on seniority.

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274 JAL, Art.44(1).

275 JAL, Art. 44(2).

276 JAL, Art. 44(3).

277 JAL, Art. 44(4).

278 JAL, Art. 9.

279 JAL, Art. 44.

280 JAL Art. 81.

281 Pursuant to Article 6 of Law No.82 of 1969, this committee studies appointments, promotions, transfers and grievances before presenting the issues to the SCJB.

282 JAL, Art. 81.

283 Law No.192 of 2008 annulled Law No.82 of 1969.

ii. Women in the judiciary

Although women have attained law degrees, have practiced law and have also worked as law professors for decades in Egypt, very few women have been appointed as judges.

The significant under-representation of women on the bench is a result of discrimination entrenched in attitudes of men, including some members of the judiciary, despite there being no explicit prohibition in the 1971 Constitution or the laws governing the judiciary.[284]

For years, women in Egypt were not appointed as judges because of a widespread and deeply-held discriminatory view that working as a judge in court was an inappropriate profession for women. Male judges repeatedly expressed this view in court judgments. For example, in 1952 the Administrative Court held that women could not be appointed to certain positions or professions, including the State Council (the body that encompasses all administrative courts) and the judiciary, due to the status, environment and requirements of these positions and as a result of the traditions and practices of Egyptian society.[285] A similar court decision was issued in 1978.[286] Both of these judgments were issued by the Administrative Court in cases brought by women following refusals to appoint women to the State Council.

Following a fatwa from the Sheikh of Al Azhar and other authorities decreeing that "there is no express provision from the Quran or from the Sunna that prohibits women from assuming judicial posts," former President Mubarak appointed a woman to the Supreme Constitutional Court in 2003.[287] Tahani Al Gabali was the only female judge until 2007, when an additional 31 women were appointed to the ordinary judiciary.[288] The majority of these women were appointed from positions within the Administrative Prosecution Service. Interviews with female judges and lawyers in Cairo in 2012 indicated that a total of 42 female judges had been appointed across criminal, civil, family and commercial courts.[289]

Despite these improvements, considerable opposition to the appointment of women remains within the judiciary itself. In 2010, the State Council's General Assembly overwhelmingly voted against the appointment of female judges to that body.[290] Following the vote of the State Council, the then Minister of Justice submitted a request for an Advisory Opinion to the Supreme Constitutional Court on the appointment criteria for the State Council. The SCC ruled that the criteria were clear and could not be interpreted by the State Council to exclude women.[291] Despite the SCC ruling, the ICJ has been informed by a number of Egyptian practitioners that no women have been appointed as judges in administrative courts.

In a September 2012 meeting with the ICJ, the Secretary-General of the State Council defended this

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284 See 1971 Constitution; JAL, Art. 38; and Law No. 47 of 1972, Art. 73(1) (listing criteria for appointment as a judge and not mentioning gender as a ground of qualification).

285 Egyptian State information service Egyptian women and the Judiciary (Arabic only), http://www.sis.gov.eg/ar/Story.aspx?sid=66638

286 Egyptian State information service Egyptian women and the Judiciary (Arabic only), http://www.sis.gov.eg/ar/Story.aspx?sid=66638

287 "*Egyptian Women and the Judiciary*" (Arabic), Egypt State Information Service, available at http://www.sis.gov.eg/ar/Story.aspx?sid=66638

288 "*Egyptian Women and the Judiciary*" (Arabic), Egypt State Information Service, available at http://www.sis.gov.eg/ar/Story.aspx?sid=66638

289 ICJ interviews with women judges and lawyers on 4 September 2012. The ICJ was not able to obtain official statistics of the total number of judges in Egypt. The total population in Egypt is estimated by the United Nations Development Programme to be 90.2 million.

290 Of a total of 380 judges, 334 voted against the appointment of women, while 42 judges voted in favour and 4 abstained.

291 SCC Advisory Opinion relating to request No.1 for Judicial Year 32, decision of 15 March 2010. See also International Bar Association Human Rights Institute ("IBAHRI"), *Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt*, February 2014, p. 30.

position as one that is appropriately cautious, saying that "[t]he experiment of having women as judges started only around seven years ago. We have to see how it works out and are now testing the experiment. If it works well, then it can trickle down to others, including the State Council." Similarly, a Vice-President of the State Council stated: "We are monitoring and evaluating the experience and waiting. There is no objection on a legal basis."

Other senior judges were even less open to the idea of appointing more women to the judiciary. For example, a judge at the Cairo Criminal Court shared his view with the ICJ stating that women should not work as judges as it would be inappropriate for women to be involved in criminal investigations.

Despite this opposition, the 2014 Constitution requires the State to guarantee women's right to appointment in judicial bodies without discrimination.[292]
In June 2015, 26 additional women were appointed from the Administrative Prosecution and from the Department of State Affairs as judges in ordinary courts.[293]

iii. Security of tenure and transfer

Article 186 of the 2014 Constitution provides that judges are irremovable and that the law regulates their retirement and discipline in a manner that maintains their independence and impartiality. The JAL affirms that members of the judiciary and the OPP have security of tenure until they reach 70, the age of mandatory retirement.[294] Notwithstanding these provisions, Judges may, however, be removed from office or be forcibly retired as the result of disciplinary or "unfitness" proceedings; they may also choose to resign.[295]

While Morsi was President, a proposal was made by the Freedom and Justice Party, Al Wasat Party and the Construction and Progress Party to lower the mandatory retirement age of members of the judiciary, including both judges and prosecutors, from 70 to 60. This change would have affected thousands of judges and prosecutors across Egypt, forcing them into retirement.[296] The proposal was strongly criticized by members of the judiciary as reminiscent of the "massacre of judges" by President Nasser in 1969, in which hundreds of judges were fired or transferred to non-judicial jobs. Supporters of the proposal, however, claimed that lowering the retirement age would force out Mubarak-era appointees. Although the proposal was strongly opposed by most judges and the HJC, which is mandated by law to comment on draft legislation related to the judiciary, the Executive placed the draft law for debate before the Shura Council (the upper house of parliament). In May 2013, the Shura Council provisionally approved the draft law. Ultimately, the legislature failed to pass the draft law before Morsi's ouster, but the incident nonetheless highlights the continuing risk for such type of interference with judicial tenure by the Executive and Legislature.

Under the JAL, judges may only be transferred, temporarily assigned or seconded as provided for by law.[297] The JAL grants the Minister of Justice authority to assign judges to other judicial posts, as follows:

- The presidents or judges of courts of first instances may be assigned to other courts for a period of 6 months, renewable once, with the consent of the

292 2014 Constitution, Art. 11.

293 Decision No.235 of 2015 of the President of the Republic, issued on 26 May 2015, published in the Official Gazette No.25 of 18 June 2015.

294 JAL, Arts. 67 & 69.

295 JAL, Art. 110 (forced retirement) & Art. 70 (resignation).

296 Ursula Lindsey, *The Law Against the Judges*, in The New York Times, 16 May 2013 (noting that the law "would send some 3,000 senior judges packing"); Nathan J. Brown, *The Battle over Egypt's Judiciary* in Sada, 8 May 2013.

297 JAL, Arts. 52.

HJC.[298]

- Appellate court judges may be assigned to be presidents of first instance courts for a period of 1 year, renewable once, with the consent of the HJC.[299]

- Appellate court judges may be assigned to sit on other appellate courts, the Court of Cassation, or to the Office of the Public Prosecutor for a period not exceeding 6 months, renewable once, taking into consideration the opinions of the General Assembly of the court concerned and with the consent of the HJC.[300]

The consent of the judge is not required for such temporary re-assignments.

Additionally, judges may be temporarily assigned by the Minister of Justice to undertake other judicial or legal duties instead of or in addition to their normal duties. Such assignments, which require prior consultation with the General Assembly of the court to which the judge belongs and the consent of the HJC, are limited to a period of three continuous years.[301] The judge's consent is not required for such temporary assignments either.

Members of the judiciary, including prosecutors, may also be seconded by Presidential Decree to positions with foreign governments or international bodies, after account has been taken of the non-binding opinion of the General Assembly of the court from which the judge presides or the Prosecutor-General (if the individual to be seconded is serving in the OPP), and with the consent of the High Judicial Council.[302] The secondment of a member of the judiciary to a foreign government or international body may not exceed four continuous years, unless the President decides that it is in the interest of the nation to extend the period.[303] The consent of the judge is not required.

The 2014 Constitution states that judges may be fully, or partly, seconded only to those bodies that are specified in the law and to perform only such functions as are specified by law. Furthermore, such secondments must maintain the independence and impartiality of the judiciary and judges, and conflicts of interest must be prevented.[304] Although such provisions could be used as a basis to argue for increased transparency, the establishment of objective criteria and an end to the Executive's role in decisions relating to secondments and assignments, as of July 2016, such legal and policy reforms have not been forthcoming.

In addition to the above, a transitional provision of the 2014 Constitution states that the House of Representatives (the successor body to the People's Assembly) will issue rules for assigning judges and other members of judicial bodies to ensure that assignments to non-judicial bodies or committees managing judicial affairs or overseeing elections are cancelled.[305] According to one member of the constitution-drafting committee, this transitional provision was aimed at curbing Executive interference with the judiciary by limiting the practice of seconding judges to non-judicial bodies.[306] It remains to be seen what proposals the House of Representatives will put forward.

Since the ouster of former President Morsi in July 2013, scores of judges have been transferred to non-judicial functions, forcibly retired and dismissed following disciplinary proceedings and unfitness

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298 JAL, Art. 58.

299 JAL, Art. 9.

300 JAL, Art. 56-57.

301 JAL, Arts. 62 & 64.

302 JAL, Art. 65.

303 JAL, Art. 65.

304 2014 Constitution, Art. 186.

305 2014 Constitution, Art. 239.

306 Briefing by Dr. Mona Zulficar hosted by the Permanent Mission of Egypt to the United Nations, 24 March 2014, Geneva, Switzerland.

proceedings (See Chapter One, Section III, which raises concern about the fairness and grounds for such proceedings and Annex I for further details of such proceedings.) The next section includes information about the details of the procedures.

iv. Assessment and discipline

A Judicial Inspection Department, within the Ministry of Justice, assesses the work of judges of first instance courts.[307] The Judicial Inspection Department is composed of judges chosen by the Minister of Justice, without reference to specific selection criteria, from the Court of Cassation, appellate courts, and first instance courts.[308] After the 2011 uprising, there were reports that the Judicial Inspection Department would be separated from the Ministry of Justice.[309] In 2012, then Minister of Justice, Ahmed Mekki, also told the ICJ that a draft order for the Inspection Department to be overseen by the HJC had been prepared.[310] However, no law to this effect has been promulgated, and, as of July 2016, the Judicial Inspection Department remains within the Ministry of Justice.

There are two types of inspection: 1) technical inspections, where a judge's work is examined by the Judicial Inspection Department; and 2) inspections following a written warning, instances in which a judge's conduct has been called into question by the President of the court to which the judge is assigned or that court's General Assembly.

According to the JAL, technical inspections of a group of pre-selected first instance judges occur at least once every two years.[311] The list of first instance judges that will be subject to a technical inspection in a particular period is prepared by the Minister of Justice, at his or her discretion. In the past, the approval of the SCJB of the list of first instance judges to be inspected was required; however, given the abolition of this body by the 2014 Constitution, it is not clear which body, if any, is required to approve the list.[312]

There is no comprehensive national code of judicial conduct or ethics within the JAL or elsewhere in Egyptian law to guide judges, or against which a judge's performance or conduct can be uniformly assessed in the course of regular, periodic, technical inspections or within the system of warnings or more formal disciplinary system. However, some limited articles on the recusal of judges from a case are set out in the Criminal Code of Procedure.

Following a technical inspection, the Judicial Inspection Department alerts the Minister of Justice about those judges whose performance it has rated as average or below average. The Minister of Justice then notifies these judges of the result.[313] A judge who is aggrieved by the technical inspection rating he or she receives may submit a grievance to the Judicial Inspection Department. Previously such grievances were referred to a committee of the SCJB, which was required to issue a decision within 15 days after examining the papers and hearing the testimony of the judge concerned.[314] Since the abolition of the SCJB by the 2014 Constitution, it is not clear which body is now charged with considering such grievances.

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307 JAL, Art. 78.

308 JAL, Art. 78.

309 *Minister moves towards an independent judiciary in Egypt*, in Ahram Online, 8 March 2011, available at http://english.ahram.org.eg/NewsContent/1/64/7273/Egypt/Politics-/Minister-moves-towards-an-independent-judiciary-in.aspx.

310 The ICJ met with Minister of Justice Ahmed Mekki on 3 September 2012. See also *Justice Minister drafts laws for more judicial independence*, in Egypt Independent, 13 August 2012, available at http://www.egyptindependent.com/news/justice-minister-drafts-law-more-judicial-independence.

311 JAL, Art. 78.

312 JAL, Art. 78. The Supreme Council of Judicial Bodies coordinates the affairs of the various judicial bodies in Egypt. It is not to be confused with the High Judicial Council, which handles the administrative affairs for the ordinary courts.

313 JAL, Art. 79.

314 JAL, Arts. 80 and 81.

Furthermore, if a judge receives two consecutive below average technical inspection ratings, the Minister of Justice may refer the judge to the Disciplinary Board. The Disciplinary Board examines the reports to determine whether they are correct and the grievance procedure has been exhausted and has not resulted in an improved grade. If so, the Disciplinary Board must either require the judge to forcibly retire or order that the judge be transferred to a non-judicial position.[315] There is no appeal against such a decision.

As noted above, a judge may also receive a warning from the President of the court to which a judge is assigned, or from that court's General Assembly. A warning may be issued when the President of the court considers, or the General Assembly of the court decides, that the judge has "breached his [or her] duties or the requirements of his [or her] office".[316] The warning to the judge may be either verbal or written. If the warning is in writing, the Minister of Justice is also informed.

A judge may submit an objection to the HJC within two weeks of receiving a written warning.

The HJC is responsible for conducting an investigation into the alleged conduct or incident which served as the basis for the warning. The HJC must hear the testimony of the judge concerned and decide whether or not the warning was founded. Its decision is sent to the Minister of Justice. If the warning is considered well founded and the conduct continues, or is repeated, disciplinary action ensues.[317] Disciplinary actions are governed by Article 98 of the JAL.

In addition to technical or complaint-based inspections, all judges, except the judges sitting on the SCC, may be subject to discipline under Article 98 of the JAL. For judges of the SCC, the disciplinary process is handled by the Court's General Assembly. Disciplinary actions against a judge may be initiated in one of three ways: (1) by the Prosecutor-General acting on his or her own initiative; (2) after a referral of a complaint by the Ministry of Justice to the Prosecutor-General; or (3) after a recommendation to the Prosecutor-General by the President of the relevant court.[318]

A Disciplinary Board, consisting of a panel of judges who regularly sit as the board, is composed of the most senior members of the Court of Appeal who are not also members of the HJC, the two most senior judges on the Court of Cassation, and the most senior Deputy Vice-President of the Court of Appeal. The judge who leads the disciplinary investigation is chosen according to the rank of the judge who is the subject of the complaint.[319] Once the judge who will lead the investigation has been selected, the HJC will authorize the commencement of the investigation.[320]

The judge concerned has the right to be represented by a current or former member of the judiciary (not a lawyer) and may submit his or her defence in writing.[321] Under Article 102 of the JAL, if the Disciplinary Board decides it is necessary to have a hearing, it will issue a notice to the judge concerned at least one week in advance of such a hearing.[322] The notice must include sufficient information on the subject of the proceedings and the evidence to substantiate the charge. Disciplinary hearings

315 JAL, Art. 112.

316 JAL, Art. 94.

317 JAL, Art. 94.

318 JAL, Art. 99.

319 Article 99 provides: If the case concerns judges of the Court of Cassation or appeals courts, "the investigation is undertaken by one of the vice presidents of the Court of Cassation or the Chief Justice of the appeals court delegated by the Minister of Justice or president of the Court. If the case concerns presidents of first instance courts, the investigation is undertaken by a judge from the Court of Cassation or from the inspection department of the court of appeal".

320 JAL, Art. 96(4).

321 JAL, Art.106.

322 If no hearing is considered necessary, there is no provision in law requiring the judge to be notified of the complaint.

concerning judges are held behind closed doors; the public, the media and even the judge's family may not attend.[323]

The Disciplinary Board has the authority to "require" the judge who is the subject of the complaint to attend the hearing but the board may render its decision regardless of whether or not the judge concerned does so. However, it should ensure that the judges was properly given notice.[324] The Disciplinary Board's decision must include reasons for the decision and, in contrast to the hearings on the complaint, is required to be delivered in a session that is open to the public, including the media.[325]

Both the Prosecutor-General and the judge concerned have the right to appeal the decision of a Disciplinary Board within 30 days. Appeals are considered by a Supreme Disciplinary Board which is composed of the President of the Court of Cassation, who serves as the President of the board, the three most senior Presidents of the Courts of Appeal, and the three most junior Vice-Presidents of the Court of Cassation.[326] The appeal is submitted by way of written petition and both the Prosecutor-General and judge are summoned to attend a preparatory session. The law does not set out a specific period in advance of the session for notice of the session to be given to the parties.[327] Thereafter the judge facing proceedings is referred to a session before the Supreme Disciplinary Board to plead his or her case.[328] Once again, the law does not specify a period in advance of the session for notice to be given to the judge. The law also does not state whether the judge has the right to present his or her pleadings orally or in writing.

The Disciplinary Board decides on the sanctions that may be imposed following a ruling that a judge was responsible for misconduct. The permissible sanctions include either reprimand or removal from office.[329] For example, a judge may be removed from a judicial office and transferred to a non-judicial position as a result of a disciplinary proceeding.[330] There is no guidance in the JAL as to how these sanctions should be applied, such as a requirement that the sanction be proportionate to the misconduct or that removal from office be limited to situations where the misconduct renders the judge unfit for judicial office.

The Minister of Justice is responsible for implementing the decisions of the Disciplinary Board, including dismissals.[331]

Under Article 104 of the JAL, the fact that a disciplinary proceeding was carried out – irrespective of its result – will not prejudice the prosecution of a civil or criminal case based on the same alleged misconduct.

In addition to inspections and disciplinary proceedings, if a judge is alleged to be "unfit" to perform judicial functions for reasons unrelated to his or her health, he or she can be referred by the Minister of Justice or by the head of the relevant court to the Disciplinary Board for an "unfitness" hearing. The Disciplinary Board may delegate one of its members to conduct an investigation and to call the judge for a hearing within three days. Pending determination of the case, the judge is placed on forced leave with pay. The Disciplinary Board will hear from the Office of the Public Prosecutor and the judge concerned or his or her representative and issue its decision, giving reasons to substantiate it. Upon making a finding of "unfitness", the Disciplinary Board may require the judge to retire or transfer the

323 JAL, Art.106.

324 JAL, Art. 106.

325 JAL, Art. 107.

326 JAL, Arts. 106 & 107.

327 JAL, Arts. 107 and 83-85.

328 JAL, Art.84.

329 JAL, Art. 108.

330 JAL, Art. 114.

331 JAL, Art. 110.

judge to perform non judicial functions, for example in the Ministry of Justice.[332] A judge who is found unfit may appeal the decision of the Disciplinary Board to the Supreme Disciplinary Board.[333]

There is no guidance in the JAL or elsewhere that differentiates between unfitness and disciplinary proceedings, nor clarifies what conduct or condition may render a judge "unfit" to perform judicial functions.

In March 2015, 31 judges were forced into retirement following "unfitness proceedings" for their alleged role in signing the July Statement and their appearance at the Rabaa Square demonstration. In the course of the proceedings against them, the judges argued that the case should have been handled as a disciplinary case, since the proceedings related to a single incident. The Disciplinary Board, however, rejected this argument, and stated that unfitness proceedings are appropriate when a judge is unable to carry out his or her functions on account of improper conduct and lack of impartiality.[334] The 31 judges who were forced to retire from the judiciary were found to have engaged in a political activity which was deemed to have compromised their independence forever, therefore rendering them unfit for judicial office. The judges appealed this decision to the Supreme Disciplinary Board. On 28 of March 2016, 32 of the judges that were referred to disciplinary proceedings were forcibly removed from their offices. (This case is discussed in detail in Section III of Chapter One.)

II. ASSESSMENT IN LIGHT OF INTERNATIONAL STANDARDS

As discussed in the previous chapter, international standards safeguarding the independence of the judiciary aim to ensure that matters related to the appointment of judges, their security of tenure, continuing legal education, evaluation, promotion, transfer and discipline, are consistent with and bolster the independence of judges, including by ensuring that they are free from improper influence by the other branches of government.

The Human Rights Committee has clarified that the requirement of an independent judiciary set out in Article 14 of the ICCPR refers, among other things, 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".[335]

In reviewing States' compliance with their obligations under the ICCPR, the Human Rights Committee has noted with concern the lack of independent mechanisms for the recruitment and discipline of judges. In the Republic of Congo, for example, the Committee noted the lack of an independent mechanism responsible for the recruitment and discipline of judges, and the many pressures and influences, including those of the Executive branch, to which judges are subjected. It called on the State to give particular attention to the training of judges and to the system governing their recruitment and discipline, in order to free them from political, financial and other pressures, ensure their security of tenure and enable them to render justice promptly and impartially.[336] With regard to Madagascar, where the Minister of Justice exercised considerable powers regarding the appointment and assignment of judges, the Human Rights Committee queried the method of appointment and noted with concern that there was no mechanism "to prevent possible interference by the executive branch in

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332 JAL, Art. 111. This procedure, although carried out by the Disciplinary Board, is a distinct procedure that applies to "unfitness" hearings.

333 JAL, Arts. 111 and 107.

334 Case no. 1 of judicial year 9, Unfitness, Judgment of 14 Mars 2015, p. 53.

335 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19. See, e.g., Concluding Observations of the Human Rights Committee on Bolivia, UN Doc. CCPR/C/79/add.74, para. 34; Concluding Observations of the Human Rights Committee on Lebanon, UN Doc. CCPR/C/79/Add.78, para. 15; Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14; Concluding Observations of the Human Rights Committee on Sudan, UN Doc. CCPR/C/79/Add.85, para. 21.

336 Concluding Observations of the Human Rights Committee on the Congo, UN Doc. CCPR/C/79/Add.118, para. 14.

the affairs of the judiciary".[337]

Similarly, clarifying the obligations imposed by the guarantee of the right to a fair trial before an independent and impartial tribunal under Article 6 of the European Convention on Human Rights, the European Court of Human Rights has held repeatedly that "in order to establish whether a tribunal can be considered 'independent' for the purposes of Article 6 §1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence".[338]

i. Appointment and promotion

Under international standards aimed at safeguarding the independence of the judiciary, selection criteria for judges must be based on merit and applied in a fair, non-discriminatory and transparent manner.[339] The UN Basic Principles state that persons "selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of selection shall safeguard against judicial appointments for improper motives".[340]

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that the process of appointment "shall be transparent and accountable" and that the method of selection "shall safeguard the independence and impartiality of the judiciary".[341]

The Human Rights Council, the Special Rapporteur on the independence of judges and lawyers and the Human Rights Committee have called on States to ensure the appointment of qualified women and minority judges.[342] The Latimer House Guidelines, which were endorsed and commended to governments by judges (including 31 Chief Justices) and approved by Law Ministers from Commonwealth countries, provide that "judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination."[343]

International standards and bodies recommend that the body responsible for decisions to appoint judges should be independent of the executive and legislative branches of government.[344] Similarly, the Special Rapporteur on the independence of judges and lawyers and the Principles and Guidelines

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337 Concluding Observations of the Human Rights Committee on Madagascar, UN Doc. CCPR/C/MDG/CO/3, para. 26.

338 See generally, *Incal v. Turkey*, ECtHR, Application No. 22678/93, Judgment of 9 June 1998, para. 65, *Findlay v. United Kingdom*, ECtHR, Application No. 22107/93, Judgment of 25 February 1997, para. 73; *Bryan v. United Kingdom*, ECtHR, Application No. 19178/91, Judgment of 22 November 1995, para. 37.

339 See generally, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle A(4)(i) (noting that the "sole criteria" shall be the suitability of a candidate "by reason of integrity, appropriate training or learning and ability"); Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: *independence, efficiency and responsibilities*, para. 44; European Charter on the Statute for Judges, para. 2.1. See also ICJ, *Practitioners' Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Geneva 2007, p. 41.

340 UN Basic Principles on the Independence of the Judiciary, Principle 10.

341 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A(4)(h).

342 Human Rights Council resolution 23/6, on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, UN Doc. A/HRC/RES/23/6 (2013) para 2; Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/66/289 (2011) paras 22-33 and 92A/HRC/11/41, para. 34; Concluding Observations of the Human Rights Committee on Sudan, UN Doc. CCPR/C/79/Add.85, para. 21.

343 Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998, ("Latimer House Guidelines") Principle 11.1.

344 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A(4)(h). Beijing Principles, Principles 13 to 17; Latimer House Guidelines, principle II.1; Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: *independence, efficiency and responsibilities*, para. 46 and 47; Universal Charter of the Judge, Art. 9; European Charter on the Statute for Judges, Principles 1.3 and 3.1. See also ICJ, *Practitioners' Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Geneva 2007, p. 45.

on the Right to a Fair Trial and Legal Assistance in Africa recommend that an independent authority be in charge of the selection of judges.[345] Ideally, it is preferable for judges to be selected by their peers or by a body independent from the Executive and the Legislature, such as an independent judicial council.

The involvement of the Executive in the appointment of judges can undermine the independence of the judiciary as a whole and of individual judges. This is a concern that the Human Rights Committee has raised repeatedly with regard to a number of States.[346]
While international standards do not require that the executive and legislative branches be absolutely precluded from taking a role in judicial appointment, they emphasize the necessity of ensuring that the selection process is free of political taint. Thus the Committee of Ministers of the Council of Europe, in their 'Recommendation on the independence, efficiency and responsibility of judges' state that where the head of State, government or legislative power takes decisions concerning the selection and career of judges, "an independent and competent authority drawn in substantial part from the judiciary … should be authorized to make recommendations or express opinions which the relevant appointing authority follows in practice".[347] The Singhvi Declaration provides that participation in judicial appointments by the other branches, should be "scrupulously safeguarded against improper motives and methods". The Singhvi Declaration also recommends consultation with members of the judiciary and the legal profession or for a judicial body to make recommendations.[348]

The Special Rapporteur on judges and lawyers has elaborated on the types of powers a judicial body responsible for appointments might have and how objective criteria can be applied in the selection of judges. In particular, the Special Rapporteur has highlighted that competitive examinations conducted at least partly in a written and anonymous manner can serve as an important tool in the selection process. The Special Rapporteur also noted that other complementary procedures could be used to aid the selection of judges such as, holding public hearings where citizens, non-governmental organizations or other interested parties, are able to express their concern or support for particular candidates.[349]

In terms of career progression, the UN Basic Principles on the Independence of the Judiciary state that the promotion of judges "should be based on objective factors, in particular ability, integrity and experience".[350] The Human Rights Committee has noted that if promotion decisions depend on the discretion of administrative authorities, it may "expose judges to political pressure and jeopardize their independence and impartiality".[351] Although the head of the court "may legitimately have supervisory powers to control judges on administrative matters," a judge must be "independent vis-à-vis his judicial colleagues" in the decision-making process.[352] As the Committee of Ministers of the Council of Europe's Recommendation on judicial independence notes: "Hierarchical judicial organization should not undermine individual independence".[353]

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345 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 27; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A(4)(h).

346 See, e.g., Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, para. 16; Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/C/84/TJK, para. 17; Concluding Observations of the Human Rights Committee on the Congo, UN Doc. CCPR/C/79/Add.118, para. 14.

347 Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: *independence, efficiency and responsibilities*, para. 47.

348 Singhvi Declaration, para. 11(c).

349 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, paras.30-31.

350 UN Basic Principles on the Independence of the Judiciary, Principle 13; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle A(4)(o); Singhvi Declaration, para. 14.

351 Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14.

352 IBA Minimum Standards, paras. 32 & 46.

353 Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: *independence, effi-*

Decisions on the promotion of judges should be based on the same kind of fair assessment of objective criteria that regulate selection, such as "ability, integrity and experience".[354] The Singhvi Declaration states: "Promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. No promotions shall be made from an improper motive".[355]

Similarly, the European Charter on the Statute for Judges stipulates a system of promotion "based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned".[356] In this regard, the Human Rights Committee has emphasized that the exercise of power by the Ministry of Justice over judicial matters, including powers of inspection of the courts, constitutes interference by the Executive and a threat to the independence of the judiciary.[357]

In the past Egypt has fallen notably short of meeting these standards.

With regards to the selection of judges of ordinary courts, it remains a concern that the President of the Republic selects and appoints the Chief Justice of the Court of Cassation. Although the President's choice in appointing the Chief Justice of the Court of Cassation is restricted to selecting one person among the serving Vice-Presidents of the Court of Cassation and has, according to judges interviewed by the ICJ, been in the past based on seniority, it remains of concern that there is no objective and merit-based criteria in the law for the appointment of the Chief Justice.

It is also of concern, both in the light of the method of selection of the Chief Justice and other judges who sit on the Court of Cassation, that under the current system, the President of the Republic and Minister of Justice play key roles in the nomination and appointment of candidates for Vice-Presidents and judges of the Court of Cassation.

Furthermore, it is of concern in relation to the independence of the judiciary that the Minister of Justice assigns the Presidents of the first instance court from among the appellate judges, with the approval of the HJC.

The potential for politicized decision-making in the selection of all judges of the Cassation Court and Presidents of first instance courts is apparent, but this problem is compounded by the fact that the selection criteria and appointment process used by the HJC for all judges of ordinary courts are not clear and transparent.

When the current law governing the selection and appointment process was amended in 2006, the Special Rapporteur on the independence of judges and lawyers expressed concern that the law failed to "set out clear criteria for the selection and appointment of judges".[358] Indeed, commentators have noted that judgeships "are often concentrated among a small number of families" and the lack of

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ciency and responsibilities, para. 22.

354 UN Basic Principles on the Independence of the Judiciary, Principle 13 ("Promotion of Judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience."); Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle A(4)(0) ("Promotion of officials shall be based on objective factors, in particular ability, integrity and experience."); Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: *independence, efficiency and responsibilities*, para. 44 ("Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity".).

355 Singhvi Declaration, para. 14.

356 European Charter on the Statute for Judges, Principle 4.1.

357 Concluding Observations of the Human Rights Committee on Romania, UN Doc. CCPR/C/79/Add.111, para. 10.

358 "Human Rights Expert Concerned Over Law on the Judiciary in Egypt", Statement by Special Rapporteur on the independence of judges and lawyers, 14 July 2006, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2854&LangID=E.

transparency fuels the appearance of nepotism.[359]

The issue of discrimination in the appointment of judges was brought to the fore in May 2015, when the then Minister of Justice stated in a television interview that the son of a rubbish collector could not become a judge because a judge had a "lofty" status and had to come from a "respectable medium both financially and morally", and that if such a person was appointed as a judge, he would become depressed and would not be able to continue.[360] The Minister resigned shortly after the interview due to the public outrage his comments generated, however, many felt that his comments were indicative of a view that is widely held among Egypt's ruling classes.

Another concern regarding the selection process is the practice of selecting judges primarily from the OPP. This practice, among other things, reduces the pool and diversity of background and experience of candidates and undermines the separation between prosecutorial and judicial roles and functions, as required under international law, including in order to ensure the independence and impartiality of judges. In this regard, consistent with the UN Guidelines on the Role of Prosecutors which clarify that the functions of prosecutors and judges must be strictly separated, the Special Rapporteur on the independence of judges and lawyers has underscored that the careers of judges and prosecutors should be separate and distinct. Although both prosecutors and judges must be highly qualified, it was noted that in countries where the prosecution service is part of the judiciary, the possibility of switching careers is limited, and in others in which the careers are separate, switching careers was subject to a competitive selection process.[361]

The JAL contains no mention of objective criteria for decisions regarding promotion of judges, in contrast to international standards safeguarding the independence of the judiciary which clarify that promotion should be based on objective criteria such as ability, integrity and experience.[362] The ICJ has been informed that, in practice, judges are promoted predominantly on the basis of seniority. In addition, although the technical inspection record issued by the Judicial Inspection Body is taken into account, the criteria used to evaluate judges' performance for the purpose of such records is not clear and the Judicial Inspection Body lacks independence, since its membership and oversight is under the control of the Minister of Justice.

In addition to a lack of objective criteria for making decisions on promoting a judge, the procedure governing promotions is completely opaque, and even judges appear to be unclear about the procedure. The JAL establishes that this function is carried out by a body that has been abolished.

ii. Women in the judiciary

The number of women judges in Egypt is not only one of the lowest in the world, it is also far lower than many other jurisdictions in the MENA Region.[363]

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359 Nathan Brown, "The Battle over Egypt's Judiciary", in *Sada*, 11 May 2013; International Bar Association Human Rights Institute, "Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt", February 2014, p. 25.

360 Television interview with Minister of Justice, Mahfouz Saber, of 10 May 2015, available at https://www.youtube.com/watch?v=f-IwwjHX1DI last accessed 17 June 2015.

361 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19 (2012), paras.37-40; see also Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19/Add.3 (2012), para. 37.

362 Principle 13 of the UN Basic Principles on the Independence of the Judiciary.

363 In Jordan, official figures indicate that in 2011, 12.5 per cent of all judges were women, 107 women judges in total. According to OHCHR, this number has increased since then. In Tunisia, figures from 2008 indicate that over 30 per cent of judges are women. See ICJ Geneva Forum Series No.1, *Women and the judiciary*, 2013, available at http://www.icj.org/wp-content/uploads/2014/10/Universal-Women-and-Judiciary-Gva-For-1-Publications-Conference-Report-2014-ENG.pdf. In Algeria, in 2009, out of a total of 3,582 judges, 36.82 per cent were women, combined 3rd and 4th periodic reports, 24 March 2010, CEDAW/C/DZA/3-4, p.66. In Lebanon, in 2011, there were 543 judges, of whom 221 were women, 41 per cent of the total, combined 4th and 5th periodic reports, 20 May 2014, CEDAW/C/LBN/4-5, para.106. In Palestine, in 2013, 33 of a total of 211 judges were women (15.6 per cent) according to the Palestinian Central Bureau of Statistics.

Addressing this situation and taking steps towards women's full and equal participation in the judiciary is vital and is required under international law.[364] In particular, Egypt's obligations in this respect derive from the obligations to ensure the right to an independent and impartial judiciary, and women's enjoyment of their human rights on the basis of equality and non-discrimination. Indeed, taking steps to remove legal and practical barriers to women's equal participation, as well as taking steps to actively encourage and advance women's equal representation within the judiciary is required.

In particular, under Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Egypt is required to "take all appropriate measures to eliminate discrimination against women in the political and public life of the country", and to this end the authorities must ensure women's right "to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government".[365] The Committee on the Elimination of Discrimination against Women, the independent body of experts mandated by the CEDAW to monitor the implementation of this treaty by States Parties has clarified that this includes "the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers".[366] Article 7 of CEDAW not only requires the state to ensure the removal of legal and other barriers to women's participation in the judiciary, it also requires a range of practical and structural measures, including temporary special measures, to ensure women's equal enjoyment in practice of the right to hold judicial office.[367] As the Committee on the Elimination of Discrimination against Women has underscored, although the removal of legal barriers to women's equal representation within the judiciary is crucial, it is not sufficient; "the critical issue … is the gap between the *de jure* and *de facto*, or the right as against the reality of women's participation."[368]

Thus, the dramatic under-representation of women at all levels of the Egyptian judiciary is incompatible with Egypt's obligations under international law.

The 2014 Constitution provides a framework for the necessary changes in the composition of the judiciary. Article 11 requires the State to ensure the "achievement of equality between women and men in all civil, political, economic, social and cultural rights," including the right "to hold public posts and high management posts in the state and to appointment in judicial bodies and entities without discrimination". Article 9 guarantees "equal opportunities for all citizens without discrimination".

Nevertheless, shortly after the Constitution was adopted, events revealed that opposition to the idea of female judges is deeply entrenched. Mervat Al-Tallawy, the head of the National Council for Women, wrote a letter to the State Council (the body that encompasses all administrative courts) requesting immediate investigations regarding complaints from female law school graduates whose applications for appointment as administrative court judges had been rejected by the State Council.[369] A number of members of the Council publicly denounced the letter as unacceptable and suggested that legal action should be commenced against Mervat Al-Tallawy for "insulting the judiciary".[370]

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364 CEDAW, Art. 7; ICCPR, Art. 25; Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), UN Doc. CCPR/C/21/Rev.1/Add.7. See also ICCPR Arts. 2 & 3; CEDAW, Arts. 1 & 2; ICESCR, Arts. 2, 3, 6 & 7; Beijing Declaration and Platform for Action, 4th World Conference on Women, 15 September 1995, Principle 13 and paras. 232 (m) and 190(a).

365 CEDAW, Art. 7(b).

366 CEDAW General Recommendation No. 23, Participation in Political and Public Life, UN Doc. A/52/3 (hereafter General Recommendation No. 23), paras. 5, 15 and 46(b).

367 General Recommendation No. 23, para. 15.

368 General Recommendation No. 23, para. 16. See also, Beijing Declaration and Platform for Action adopted in 1995 at the Fourth World Conference on Women, paras. 232(m) and 190(a).

369 "Judges ignore complaints and push against Tallawy instead", in *The Cairo Post*, 23 January 2014, available at http://thecairopost.com/news/78232/news/judges-ignore-complaints-and-push-against-talawy-instead.

370 "After reaching the ordinary judiciary, does State Council deprive women of its platform", in *El Shorouk*, 22 January 2014, available at http://www.shorouknews.com/news/view.aspx?cdate=21012014&id=7f798707-824a-4807-a50a-c26e97709ae8. Article 184 of the Penal Code provides: "Whoever affronts or insults in any

While the appointment of 26 women as judges in ordinary courts in June 2015 marks a small but important step forward, the ICJ notes that none of these women were appointed as judges in the administrative courts.

iii. Security of tenure and transfer

Security of tenure is a fundamental condition of judicial independence. Unless judges have security of tenure, they are vulnerable to pressure from those in charge of decisions whether to renew a judge's post. Thus, international standards prescribe that judges should have guaranteed tenure until retirement age or the expiry of their term of office.[371] According to some standards, life tenure should be the norm.[372]

Furthermore, as noted above, international standards clarify that judges should be subject to suspension or removal from office only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.[373]

International standards are clear that decisions on assignment of judges to a case within the court that they sit shall be made by judges.[374] The European Charter on the Statute for Judges also recommends that the decision to assign a judge to a tribunal should be taken by an "independent authority" or "on its proposal, or its recommendation or with its agreement or following its opinion".[375] The Singhvi Declaration states the assignment of a judge to a post "shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist".[376]

In addition, standards clarify that decisions to transfer judges should be made by judicial authorities and not by members of the executive branch. For example, the International Bar Association's Minimum Standards of Judicial Independence provides: "The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld".[377] Similarly, the Singhvi Declaration states that "judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge".[378]

In Egypt, the 2014 Constitution guarantees the irremovability of judges and the JAL sets out the required age for judges to retire.

The guarantee of irremovability is, however, undermined by the numerous procedures through which judges can be removed from office, including as a result of dismissal, forced retirement or transfer to a non-judicial position.

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of the foregoing ways, the People's Assembly, the Shura Council, other governmental bodies, the military, the courts, the authorities, or public departments will be penalized with detention and a fine of not less than 5,000 Egyptian pounds and not greater than 10,000 pounds".

371 Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: *independence, efficiency and responsibilities*, para. 49: UN Basic Principles on the Independence of the Judiciary, Principle 12; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle A(4)(l).

372 Latimer House Guidelines, Guideline II.1.

373 UN Basic Principles on the Independence of the Judiciary, Principle 18: Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle A(4)(p).

374 UN Basic Principles on the Independence of the Judiciary, Principle 14.

375 European Charter on the Statute for Judges, Principle 3.1.

376 Singhvi Declaration, para. 13.

377 IBA Minimum Standards, Standard A.12.

378 Singhvi Declaration, para. 15.

As outlined in further detail below, contrary to international standards safeguarding the independence of the judiciary, proceedings leading to removal of a judge in Egypt are not based on established standards of judicial conduct and do not guarantee the due process rights of the judge subject to them. Indeed, as highlighted in Chapter One above, judges have been removed from their duties for having exercised their internationally guaranteed rights to freedom of expression.

In addition, provisions in the JAL grant extremely wide latitude to the Minister of Justice, a member of the executive branch, to transfer, assign and second judges. The Minister of Justice can assign judges to specific courts and can transfer judges to non-judicial posts. In addition, the President of the Republic can second judges to foreign governments and international bodies. Members of the executive branch have used the power to transfer, assign and second judges as a means to punish judges for speaking out against corrupt practices or in favour of judicial independence. As the Special Rapporteur on the independence of judges and lawyers pointed out, the JAL provides "no objective criteria … for decisions of secondment: therefore such decisions can be used as a significant pressure on judges to threaten them or reward them, and therefore seriously infringes their independence".[379]

iv. Assessment and discipline

The UN Basic Principles on the Independence of the Judiciary and other international and regional standards, clarify that the disciplining of judges, including any decisions concerning the suspension or removal of a judge, should be based only on established standards of judicial conduct following fair proceedings before an independent body.

Disciplinary proceedings must include an independent, impartial, thorough and fair investigation and adjudication.[380] In addition, the examination of the matter at its initial stage should be kept confidential, unless otherwise requested by the judge.[381] Furthermore, the disciplinary measures or sanctions imposed on a judge following a finding of misconduct in a fair procedure, must be proportionate and subject to an independent review.[382] As noted in the previous sub-section, the law and procedures must ensure that a judge may only be suspended or removed from office for reasons of incapacity or behaviour that render the individual unfit to discharge judicial duties.[383]

The Human Rights Committee has also clarified that "[t]he dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary."[384]

The Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have regularly expressed concern about systems in which legislative or executive branches play a role in disciplining judges.[385]

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379 Statement of the UN Special Rapporteur on the independence of judges and lawyers, 14 July 2006, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2854&LangID=E.

380 Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: *independence, efficiency and responsibilities*, para. 69; UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle A(4)(q).

381 UN Basic Principles on the Independence of the Judiciary, Principle 17.

382 Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: *independence, efficiency and responsibilities*, para. 69; UN Basic Principles on the Independence of the Judiciary, Principles 17 & 20; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle A(4)(q).

383 UN Basic Principles on the Independence of the Judiciary, Principle 18.

384 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 20.

385 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 60; *Pastukhov v. Belarus*, Human Rights Committee Communication No. 814/1998, Views of 5 August 2003, UN Doc. CCPR/C/78/D/814/1998, para. 7.3; *Adrien Mundyo Busyo et al. v. Democratic Republic of the Congo*, Human Rights Committee Communication No. 933/2000, Views of 31 July 2003, CCPR/C/78/D/933/2000, para. 5.2.

Instead, the International Bar Association Minimum Standards on Judicial Independence provide that "[t]he power to discipline or remove a judge must be vested in an institution, which is independent of the Executive," preferably with the power of removal "vested in a judicial tribunal".[386] However, even in systems in which the body responsible for the discipline of judges is a legislative or executive one, the procedure must be one in which due process and fair trial safeguards apply, and the right of the judge to appeal to an independent judicial body is even more important.[387]

In Egypt, the executive is involved in both the inspection of judges' performance and disciplinary processes. Specifically, the Minister of Justice can request the Prosecutor-General to initiate disciplinary proceedings under Article 99 of the JAL and can refer a judge for an unfitness hearing under Article 111 of the JAL. In addition, as previously highlighted (in Chapter Four, Section I(iv)) the Minister of Justice selects the members of the Judicial Inspection Department, – the body tasked with investigating and appraising the work of judges – manages it and decides which judges are to be subject to technical inspections and is responsible for enforcing the HJC's disciplinary decisions.

The system for disciplining judges has long been used to punish or remove judges that exercise their right to freedom of expression. For example, under the Mubarak regime, in the 2005 parliamentary elections, senior judges Mahmoud Mekki and Hisham Bastawisi reported "fraud, intimidation and assaults on judges who were supervising the elections".[388] As a result, they were referred to disciplinary proceedings. Hisham Bastawisi was found guilty of disparaging the HJC, while Mahmoud Mekki was acquitted. UN experts at the time stated that they were "gravely worried that this decision represents a means to punish Judge al-Batawissi for exercising his right to freedom of expression with regards to the allegations of widespread electoral fraud during the parliamentary elections of 2005 and deter other judges from further action in favour of judicial reform".[389] More recently, under the SCAF, Minister of Justice Abdel Aziz Al Gendy referred three judges for investigation for talking to the media about the reform of the judiciary and the trial of civilians by military courts.[390] As highlighted in Chapter One, following the ouster of President Morsi in July 2013, scores of judges have been referred to disciplinary and "unfitness" proceedings, including in connection with their rights to freedom of expression, association and assembly.

Neither the inspections of the Judicial Inspection Department, nor disciplinary proceedings brought against judges, including "unfitness" proceedings, are based on established standards of judicial conduct. There is no comprehensive Code of Conduct or Code of Ethics for judges in Egypt, and the Code of Criminal Procedure contains only a few articles relating to the recusal of judges from a case. As a result, decision makers within the inspection and disciplinary systems have broad discretion to determine whether a judge has breached his or her duties or the requirements of judicial office.

Furthermore, as demonstrated in the case resulting in the forcible retirement of 31 judges, described above in Section III of Chapter One, there is also a lack of clarity as to the distinction between disciplinary and unfitness proceedings.

Due process requirements and basic requirements of fairness are lacking in disciplinary proceedings. Under Article 106 of the JAL judges may not be represented by a lawyer of their choice; they may only be represented in proceedings before the Disciplinary Board and the Supreme Disciplinary Board by

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386 International Bar Association (IBA) Minimum Standards, adopted by the IBA Council in 1982, Standard A(4)(a) & (b).

387 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41, para. 61.

388 *When judges are beaten*, in The Guardian, 9 May 2006, available at http://www.theguardian.com/commentisfree/2006/may/10/comment.egypt.

389 *UN rights experts urge Egypt to guarantee independence of judiciary; deplore attacks*, Press Release 14 June 2006, UN News Centre, available at http://www.un.org/apps/news/story.asp?NewsID=18853&Cr=Egypt&Cr1.

390 *Justice Minister denies referring judges to judicial inspection over media statements*, in Daily News Egypt, 5 June 2011, available at http://www.dailynewsegypt.com/2011/06/05/justice-minister-denies-referring-judges-to-judicial-inspection-over-media-statements/.

current or former judges. In addition, a judge subject to disciplinary proceedings is not entitled to an oral hearing as of right. Instead, whether there will be one is left to the discretion of the Board. This is particularly problematic, since, without notice of a hearing, the judge is not guaranteed to receive information concerning the proceedings and the evidence; nor is the judge's right to attend an oral hearing guaranteed in an appeal before the Supreme Disciplinary Board. Further, there are no minimum notice requirements for the preparatory hearing to prepare the case or the session where the judge is required to present his or her pleadings before the Supreme Disciplinary Board.

Similarly, judges subject to "unfitness" proceedings – in which the judge is alleged to be "unfit" to perform judicial functions for reasons unrelated to his or her health – do not have the right to adequate information and evidence regarding the allegations against them. In addition, when a hearing is ordered in the context of such proceedings, the judge who is the subject of them is entitled to receive notice of the hearing just three days' in advance thereof, which, in many cases is unlikely to permit the judge sufficient time to prepare a defence. The law does not provide for the judge to request a postponement.

Furthermore, no provision of law requires that the sanctions imposed in both disciplinary and unfitness proceedings be proportionate to the proven misconduct, nor does any provision limit removal from office only to cases in which the proven incapacity or misconduct renders the judge unfit to discharge the duties of a judge.

III. RECOMMENDATIONS

In light of the above, the Judicial Authority Law should be amended to ensure that:

i. **There are fair, open and transparent procedures for appointing judges, which are overseen by the HJC.**
ii. **The process for the appointment of judges is non-discriminatory and is based on objective merit-based criteria and on redressing past discrimination that has resulted, among other things, in the under representation of qualified women and individuals from diverse socio-economic backgrounds on the bench.**
iii. **Assessments, promotions as well as transfers of judges are based on objective criteria and follow fair and transparent procedures, and are carried out under the authority of the HJC.**
iv. **All assignments, secondments and other transfers of judges are based on the consent of the judge and the court President concerned. Such consents shall not be unreasonably withheld, and decision-making power is vested in the HJC.**
v. **The Minister of Justice's powers to appoint and supervise the Judicial Inspection Department are transferred to the HJC.**
vi. **A code of ethics and judicial conduct that is consistent with international standards is established by the judiciary and used as the basis on which judges are disciplined and subject to removal from office.**
vii. **The Disciplinary Board and Superior Disciplinary Board are overseen by the HJC.**
viii. **Disciplinary proceedings are held before an independent and impartial body and afford the judge concerned a fair hearing that is consistent with international standards of due process, guaranteeing that the judge concerned:**
    a. **is given sufficient notice of the allegations of misconduct;**
    b. **has the right to adequate time and facilities to prepare and present defence, including the right to be represented by counsel of choice; and**
    c. **has the right to appeal any adverse decision and sanction to an independent judicial body.**
ix. **Sanctions against judges are proportionate to the misconduct in question that a judge may only be removed from office, including by way of dismissal, forced retirement and transfer to non-judicial positions, on proven grounds of incapacity or behaviour that renders the judge unfit to discharge the duties of his or her judicial office.**
x. **"Unfitness proceedings" in their current form are abolished.**
xi. **The rights of judges, to freedom of expression, association and peaceful assembly, exercised in a manner that is consistent with preservation of the dignity of**

their office and the independence and impartiality of the judiciary, are respected and protected.

CHAPTER FIVE : SUPREME CONSTITUTIONAL COURT

An independent, appropriately mandated and adequately resourced constitutional court, or an equivalent judicial body of last instance, that reviews the constitutionality of laws should serve as a guarantor of the rule of law and human rights.

Like all other courts, the independence and impartiality of a constitutional court must be guaranteed and safeguarded.

I. INTRODUCTION

Egypt's Supreme Constitutional Court (SCC) was established by the 1971 Constitution as "an independent, self-standing judiciary body" to replace the Supreme Court of Egypt.[391]

The 1971 Constitution guaranteed the irremovablity of SCC judges, but it did not include further specifications to guarantee the independence of the court and its judges.[392] It also granted the SCC exclusive competence to control the constitutionality of laws but deferred to the law in terms of how the court was to function, including access to the court.

The SCC began operating in 1980 with the enactment of Law No. 48 of 1979 'Governing the Operations of the Supreme Constitutional Court of Egypt' (the SCC Law).

Although Article 1 of the SCC Law provides that the SCC is "an independent judicial body", since its formation, the SCC has been viewed as lacking in independence and inconsistent in terms of its role in safeguarding human rights.

On several occasions the SCC failed to address the serious human rights challenges under former President Mubarak's regime. For example, the SCC ruled that emergency and security courts were constitutional and "did not consider petitions on the constitutionality of transferring civilians to military courts".[393]

In a meeting with the ICJ in September 2012, then Chief Justice of the SCC, Maher al Behiery maintained that there was a clear separation between the SCC and the Executive and that the Execu-

391 1971 Constitution, Art. 174.

392 Article 176 of the 1971 Constitution stated: "The law shall regulate the manner of the formation of the Supreme Constitutional Court, and define requirements to be satisfied by its members, rights and immunities". Article 177 provided that members "shall not be removed".

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

tive did not exercise direct control over SCC judges. Others have, however, claimed that many SCC judges, as Mubarak-era appointees, served the interests of the regime and ruled or delayed ruling in ways that supported the regime.

Since the ouster of President Mubarak, the judgments of the SCC have significantly shaped the course of events.

In June 2012, following the parliamentary elections of November 2011 resulting in a plurality victory for the Muslim Brotherhood's Freedom and Justice Party, it found that the law on parliamentary elections was unconstitutional and thus the formation of the People's Assembly null and void.[394] It also held that the amendments to the political exclusion law, which would have banned individuals who had served in the Mubarak regime from standing as candidates for election in the presidential elections, were unconstitutional.

In July 2012, shortly after the election of Mohamed Morsi, the Freedom and Justice Party candidate, as President, the SCC suspended President Morsi's decree reinstating the People's Assembly. In June 2013, a few weeks before the ouster of President Morsi by the army, the SCC ruled that both the Shura Council, the upper house of Parliament, and the second Constituent Assembly, the body that drafted the 2012 Constitution, were unconstitutional.

There is a perception that judges, including judges of the SCC, once viewed as above the political fray, have, since the overthrow of President Mubarak, become a tool of the military authoritarian system and the Sisi regime.[395]

Since the end of the Mubarak regime, the SCC has been subject to changes as a result of two different Constitutions: the 2012 Constitution and the 2014 Constitution. These changes are described in more detail below through an examination of the SCC's independence and its functions.

II. INDEPENDENCE

i. Appointment and composition

Article 3 of the SCC Law states that the SCC "shall be formed of the Chief Justice and a sufficient number of members," permitting a fluctuating number of judges to sit on the Court. It specifies that a quorum of seven judges is required for judgments and decisions.[396]

Judges of the SCC must meet the eligibility requirements for the judges of ordinary courts set out in the JAL. They must therefore:

- have Egyptian citizenship with full civil capacity;
- meet the minimum age requirements - for judges of the SCC the minimum age is 45 years
- have a law degree from an Egyptian university or an equivalent foreign degree and an equivalency exam;

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

395 See, e.g., Nathan J. Brown, *Why do Egyptian Courts Say the Darndest Things*, in The Washington Post, 25 March 2014; Nathan J. Brown & Michele Dunne, *Egypt's Judges Join In*, in Foreign Affairs, 2 April 2014; *Political Executions in Egypt*, in The New York Times, 28 April 2014.

396 SCC Law, Art. 3.

- have no criminal or disciplinary record; and
- be of good conduct and reputation.[397]

In addition, SCC judges must be selected from among:

- current members of the court;
- current or former members of judicial bodies holding the rank of a counsellor or its equivalent for at least five consecutive years;
- current or former law professors at Egyptian universities who have held the position of a professor for at least eight consecutive years; and
- attorneys who have practiced before the Court of Cassation, or the Supreme Administrative Court for at least ten consecutive years.[398]

Until the enactment of the 2014 Constitution, the President of the Republic appointed the Chief Justice of the SCC. Other than the selection criteria set out above the President had broad discretion to appoint the candidate of his choice.

For every other position on the SCC, two candidates were nominated, one by the Chief Justice and the other by the General Assembly of the SCC, which is composed of all the judges of the SCC. The President of the Republic selected and appointed one of the two candidates nominated by the General Assembly and the President of the Court, for each vacant position .[399]

Although the President's appointment power was viewed as largely a formality, his ability to appoint the Chief Justice, who could then nominate other appointees, opened the door for executive influence of the composition of the Supreme Constitutional Court.[400] This was evidenced, for example, when, in 2001,then President Mubarak appointed Fathi Naguib as Chief Justice of the SCC. When he made this appointment, President Mubarak abandoned the custom of appointing the Chief Justice from among the members of the SCC. Prior to his appointment as Chief Justice of the Supreme Constitutional Court, Naguib was the Chief Justice of the Court of Cassation and had previously served as Assistant Minister of Justice. Once appointed as Chief Justice of the SCC, Naguib added five new justices to the Court. Some have claimed that the move was in order to pack the court in favour of the government.[401] Others have opined that, as an outsider, Naguib had to bring in new judges in order to manage the court more efficiently.

In 2011, under the SCAF, amendments were made to Article 5 of the SCC Law. The pool from which the President could appoint the Chief Justice was restricted to the three most senior Vice-Presidents of

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397 JAL, Art. 38.

398 SCC Law, Art. 4.

399 SCC Law, Art. 5. The General Assembly has a mandate to consider issues concerning the organization of the Court, its internal affairs, the distribution of work among the judges, and "all other relevant matters of concern". It can form committees to deal with specialized work and its opinion must be sought on draft laws relevant to the Court. The Chief Justice presides and casts the tie-breaking vote. See SCC Law, Arts. 8 & 9.

400 Nathan J. Brown, *The Revolution in Crisis*, in Egypt Independent, 27 November 2012, available at http://www.egyptindependent.com/opinion/revolution-crisis. "All members of the court were indeed formally presidential appointments. But most were nominated by the justices themselves; their appointment by Mubarak was a formality." See also *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* by Tamir Mustafa, Cambridge University Press, 11 June 2007, p. 198.

401 *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* by Tamir Mustafa, Cambridge University Press, 11 June 2007, pp. 198-202. In an interview, Fathi Naguib stated: "They (SCC justices) were issuing rulings that were bombs in order to win the support of the opposition parties. They were very pleased with the rulings, but the rulings were not in the interests of the country. This needed to be corrected. Now the President (Mubarak) can be assured that the Court will make rulings that are in the interest of the country and yet still maintain its independence" (p. 201).

the Court; and the President's choice was required to be approved by the SCC's General Assembly.[402]

With the adoption of the 2012 Constitution, which was drafted and approved by the second Constituent Assembly, the number of justices of the SCC was reduced to the then President of the SCC and the ten most senior members of the Court.[403] The 2012 Constitution specified that the other seven SCC justices would "return to the posts they had occupied before their appointment to the court".[404] The second Constituent Assembly was dominated by Islamist parties and indeed many individuals who were members of or aligned with secular or liberal parties, withdrew before the final draft. The political wing of the Muslim Brotherhood, the Freedom and Justice Party, considered that having a flexible number of justices was dangerous because the President of the Republic could add or reduce the number "according to his will".[405] Others, however, saw the removal of seven justices, including the Court's only female justice, as part of a series of actions by the Morsi government to weaken the judiciary.

Shortly after the promulgation of the 2012 Constitution, proposals were made by the Freedom and Justice Party and two other parties to lower the retirement age of all judges from 70 to 60 years old. If the amendment had been adopted, almost all the justices on the SCC would have been forcibly retired raising considerable uncertainty over the composition of the SCC and seemingly undermining the arguments put forward by the Freedom and Justice Party in support of their constitutional reforms relating to the SCC.

The 2014 Constitution re-establishes the composition of the SCC to a flexible number of judges, providing for a "President and a sufficient number of Deputies".[406] Some of the judges who were removed following the entry into force of the 2012 Constitution have now been reinstated as justices of the SCC by the court's General Assembly.[407] However, it is not clear what procedure and criteria were used to reinstate these judges. At present, the SCC comprises 12 judges, all of whom are male.

The 2014 Constitution also accords the SCC more power. It provides that the SCC's General Assembly, and not the President, chooses the Chief Justice from among the Court's three most senior Vice-Presidents. The 2014 Constitution further provides that the General Assembly of the SCC selects the Vice-Presidents of the Court and all the members of the Commissioners Board who are then appointed to office by a Presidential decree.[408]

The Commissioners' Board is an institution of the SCC that is composed of judges who review cases pending before the SCC and draft reports containing opinions on the constitutional and legal issues presented in the case.[409] The Commissioners' Board has the authority to contact the parties to obtain further clarification of their arguments and to require them to present documents and supplementary briefs. The report containing the opinion of the Commissioners' Board on a case, which may be viewed by the parties, must include the rationale for its opinion. Once the Chief Justice receives the Commissioners' Board's report on a case, he or she schedules a session of the SCC to decide the case. The SCC may grant leave to the parties' representative and the Commissioners' Board to submit supplementary reports, covering supplemental points.[410] Where the SCC determines that oral plead-

402 Legislative Decree No. 48 of 2011, amending some of the provisions of the SCC Law.

403 2012 Constitution, Arts. 233 & 176.

404 2012 Constitution, Art. 233.

405 Connor Molloy, *Why the reduction in SCC justices?*, in The Daily News Egypt, 24 December 2012.

406 2014 Constitution, Art. 193.

407 *Reinstatement of dismissed judges of the SCC*, in Akhbar El Yom, 28 March 2014, available at http://dar.akhbarelyom.com/issuse/detailze.asp?mag=akh&akhbarelyom=&field=news&id=20662; *Presidential decree to appoint 2 deputy chairmen of SCC*, in State Information Service, 2 April 2014, available at http://www.sis.gov.eg/En/Templates/Articles/tmpArticleNews.aspx?ArtID=77004#.U5Duhyiw4yE.

408 2014 Constitution, Art. 193.

409 SCC Law, Art. 40.

410 SCC Law, Art. 44.

ings are necessary, representatives of the Commissioners' Board and counsel for the parties appear before the Court.

Under Article 11 and 24 of the SCC Law, the judges of the SCC and the Commissioner's Board may not be removed from their posts or transferred to other positions without their consent. However, judges of the SCC may be "assigned and seconded" without requiring their consent to international organizations or foreign states although "only for the performance of legal duties".[411] It is not clear who can order such assignments or secondments.

ii. Discipline

The law sets out a separate system of accountability for SCC members.

Article 19 of the SCC Law provides that the Chief Justice may submit allegations that a member of the court has been untrustworthy or derelict in his duties to the Committee on Occasional Affairs. The Committee on Occasional Affairs is a body consisting of two or more SCC judges that is established by the General Assembly of the SCC and presided over by the Chief Justice.[412] After hearing the testimony of the judge concerned, this Committee will decide whether the matter bears further investigation. If it considers it does, it will delegate one of its members or a sub-committee of three to conduct such further investigation. In such cases, the concerned judge is placed on mandatory leave with full salary. Results of the investigation are sent to the General Assembly, which sits as a disciplinary tribunal, with the exclusion of those members who participated in the investigation or the accusation.[413] The General Assembly hears the defence of the concerned judge and decides whether the disciplinary charge is sustained. The only sanction for misconduct is forced retirement. The decision of the General Assembly is "final and irrevocable".[414]

When sitting as a disciplinary tribunal, the General Assembly of the SCC has the same rights and duties as the Disciplinary Board under the JAL.[415] Those under investigation have the same procedural rights as judges in the Court of Cassation (the right to be represented by a current or former member of the judiciary, to submit his or her defence in writing, to be provided with at least one week notice in advance of the oral hearing, for notice to include information on the subject of the proceeding and evidence to substantiate the charge).[416]

III. FUNCTIONS

i. Jurisdiction

The 1971 Constitution granted the SCC the power to review the constitutionality of laws and regulations and to interpret legislation.

Powers of the court were expanded under the SCC Law. In addition to its exclusive jurisdiction to determine the constitutionality of laws and regulations, under the SCC law, the Court was granted jurisdiction to determine conflicts of jurisdiction between lower courts and the power to issue a final judgment in cases where other courts had produced contradictory judgments.[417]

The 2012 Constitution removed the SCC's power to interpret legislation but retained the jurisdiction of

411 SCC Law, Art. 13.

412 SCC Law, Art. 10.

413 SCC Law, Art. 19.

414 SCC Law, Art. 19.

415 SCC Law Art. 20.

416 SCC Law, Art. 20.

417 SCC Law, Art. 25.

the SCC to review the constitutionality of laws and regulations.[418] The 2012 Constitution also granted the SCC the power to review "draft laws governing the practice of political rights and the presidential or local elections".[419] If the SCC did not reach a decision on such draft laws within 45 days, the proposed law would be considered approved, and, once enacted, the constitutionality of such laws was not subject to review.

In 2013, the SCC ruled that several provisions of previously enacted election laws, including Law No. 38 of 1972 on the People's Assembly and Law No. 73 of 1956 on the exercise of political rights, were unconstitutional.[420] In its review of the latter, the SCC ruled that members of the armed forces and police on active duty should be given the right to vote.–

The 2014 Constitution now mirrors the SCC Law, providing that the SCC is "exclusively competent to decide on the constitutionality of laws and regulations, interpret legislative texts, and adjudicate disputes pertaining to the affairs of its members, disputes between judicial bodies and entities that have judicial mandates, 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 disputes pertaining to the implementation of its rulings and decisions".

The 2014 Constitution removed the provision of the 2012 Constitution that granted the SCC jurisdiction to review draft laws on political rights or elections; its jurisdiction is therefore limited to *ex post facto* consideration of the constitutionality of laws.

Furthermore, in accordance with the SCC Law, a request for "statutory interpretation must be submitted by the Minister of Justice, upon the request of the Prime Minister, the Speaker of the People's Assembly, or the Supreme Council of Judicial Bodies".[421]

All judgments and decisions of the SCC are final and binding on public authorities and individuals.[422]

ii. Access

Under the SCC Law, a lower court may refer matters to the SCC if it determines that a question regarding the constitutionality of a law or regulation is involved in the case. In such cases, the disposition on the merits of the case by the referring court is suspended pending the adjudication of the constitutional question.[423] Alternatively, if a party to a case contests the constitutionality of a law or regulation and the lower court finds that the issues raised are "serious", the court may postpone the case and require the party who made the application to present the constitutional issue to the SCC "within a period not exceeding three months".[424] Individuals do not have direct access to the SCC to seek review of the constitutionality of a law.

In a meeting with the ICJ in September 2012 then Chief Justice Behiery of the SCC explained: "At present there is individual access but not direct access … The idea of direct access has been proposed before but not accepted". He further noted that courts are not under an obligation to refer a constitutional question, but have discretion to do so. SCC Justices emphasized the importance of having "gatekeepers", so that the Court is not overwhelmed with cases that lack merit.
As noted above, the Commissioner's Board examines the cases received by the SCC and issues a report on each setting out an opinion on the constitutional and legal issues involved. After receiving

418 2012 Constitution, Art. 175.

419 2012 Constitution, Art. 177.

420 SCC decision 17 February 2013, published in the Official Gazette on 18 February 2013, No. 7(bis).

421 SCC Law, Art. 33. As noted above, the SCJB has been abolished by the 2014 Constitution. The SCC Law has yet to be amended to reflect this fact.

422 SCC Law, Arts 48 & 49.

423 SCC Law, Art. 29(a).

424 SCC Law, Art. 29(b).

the Commissioner's Board report, if an oral hearing is considered necessary by the Court, the Chief Justice of the SCC will set a date for the hearing. A minimum of 15 days' notice is required except when the Court considers it necessary to expedite the process or when either party requests it, in which case a minimum of 3 days' notice is required.[425] If an oral hearing is ordered the SCC hears the lawyers of the parties and a representative of the Commissioner's Board.

Aside from the parties to a case and the Commissioner's Board, there is no possibility in law for individuals or groups to access the court or intervene in a case as *amicus curiae* or as interested parties.

IV. ASSESSMENT IN LIGHT OF INTERNATIONAL STANDARDS

i. Independence

The SCC as a court and its judges must be both independent and impartial.[426]

As highlighted above, the requirements of independence and impartiality mean that members of the Court must be free from both interference and influence. This requires that both the SCC as an institution as well as its judges are independent from the executive and legislative branches of the State. The independence of constitutional court judges is especially important, "owing to the nature of the matters submitted to their consideration".[427]

However, the SCC has historically not been perceived as an independent or impartial court. For example, its independence has been called into question as a result of its failure to rule, or extensive delays in ruling, on cases raising politically sensitive questions. Two cases filed 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.[428]

The internationally recognised standards related to methods and criteria for appointment and promotion, guarantees of tenure, procedures for assessment, transfer and discipline safeguarding independence, which are set out in Chapter Four, apply equally to judges of the SCC.

a) Appointment and composition

The broad discretion historically afforded to the President of the Republic to select and appoint the Chief Justice of the SCC had the potential to allow executive control over the SCC and to undermine its independence. In particular, since the President selected each Vice-President of the SCC from a shortlist of two candidates, one of whom was always nominated by the Chief Justice, the composition of the SCC was effectively open to control by the Executive.

The divestment of this Power and the requirement in the 2014 Constitution that the Chief Justice and Vice-Presidents of the SCC are chosen by the General Assembly of the court, is an important step in bolstering the independence of the court and its judges. However, the continuing absence of particular additional selection criteria for both the Chief Justice of the SCC and its Vice-Presidents raises questions, already familiar in ordinary courts, of the practice of appointing individuals regardless of merit.

As with the other courts, there should be clearly defined criteria for selection and an open and transparent procedure for appointment for both the members of the SCC and the members of the Com-

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425 SCC Law, Art. 41.

426 ICCPR, Art. 14.

427 Judgment of 31 January 2004, Inter-American Court of Human Rights*, Constitutional Court v. Peru*, para. 75.

428 Cases No.72 and 73 of Judicial Year 17 were filed with the SCC on 8 November 1999 both challenging the constitutionality of Article 6(2) of the Military Judiciary Law, No.25 of 1966; Case No. 11 of Judicial Year 13, on whether judicial supervision of elections was required, was submitted to the SCC on 21 January 1991 and was not decided until 8 July 2000. ICJ report, *Egypt's new Constitution: A flawed process; uncertain outcomes*, p. 33 & n. 92.

missioner's Board. The SCC Law should be amended in this regard.

The lack of diversity in judges on the SCC – there has only been one female judge on the SCC - has resulted in the SCC being viewed as isolated from the general concerns and realities of the population at large.[429] Consequently, in addition to objective, merit-based criteria and open and transparent selection procedures, appointment procedures should also redress past discrimination.

The IBA Minimum Standards provide that legislative changes in the terms of and conditions of judicial service "shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service".[430] The only circumstance in which a judge may be moved without his or her consent is if the organisation of the judicial system is being changed.[431]

In accordance with these standards, changes in the law concerning both the appointment procedure and the composition of courts should be prospective. The 2012 Constitution's reduction in the number of SCC justices clearly ran counter to international law standards.

b) Discipline

As noted previously, there is currently no judicial code of conduct or ethics in Egypt against which decisions as to whether to investigate an allegation of judicial misconduct, including against a member of the SCC, are based and against which such allegations are assessed.

The basis on which decisions can be made to investigate allegations of misconduct against judges of the SCC appears to be both broad in scope and ill-defined. The disciplinary process grants a wide discretion to decision-makers as to whether disciplinary proceedings should be instituted and whether a judge has engaged in misconduct, and is therefore open to abuse.

Consequently judges may be suspended or dismissed in circumstances other than on grounds of incapacity or for serious misconduct or incompetence.[432]

There is also no requirement for sanctions to be applied proportionately based on the gravity of the misconduct.

Furthermore, the procedural rules that apply to disciplinary matters against members of the SCC is the same as judges of the Court of Cassation. Consequently, the same concerns applicable under the disciplinary procedures of the JAL also apply regarding SCC judges. In particular, the judge's right of defence is restricted in that only current or former members of the judiciary may represent an SCC member accused of misconduct and the accused judge is not guaranteed access to the full investigative file.

ii. Function

a) Jurisdiction

A constitutional court is key to ensuring the application and protection of constitutional rights.

The jurisdiction of the SCC, like Egypt's other courts, is limited to *ex post* review of laws that have entered into force. Although the 2012 Constitution gave the SCC *ex ante* review over election laws,

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429 See, e.g., Nathan J. Brown, *Why Do Egyptian Courts Say the Darndest Things?* in The Washington Post, 25 March 2014.

430 IBA Minimum Standards, Art. 20(a).

431 Council of Europe, Committee of Ministers Recommendation (2010)12 on judges: independence, efficiency and responsibilities, para. 52; Beijng Statement on the Principles of an Independent Judiciary, Principle 29.

432 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 20.

the 2014 Constitution removed this power.[433]

Expanding the court's jurisdiction to include *ex ante* review of the constitutionality of draft laws, can assist in preventing the enactment of laws that infringe or could facilitate the infringement of human rights.

In Egypt, the SCC's *ex post* review of the constitutionality of election laws has greatly impacted on the course of events, including by undermining the separation of powers. For example, as outlined above, the SCC's ruling in June 2012 that the election law was unconstitutional, resulted in the sudden dissolution of the lower house of Parliament five months after its election thereby largely concentrating power in the Executive. Similarly, on 2 June 2013, the SCC ruled that the election law of the upper house of parliament, the Shura Council, was unconstitutional and that the Constituent Assembly, whose members were in part drawn from the Shura Council was unconstitutional. This ruling came more than 16 months after the election of the Shura Council, a year after the election of the Constituent Assembly and six months after the adoption of the 2012 Constitution. As a result, it created considerable uncertainty regarding the role of the Shura Council and the validity of the 2012 Constitution.[434]

Granting the SCC jurisdiction to carry out *ex ante* review, including of election laws, may therefore be a prudent.

The expansion of the SCC's jurisdiction to include *ex ante* review should be without prejudice to the SCC's *ex post* review of laws or regulations in cases of specific violations brought before the court.

b) Access

The 2014 Constitution as well as the SCC Law does not permit individuals to petition the SCC directly; instead, lower courts serve as the gatekeepers.

Although significant cases on human rights have found their way to the SCC in the past, litigants, including since the ouster of President Mubarak, have frequently been blocked in their efforts to ensure the constitutionality of the laws.

Challenges of constitutionality of provisions enacted since the ouster of President Mubarak, which are alleged to violate human rights, raised in the course of proceedings before ordinary courts, have been refused on the basis that the challenge is not "serious". For example, numerous challenges to the constitutionality of the Demonstration Law have been made in the context of criminal and administrative cases in ordinary courts in connection with the cases of the thousands arrested under this law. Nearly all of these have been rejected by courts, without referral to the Supreme Constitutional Court.[435] In the Case of *Amhed Maher, Ahmed Douma and Mohamed Adel*, the Abedine Misdemeanour Court concluded that the constitutional challenge was "not serious as it aims at prolonging the trial."[436] The Court of Appeal in the case upheld this reasoning of the first instance court.[437] In the Case of *Yara Sallam and 22 others*, the Heliopolis Misdemeanour Court did not address the substance of the constitutional challenges to the Demonstration Law. The Court instead recalled its discretionary power to assess whether the constitutional defence is "serious" enough to grant the parties the right to present it before the SCC and stated that the arguments were not sufficiently serious, without

433 2012 Constitution, Art. 177.

434 Ultimately, these rulings were overtaken by events following the military's ouster of President Morsi in July 2013.

435 See Chapter One for more details of such requests and their rejection by the courts. In June 2014, the Cairo Administrative Court referred a case challenging the constitutionality of the Demonstration law to the SCC. As of July 2016, the SCC has yet to decide the case.

436 Case No.9593/2013, Judgment of Abedine Misdemeanour Court of 22 December 2013, p.6.

437 Case No.1343/2014, Appeals Misdemeanour Court, of 7 April 2014, p.7.

providing any reasons for this decision.[438] The Court of Appeal also dismissed the constitutional arguments on the basis that they lacked seriousness and aimed at compromising the criminal case against the defendants.[439] The Court added that the defendants had failed to give the Court reasons to accept the challenge and to suspend the case until the Constitutional Court had ruled on the arguments.[440]

Having lower courts act as gate-keepers increases the likelihood that some laws and provisions may never be subjected to constitutional review.

Furthermore, as the cases challenging the Demonstration Law show, the vague wording of the SCC Law in terms of the standard that must be met before a case is referred for constitutional review – whether the case is sufficiently "serious" - grants the lower courts broad discretion over the referral of cases and in many instances has been interpreted in an unduly restrictive manner.

This restrictive interpretation is compounded by the inability for parties specifically to seek review of a court's decision not to refer a constitutional challenge. The only way a decision not to refer can be challenged is through appeal proceedings once a decision on the merits has already been made.

The effectiveness of the SCC is also hampered by the lack of access for individuals or organizations who are not parties to the underlying case to address the Court as *amicus curiae* or interveners.

In addition, the ability for the court acting on its own initiative or at the request of one of the parties to curtail the notice period for any hearing to three days or more undermines the ability of parties to adequately prepare their case.

V. RECOMMENDATIONS

In light of the above, the SCC Law should be amended to ensure that:

- **i. There is a transparent and open procedure for the appointment of members of the SCC and members of the Commissioner's Board.**
- **ii. The process for the appointment of members of the SCC and the Commissioner's Board is based on objective merit-based criteria and on redressing past discrimination.**
- **iii. Any decrease in the number of SCC judges is only given prospective effect.**
- **iv. Judges of the SCC are bound by a code of ethics and judicial conduct, which is consistent with international standards, established by the judiciary in an open and transparent and inclusive process and serves as the basis on which decisions on whether SCC judges are subject to discipline are made.**
- **v. Disciplinary proceedings are held before an independent and impartial body and afford the judge concerned a fair hearing that is consistent with international standards of due process, guaranteeing that:**
  - **a. the judge concerned is given sufficient notice of the allegations of misconduct;**
  - **b. the judge's rights to defence, including through counsel of choice are respected;**
  - **c. the judge is given adequate time and facilities for the preparation and presentation of the defence; and**
  - **d. the judge has the right to appeal any adverse decision and sanction to an independent judicial body.**
- **vi. Sanctions against SCC judges are proportionate to the misconduct in question and removal from office, including forced retirement, is limited to cases of incapacity or behaviour that renders the judge unfit to discharge his or her duties.**
- **vii. Without prejudice to *ex post* review, the SCC has jurisdiction to review *ex ante* the constitutionality of laws and their compliance with international standards.**

438 Judgment of Heliopolis Misdemeanours Court of 26 October 2014, ps. 3 to 4.

439 Judgment of North Cairo Court of Appeal of 28 December 2014, p.8.

440 Judgment of North Cairo Court of Appeal of 28 December 2014, p.8.

viii. **There is a clear and transparent procedure for bringing constitutional challenges before the SCC and the standard applied by lower courts in referring cases is not unduly burdensome or restrictive.**

ix. **The law provides avenues for individuals to directly petition the SCC without having lower courts act as "gatekeepers". Until these avenues are provided for, any decision by a lower court not to refer a case should be subject to review by an independent body, either by another court or a different panel of the same court.**

x. **Individuals or organizations who are not parties may participate as interveners or *amicus curiae*, provided they show a sufficient expertise or interest in a legal issue before the court.**

xi. **Parties to a case before the SCC are provided sufficient notice of an oral hearing.**

xii. **The SCC is required to issue reasoned judgments in a timely manner.**

CHAPTER SIX : OFFICE OF THE PUBLIC PROSECUTOR

I. CURRENT STATUS

Under the 2014 Constitution, public prosecutors are considered part of the judiciary in Egypt.[441]

The Office of the Public Prosecutor (OPP) operates as a hierarchy; all prosecutors are subject to the supervision of their immediate superiors and the Prosecutor-General.[442]

Given that the Prosecutor-General is responsible for deciding what alleged criminal conduct to investigate and who to prosecute and who not to prosecute, the position is an extremely powerful one. Decisions made within the OPP determine which criminal cases will be prosecuted before the courts.

Prior to the adoption of the 2014 Constitution, the President of the Republic had the power to select and appoint the Prosecutor-General.[443] Although the 2012 Constitution also removed the President's ability to select the Prosecutor-General (Art. 173), the July 2013 Constitutional Declaration reverted to the previous system of granting the President the discretion to select and appoint the Prosecutor-General.

This power, coupled with the executive branch's influence over cases assigned to individual prosecutors, prevented the investigation and prosecution of state actors for human rights violations in many cases and raised questions regarding the OPP's independence.

While the 2014 Constitution removed the President's power to select the Prosecutor-General, executive influence over the assignment of cases and in relation to prosecutors' appointment, transfer and discipline, remain. For example, the Executive oversees the administration of the OPP.

The lack of independence of the OPP has resulted in long-standing impunity for human rights violations in Egypt. Since the overthrow of Mubarak, the continuing failure of prosecutors to investigate and prosecute law enforcement officers for serious human rights violations have made the role of the Prosecutor-General and the impartiality of individual prosecutors a continuing point of contention.

i. Appointment, promotion, transfer and discipline

441 2014 Constitution, Art. 189.

442 JAL, Arts. 26 and 125.

443 Although the 2012 Constitution also removed the President's ability to select the Prosecutor-General (Art. 173), the July 2013 Constitutional Declaration reverted to the previous system of granting the President the discretion to select and appoint the Prosecutor-General.

Under the JAL, which alone governed the structure of the OPP until the adoption of the 2012 Constitution, the President chose the Prosecutor-General from among the Vice-Presidents of the Courts of Appeal, Judges of the Court of Cassation, or First Attorneys-General.[444] The HJC's approval was not required.[445]

Issues regarding the lack of independence of the OPP prior to the new Constitutional order came to the fore in the post-Mubarak period. In October 2012, after the acquittal of the Mubarak loyalists accused of orchestrating the "Battle of the Camels" – a vicious attack against protesters by men riding camels in February 2011 – then President Morsi moved to assign the Mubarak-appointed Prosecutor-General, Abdel Maguid Mahmoud, as ambassador to the Vatican.[446] This move, coming on the heels of the acquittal, was seen as an effort to appease public outrage at the impunity of Mubarak-era officials and police officers. Some sources have reported that Abdel Maguid Mahmoud himself had requested a transfer. Media reports indicate that publicly, however, that Abdel Maguid Mahmoud refused to resign as Prosecutor-General, arguing that President Morsi had no authority to effectively dismiss him under the law.[447] A few days later, President Morsi withdrew the ambassadorial appointment and Abdel Maguid Mahmoud remained in his post.[448]

A little over a month later, President Morsi again attempted to assert control over the OPP. He issued the 21 November 2012 Declaration, which stated in part that "the public prosecutor shall be appointed from among members of the judiciary by presidential decree" for a four-year term and was effective immediately.[449] Morsi then issued a decree appointing Talaat Abdellah as Prosecutor-General.[450]

The 2012 Constitution, signed into law on 25 December 2012, transferred the power to select the Prosecutor-General to the High Judicial Council while retaining the President's formal powers of appointment.

On the same day, the Judges' Club and the HJC issued a joint statement calling for Talaat Abdallah to resign as Prosecutor General. Abdel Maguid Mahmoud then challenged the appointment of Talaat Abdallah as Prosecutor General before the Cairo Court of Appeal.[451].

On 27 March 2013, the Court of Appeal issued its decision, quashing the presidential decree that had appointed Talaat Abdellah as Prosecutor-General.[452] Both Abdel Maguid Mahmoud and Talaat Abdellah appealed the ruling to the Court of Cassation. The Court of Cassation, however, affirmed the Court of Appeal's ruling. Shortly after his reinstatement as Prosecutor General, Abdel Maguid Mahmoud resigned from office. The military-backed Interim President, Adly Mansour, then appointed Hisham Barakat as Prosecutor-General.

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444 JAL, Art. 119.

445 JAL, Art. 119.

446 On 2 February 2011, men on camel and horseback attacked protestors. Twenty-four senior Egyptian officials and NDP loyalists were accused of orchestrating the attacks, known as the Battle of the Camels.

447 Article 67 of the JAL states in part, "Judges and the Prosecutors – except assistant prosecutors- cannot be dismissed".

448 "Morsi backtracks on sacking Egypt's top prosecutor", in *France 24*, 13 October 2012, available at http://www.france24.com/en/20121013-morsi-backtracks-dismissing-top-prosecutor-judicial-interference-abdel-meguid-mahmoud-egypt/.

449 21 November 2012 Constitutional Declaration, Art. 3.

450 Presidential Decree No. 386 for 2012 (appointing Abdallah as Prosecutor-General).

451 Case No. 3980 for Judicial Year 129; JAL, Art. 83 provides that the civil circuit of the Cairo Court of Appeal is exclusively competent to adjudicate cases filed by members of the judiciary, including prosecutors, in administrative decisions related to them.

452 "Egypt court overturns president's removal of prosecutor-general", in *Jurist*, 27 March 2013, http://jurist.org/paperchase/2013/03/egypt-court-overturns-presidents-removal-of-prosecutor-general.php; "Egypt court reinstates fired prosecutor", in *Al Jazeera*, 27 March 2013, available at http://www.aljazeera.com/news/middleeast/2013/03/201332711456948646.html.

These months of uncertainty and partisan manoeuvring by all sides reveal that the executive branch viewed control of the OPP as crucial.

Under the 2014 Constitution, individuals appointed as the Prosecutor-General are no longer selected by the President and their term is limited and non-renewable, thus curtailing the potential for direct interference by the President of the Republic. Article 189 of the Constitution provides that the Prosecutor-General will be "selected by the HJC from among the Vice-Presidents of the Court of Cassation, the Presidents of the Courts of Appeal or the Assistant Prosecutors-General, by virtue of a presidential decree" and limits the term to four-years non-renewable. Although the pool of candidates from which the Prosecutor-General can be selected largely follows Article 119 of the JAL, it is significant that the new Constitution grants the power of selection to the HJC instead of the President.

Entry-level prosecutors, called Associate Prosecutors, must meet the same eligibility requirements as judges:

- Egyptian citizenship with full civil capacity;
- minimum age requirements;
- being a recipient of a law degree from an Egyptian university or an equivalent foreign degree and an equivalency exam;
- the absence of a criminal or disciplinary record; and
- good conduct and reputation.[453]

The main difference is that an individual can become an associate prosecutor at age 19 and an assistant prosecutor at 21, whereas the minimum age for appointment as a judge of a first instance court is 30.[454]

To become an Assistant Prosecutor directly, without having first been an Associate Prosecutor, an individual must take an exam that is created and administered by the Ministry of Justice, having consulted the General Assembly and having been approved by the HJC.[455]

Associate Prosecutors, Assistant Public Prosecutors, First Attorneys-General, and all other members of the OPP are, in accordance with the JAL, appointed by presidential decree with the approval of the HJC.[456]

As in relation to judges (see Chapter Four), allegations of discriminatory practices have also been made in relation to the appointment of prosecutors. For example, media reports claim that, in 2014, 138 applicants to the OPP were turned down because their fathers had not obtained university degrees. In addition, the Vice-President of the Cassation Court was reported to have told a journalist that the son of a sanitation worker had "no place in the prosecution".[457]

Positions above the level of Associate, Assistant and First Attorneys-General are filled by promotion

453 JAL, Art. 38.

454 JAL, Art. 38.

455 JAL, Art. 116.

456 JAL, Art. 119(3).

457 See, for example, *Egyptian Justice Minister resigns after controversial comments*, Middle East Eye, 11 May 2015, available at: http://www.middleeasteye.net/news/son-garbage-collector-cannot-become-judge-egypt-s-justice-minister-1249138395#sthash.7vVucJqH.dpuf

within the OPP or are drawn from the judiciary.[458] Such positions can also be filled by appointment among members of the Department of State Affairs, State Council, Administrative Prosecution and junior teachers in law faculties provided certain conditions of seniority or salary scale are met.[459]

There are no additional criteria or qualifications set out in the law, other than the general eligibility criteria that apply also to judges, for the appointment or promotion of prosecutors. The law is also silent regarding the procedure for promoting prosecutors within the OPP.

The Minister of Justice may, after consulting the General Assembly of the court on which the judge sits and with the approval of the HJC, assign judges of appellate courts to the OPP for a period not exceeding 6 months, renewable once.[460]

With the consent of the HJC, prosecutors may also be seconded to positions with foreign governments or international bodies by presidential decree; the opinion of the Prosecutor-General must be sought, but is not binding.[461]

The OPP is headed by the Prosecutor-General, who has extensive powers to control prosecutors. One example that illustrates this arose after the protests at the presidential palace in December 2012. The Prosecutor-General asked the head of the East Cairo Prosecution Office to detain all persons involved in the protests. After arrests had been made, the local prosecutor in charge of the case considered that there was no legal basis for continued detention and so decided to release all of the accused. The Prosecutor-General reportedly requested that the prosecutor reverse his decision and then transferred him to another office. The prosecutor submitted a complaint, causing the Prosecutor-General to reverse his stance.[462] Although there are conflicting opinions about the merits of the case against the protestors and ultimately the Prosecutor-General reversed his decision, this example demonstrates the potential for the Prosecutor-General to use his or her powers to control the decisions of individual prosecutors.

Under the JAL, the Minister of Justice is responsible for the supervision and administrative oversight of prosecutors and the OPP, including the provision of health and social services for Prosecutors.[463]

While the 2014 Constitution guarantees the irremovability of judges, it is silent on the tenure of prosecutors. The JAL, however, specifies that prosecutors, except associate prosecutors, are irremovable.[464]

Disciplinary proceedings against prosecutors can be commenced by the Prosecutor-General, at his or her own initiative, or upon the referral of the Minister of Justice.[465] In accordance with the JAL, members of the OPP are subject to the same disciplinary procedures as judges.[466] Thus, the HJC authorizes the commencement of the investigation by a judge or prosecutor. Once the investigation is complete, the Disciplinary Board decides whether to have an oral hearing – which is held behind closed doors. The decision of the Board is, however, delivered in a session that is open to the public. The Disci-

458 JAL, Art. 117.

459 JAL, Art. 117.

460 JAL, Art. 57.

461 JAL, Art. 65.

462 "We are publishing the text of judge Mustapha Khatar protesting his transfer: Public prosecutor received him and the investigation team coldly and asked for the imprisonment of the accused without evidence so not to embarrass the presidency and threatened not to work with them, Youm 7, 12 December 2012, available at http://www1.youm7.com/News.asp?NewsID=874607#.U0aKPKXq-qE

463 JAL, Arts. 125 & 92.

464 JAL, Art. 67.

465 Article 129 of the JAL states in part "The Office of the Prosecutor may undertake a disciplinary investigation on its own or at the suggestion of the Minister of Justice." See also Art. 99.

466 JAL, Art. 129.

plinary Board that adjudicates cases related to judges also considers cases against prosecutors and decides on the applicable sanction. Prosecutors enjoy the same procedural rights as judges in the context of such disciplinary proceedings, namely: the right to be represented by a judge or prosecutor or former judge or prosecutor; the right to at least one week's notice in advance of any oral hearing, such notice to contain information on the subject of proceedings and substantiating evidence and the right to appeal to the Supreme Disciplinary Board within 30 days (see Chapter Four, Section I(iv) for further details of the disciplinary procedure).

The Prosecutor-General may decide whether or not to suspend a prosecutor who is under investigation for alleged misconduct.[467]

ii. Functions of prosecutors and relationship with other branches of government

Under the 2014 Constitution and the law, prosecutors are primarily responsible for instituting criminal proceedings.[468] Although a victim of a crime can summon a suspected perpetrator to appear in court in cases where the prosecutor or investigative judge has closed a case or decided not to institute criminal proceedings, this is not possible where the alleged perpetrator is a public official and the offence was committed in the course of the official's duties.[469] Consequently, prosecutors have broad discretion over the prosecution of human rights violations committed by public officials.

Under the JAL the OPP is also responsible for the supervision of police stations and prisons.[470] In addition, the Prosecutor-General has the authority to initiate disciplinary investigations against judges.[471]

The OPP's powers to investigate potential offences are not exclusive. Both the Minister of Justice and the Prosecutor-General can request that an investigative judge, instead of a prosecutor, conduct an investigation into a certain case or certain types of crime.[472] In such instances, the Minister of Justice requests the General Assembly of the Court of Appeal to assign a judge to investigate, whereas the Prosecutor-General requests the President of the First Instance Court to assign a judge. This transfer of responsibility over an investigation from a prosecutor to an investigative judge may occur even after the commencement of an investigation by a prosecutor. There are no criteria in law to govern when the Minister of Justice can request such an assignment. In the case of assignments by the Prosecutor-General, these can be made when it is considered necessary given the special circumstances of the case and the knowledge of the investigative judge.[473]

Following a transfer to an investigative judge, the investigative judge is then supervised by the President of the court to which the judge belongs.[474] After the end of the investigative process, the investigative judge sends the file back to the OPP to make its submissions. Then, the investigative judge makes a finding as to whether the conduct is punishable or not under the law and refers the accused to the relevant court.[475]

In various meetings during the last ICJ missions to Egypt, prosecutors themselves told the ICJ that they felt they were independent of the Executive. This view, however, is neither supported by the law or by practice. In particular, the law permits the Executive to interfere, including by transferring

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467 JAL, Art. 129.

468 2014 Constitution, Arts. 189 & 159; Criminal Procedure Code, Art. 1; JAL Art. 21; Penal Code, Art. 199.

469 Criminal Procedure Code Arts. 162 and 232(2).

470 JAL, Art. 27; See also, Criminal Procedure Code Art. 42.

471 JAL, Arts. 27 & 99.

472 Criminal Procedure Code, Arts. 64 and 65.

473 Criminal Procedure Code, Art. 64.

474 Penal Code, Art. 74.

475 Criminal Procedure Code, Arts. 153-155.

specific cases or categories of crimes from prosecutors to investigative judges, assigning appellate court judges to the prosecution service temporarily and referring allegations of misconduct to the Prosecutor-General for the initiation of disciplinary proceedings against individual prosecutors.

Furthermore, prosecutors are currently perceived by some as acting to pursue the agenda of the authorities in power, rather than objectively serving the public interest. As described in Chapter One, rather than acting in accordance with international standards on the role of the prosecutor by discontinuing prosecutions where it appears the charge was unfounded, respecting and protecting human rights, and giving due consideration to the prosecution of human rights violations by public officials, prosecutors have continued prosecutions in the absence of evidence against individuals of criminal conduct and have even prosecuted individuals for the peaceful exercise of their internationally guaranteed rights of freedom of expression and peaceful assembly. At the same time, there have been few, if any, effective investigations of and prosecutions for those responsible for torture and ill-treatment in detention centres and investigations into the legality of force used by law enforcement officials that have resulted in the killing, and serious injury of protestors.

iii. Prosecutors facilitating impunity for human rights violations

For many years in Egypt, there has been a routine failure to ensure that those responsible for human rights violations are brought to justice. This is in large part 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. The vast majority of cases related to human rights violations that are referred to prosecutors for investigation are closed due to "lack of evidence".[476] Cases that have been brought to trial have frequently resulted in acquittals because of weak evidence or inaccurate charges.

Those responsible for serious human rights violations have continued to enjoy impunity since the 2011 uprising. Law enforcement and security officers responsible for unjustified or excessive use of force resulting in the killing and injuring of protestors and other individuals during the 2011 uprising have not been prosecuted. Investigations of such cases by the authorities have been marred by delays, cursory in nature and often lacking in independence and impartiality.

For example, the non-governmental organization the Egyptian Initiative for Personal Rights (EIPR) carried out research regarding the killing of prisoners in five prisons between 29 January and 25 February 2011. Based on the information available, the organization concluded that prison guards opened fire on prisoners killing over 100 inmates and injuring hundreds. Furthermore, the EIPR found that this use of force was unlawful in that it was both excessive and unjustified. No public official was, however, prosecuted for these violations.[477] Following its in-depth examination of some of these and other cases of alleged killings and torture and ill-treatment by law enforcement officials, the EIPR found that the investigations were woefully inadequate. Among other things, those responsible for investigations failed to question the officers suspected of responsibility, impound weapons used, seize police weapons logs, or ask the medical examiner to remove the bullets from the victims' bodies in order to determine the type of ammunition used. In two cases involving the killing of prisoners, the prosecutor reportedly sent letters to the principal suspects asking them to investigate the events.[478]

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476 See, for example, Supplementary reports of States parties due in 1996, Egypt, CAT/C/34/Add.11, 28 January 1999, ps.32-34, which provides statistics regarding complaints of torture submitted to the OPP. In 1993, of 63 complaints, 5 cases were sent for "criminal or disciplinary trial" and 6 were sent for administrative sanction. In 1994, of 71 complaints, 6 were sent for "criminal or disciplinary trial" and 2 were sent for administrative sanction. In 1995, of 55 complaints, 5 cases were sent for "criminal or disciplinary trial" and 6 were sent for administrative sanction. See also, Human Rights Watch Report, "*Work on Him until He Confesses", Impunity for Torture in Egypt,* January 2011, ps. 42-43, available at http://www.hrw.org/sites/default/files/reports/egypt0111webwcover.pdf

477 Egyptian Initiative for Personal Rights, *Martyrs Behind Bars... Killings and Torture of Prisoners During Egypt's Revolution,* August 2011, available at http://www.eipr.org/en/report/2011/08/24/1300

478 Egyptian Initiative for Personal Rights, *State crimes remained unpunished: the Interior Ministry is above the law and the Public Prosecution is missing in action*, 25 January 2013, available at http://eipr.org/en/re-

The few cases against officials for their alleged role in serious human rights violations that have been brought to trial have, for the most part, resulted in acquittals due to a lack of sufficient evidence.

A notable example is the prosecution 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 during the uprising. On 2 June 2012, a Cairo Criminal Court acquitted the six security officials stating that there was insufficient evidence to persuade the court that those who carried out the killings were police officers and police personnel. Despite this finding, Mubarak and Al Adly were found guilty and were sentenced to life in prison. In January 2013, the Court of Cassation reviewed the case and ordered a retrial. The Cairo Felonies Court subsequently dropped charges against Hosni Mubarak, Habib Al Adly and the six aides for their alleged complicity in the killing of demonstrators.[479] In June 2015 the Court of Cassation, in a second review, ordered the retrial of Hosni Mubarak but upheld the acquittals of Habib Al Adly and the six aides.
Public condemnation of acquittals of police and other officials charged in connection with killings and injuries which occurred in the context of the protests led in November 2012 to attempts by then-President Morsi to ensure new investigations; among other things he issued a Constitutional Declaration that allowed the re-opening of investigations where new evidence was discovered. He also established a committee to investigate the deaths of protestors.[480] The committee issued a non-public report in early January 2013; reports in the media, however, suggested that the committee had found new evidence that could lead to the retrial of officers and officials.[481] Following receipt of the report, the OPP announced the establishment of the Revolution Protection Prosecution, specialized prosecution departments to investigate and retry individuals implicated in crimes against participants of the 2011 uprising.[482] There are however no reports of the unit reopening cases or launching new investigations into cases of alleged crimes by officials in relation to killings and injuries which occurred at the hands of security officials in the context of the 2011 protests.

Since the ousting of President Morsi, the killing and injuring of protestors by law enforcement officials has increased dramatically; more than 1,000 individuals were killed during the dispersal of protestors from the Rabaa and Nahda Squares in Cairo.[483] Reports of enforced disappearances and torture and other ill-treatment, including cases resulting in the deaths of detainees have also continued.[484] Almost no prosecutions have been brought in relation to these incidents. The rare cases that have been prosecuted have been based on charges that do not appear to reflect the nature or gravity of the crime and have frequently resulted in acquittals, convictions being subsequently overturned or in disproportionately lenient sentences.

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port/2013/01/22/1602.

479 Decision of the Cairo Felonies Court of 29 November 2014.

480 22 November 2012 Constitutional Declaration, Art. 1, available at http://english.ahram.org.eg/News/58947.aspx In the Declaration, Morsi announced that he had decided to "re-open the investigations and trials in the crimes of murder, attempted murder and wounding of protesters as well as the crimes of terror committed against the revolutionaries by anyone who held a political or executive position under the former regime, pursuant to the Law of the Protection of the Revolution and other laws". Following a backlash against what was perceived as a power grab, Article 2 of Morsi's 11 December 2012 Declaration annulled the November decree, and made the reopening of investigations contingent on the discovery of new evidence.

481 "Police, armed forces shot protestors during revolution, says Morsi's fact-finding committee", in *Egypt Independent*, 1 January 2013, available at http://www.egyptindependent.com/news/police-armed-forces-shot-protesters-during-revolution-says-Morsi-s-fact-finding-committee.

482 Art. 1584 of the Instructions of the Public Prosecutor of 1958, an internal instruction manual of the OPP, states that the Prosecutor-General may establish specialized offices that have jurisdiction over certain types of crimes.

483 ICJ, "Investigate and address human rights abuses following the ouster of President Morsi", Press Release 4 September 2013, available at http://www.icj.org/egypt-investigate-and-address-human-rights-abuses-following-the-ouster-of-president-morsi/.

484 ICJ, "Authorities must effectively investigate deaths of lawyers in custody", Press Release 24 April 2015, available at http://www.icj.org/egypt-authorities-must-effectively-investigate-deaths-of-lawyers-in-custody/ ; Amnesty International, "Key human rights concerns ahead of presidential elections", Briefing 23 May 2014 https://www.amnesty.org/en/documents/MDE12/028/2014/en/

For example, one of the few prosecutions of law enforcement officials was brought in relation to 37 detainees, who died on 18 August 2013 after law enforcement officials fired tear gas into the police van in which they were being transferred to prison. The prosecutor charged four police officers with only misdemeanour offences, including "involuntary manslaughter" and "extreme negligence", claiming an inability to prove intentional killing. On 18 March 2014, following the conviction of the four police officers, a misdemeanour court jailed one police officer for ten years and imposed a one-year suspended sentence on the other three officers. These convictions were overturned on appeal[485] and the Court of Cassation subsequently ordered a re-trial.[486] On 13 August 2015, the Khanka Misdemeanour Court after finding the four guilty imposed a sentence of five years' imprisonment on one officer, while the other three officers were again given a one-year suspended sentence.

Another one of the rare prosecutions against officials was prompted by international outcry over the killing of Shaimaa Al-Sabbagh, a member of a political opposition party who was participating in a peaceful protest marking the anniversary of the January 2011 uprising. As a result of the prosecution, a police officer, Yassin Mohamed Hatem Salaheden, was convicted and sentenced to 15 years' imprisonment. However, even though Al-Sabbagh died as a result of being shot with birdshot at close range, the officer was charged with "beating until death". Lawyers for the victim's family requested that the charges be amended to premeditated murder. There were concerns that the conviction could be annulled by the Court of Cassation, on grounds of lack of evidence of "beating". On 14 February 2016, the Court of Cassation annulled the conviction and ordered a retrial.

II. ASSESSMENT IN LIGHT OF INTERNATIONAL STANDARDS

The OPP in Egypt, which is subordinate to the Minister of Justice, has, for many years, lacked sufficient autonomy and independence from the executive branch. Executive interference, combined with a lack of sufficient criteria, ethical and professional guidelines and transparent procedures regarding the appointment, promotion, transfer and discipline of prosecutors, has eroded the impartiality of prosecutors and has undermined their ability to uphold human rights and ensure the effective administration of justice, including the effective investigation and prosecution of public officials responsible for gross human rights violations.

i. International standards

International standards related to prosecutors are set out in the UN Guidelines on the Role of Prosecutors and other instruments that have been adopted by the African Commission on Human and People's Rights and the Council of Europe. In addition, General Comments, conclusions and recommendations and jurisprudence of UN treaty monitoring bodies and the jurisprudence of regional human rights courts serve to provide authoritative clarification of the content of specific treaty guarantees. In addition, the International Association of Prosecutors adopted standards on professional responsibility in 1999.

Broadly speaking, the standards from these various sources are largely similar and aim to ensure that prosecutors play an effective role in the administration of justice in a manner that is consistent with the right to a fair trial and the protection of human rights and the rule of law. The one significant area of difference between the various standards is on the institutional status of the prosecutorial service within the government and in particular whether it must be independent of the executive branch as well as objective and impartial, or only objective and impartial. This is due to the fact that the status and role of prosecutors differs in some national legal systems. However, even where the public prosecutor is a part of or subordinate to the executive power, international standards are explicit that the lines of authority must be clear and transparent and that prosecutors should be impartial in carrying

485 "Egypt court overturns detainee tear-gas death sentence", in *BBC News*, 7 June 2014, available at http://www.bbc.com/news/world-middle-east-27748355.

486 "Egypt's high court orders re-trial of policemen linked to 37 deaths", Reuters, 22 January 2015, available at http://uk.reuters.com/article/2015/01/22/cnews-us-egypt-courts-police-idCAKBN0KV0VH20150122

out their duties. Specific guidance on such a situation is detailed below.

The UN Guidelines on the Role of Prosecutors (hereafter "UN Guidelines") were expressly formulated to assist States in "securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".[487] The Guidelines are intended to be applicable to all jurisdictions, regardless of whether the prosecutorial function is subsumed within or independent of the executive branch. The Guidelines are thus neutral on specific appointment procedures and the location of prosecutors within either the executive or judicial branches of the State.

ii. Appointment, structure and discipline

The UN Guidelines on the Role of Prosecutors provide that the selection of individuals as prosecutors should be based on objective criteria, should "embody safeguards against appointments based on partiality or prejudice" and should exclude discrimination.[488] Prosecutors should have "appropriate education and training" and should be made aware of the ideals and ethical duties of their office and of constitutional and statutory protections for suspects and victims, as well as human rights law.[489]

The UN Guidelines on the Role of Prosecutors also specify that promotions should be based on "objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures".[490]

Furthermore, the UN Guidelines on the Role of Prosecutors and other standards clarify that States have a duty to ensure that prosecutors "are able to perform their professional functions without intimidation, hindrance, harassment, improper interference, or unjustified exposure to civil, penal or other liability".[491]

In accordance with international standards, the conduct of prosecutors should be regulated by law or regulation and they should be accountable for professional misconduct. In the face of allegations of professional misconduct which are the subject of disciplinary proceedings, prosecutors have the right to a fair hearing and independent review of decisions to discipline them.[492]

Regarding the prosecutorial function, the UN Guidelines on the Role of Prosecutors state that prosecutors shall "carry out their functions impartially", shall "protect the public interest" and "shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded".[493] The Guidelines also state that prosecutors should

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487 Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1, para. 189 (1990) (hereafter "UN Guidelines on the Role of Prosecutors"), Preamble.

488 UN Guidelines on the Role of Prosecutors, Guidelines 1 & 2(a); Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, paras. 5(a) & (b); Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle F(c).

489 UN Guidelines on the Role of Prosecutors, Guideline 2(b); Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, para. 7.

490 UN Guidelines on the Role of Prosecutors, Guideline 7; see also Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle F(c); Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, para. 5(b).

491 UN Guidelines on the Role of Prosecutors, Guideline 4; see also Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle F(a)(ii); Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, para. 11.

492 UN Guidelines on the Role of Prosecutors, Guideline 21; see also Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle F(n); Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, para. 5(e).

493 UN Guidelines on the Role of Prosecutors, Guidelines 13(a) & (b) & 14; see also Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle F(i) & (j); Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, paras. 24 & 27.

give due attention to the prosecution of human rights violations, among other crimes.[494] They clarify that prosecutors are also under a duty to refuse to use evidence known or believed to have been obtained by recourse to unlawful means and must take steps to ensure that persons responsible for the use of such unlawful means are brought to justice.[495]

Furthermore, as public officials who are key players in the administration of justice, prosecutors should also be accountable to the public. As the Special Rapporteur on the independence of judges and lawyers has noted, among other things, some regional systems recommend the possibility of interested parties challenging a decision by a prosecutor not to prosecute.[496]

In Egypt, although the Prosecutor-General is no longer appointed by the President of the Republic, the former Prosecutor-General, Hisham Barakat, was appointed by the military-appointed President, Adly Mansour. Following the assassination of Hisham Barakat in June 2015, the HJC selected Nabel Sadeq, Vice-President at the Court of Cassation as Prosecutor-General. His appointment was formalised by presidential decree issued by President Sisi on 19 September 2015.-

As is the case with judges, although entry-level prosecutors must have the relevant qualifications and meet the specified criteria, there is a lack of objective and merit-based criteria for the appointment of more senior prosecutors and promotion within the OPP. Furthermore, the law contains no provision for addressing discriminatory practices in the appointment of prosecutors. There are also no criteria or qualifications and no clear and transparent procedure set out in law for the promotion of prosecutors.

Prosecutors are members of the judiciary in Egypt, but the law nonetheless still grants the Minister of Justice and the President of the Republic, both members of the Executive, the authority to exercise power over the OPP and the careers of individual prosecutors.

For example, the Minister of Justice can refer prosecutors to the Prosecutor-General for the initiation of disciplinary proceedings and is responsible for the supervision and administrative oversight of the OPP and services for prosecutors. In addition, albeit following consultation of the General Assembly of the OPP and with the approval of the HJC, the Minister establishes and administers the exam to be taken by individuals seeking appointment as Assistant Prosecutors, who have not previously served as Associate prosecutors, and may temporarily assign Court of Appeal judges to the OPP. Furthermore, with the consent of the HJC and having sought the non-binding opinion of the Prosecutor-General, the President may second prosecutors to foreign governments or international bodies.

Another gap in safeguarding the independence, impartiality and objectivity of prosecutors in Egypt is that Egyptian prosecutors currently have no code of conduct. They can therefore operate without a defined set of principles and standards on professional ethics. International standards recommend that prosecutors have clear ethical standards or codes that they are required to adhere to in the exercise of their professional duties,[497] to which they are held accountable; they clarify that decisions in disciplinary proceedings against prosecutors should be based on the code of professional conduct.[498]

In addition, the same flaws that render the disciplinary procedure for judges to be of concern – namely, restrictions on legal representation, the lack of oral hearings as a right, the potential for inadequate notice or information concerning the proceedings and the evidence and the absence of a right to attend an oral hearing on appeal – also effect the fairness of disciplinary proceedings against prosecutors, given that the same system applies. Thus, there are concerns that prosecutors may be subject to arbitrary discipline.

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494 UN Guidelines on the Role of Prosecutors, Guideline 15.

495 UN Guidelines on the Role of Prosecutors, Guideline 16.

496 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 86.

497 Committee of Ministers Recommendation (2000)19, para. 35.

498 UN Guidelines on the Role of Prosecutors, para. 22.

The lack of criteria and a transparent procedure for appointment and promotion, combined with the powers of the Minister of Justice in relation to the appointment, transfer and disciplining of prosecutors and the administration of the OPP, increase concerns about the functional independence and autonomy of the OPP, a branch of the judiciary.

iii. Functions of prosecutors and relationship with other branches of government

a) Relationship with the Executive

Some international standards express a strong preference for a prosecution authority that is independent of the executive branch of government. The Special Rapporteur on the independence of judges and lawyers has noted a "growing tendency to move towards a more independent prosecution service model, in terms of its relationship with other authorities, notably the Executive."[499] The Special Rapporteur considers that a prosecution service that is autonomous and viewed by the public as such will increase confidence in its ability to investigate and prosecute crimes.[500]
Likewise, the Inter-American Commission on Human Rights has focused on the need to increase "the independence, autonomy and impartiality which the Office of the Public Prosecutor must have", in Mexico.[501] The Commission found a "clear violation of autonomy" and stated that "for the proper exercise of its functions [the public prosecutor] must have autonomy and independence from the other branches of government".[502]

The European Court of Human Rights has held that "in a democratic society both the courts and the investigation authorities must remain free from political pressure" and that "it is in the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State".[503]

Other standards, including Recommendation (2000)19, adopted by the Committee of Ministers of the Council of Europe, on the role of public prosecution in the criminal justice system, recognize that in some national legal systems the public prosecution is part of or subordinate to the government, as it is in Egypt. In order to ensure that the public prosecution, in such systems, is able to perform its work without "unjustified interference," this standard recommends that States take measures to guarantee that:

- the nature and scope of the powers of the government with respect to the public prosecution are established by law;
- the government exercises these powers in a transparent way and in accordance with national and international law;
- if the government has the power to give instructions to prosecute a case, such instructions should be in writing and must respect principles of transparency and equity; the government should be under a duty:
    - to seek prior written advice from either the public prosecutor or the body that is carrying out the public prosecution;
    - to explain its written instructions, especially when they deviate from the public prosecutor's advice, and to transmit them through hierarchical channels; and
    - to see to it that, before trial, the advice and instructions become part of the public case file;

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499 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 27.

500 See Report on Mission to Mexico of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/65/274, paras. 16 & 87.

501 IACHR, *Report on the Situation of Human Rights in Mexico*, OAS Doc. OEA/Ser.L/V/II.100, para. 372. See also IACHR, *Annual Report 1997*, OAS Doc. OEA/Ser.L/V/II.98 doc. 6 rev. 13, Ch. VII.1.

502 *Report on the Situation of Human Rights in Mexico*, para. 381

503 *Guja v. Moldova*, ECtHR, Application No. 14277/04, Judgment of 12 February 2008, paras. 86 & 90.

- prosecutors remain free to make any legal argument of their choice to a court; and
- instructions not to prosecute a case are either prohibited or are exceptional.[504]

The Bordeaux Declaration, adopted by the Consultative Council of European Judges and the Consultative Council of European Prosecutors in 2009, offers similar guidance. The Explanatory Note to the Declaration underscores that:

> The independence of public prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realised. Thus, akin to the independence secured to judges, the independence of public prosecutors is not a prerogative or privilege conferred in the interests of the prosecutors, but a guarantee of a fair, impartial and effective justice that protects both public and private interests of the person concerned.[505]

The Bordeaux Declaration states that even if prosecutors are located within a government hierarchy, they must "enjoy complete functional independence in the discharge of their legal roles". In order to "ensure their accountability and prevent proceedings being instituted in an arbitrary or inconsistent manner, public prosecutors must provide clear and transparent guidelines as regards the exercise of their prosecution powers".[506]

The Bordeaux Declaration further provides that to ensure that public prosecutors have independent status, their position and activities should not be "subject to influence or interference from any source outside the prosecution service itself".[507] Thus, matters such as "their recruitment, career development, security of tenure including transfer" should be effected only according to the law or by their consent, and their remuneration should be "safeguarded through guarantees provided by the law".[508]

The Bordeaux Declaration also recognizes that, in some States, the prosecution service is hierarchical. In such cases there should be transparent lines of authority, accountability, and responsibility. Furthermore, directions to public prosecutors "should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria. Any review according to the law of a decision by the public prosecutor to prosecute or not to prosecute should be carried out impartially and objectively."[509]

Functional independence is a pre-requisite to enable prosecutors to carry out their duties, which, among other things, include the institution of prosecutions and, where authorized by law, the investigation of crimes and supervision of such investigations.[510] Regardless of whether prosecutors are independent of or subordinate to the executive branch, they should always "be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognized by international law".[511]

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504 Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, para. 13(a)-(f).

505 Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE), Judges and Prosecutors in a Democratic Society, CM(2009)192 (hereafter "Bordeaux Declaration"), Explanatory Note, para. 27.

506 Bordeaux Declaration, Explanatory Note, para. 29.

507 Bordeaux Declaration, para. 8.

508 Bordeaux Declaration, para. 8.

509 Bordeaux Declaration, para. 9.

510 UN Guidelines on the Role of Prosecutors, Guideline 11.

511 Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, para. 16; see also UN Guidelines on the Role of Prosecutors, Guideline 15; and Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle F(k).

In Egypt, the requisite safeguards for the impartiality and objectivity of the prosecution function are lacking. Indeed, the Special Rapporteur on the independence of judges and lawyers has noted with concern that in Egypt there is a lack of clear separation between the prosecution and the executive power in the JAL.[512] Given the institutional subordination of the OPP to the Ministry of Justice, as well as the fact that prosecutors are considered to be part of the judiciary, it is all the more important that there exist "transparent lines of authority, accountability, and responsibility".[513] In addition, clear and transparent guidelines should be developed regarding the exercise of prosecutorial powers.

Furthermore, the ICJ considers that in order to safeguard the independence of the judiciary, including both the OPP and judges, the Minister of Justice should be divested of the power to remove an investigation from a specific prosecutor and to request the General Assembly of the Court of Appeal to assign it to an investigative judge.

The OPP's lack of independence from the Executive has undermined the effectiveness of the OPP as well as the ability of individual prosecutors to carry out their essential role in the administration of justice. As detailed in Chapter One, for many years, including since the overthrow of President Mubarak, prosecutors have failed to effectively investigate conduct amounting to, and to prosecute those responsible for, gross human rights violations. The rare criminal investigations against law enforcement officers, when they are initiated, are often protracted and inconclusive. Even cases of torture in which allegations are supported by forensic reports have been closed by the OPP for lack of evidence. [514]

In addition to greater independence from the Executive, the OPP's exclusive discretion to determine whether a case for gross human rights violations ever comes to trial often poses an insurmountable obstacle to accountability. The prohibition on victims appealing a prosecutor's decision to close a case, or not to prosecute where the accused is a public official, makes it difficult to ensure that state actors are held to account for violations of human rights, thereby undermining the rule of law. In order to enhance respect for human rights and the rule of law, the law should be amended to ensure that decisions of prosecutors not to prosecute or to close a case against a public official may be challenged by interested parties. Furthermore, prosecutorial guidelines should be adopted and require prosecutors to prioritise crimes committed by public officials, particularly corruption, abuse of power, grave human rights violations and other crimes recognized by international law.

b) Relationship with the judiciary

The distinct roles of prosecutor and judge are a necessary component of a system of justice based on the rule of law and the fair, effective and impartial administration of justice. Thus the UN Guidelines on the Role of Prosecutors state that the "office of prosecutors shall be strictly separated from judicial functions".[515] The Bordeaux Declaration provides that "[j]udges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other".[516] The Council of Europe Committee of Ministers Recommendation (2000)19 provides that "States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states should guar-

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512 Human rights expert concerned over law on the judiciary in Egypt, Statement by the Special Rapporteur on the independence of judges and lawyers, 14 July 2006, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2854&LangID=E

513 Bordeaux Declaration, para. 9.

514 See Redress*, Reparation for Torture: A Survey of Law and Practice in 30 Selected Countries: Egypt Country Report,* 2003, ps.10-11 available at http://www.redress.org/downloads/country-reports/Egypt.pdf ; and Human Rights Watch, *"Work on Him until He Confesses" Impunity for Torture in Egypt,* January 2011, ps.42-43 available at http://www.hrw.org/sites/default/files/reports/egypt0111webwcover_0.pdf

515 UN Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (hereafter « UN Guidelines on the Role of Prosecutors »), Havana, 27 August to 7, para. 10.

516 Bordeaux Declaration, para. 3.

antee that a person cannot at the same time perform duties as a public prosecutor and as a court judge".[517]

The Special Rapporteur on the independence of judges and lawyers has noted that it is "important that prosecutors and judges be perceived by the general public as performing different roles and functions, as public confidence in the proper functioning of the rule of law is best ensured when every State institution respects each other's sphere of competence".[518] The Special Rapporteur has also warned that the opportunity to switch careers between the prosecution service and the judiciary "could potentially affect their independence and impartiality, or at least the appearance thereof, especially considering that they have different functions and play different roles".[519]

The Explanatory Note to the Bordeaux Declaration acknowledges that in some l somesome legal systems, judges and prosecutors may both be part of the judicial corps and the public prosecution's autonomy from the Executive may be limited. This is certainly the case in Egypt. Nevertheless, the Explanatory Note states that there must still be a guarantee of separate functions,[520] arguing that "[t] he independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary. The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the Executive and the Legislature and where the distinct role of judges and prosecutors is correctly observed".[521]

In the light of these standards, several aspects of the law and current functioning of the OPP and its relationship with the judiciary are problematic. First, as noted in Chapter three, members of the bench are largely drawn from the ranks of prosecutors. In addition, prosecutors above the rank of Assistant Prosecutors are frequently drawn from members of the bench and both prosecutors and judges can freely swap from one profession to the other. Furthermore, the Minister of Justice can select a judge of the Court of Appeal and temporarily assign him or her to work in the prosecution service.[522] These practices could influence the outcome of a particular case and present a direct conflict of interest, including in cases where, for example, the same individual could become a "judge in one's own cause".[523] In addition, the lack of distinction between the two professions could affect the independence and impartiality of judges and prosecutors, or at least the appearance thereof, and could blur what should be a clear distinction in their separate roles and functions.

Also of concern is the ability of the Minister of Justice and the Prosecutor-General to order the removal of a case from a specific prosecutor and its assignment to an investigative judge. The Minister of Justice's powers in this regard potentially undermines the individual independence of prosecutors and judges by enabling the Executive to determine when a case should be removed from a specific prosecutor and assigned to an investigative judge. In the case of the equivalent powers of the Prosecutor-General, there is a risk of encroaching on the individual independence of judges and prosecutors as a result of the lack of adequate criteria to determine the circumstances in which a case or cases can be re-assigned and the fact that the President of the Court of First Instance selects the investigative judges, as opposed to the General Assembly of the Court.

c) Prosecutors facilitating impunity

517 Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, para. 17.

518 Id. at para. 40.

519 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 39.

520 Bordeaux Declaration, Explanatory Note, paras. 6-9.

521 Bordeaux Declaration, Explanatory Note, para. 10.

522 JAL, Art. 57. Consultation with the General Assembly of the Court of Appeal from which the judge is assigned is required, as is the approval of the HJC.

523 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para. 39.

Egypt's obligations, including under the ICCPR, to respect and ensure human rights, include ensuring that any person whose rights have been violated has "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".[524] In elaborating on the nature of the general legal obligation imposed on States by Article 2 of the ICCPR, the Human Rights Committee has clarified that States are under a duty to "investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies".[525] Further, where an investigation reveals violations recognized as criminal under domestic or international law, including torture or other ill-treatment, summary and arbitrary killing and enforced disappearance, those responsible must be brought to justice.[526]

In any criminal justice system that respects the rule of law, prosecutors have a key role to play in ensuring those responsible for human rights violations are brought to justice, and thus in combating impunity. Impunity has been defined as "the impossibility, de jure or de facto, of bringing the perpetrators of [human rights] violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims".[527] The UN Guidelines thus clarify that prosecutors "shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law".[528]

Regardless of whether prosecutors are independent of or subordinate to the executive branch, they should always "be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognized by international law".[529]

UN treaty bodies and Special Rapporteurs have highlighted the special responsibility of prosecutors in investigating alleged human rights violations committed by state actors. In its Concluding Observations following examination of the implementation of the ICCPR by France, the Human Rights Committee expressed concern about "the failure or reluctance of prosecutors to apply the law on investigating human rights violations where law enforcement officers are concerned, and at the delays and unreasonably lengthy proceedings in investigating and prosecuting alleged human rights violations involving law enforcement officers".[530] Similarly, concerning Tunisia, the Committee against Torture found that the Public Prosecutor had breached his duty of impartiality when he failed to appeal a decision to dismiss a case pertaining to an alleged death in custody resulting from torture.[531]

The Special Rapporteur on the independence of judges and lawyers has also stressed "the need for prosecutors to bring impartial and objective judgment to bear on case files prepared by police or

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524 ICCPR, Art. 2(3)(a).

525 Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 15.

526 Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18. See also, Report of the Independent Expert to update the Set of principles to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, principle 19.

527 Report of the Independent Expert to update the Set of principles to combat impunity, UN Doc. E/CN.4/2005/102/Add.1(2005), pg 6, Definitions, para A.

528 UN Guidelines on the Role of Prosecutors, Guideline 14; see also Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle F(k).

529 Council of Europe, Committee of Ministers Recommendation (2000)19 on the role of public prosecution in the criminal justice system, para. 16.

530 Concluding observations of the Human Rights Committee on France, UN Doc. CCPR/C/79/Add.80, para. 15.

531 Committee Against Torture, Communication No. 60/1996, Views of 24 January 2000, UN Doc. CAT/C/23/D/60/1996, para. 11.10.

investigators".[532]

Indeed, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, following a mission to Egypt in 2009, expressed "deep concern about serious and frequent allegations of torture or other ill-treatment, illegal detention and non-compliance with judicial release orders for terrorist suspects" and urged the Government "to ensure that prompt and independent investigations of complaints are carried out on a consistent basis with the purpose of bringing to justice all persons implicated in such offences".[533] Data compiled during the rule of former President Mubarak has revealed that most complaints of torture "[did] not result in a trial, let alone the conviction and punishment of alleged perpetrators".[534] The same appears to remain true in relation to allegations of torture and other serious human rights violations today.

Judges and prosecutors who spoke to ICJ delegates in September 2012 about the issue of impunity for human rights violations frequently shifted the responsibility for impunity away from the OPP itself. Rather, judges and members of the OPP highlighted both deficiencies in the Penal Code and the problems inherent in obtaining evidence from the police. A senior judge of Cairo's Criminal Court suggested that a major obstacle is that the evidence is with the institution that committed the crime.[535] Lawyers and members of the judiciary stressed that police officers are unwilling to give evidence against their fellow officers. Furthermore, not only are police witnesses reluctant to testify, they may even act to conceal evidence of abuse.

In addition, Article 63 of the Criminal Code codifies a "higher orders" defence, whereby government employees incur no liability for crimes committed if such crime resulted from following orders by superiors. However, the employee must prove that he carried out the act only after inspecting and ensuring that it was lawful; he believed it was lawful, and his belief was premised on a reasonable basis.

Individuals also discussed, in relation to impunity, the potential bias in the work of forensic experts when reporting on deaths or injuries linked to government authorities.

In meetings with the ICJ, judges emphasised that they could only rule on the evidence before the court. While they were aware of the desire within various sectors of the society to ensure convictions in certain types of cases, they were still required to follow the law, including the law on sufficiency of the evidence. One judge explained that he was trapped between the law, his own conscience, and public opinion.

When asked why the OPP could not compel police to provide evidence, one judge described prosecutors and the police as "sweethearts". Some critics also noted that many members of the OPP are themselves former police officers or were recruited from the police college.

Under Article 22 of the Code of Criminal Procedure, the Prosecutor-General may proceed with a disciplinary action against any "judicial officer" who is not fulfilling his or her duties in relation to an investigation.[536] However, it is unclear how frequently the OPP has pursued such cases, or indeed, whether prosecutors have been disciplined for failure to diligently investigate a case relating to an alleged human rights violation.

Prosecutors in Egypt have, for many years, failed to carry out prompt, thorough, effective and inde-

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532 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/20/19, para 43.

533 Mission to Egypt, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/13/37/Add.2, para. 56.

534 Redress, *Reparation for Torture: A Survey of Law and Practice in 30 Selected Countries: Egypt Country Report*, 2003, p. 11, available at http://www.redress.org/downloads/country-reports/Egypt.pdf.

535 ICJ meeting with lawyers and judges 6 September 2012.

536 "Judicial officer" is defined in Article 23 and encompasses a broad range of individuals including members of the OPP, law enforcement officials, prison detention officers, tourism inspectors and railway and transport police.

pendent and impartial investigations into allegations of human rights violations. Although to some extent failings can be attributed to factors beyond their control, such as deficiencies in the Criminal Code, in many instances it appears that the Executive's control over the OPP and the lack of independence between prosecutors and police officers responsible for the crimes under investigation has resulted in widespread impunity for state actors. The almost total failure to prosecute State officials for human rights violations committed since January 2011 stands in stark contrast to the mass prosecutions of thousands of perceived opponents of the government, including politicians, lawyers, journalists and others who speak out against the regime, in this same period.

III. RECOMMENDATIONS

In light of the above, in order to safeguard the independence and impartiality of the OPP and prosecutors and to combat impunity enjoyed by officials responsible for human rights violations, the JAL and the Criminal Code of Procedure should be amended to:

i. **Establish fair, clear and transparent procedures set out in law for the selection of prosecutors and remove the role of the Minister of Justice in setting and administering the exam for Assistant Prosecutors.**
ii. **Establish additional merit-based criteria for the selection of prosecutors to ensure that individuals who are appointed have appropriate training and qualifications in law, ability, integrity and experience.**
iii. **Ensure that selection criteria embody safeguards against appointments based on partiality or prejudice and that selections are free of discrimination on any ground.**
iv. **Require appropriate training, including training on the rights of the suspect and the victim, and of human rights and fundamental freedoms enshrined in national and international law.**
v. **Establish clear criteria for promotion based on objective merit-based factors, in particular professional qualifications, ability, experience and integrity.**
vi. **Ensure that decisions on promotions are made the context of fair and impartial procedures by a branch of the HJC composed predominantly of prosecutors.**
vii. **In addition to recommendations vii – ix in Chapter Four on the disciplinary procedure applicable to judges and prosecutors, ensure that all disciplinary proceedings and rulings in such proceedings are based on an established code of conduct for prosecutors that is consistent with international standards.**
viii. **Ensure that prosecutors are able to perform their functions independently and objectively and are protected from intimidation, hindrance, harassment, and improper interference, including by:**
    a. **Rescinding the authority of the Minister of Justice to remove investigations from the OPP and to request the Court of Appeal to assign an investigative judge;**
    b. **Ensuring that the Minister of Justice has no authority to interfere with prosecutorial decision-making in individual cases;**
    c. **Ensuring that the Minister of Justice has no role in the investigation or disciplining of prosecutors; and**
    d. **Ensuring the President of the Republic has no role in identifying and selecting prosecutors for secondment to foreign governments or international bodies;**
ix. **Guarantee a clear separation of the prosecutorial function from that of judges and preserve the independence of prosecutors and investigative judges, including by:**
    a. **Adopting clear and transparent criteria to define the circumstances in which the Prosecutor-General can request an investigative judge be assigned to any particular case or type of crimes;**
    b. **Amending Article 64 of the Code of Criminal Procedure to ensure that the decision to assign a particular investigative judge to a case is taken by the General Assembly of the Court; and**
    c. **Removing the power of the Minister of Justice to temporarily assign Court of Appeal judges to the prosecution service.**

x. **Ensure that any decision by a prosecutor not to prosecute or to close a criminal investigation may be challenged by an interested party before a court in the context of an independent and impartial judicial review.**
xi. **Prohibit the use of illegally obtained evidence, including confessions obtained through illegal means, including torture or other ill-treatment or conduct that amounts to unlawful coercion.**

In addition to the specific reforms to the JAL and the Code of Criminal Procedure, the Egyptian authorities should:

i. **Ensure that clear and transparent prosecutorial guidelines are established that require prosecutors to give due attention to the prosecution of crimes committed by public officials, including corruption, human rights violations, and crimes under international law.**
ii. **Provide for the development and adoption of a code of conduct for prosecutors that is consistent with international standards, with the active participation of prosecutors themselves, as well as defence counsel and judges.**

CHAPTER SEVEN : MILITARY AND EMERGENCY COURTS

The 1971 Constitution, the Military Code of Justice, and the Emergency Law authorised the establishment of a series of special and military courts in Egypt that operate, in effect, as a parallel judicial system.

The resort to specialized and exceptional courts, including military courts and emergency state security courts, began before Mubarak and has continued after him. It was a way to evade the ordinary court system, which sometimes acted as an inconvenient check on the government's "most authoritarian impulses".[537] Under Mubarak, exceptional courts were a quick and easy way to ensure the punishment of political opponents. Procedural protections safeguarding the rights of people tried before these courts were few and the government was almost always guaranteed a favourable outcome.

The 2014 Constitution continues to authorise the expansive use of military courts and, although it prohibits exceptional courts, the Emergency Law continues to authorise the establishment of special courts.

While these courts were a key feature of Egypt under Mubarak, the use of military courts has actually increased after Mubarak's relinquishment of power under the SCAF. Between 28 January and 29 August 2011, military tribunals reportedly tried 11,879 civilians.[538]

When Mohamed Morsi became President, he issued a decree pardoning all who had been convicted, or were still under investigation, or on trial for acts committed with the aim of "supporting the revolution", including the thousands of individuals who had been tried and convicted in military courts.[539] The pardon applied to all those arrested between 25 January 2011 and 30 June 2012. However, in May 2014, as one of his last acts as interim President, Adly Mansour announced that the pardon decree, as well as all other decrees issued by Mohamed Morsi while he was President, were annulled.[540]

Since his election, President Sisi has unilaterally expanded the jurisdiction of military courts further,[541] resulting in the referral of thousands of cases of civilians for prosecution before military courts.[542]

As detailed below, the routine use of military courts to try civilians and the trials before military courts and state security courts violate Egypt's obligations under international human rights law to guarantee fair trials before independent and impartial courts in several respects.

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537 Nathan J. Brown & Michele Dunne, "Egypt's Judges Join In", in *Foreign Affairs*, 1 April 2014, available at http://www.foreignaffairs.com/articles/141088/nathan-j-brown-and-michele-dunne/egypts-judges-join-in.

538 Press conference of General Adel Morsi of the SCAF, 5 September 2011. See also Human Rights Watch, *Egypt: Retry or Free 12,000 After Unfair Military Trials*, 10 September 2011, available at http://www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials

539 "Egypt's President Mursi pardons 'revolutionaries'", in *BBC World News*, 9 October 2012, available at http://www.bbc.com/news/world-middle-east-19877428. An English translation of the pardon is available here http://english.ahram.org.eg/NewsContent/1/140/55104/Egypt/First--days/English-text-President-Morsis-pardon-decree-for-re.aspx.

540 "Egypt cabinet annuls Morsi's presidential pardons" in *Ahram Online*, 22 May 2014, available at http://english.ahram.org.eg/NewsContent/1/64/101994/Egypt/Politics-/Egypt-cabinet-annuls-Morsis-presidential-pardons.aspx; "Mansour cancels Morsi pardons" in *Mada Masr*, 29 May 2014, available at http://www.madamasr.com/content/mansour-cancels-morsi-pardons.

541 Presidential Decree No. 136 of 2014 on 'Securing and Protection of Public and Vital Facilities', 27 October 2014.

542 See Section I.II below for further details.

I. MILITARY COURTS

i. Formation and appointment

The military judiciary is organized under the Military Judiciary Law (MJL), Law No. 25 of 1966.

Both the 2014 Constitution and MJL declare military courts to be independent.[543]

The 2014 Constitution also provides that military court judges are independent and irremovable and that they shall enjoy the guarantees, rights and duties stipulated for members of other judicial bodies.[544]

Likewise, the MJL provides that military judges are independent.[545]

Notwithstanding these declarations and guarantees of independence, military courts and military court judges operate under the direct supervision of the Ministry of Defence.[546]

Military judges 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.[547] In addition to fulfilling the criteria for becoming a judge provided for under Article 38 of the JAL – namely, Egyptian citizenship with full civil capacity; minimum age requirements; a law degree; the absence of a criminal or disciplinary record; and good conduct and reputation – individuals who are appointed as military judges must also fulfil the conditions of service and promotion criteria for armed forces officers.[548]

Military Judges swear an oath of office before the Deputy Supreme Commander of the Armed Forces and the Director of the Military Judiciary.[549]

Under the JAL, military judges are independent and subject only to the law in the exercise of their functions. Except for prosecutors of the rank of lieutenant, military judges are irremovable, barring cases of disciplinary measures taken pursuant to Law No. 232 of 1959, on the 'conditions of service and promotion for officers of the armed forces' (the Military Service Law).[550]

Consequently, military judges remain subject to the military chain of command even in the context of their judicial duties.

Under recent amendments to the MJL, the system of military courts consists of felony courts and misdemeanour courts. Cases from Military Misdemeanour Courts can be appealed to the Military Court for Misdemeanour Appeals. Appeals from this court and the Military Felony Courts can be appealed to the Supreme Court of Military Appeals.[551]

Military trials can be carried out in any location, regardless of where the crime took place.[552]

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543 2014 Constitution, Art. 204 and MJL, Art. 1.

544 2014 Constitution, Art. 204.

545 MJL, Arts. 1 & 3.

546 MJL, Art. 1.

547 MJL, Art. 54.

548 MJL, Art. 2. See Chapter Four, Section I for further details on the requirements for appointment as a judge in ordinary courts.

549 MJL, Art. 56.

550 MJL, Art. 3.

551 MJL, Art. 43 as amended by Law No. 12 of 2014.

552 MJL, Art. 53.

The Supreme Court of Military Appeals hears appeals in both cases concerning military law and cases concerning public law that involve either military personnel or civilians.[553] Its headquarters is in Cairo and it is composed of a President, a sufficient number of Deputies and military judges with the minimum rank of colonel. Judgments of the Supreme Court of Military Appeals are issued by a panel of five military judges.

The Military Court for Misdemeanour Appeals is competent to hear appeals filed by either the prosecution or the defence from the Military Misdemeanour Courts.[554]

The Military Felony Courts , the Military Misdemeanour Courts and the Military Court for Misdemeanour Appeals comprise various regional circuits with three military judges on each court.[555]

In addition to the above, field courts may be formed by an order from the Minister of Defence and have jurisdiction over:

- members of the armed forces engaged in military operations inside or outside the country
- members of the armed forces located outside of Egypt; an
- other cases as decided by the Minister of Defence.[556]

Decisions of field courts can be appealed to the Supreme Court of Military Appeals.

ii. Personal and subject matter jurisdiction

Under the 2014 Constitution and the MJL, military courts have broad jurisdiction to try both military personnel and civilians, including people under the age of 18, for a variety of offences, including conduct that is unrelated to military service.

In addition to members of the armed forces, the MJL extends jurisdiction to:

- students of military schools, professional training centres and institutes, and military colleges;
- prisoners of war;
- any armed forces formed by a presidential order to perform a public, private, or temporary service; and
- soldiers belonging to allied forces or aligned with them if they are residing in Egypt unless there is a treaty or convention to the contrary.[557]

The MJL also grants military courts jurisdiction over civilians who are assigned to military personnel during field service and who work in the Ministry of Defence or armed forces.[558] In addition, military courts have jurisdiction over all crimes where one party, whether victim or defendant, is a member of the military.[559]—

553 MJL, Art. 43(bis).

554 MJL, Art. 45.

555 MJL, Arts. 44 & 45.

556 MJL, Art. 92.

557 MJL, Arts. 4 and 8(bis)(1).

558 MJL Art. 4.

559 MJL Art. 5

The trial of civilians before military courts was very much a contentious issue during the uprising that toppled former President Hosni Mubarak and in its aftermath.

Nevertheless, despite assurances by constitutional drafters that such jurisdictional grants would be removed under the new legal regime, both the short-lived 2012 Constitution and the 2014 Constitution authorise trials of civilians before military courts.[560] In particular, the exceptions to the prohibition of the exercise of jurisdiction by military courts over civilians in the 2014 Constitution include 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".[561] In addition, the 2014 Constitution has opened the door for further expansion of the jurisdiction of military courts by establishing that the definition of such crimes and "other competences" of the military courts are to be determined by the law.[562]

The MJL grants military courts subject matter jurisdiction over crimes committed in military-occupied areas.

Moreover, under the MJL, the military judiciary has exclusive competence (to the exclusion of civilian courts) to determine whether a crime falls within the jurisdiction of military courts.[563]

Article 203 of the 2014 Constitution grants the National Defence Council a role in drafting laws that are related to the Armed Forces. Given the broad language of crimes over which military courts have jurisdiction under the 2014 Constitution, and the fact that nearly half of the National Defence Council members are representatives of the armed forces, the military has extensive powers to ensure that the broad jurisdiction of military courts over civilians is maintained.[564]

Until May 2012, the President had the authority, under the MJL during a state of emergency, to refer any case to a military court.[565] Under the 1971 Constitution, the President could also refer "any terror crime to any judicial body stipulated in the Constitution or the law".[566]

This sweeping right of referral was exploited by the SCAF immediately following the ouster of Mubarak. In March 2011, the Penal Code was amended to include provisions criminalizing "intimidation, terrorization and thuggery".[567] In July 2011, SCAF reaffirmed its authority to order that individuals arrested for thuggery be tried in military courts.[568]

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560 In meetings with the ICJ in 2012 for example, then-president of the Constituent Assembly, Hossam Al Gheriani, asserted that the new Constitution would not allow civilians to be tried before military courts.

561 2014 Constitution, Art. 204.

562 2014 Constitution, Art. 204.

563 MJL Art. 48.

564 Article 197 of the Constitution provides that the National Defence Council is presided over by the President, and composed of the speakers of the House of Representatives and the Shura Council, the Prime Minister, the Minister of Defence (who under Article 195 is the Commander in Chief of the Armed Forces), the Minister of Foreign Affairs, the Minister of Finance, the Minister of Interior, the Chief of the General Intelligence Service, the Chief of Staff of the Armed Forces, the Commander of the Navy, the Air Forces and Air Defence, the Chief of Operations for the Armed Forces and the Head of Military Intelligence.

565 Amendments on 9 May 2012 to Law No. 25 of 1966 repealed Article 6.

566 1971 Constitution, Art. 179.

567 Egyptian Initiative for Personal Rights, "EIPR Urges People's Assembly to Immediately Vote to End the State of Emergency", Press Release 30 January 2012, available at http://eipr.org/en/pressrelease/2012/01/30/1360.

568 "SCAF releases another statement saying military trials still an option", in *Ahram Online*, 17 July 2011, available at http://english.ahram.org.eg/NewsContent/1/64/16599/Egypt/Politics-/SCAF-releases-another-statement-saying-military-tr.aspx.

In May 2012, the People's Assembly amended the MJL, prohibiting the possibility of referral of ordinary crimes for trial in military courts and repealing the provision of the MJL giving the President power to refer cases to a military court during a state of emergency. Furthermore, under the 2014 Constitution, the President no longer has the right to refer terrorism cases to any court.

The May 2012 amendments to the MJL, however, maintained the provisions of the MJL, which permit the trial by military court of civilians arrested in an area where the military is deployed or when one party is from the military. Thus, in November 2012, residents of Qursaya Island, who were forcibly evicted by the military when it claimed ownership of the land, were arrested, charged with "assaulting public servants", "encroaching on army-owned property" and "being present in a military zone" and were tried in military courts.[569] Such trials are still permissible under the 2014 Constitution.

On 27 October 2014, President Sisi further expanded the jurisdiction of military courts in Presidential Decree No. 136 of 2014 on 'Securing and Protection of Public and Vital Facilities'. Article 1 of the decree states that the armed forces shall assist the police in protecting public and vital installations, including utilities infrastructure, transport networks and "other buildings, installations, facilities, public property".[570] These places are to be considered "military installations" while the army is guarding them. Article 2 of the decree extends the jurisdiction of military courts to all crimes that are committed on the installations and facilities referred to in Article 1. Since Article 2 does not limit jurisdiction specifically to "military installations", it grants military courts broad jurisdiction over any crimes committed on any public property or facility, whether or not the army is guarding them at the time.

Between 27 October 2014 and 24 March 2015, over 3,000 civilians were reported to have been tried in military courts.[571] These include, for example, cases against students for alleged crimes committed on or around university campuses.[572]

Furthermore, under the Emergency Law, the President can order the formation of "emergency state security courts" composed of military officers. These courts have jurisdiction to try civilians for various crimes relating to "terrorism", "drugs" and "thuggery". Thus, in addition to being tried by military officers in military courts civilians may also face trial before emergency state security courts composed of military officers. These courts are described in more detail in section III below.

iii. Trials before military courts

a) Military prosecution

In accordance with the MJL, the military prosecution is headed by a military Prosecutor-General, who is supported by a sufficient number of members, whose rank is not below a first lieutenant.[573]

The military Prosecutor-General supervises members of the military prosecution and can assign work

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569 "Court rules military should leave Qursaya island", in *Mada Masr*, 22 August 2013, available at http://www.madamasr.com/content/court-rules-military-should-leave-qursaya-island; Egyptian Initiative for Personal Rights, "Against the backdrop of a land dispute on Qursaya Island : At Least Three Dead, Several Injured by Military Police and 25 Detained by Military Prosecutor" 25 November 2012 Press Release, available at http://eipr.org/en/pressrelease/2012/11/25/1551.

570 Pursuant to Article 3 of Decree No.136 of 2014, this assistance is to last for a period of two years, however the expanded jurisdiction of military courts is not time limited.

571 "3000 civilians tried in military courts in 5 months: No to Military Trials campaign", 24 March 2015, Mada Masr http://www.madamasr.com/news/politics/3000-civilians-tried-military-courts-5-months-no-military-trials-campaign ; and "3000 Egyptians have faced military trials in last 5 months", 24 March 2015, Middle East Eye http://www.middleeasteye.net/news/3000-egyptians-have-faced-military-trials-last-5-months-250042398; See also, Egypt: Surge of Military Trials, Human Rights Watch, 18 December 2014, available at http://www.hrw.org/news/2014/12/18/egypt-surge-military-trials.

572 See, for example, Case No.308 of 2014, referral by the East Cairo Office of the Military Public Prosecutor and Case No.319 of 2014, referral by the North Cairo Office of the Military Public Prosecutor.

573 MJL, Art. 25.

to specific military prosecutors.[574] Military prosecutors conduct investigations related to all public law crimes within the jurisdiction of the military judiciary, military crimes related to public law and military crimes referred to it by the competent authorities.[575] They also press charges, supervise military prisons, and have the same competencies as civilian prosecutors and investigative judges.[576]

b) Procedural rights of suspects before military courts

Under the MJL, a person charged with a criminal offence over which a military court has jurisdiction must be given a minimum of 24 hours' notice before he or she is required to appear before the military court.[577] The court may, if necessary, postpone the session based on a request from the accused, his or her lawyer, or the military prosecutor.[578]

Since 2011, the MJL requires that military courts appoint counsel for any individual charged with a felony or misdemeanour punishable by a prison term.[579] If the accused does not have a lawyer the court shall appoint one for him. While the law does not clarify which circumstances can prompt the court to appoint a lawyer to the accused, such as lack of financial means, Egyptian lawyers have informed the ICJ that the provision has been applied to cases where the defendant lacked the financial means to hire private counsel. In such a case, the lawyer receives a lump sum from the Bar in exchange for his or her services.

The accused or his or her representative may review the case file but the court may forbid him or her from copying any documents that are considered classified.[580]

Although hearings before military courts are, as a general rule, open to the public, the court may order that some or all of the court's sessions be closed to protect "public order, the protection of war secrets or morals".[581] The court may also prohibit "the attendance of certain individuals and the publication of any news on the session".[582]

The Supreme Court of Military Appeals has jurisdiction to hear appeals of individuals (military and civilians) charged with public law crimes. In such cases, the prosecutor and the defence have a right of appeal.[583] The procedures followed for the appeal are the same as those for the Court of Cassation.

For "military crimes", however, only military personnel may appeal their conviction.[584] Consequently, civilians could be denied the opportunity to appeal when convicted of offences such as stealing from an injured or sick soldier on the battlefield.[585]

Under Article 113 of the MJL, appeals of the verdicts of military courts must be grounded on one of the following two bases: a) if the judgment is contrary to the law or based on an error in the law's application or interpretation or b) if there is a fundamental flaw in the proceedings that prejudiced the rights of the accused.

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574 MJL, Arts. 26-27.

575 MJL, Art. 29.

576 MJL, Arts. 30, 32, & 28.

577 MJL, Art. 68.

578 MJL, Art. 70.

579 MJL, Art. 74; Previously, lawyers were only appointed to represent individuals charged with felonies.

580 MJL, Art. 67.

581 MJL, Art. 71.

582 Id.

583 MJL, Art. 43(bis).

584 MJL, Art. 111.

585 MJL, Art. 136.

Prior to amendments made to the MJL in February 2014, death sentences could be imposed based on the unanimous opinion of the judges. However, since then, once a court has imposed the death sentence it is considered to be provisional and must be sent to the Grand Mufti of the Republic, the highest official of religious law, for his opinion. Once his opinion has been received, the case is sent back to the same court for the sentence to either be revised or confirmed .[586]

Lastly, civil claims, such as claims for compensation, are not permissible under the MJL.[587] Instead, military courts can order restitution or confiscation. Consequently, victims of human rights violations cannot join proceedings before military courts in order to obtain reparation.

II. ASSESSMENT IN LIGHT OF INTERNATIONAL STANDARDS

The guarantees of the right to a fair trial by an independent, impartial and competent court enshrined in Article 14 of the ICCPR and Article 7 of the African Charter on Human and Peoples' Rights apply to all courts regardless of whether the court is "ordinary or specialized, civilian or military".[588]

Moreover, everyone has the right to be tried "by ordinary courts or tribunals using established legal procedures".[589]

Military courts are not ordinary courts. Due to the purpose of military courts and concerns over their lack of independence and impartiality, and the fairness of proceedings before them, there is growing consensus, including among a range of human rights expert bodies and mechanisms, that military courts should be used only to try members of the military and then only for military-related offences. Furthermore, military courts should not be used to try individuals charged with human rights violations, including but not limited to torture, enforced disappearance and extrajudicial and summary execution. Moreover, military courts should also have no jurisdiction over offences committed by civilians, even where the target or victim of the offence is the military.

i. Subject matter jurisdiction: trial of non-military related offences

In accordance with international standards, the subject matter jurisdiction of military courts should be limited to military-related offences.[590] It should not extend to crimes under international law or other human rights violations.

The Human Rights Committee and other treaty monitoring bodies and special procedures, as well as regional human rights standards and bodies, have addressed the issue of bringing military personnel accused of human rights violations to trial in military courts. An ICJ study in 2004 found that the human rights treaty bodies and mechanisms of the UN Commission on Human Rights (the precursor to the UN Human Rights Council), as well as the Inter-American Court and Commission on Human Rights, had concluded that this practice was incompatible with international human rights law. This is because "gross human rights violations – such as extrajudicial executions, torture and enforced disappearance – carried out by members of the military or police cannot be considered to be military offences, service-related acts, or offences committed in the line of duty".[591]

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586 Criminal Procedure Code, Art. 381 and MJL, Art. 80, as amended by Law No. 12 of 2014.

587 MJL, Art. 49.

588 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 22.

589 UN Basic Principles on the Independence of the Judiciary, Principle 5.

590 Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle L(a); Draft Principles Governing the Administration of Justice through Military Tribunals, UN Doc. E/CN.4/2006/58, Principle 29; and Report of the Special Rapporteur on the independence of judges and lawyers, A/68/285, 7 August 2013, paras.98 and 100.

591 Federico Andreu-Guzman, *Military jurisdiction and international law: military courts and gross human rights violations*, Vol. I, International Commission of Jurists, Geneva, 2004, p.12.

This is consistent with other sources of international law and standards, including standards adopted since 2004. For example, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa state that "the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel".[592] The Inter-American Court and Commission have also held that military tribunals may not "be used to try violations of human rights or other crimes that are not related to the functions that the law assigns to military forces and that should therefore be heard by the regular courts".[593] Thus, in a case concerning Brazil, the Inter-American Commission stated that "trying common crimes as though they were service-related offences merely because they were carried out by members of the military violates the guarantee of an independent and impartial court".[594] In its recommendations issued to member states on improving the administration of justice, the Inter-American Commission observed that "[m]ilitary justice has merely a disciplinary nature and can only be used to try Armed Forces personnel in active service for misdemeanours or offences pertaining to their function. In any case, this special jurisdiction must exclude the crimes against humanity and human rights violations".[595]

Similarly, the Human Rights Committee and the Committee against Torture have repeatedly expressed concern when military tribunals' jurisdiction includes human rights offences committed by members of the military.[596] The Committee on the Rights of the Child has also stated that violations of human rights and children's rights "should always be examined by civilian courts under civilian law, not military courts".[597]

The Decaux Principles[598], which were welcomed by the then UN Sub-Commission on the Promotion and Protection of Human Rights in 2005,[599] and have been cited by among others, the European Court of Human Rights,[600] are consistent with the above-referenced jurisprudence. They state that:

> "[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to

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592 Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle L(a).

593 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, para. 232; see also *Judgment of 6 August 2000*, IACtHR, Durand and Ugarte v. Peru, paras. 117 and 118 (noting that military's actions were "common crimes" and should be under "ordinary justice").

594 *Report No. 55/01 of 16 April 2001*, Inter-American Commission on Human Rights, Case Nos. 11.286, 11.406, 11.407, 11.412, 11.413, 11.415, 11.416 and 11.417, *Aluisio Cavalcante et al. v. Brazil*, para. 153.

595 IACHR Annual Report 1997, OAS Doc. OEA/Ser.L/V/II.98 doc. 6 rev. 13 (1998), Ch. VII Recommendation I.

596 Concluding Observations of the Human Rights Committee on Venezuela, UN Doc. CCPR/C/79/Add.14, para. 10; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/79/Add.66, para. 315; Concluding Observations of the Human Rights Committee on Brazil, UN Doc. CCPR/C/BRA/CO/2, para. 9; Concluding Observations of the Human Rights Committee on Colombia, UN Doc. CCPR/C/79/Add2, para. 393; Conclusions and Recommendations of the Committee against Torture on Guatemala, UN Doc. CAT/C/GTM/CO/4, para. 14; Concluding Observations of the Human Rights Committee on the Democratic Republic of Congo, UN document CCPR/C/COD/CO/3, para. 21; Conclusions and Recommendations of the Doc. against Torture on Mexico, UN Doc. CAT/C/MEX/CO/4, para. 14; Conclusions and Recommendations of the Committee against Torture on Peru, UN Doc. CAT/C/PER/CO/4, para. 16. See generally *Military jurisdiction and international law*, pp. 61-71.

597 Concluding Observations of the Committee on the Rights of the Child on Colombia, UN Doc. CRC/C/15/Add.30, para. 17.

598 UN Doc. E/CN.4/2006/58 at 4 (2006)

599 UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2005/15 on the Issue of the Administration of Justice Through Military Tribunals, UN Doc. E/CN.4/Sub.2/RES/2005/15 (adopted without a vote 10 August 20015)

600 E.G., European Court of Human Rights, *Ergin v. Turkey* (No. 6), Application No. 47533/99, Judgment of 4 May 2006

prosecute and try persons accused of such crimes."[601]

In addition, the Inter-American Convention on Forced Disappearance of Persons and the UN Declaration on the Protection of All Persons from Enforced Disappearance, both specifically exclude the use of military courts for trials of individuals charged with acts of enforced disappearance.[602]
In Egypt, contrary to international standards the subject matter jurisdiction of military courts is very broad and extends to conduct that is not related to military functions, including human rights violations. The Human Rights Committee criticized this in its Concluding Observations on Egypt in 1993, emphasizing 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".[603] The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism also raised this point in his report on Egypt in 2009.[604]

Notwithstanding these standards and the recommendations of the Human Rights Committee and the Special Rapporteur on human rights and counter terrorism to the Egyptian authorities, Egyptian military courts' jurisdiction continues to extend to, and military courts continue to try, military personnel for human rights violations. One recent example of this was the trial by a military court of a military doctor accused of carrying out "virginity tests" on female protesters, which ended in his acquittal.[605] According to media accounts, the military court concluded that the tests had not even taken place, despite admissions by army generals immediately after the release of the women that the tests had taken place and findings to this effect by a civilian administrative court in December 2011.[606] Human Rights Watch reported that the military prosecutor had first reduced the charges against the doctor from sexual assault to "an act of public indecency" and "failure to obey orders". Furthermore, at trial, the military prosecutor "summoned no witnesses for the prosecution to establish the charges under which he had referred the case to court, nor did he challenge apparently factually inconsistent testimony by defence witnesses".[607]

This case highlights the dangers of prosecuting cases of alleged human rights violations before military courts that are lacking in independence by military prosecutors who - given the fact that they are supervised and appointed by the Executive and remain subject to the military chain of command – cannot be considered independent and impartial. In particular, the apparently inadequate investigation and prosecution by the military prosecutor undermined not only the victims' rights to a remedy and to reparation but also the public's perception of the independent and impartial administration of justice.

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601 Draft Principles Governing the Administration of Justice through Military Tribunals, UN Doc. E/CN.4/2006/58, Principle 9 (hereafter "Decaux Principles").

602 See Inter-American Convention on Forced Disappearance of Persons, Article IX; Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, para. 16. ("They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts."). But note that the Convention on the Protection of All Persons from Enforced Disappearance states only that persons tried for such an offence "shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law" (Art. 11(3)). See also, Report of the Special Rapporteur on the independence of judges and lawyers, A/68/285, 7 August 2013, paras.99 and 106.

603 Concluding Observations of the Human Rights Committee on Egypt, UN Doc. CCPR/C/79/Add.23, para. 9.

604 Mission to Egypt, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/13/37/Add.2, para. 32, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-37-Add2.pdf.

605 "Egypt clears "virginity test" military doctor" in *Al Jazeera*, 11 March 2012, available at http://www.aljazeera.com/news/middleeast/2012/03/201231110431926293 7.html.

606 Id.; see also "Egyptian doctor acquitted over forced 'virginity tests' on female protesters", in *National Post*, 12 March 2012, available at http://news.nationalpost.com/2012/03/12/egypt-court-acquits-doctor-accused-of-performing-forced-virginity-tests-on-protesters/; David D. Kirkpatrick, "Egyptian Military Court Acquits Doctor Accused of Performing 'Virginity Tests'", in *The New York Times*, 11 March 2012, available at http://www.nytimes.com/2012/03/12/world/middleeast/egyptian-court-acquits-doctor-accused-performing-virginity-tests.html.

607 Human Rights Watch, "Military Impunity for Violence Against Women: Whitewash in Virginity Tests Trial" 7 April 2012, available at http://www.hrw.org/news/2012/04/07/egypt-military-impunity-violence-against-women.

ii. Personal jurisdiction: trial of civilians and juveniles

The UN Basic Principles provide that "[e]veryone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".[608]

Military courts are specialized courts, not ordinary courts.

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa clarify that military courts should not "in any circumstances whatsoever have jurisdiction over civilians".[609] The Decaux Principles provide:

> 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.[610]

In General Comment No. 32, the Human Rights Committee stated that while the ICCPR "does not prohibit the trial of civilians in military courts or special courts, it requires that such trials are in full conformity with the requirements of Article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned."[611] The Committee further stated that military trials of civilians should be "exceptional" and "limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials".[612]

The Committee has regularly called on countries that permit them to prohibit trials of civilians by military courts.[613] Indeed, as described by the Special Rapporteur on the independence of judges and lawyers, there is a developing consensus in international law that trials of civilians before military courts should be prohibited.[614] For example, the Working Group on Arbitrary Detention, the Committee against Torture, and the Special Rapporteur have taken the position that military courts are incompetent to try civilians.[615]

In *Incal v. Turkey*, the European Court of Human Rights considered a case regarding the trial of a civilian by a specialized security court, where one of the justices was a military judge. Although the Court noted that domestic law provided certain procedural guarantees of independence and impartiality, it nevertheless found that the applicant had legitimate fears about the independence of a judge who remained subject to military discipline. The Court thus held that the individual's right to a fair

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608 UN Basic Principles on the Independence of the Judiciary, Principle 5.

609 Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle L(c).

610 Decaux Principles, Principle 5.

611 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 22.

612 Id.

613 Concluding Observations of the Human Rights Committee on Slovakia, UN Doc. CCPR/C/79/Add.79, para. 20; see also, Concluding Observations of the Human Rights Committee on Lebanon, UN Doc. CCPR/C/79/Add.78, para. 14; Concluding Observations of the Human Rights Committee on Chile, UN Doc. CCPR/C/CHL/CO/5, para. 12; Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 18; Concluding Observations of the Human Rights Committee on Ecuador, UN Doc. CCPR/C/ECU/CO/5, para. 5.

614 Mission to Peru, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/1998/39/Add.1, paras. 78-79.

615 Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, para. 8; Reports of the Special Rapporteur on the independence of judges and lawyers: UN Doc. A/68/285, para.54; UN Doc. A/HRC/11/41, para. 36 and UN Doc. E/CN.4/1998/39/Add.1, paras. 78-79.

trial by an independent and impartial court, guaranteed under the European Convention on Human Rights, had been violated.[616]

The Inter-American human rights system has also denounced the use of military courts to prosecute civilians, including for security offences in times of emergency. "The basis of this criticism has related in large part to the lack of independence of such tribunals from the Executive and the absence of minimal due process and fair trial guarantees in their processes."[617] The Inter-American Commission on Human Rights has noted that "military tribunals by their very nature do not satisfy the requirements of independent and impartial courts applicable to the trial of civilians, because they are not a part of the independent civilian judiciary but rather are a part of the executive branch, and because their fundamental purpose is to maintain order and discipline by punishing military offenses committed by members of the military establishment".[618]

In Egypt, however, contrary to international standards, civilians are still subject to the jurisdiction of military courts in a wide variety of circumstances, including cases where either one of the victims or one of the accused is a member of the military or where the crime is defined as an assault against the military.

After coming to power in February 2011, the SCAF referred over 11,000 civilians to military courts.

The 2014 Constitution continues to permit the trial of civilians before military courts. Indeed, civilians have continued to be tried and convicted before military courts for crimes such as "defaming the armed forces" for leaking videos of Abdel-Fattah al Sisi.[619]

Moreover, since the enactment of Presidential Decree No.136 of 2014, the subject matter jurisdiction of military courts has been expanded massively to include any crimes committed on any public property or vital facility. Thousands of civilians have been prosecuted in military courts since this decree was pronounced. Furthermore in some cases the decree has been applied retrospectively, to the effect that some prosecutions of civilians have been transferred from civilian to military courts, even though the crimes with which they are charged are alleged to have taken place prior to the enactment of Decree No.136 of 2014.[620]

The broad jurisdiction of Egyptian military courts over civilians and the widespread practice of prosecuting civilians before military courts is clearly not "exceptional". Nor can it be considered necessary and justified by objective and serious reasons. Furthermore, given the subordination of military courts to the Executive and the fact that judicial personnel are appointed by the Executive and subject to the military chain of command, these courts cannot be considered independent and impartial, as required by Article 14 of the ICCPR.

International standards also require that no person under the age of 18 should be tried by a military court. The Committee on the Rights of the Child has clarified that no child, whether civilian or a child soldier, should be tried before a military tribunal.[621] Principle 7 of the Decaux Principles categorically

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616 *Incal v. Turkey*, ECtHR, Application No. 41/1997/825/1031, Judgment of 9 June 1998, paras. 67-68 & 72-73.

617 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (2002), Chapter III, paras. 230 & 256. See also *Judgment of 30 May 1999*, Inter-American Court of Human Rights, Castillo Petruzzi et al. v. Peru, para. 128.

618 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Chapter III, para. 231. See also, *Judgment of 6 December 2001*, Inter-American Court of Human Rights, Las Palmeras Case, para. 51 (citing *Judgment of 18 August 2000*, Cantoral Benavides Case, para. 113).

619 "Egypt to see first military trial of civilians under new Constitution », in *World Bulletin*, 23 February 2014, available at http://www.worldbulletin.net/middle-east/129461/egypt-to-see-first-military-trial-of-civilians-under-new-constitution; Hussein Qabani, « Egypt military court jails 4 for 'leaking secrets'", in *Turkish Press*, 10 April 2014, available at http://www.turkishpress.com/news/400045/.

620 Case No.319 of 2014, referral of the North Cairo Office of the Military Public Prosecutor.

621 See, e.g., Concluding Observations of the Committee on the Rights of the Child on the Democratic Re-

rules out the jurisdiction of military tribunals to try individuals under the age of 18 at the time of the crime.

Articles 37 and 40 of the Convention on the Rights of the Child, which Egypt ratified in 1990, list specific safeguards for individuals suspected of infringing penal laws who were under the age of 18 at the time of the alleged crime. The arrest, detention and imprisonment of individuals under the age of 18 must be a measure of last resort and for the shortest appropriate period of time. Children should be held to separate standards than adults when being deprived of their liberty. They have the right to access legal advice and representation and to a prompt hearing before a competent, independent and impartial court.[622] As the Decaux Principles highlight, "A fortiori these protective arrangements rule out the jurisdiction of military courts in the case of persons who are minors".[623]

Contrary to international standards, both Egyptian law and practice subject persons under the age of 18 to the jurisdiction of military courts.

Human Rights Watch has documented forty-three cases of juveniles being tried by military courts under SCAF rule.[624] In violation of their rights, including as guaranteed under the ICCPR, and the Convention on the Rights of the Child, the children were denied access to lawyers or their families and many reported being physically abused in detention.

iii. Fair trial before an independent and impartial tribunal

Everyone suspected of a criminal offence, whether civilian or a member of the military, is entitled to a fair trial before an independent, impartial and competent court. The fair trial guarantees of Article 14 of the ICCPR apply to criminal proceedings in all courts and tribunals, regardless of whether they are ordinary or specialized, civilian or military.[625] For the reasons set out below, the ICJ is of the view that trials before Egypt's military courts cannot be considered to meet the requirements of independence, impartiality and fairness.

a) Independence of the military tribunal

The safeguards of the independence and impartiality of civilian judges, including with respect to criteria and procedure for selection and promotion, conditions of tenure and basis and procedure for ensuring accountability set out in Chapter Four above, apply also to military judges. Further, military judges must have statutory independence from the military chain of command in the course of carrying out their judicial functions.

The European Court of Human Rights has examined whether proceedings in military courts are consistent with the fair trial guarantees enshrined in Article 6 of the European Convention on Human Rights, which are almost identical to those in Article 14 of the ICCPR. The European Court of Human Rights assesses independence and impartiality of military courts, with regard to "the manner of the appointment of its members, their terms of office, the existence of guarantees against outside pres-

public of Congo, UN Doc. CRC/C/15/Add.153, para. 75.

622 Convention on the Rights of the Child, Art. 37.

623 Decaux Principles, para. 26. As Egypt ratified the Optional Protocol to the Convention of the Rights of the Child on the involvement of children in armed conflict, this prohibition should apply to any member of the armed forces who was under the age of 18 at the time of the alleged crime (See para 27 of the Decaux Principles; Concluding Observations of the Committee on the Rights of the Child on the Democratic Republic of Congo, UN Doc. CRC/C/15/Add.153, para. 750. See also, Convention on the Rights of the Child, Art. 37; and Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), paras. 42-44.

624 Human Rights Watch, "Children on Trial: Stop Sending Juveniles Before Military Courts", 27 March 2012.

625 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 22; Concluding Observations of the Human Rights Committee on the Democratic Republic of the Congo, UN Doc. CCPR/C/COD/CO/3, para. 21. See also Decaux Principles, Principle No. 2; Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle L(b).

sures and whether the military criminal courts presented an appearance of independence".[626]

In *Findlay v. the United Kingdom*, the European Court of Human Rights concluded that the fact that the other members of the court-martial board were subordinate to the convening officer and under his command and that the convening officer had the power to dissolve the court-martial while also acting as the confirming officer responsible for ratifying the sentence, meant that there had been a violation of the applicant's right to an independent and impartial tribunal.[627] In a case involving Turkey, the Court found that the presence of lay judges was permissible under the European Convention on Human Rights, but the fact that these lay judges were appointed by their "hierarchical superiors" and "subject to military discipline" led to the finding of a violation.[628]

Military courts, both at the first instance and appeals levels, do not meet the requisite standards of independence under international law. This is because, as mentioned previously, military judges are supervised and appointed by the Minister of Defence, they are not required to have training in law and they are subject to the military chain of command, including in the course of the exercise of their judicial functions and to military discipline under the Military Service Law.

Given these failings regarding the lack of independence and impartiality of military courts, it is of particular concern that Egypt military courts have jurisdiction to try civilians and to try members of the military for alleged human rights violations.

b) Fair trial rights

Article 14 of the ICCPR requires, among other things, that all persons charged with a criminal offence be informed promptly of the charges against them and be given adequate time and facilities for the preparation of their defence. In General Comment No. 32, the Human Rights Committee stated that what counts as "adequate time" depends on the circumstances of each case. "If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial... There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed."[629]

In addition, the right of the defence to "adequate facilities" must include access to "all materials that the prosecution plans to offer in court against the accused or that are exculpatory".[630]

The ICJ considers that provisions of the MJL governing the conduct of proceedings in military courts are inconsistent with Egypt's obligations under Article 14 of the ICCPR to respect an accused person's right to adequate time and facilities to prepare a defence in several respects. In particular, the right of the defence to access the investigative file is limited to a review of the file and documents deemed "classified" cannot be copied, granting broad discretion to restrict the accused's access to the case file. There is also no provision in the law that requires the prosecution to turn over case materials to the defence in a reasonable amount of time in advance of the trial.

In addition, the provision of the law which requires a minimum of 24 hours' notice of a hearing, would

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626 *Ibrahim Gurkan v. Turkey*, ECtHR, Application No. 10987/10, Judgment of 3 July 2012, para. 17.

627 *Findlay v. the United Kingdom*, ECtHR, Application No. 22107/03, Judgment of 25 February 1997, paras. 75-80.

628 *Gurkan v. Turkey*, para. 19. See also *Sramek v. Austria*, ECtHR, Application No. 8790/79, Judgment of 22 October 1984, para. 42 ("Where, as in the present case, a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society.").

629 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 32.

630 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 33.

appear to permit an accused to be given just 24 hours' notice of the date on which the trial against him or her was to begin; such short notice would not, in most cases, be sufficient to ensure the right of the accused to adequate time and facilities to prepare a defence, even with the assistance of counsel.

Rights of defence also require that any person suspected or accused of a criminal offence has adequate time and opportunities to communicate confidentially with their legal counsel.[631] This includes the right to have access to and assistance of their lawyer, including during questioning by the authorities.[632] In the case of arrested or detained persons, access to counsel should be granted as soon as they are deprived of their liberty.[633] The right to counsel includes ensuring adequate time to consult a lawyer in confidence.[634]

Although the MJL provides for accused without a lawyer to be appointed one, there are no guarantees in law to ensure that access to a lawyer is granted upon detention and thereafter, including during interrogation, and that an accused has confidential access to a lawyer of choice. In practice, individuals tried before military courts in Egypt have frequently either been denied access to their lawyer, including during interrogation, or have been denied confidential access. As detailed in Chapter One, on 17 May 2015, six men, none of whom were members of the military were executed following their conviction by a military court on charges of participating in attacks on security services and killing two army officers. Among other fair trial violations, the accused were reportedly denied confidential communication with defence lawyers.

International standards also require that trials, including of individuals charged with criminal offences before military courts, must be public unless one of the specific grounds for excluding the public or the press from all or part of the proceedings applies.[635] Any restriction must be justified and assessed on a case-by-case basis and its impact on the fairness of the proceedings must be subject to on-going judicial supervision.

The MJL is contrary to these requirements since it permits the exclusion of the public or reporting restrictions for the protection of war secrets. This grants broad discretion to military judges to order that military trials be closed to the public. In practice, military courts are often conducted behind closed doors, demonstrating that such restrictions are not exceptional.

Violations of the absolute prohibition of torture and ill-treatment and the reliance on evidence obtained through torture and ill-treatment have also been reported in the context of military trials.[636] For example, one individual reported that the accused were subjected to shocks from a taser by the military prosecutor during trial proceedings before a military court when they said something that the

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631 Article 14(3)(b) of the ICCPR. This right is also enshrined in many other international standards including, among others, Principle 7 and Guidelines 4, para.44(g), 5, para.45(b) and 12, para.62 of the Principles on Legal Aid, Principle N(3) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

632 Article 17(2)(d) of the Convention on the Protection of All Persons from Enforced Disappearance, Principle 1 of the Basic Principles on the Role of Lawyers, principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 3 and Guideline 4 of the Principles on Legal Aid, Guideline 20(c) of the Robben Island Guidelines, Principles A(2)(f) and M(2)(f) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

633 Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para 35; Article 37(d) of the CRC, Principle 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principle 3 and Guidelines 3, para.43(b) and (d) and 4, para.44(a) of the Principles on Legal Aid; Guideline 20(c) of the Robben Island Guidelines.

634 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 34; Principle 8 of the Basic Principles on the Role of Lawyers; Principle 18(4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Rules 61, 119-120 of the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the UN General Assembly in resolution 70/175 on 17 December 2015.

635 ICCPR, Art. 14(1).

636 ICCPR, Art.7; CAT, Arts.2, 15 and 16; African Charter on Human and Peoples' Rights, Art. 5; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles F(l) and M(7)(b).

prosecutor did not like.[637] In the case of the six men executed in May 2015 following their conviction by a military court, all nine of the accused in the case alleged that they had been subjected to torture and other ill treatment; one of them was reported to have suffered a broken thigh and fractured knee as a result.

Judgments by a military tribunal on criminal cases must be subject to review by a higher court.[638] The higher court hearing the review must be independent. Furthermore, the Inter-American Commission has explained: "For a lawful and valid review of the judgment in compliance with human rights standards, the higher court must have the jurisdictional authority to take up the merits of the particular case in question and must satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law."[639] Likewise, Decaux Principle 17 states that, where military tribunals exist, "their authority should be limited to ruling in first instance". All appeals should be brought before civilian courts.[640]

The MJL does not adequately ensure respect for the right of an accused convicted in a military court to review of the legal and factual basis for the conviction and sentence before a higher independent and impartial court. As described above, given the criteria and manner of appointment of military judges and the fact that they remain subject to military discipline, the military appeals courts do not meet requisite the criteria for independence under the ICCPR and African Charter on Human and Peoples' Rights. In addition the scope of the review on appeal does not include "the basis of sufficiency of the evidence and of the law".[641] A review that is limited to "the formal or legal aspects of the conviction without any consideration whatsoever of the facts", as is the case in Egypt, "is not sufficient" under the ICCPR.[642] Moreover, contrary to the Decaux Principles, review is only available before another military court; there is no possibility of appeal to a higher civilian court.

III. EMERGENCY STATE SECURITY COURTS

i. Formation

Egypt has a long legacy of resorting to exceptional "state security courts".

Although in 2003 one form of state security courts was abolished, the Emergency State Security Courts (ESSC), created under Law No. 162 of 1958 (the Emergency Law), remain.[643]

The ESSC operate principally under a state of emergency. However, the Emergency Law permits the continuation of ESSC after a state of emergency ends. Article 19 states that the ESSC shall continue to adjudicate those cases already referred to it. Only individuals who have not yet been presented to an ESSC at the end of a state of emergency will have their cases transferred from the ESSC to ordinary courts.

The 1971 Constitution also permitted the President of the Republic to refer "any terror crime to any

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637 *Mohamed Abdallah Ali, "The trial was in a kitchen"*, IRIN News, 24 October 2011, available at http://www.irinnews.org/HOV/94045/EGYPT-Mohamed-Abdallah-Ali-The-trial-was-in-a-kitchen

638 See generally, Inter-American Commission on Human Rights, *Report on Chile*, Ch. VIII, para. 172; Singhvi Declaration, Principle 5(f); Decaux Principles, Principle No. 15.

639 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Chapter III, para. 239.

640 Decaux Principles, Principle 17.

641 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 48.

642 Id.

643 "State Security Courts" were established pursuant to Art. 171 of the 1971 Constitution and Law No. 105 of 1980 and were later abolished by Law No. 95 of 2003.

judicial body", including ESSC.[644] However, no equivalent provision was included in the 2014 Constitution.

The composition of the ESSC is determined by the President of the Republic, who may order the formation of five types of ESSC:

- "Summary State Security Courts", within the Courts of First Instance, consisting of one judge;
- "Summary State Security Courts" consisting of one judge and two officers of the armed forces;
- "Supreme State Security Court", within the Court of Appeal, consisting of three judges;
- "Supreme State Security Court" consisting of three judges and two leading military officers; and
- an ESSC composed entirely of military officers.[645]

In general, the Summary State Security Courts hear cases involving misdemeanours and the Supreme State Security Courts hear cases involving felonies. However, the President has broad discretion to determine which type of ESSC hears a case.[646]

The President appoints the judges of the ESSC, following consultation with the Minister of Justice and appoints members of the military to sit on the ESSC, following consultation with the Minister of Defence.[647]

Throughout the nearly continuous states of emergency lasting over three decades, the government routed cases outside the ordinary court system to ESCCs and obtained consistently favourable verdicts following unfair trials. Among others the ESSCs were routinely used to try thousands of political opponents and others who spoke out against the practices or policies of the government.

Although the state of emergency that began under former President Mubarak in 1981 formally came to an end on 31 May 2012, other states of emergency have been declared under President Morsi and Interim President Mansour.[648]

Despite the end of the state of emergency in May 2012, the emergency court system was not dismantled. Former President Morsi appointed over three thousand judges to the ESSC in October 2012, even though no state of emergency was then in force.[649]

Trials in ESSC continued through at least June 2013. For example, according to Human Rights Watch, in January 2013 an ESSC re-tried individuals accused of participating in sectarian violence in 2011.[650]

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644 1971 Constitution, Art. 179.

645 Emergency Law, Art. 7.

646 Pursuant to Article 7 of the Emergency Law, Supreme State Security Courts hear cases involving felonies and other crimes as determined by the President regardless of the penalty. The court composed entirely of military officers has jurisdiction either where there is a special judicial framework in place or in relation to specific cases. In addition, any court may examine violations of orders of the President of the Republic.

647 Emergency Law, Art. 7.

648 President Morsi declared a 30-day state of emergency commencing on 28 January 2013. Interim President Mansour declared a one-month state of emergency commencing on 14 August 2013. On 12 September 2013, President Mansour extended the state of emergency for another two months.

649 *Morsi appoints emergency court judges*, Daily News Egypt, 3 October 2012, available at http://www.dailynewsegypt.com/2012/10/03/Morsi-appoints-emergency-court-judges/.

650 "On January 20, 2013, one of these courts began retrying twelve Christians and eight Muslims accused of participating in sectarian violence in Abu Qurqas in April 2011, during which two Muslims died, people on both sides were injured, and scores of Christians' shops and homes were burned. A first trial in this case before an Emergency State Security court in Minya resulted in life sentences for the 12 Christians and the acquittal of the Muslim defendants, but this verdict was annulled." Human Rights Watch, "Crisis Highlights Urgent Need for Re-

The 2014 Constitution includes some limitations on the power to impose a state of emergency. It permits the President to declare a state of emergency for a three-month period, which may be renewed only upon the approval of two-thirds of the House of Representatives.[651] The Constitution, however, does not limit how many times a state of emergency may be renewed.[652]

The 2014 Constitution does not contain provision related to State Security Courts and prohibits "exceptional courts".[653] However, the Emergency Law has yet to be amended to abolish the ESSC.

ii. Jurisdiction

Prior to 2010, the President had authority to refer any crime under the Penal Code to a state security court.

In 2010, a presidential decree restricted crimes prosecutable under the Emergency Law to those involving terrorism or drugs.

In September 2011, the SCAF issued Decree No. 193, which amended the Emergency Law and expanded the jurisdiction of both ESSC to include "any internal disturbance" and other acts including weapons trade, drug dealing, and "thuggery, assaults on freedom of work, sabotaging facilities, disrupting transport, banditry (cutting off roads), or deliberately broadcasting or transmitting false news, statements or rumours".[654] On the eve of the first anniversary of the uprising, however, the SCAF issued a statement that it would limit the use of ESSC but would still allow them to try cases of "thuggery".

These categories of offences potentially include various crimes that are punishable by death under Egyptian law, including "terrorism-related" offences, drug trafficking, drug possession for the purpose of trade, kidnap and rape.[655]

iii. Proceedings under the Emergency Law and before the ESSC

Article 3(1) of the Emergency Law grants the president of the republic the right to place restrictions on the peoples' rights to assembly, movement and residency.

The Emergency Law contains no provision guaranteeing an individual's right to be promptly informed of the reasons for arrest and any charges against him or her, the right to have access to a lawyer and the right to be brought promptly before a court.

In practice, defendants tried before ESSC have frequently been held incommunicado, in secret detention, or have been denied the ability to access a lawyer of their choice and to communicate in confi-

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forms:
Stop Using Mubarak-Era Laws; End Impunity and Unfair Trials", Press Release 31 January 2013, available at http://www.hrw.org/news/2013/01/31/egypt-crisis-highlights-urgent-need-reforms.

651 2014 Constitution, Art. 154. The People's Assembly was replaced by a House of Representatives in the 2014 Constitution.

652 This is a retreat from Article 148 of the 2012 Constitution, which provided that a state of emergency could not exceed six months and could "only be extended by another similar period upon the people's approval in a public referendum".

653 2014 Constitution, Art. 97.

654 "SCAF amends articles of emergency law to cope with current situation", in *State Information Service,* 12 September 2011, available at http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?ArtID=57850#.U5HW2iiw4yF.

655 Criminal Code Law No. 58 of 1937, as amended, Articles 77-77(C), 78(A)-78(C), 80 (1), 81, 82(B), 83, 83(A) cum. 85-102(2) Bis, 102(B), 290; Arms and Ammunition Law No. 394 of 1954, as amended by Law No. 165 of 1981, Article 26; Narcotics Law, No. 182 of 1960, as amended, Articles 33, 34.

dence with their lawyer both before and during trial.[656]

Individuals arrested under the Emergency Law have the right to challenge the lawfulness of their detention within six-months of their initial detention.[657] ESSC must rule on such challenges "expeditiously".[658]

In 2013, the SCC ruled that article 3(1), which permits arrests and searches to take place in certain circumstances without respecting the Code of Criminal Procedure, to be unconstitutional. [659] However, other provisions of the law, which undermine individual rights, including the right to liberty, remain in force. .

Consequently, as highlighted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "individuals considered a "national security threat" may during the state of emergency be subjected to a regime of "administrative detention", without necessarily ever being charged or brought to trial".[660]

The framework established by the Emergency Law – including the lack of access to a lawyer, lack of prompt access to a court and potentially indefinite detention - increases the likelihood that those held in such detention will be subjected to torture or ill treatment.

In 2009, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism noted his concern that suspects detained under the framework of the Emergency Law are at particular risk of torture.[661]

In practice, there have been numerous reports of torture and ill-treatment by individuals detained under the Emergency Law.[662]

Confessions derived from torture or other ill-treatment have often been introduced as evidence before emergency state security courts. In a case challenging the fairness of the proceedings before an ESSC in which there were allegations that the accused had been subjected to torture, the African Commission on Human and People's Rights noted that the admission of confessions as evidence "appear to have formed at least part of the basis of their convictions and the imposition of the death penalty" by the Supreme State Security Court.[663] The Commission underscored that the reliance on evidence

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656 See, for example: ICJ submission to the Universal Periodic Review on Egypt, August 2009, page 3. http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/EG/ICJ_UPR_EGY_S07_2010_InternationalCommissionofJurists.pdf ; Amnesty International Report 2009 – Egypt, 28 May 2009; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37/Add.2, 14 October 2009, para. 36.

657 Emergency Law, Art. 3(1). The Human Rights Committee has affirmed that the right to be brought promptly before a judge should not exceed a few days. Human Rights Committee, General Comment No. 8, UN Doc. HRI/GEN/1/Rev.1 at 179, para.2.

658 Emergency Law, Art 3(1).

659 SCC, Case No. 17, Judicial year 15, Judgment on 2 June 2013.

660 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37/Add.2, 14 October 2009, para. 19.

661 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37/Add.2, 14 October 2009, para. 30.

662 See, for example: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37/Add.2, 14 October 2009, para.30, noting the prevalence of torture by officers of the State Security Investigations, who in practice carried out arrests and investigations under the Emergency Law (in 2011 the SSI was replaced by Egyptian Homeland Security); Committee Against Torture Concluding Observations on Egypt, UN Doc. CAT/C/CR/29/4, 23 December 2002, para. 5(c); and ICJ submission to the Universal Periodic Review on Egypt, August 2009, http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/EG/ICJ_UPR_EGY_S07_2010_InternationalCommissionofJurists.pdf ; Amnesty International, 'Egypt 'Hizbullah cell' convictions marred by torture allegations', 30 April 2010, https://www.amnesty.org/en/latest/news/2010/04/egypt-hizbullah-cell-convictions-marred-torture-allegations/

663 *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt, Communication No. 334/06*, African Commission on Human and People's Rights, (9th Extraordinary Session, 2013), para. 219, avail-

derived from torture violates the right to a fair trial.
Individuals do not have the right to appeal rulings by any of the ESSC.

All rulings issued by ESSC must be approved by the President of the Republic. The President may also commute or reduce the sentence, suspend its execution or order a retrial before another ESSC.[664]

IV. ASSESSMENT IN LIGHT OF INTERNATIONAL STANDARDS

Articles 4, 9 and 14 of the ICCPR are relevant to the use of specialized courts during states of emergency. Article 4 provides:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

While Article 9 (the right to liberty and security of the person) and Article 14 (the right to a fair trial) are not listed as one of the non-derogable rights, the Human Rights Committee has underscored that "the category of peremptory norms extends beyond the list of non-derogable provisions as given" in Article 4.[665] Thus a state "may in no circumstances" invoke Article 4 "as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance … through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence".[666]

In relation to arbitrary detention, the Working Group on Arbitrary Detention has clarified that arbitrary deprivation of liberty can never be a necessary or proportionate measure, given that the considerations the State may invoke to justify the derogation are already factored into the arbitrariness standard.[667]

In relation to the right to a fair trial, noting that certain elements of this right are explicitly guaranteed under international humanitarian law during armed conflict, the Human Rights Committee has found "no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency".[668]

The Human Rights Committee has also underscored that the requirement that tribunals are competent, independent and impartial "is an absolute right that is not subject to any exception".[669]
Egypt's ESSC cannot be considered independent and impartial tribunals, as required by Article 14, because, among other things, they are subject to strong Executive influence.

In particular, the independence and impartiality of ESSC is undermined by the President's powers

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able at http://www.achpr.org/files/sessions/9th-eo/comunications/334.06_/achpreos9_334_06_eng.pdf.

664 Emergency Law, Arts. 12-14.

665 Human Rights Committee General Comment No. 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11.

666 Id.

667 Working Group on Arbitrary Detention, Deliberation No. 9, UN Doc. A/HRC/22/44 (2012), para.48.

668 Human Rights Committee General Comment No. 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 16.

669 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para.19.

to ratify judgements and to cancel or reduce sentences issued by the courts.[670] The Human Rights Committee has expressed concern about the President's broad authority under the Emergency Law to "ratify judgments and to pardon", describing this role as "both part of the executive and part of the judiciary system".[671] Similarly, the African Commission stated that "a tribunal cannot be said to be independent when the implementation of its decision squarely vests on the executive branch of the Government, in this case the Head of State".[672]
The independence and impartiality of the ESSC is further compromised by the President's ability to control their composition and to appoint judges and military personnel to sit on the ESSC.

Furthermore, the use of ESSC as a parallel system of justice accountable only to the Executive undermines the independence of the judiciary and the administration of justice as a whole. Both the 1971 Constitution and the 2014 Constitution affirm that individuals should only be tried before a "natural judge".[673] In Egypt, the term "natural judge" is understood as referring to civilian judges and judges of ordinary courts.[674] Under international law individuals have the right to be tried by ordinary courts.[675] The operation of ESSC thus contravenes not only international law but also Article 97 of the 2014 Constitution.

The detention and trial of individuals pursuant to the Emergency Law also fails to meet international standards prohibiting arbitrary detention and fundamental requirements of fair trial. In particular, contrary to Article 9(2) and (3) of the ICCPR, individuals arrested or detained are not guaranteed in law and are frequently denied in practice the right to be brought promptly before a judge.[676]

Furthermore, individuals detained under the Emergency Law are frequently subjected to torture and other ill-treatment, including through prolonged incommunicado detention or secret detention.[677] The right to be free from torture and other ill-treatment is absolute and non-derogable.[678]

Because the right to be free from torture and other ill-treatment is non-derogable, evidence obtained in violation of this right cannot be used in any proceedings, including during a state of emergency.[679] However, reliance on such evidence has frequently been reported in cases before ESSC.

In addition, although individuals may challenge the lawfulness of their detention, they are not permitted to appeal decisions issued by ESSC. In other words, individuals who are tried before an ESSC have no right of review regarding a decision made by the ESSC before a higher independent tribunal. This is inconsistent with Article 14 of the ICCPR.

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670 Emergency Law, Arts. 12-14.

671 Concluding Observations of the Human Rights Committee on Egypt, UN Doc. CCPR/C/79/Add.23, para. 9.

672 *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egyp*t, para. 204.

673 Article 97 of the 2014 Constitution states in part "Individuals may only be tried before their natural judge. Extraordinary courts are forbidden." Article 68 of the 1971 Constitution states "The right to litigation is inalienable and guaranteed for all, and every citizen has the right to have access to his natural judge."

674 Egypt After Mubarak: Liberalism, Islam and Democracy in the Arab World, Bruce K Rutherford, 2008, ps.143, 178

675 ICCPR, Article 14(1); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A(4)(e); UN Basic Principles on the Independence of the Judiciary, Principle 5.

676 ICCPR, Article 9(2) and (3); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle M(2)(a) and (3)(a).

677 UN Mechanisms Joint Study on secret detention, UN Doc. A/HRC/13/42 (2010), paras. 27-28, 292(f); UN Mechanisms Joint Report on detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120 (2006), para. 53; Special Rapporteur on torture, UN Doc. A/61/259 (2006), para. 56; Special Rapporteur on human rights and counter-terrorism, UN Doc. A/63/223 (2008), paras. 33, 45(d).

678 Article 4(2) of the ICCPR; Article 2(2) of the Convention against Torture.

679 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 6.

The Human Rights Committee has emphasized that "guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights".[680] Since Article 6 guarantees that no one "shall be arbitrarily deprived of his life", it follows that any trial leading to the imposition of the death penalty during a state of emergency must conform to all the requirements of Article 14.

Given that numerous cases heard before the ESSC are punishable by death – including various terrorism and drug-related offences – violations of fair trial rights, including those outlined above, also amount to a violation of the right to life. This is because, in order to respect the non-derogable right to life, under Article 6 of the ICCPR, the rights of an accused charged with an offence punishable by death, including under Article 14, must be fully respected, even during states of emergency.

Thus, among other things, the failure to respect the rights of an accused charged with a capital crime who is tried before an ESSC to trial before an independent and impartial court, to be promptly informed of the reasons for arrest and detention and of any charges, to be promptly brought before a judge, to confidential access to a lawyer of choice and to the right to appeal the judgment and sentence of an ESSC before a higher independent and impartial court, would violate the right to life. In this regard, in 2009, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stated that "the right to full review of the conviction and sentence by a higher court becomes particularly crucial when convictions may lead to the death penalty, which has indeed been the case in several terrorism, trials in Egypt".[681]

In June 2013, the Supreme Constitutional Court issued a ruling finding article 3(1) a provision of the Emergency Law unconstitutional.[682] In the course of the Supreme Constitutional Court ruling on the constitutionality of article 3(1) the Court affirmed that as a legislative act it had to be consistent with the whole Constitution, including those provisions guaranteeing rights and freedoms. The SCC further noted that the Emergency Law could not be used as a justification to undermine the provisions of the Constitution or to act in contravention to them. Although the SCC's ruling could have served as a starting point to end the use of ESSC, the Emergency Law has yet to be repealed or reformed.

V. RECOMMENDATIONS

In light of the above, Egyptian authorities should annul Presidential Decree No. 136 of 2014 on military courts and amend the Military Judiciary law to ensure that:

i. **The jurisdiction of military courts is limited to trials of military personnel only for breaches of military discipline.**
ii. **Military courts do not have jurisdiction over crimes under international law or other human rights violations, such as torture or enforced disappearance or unlawful killing.**
iii. **Military courts have no jurisdiction to try civilians, even where the victim is a member of the Armed Forces or equivalent body or the conduct is alleged to have occurred in territory controlled by the military.**
iv. **No person alleged to have committed a crime or breach of military discipline before the age of 18 is tried before a military court.**
v. **The requirement that detention of a child be the last resort and for the shortest possible time, in the Convention on the Rights of the Child, is enshrined in law.**
vi. **The law safeguards the independence and impartiality of judges sitting on mili-**

680 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 6.

681 Mission to Egypt, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/13/37/Add.2, para. 33.

682 Supreme Constitutional Court Decision, Case No. 27 for Judicial Year 15, Official Gazette No. 22(bis), 3 June 2013. The case focused on Article 3(1) of the Emergency Law, which permits restrictions on an individual's freedom of assembly, movement, and residence in certain places or times, and also permits the arrest and search of suspects who are risks to security and public order. This provision authorised searches to be undertaken without being bound to provisions in the Criminal Code of Procedure.

tary courts, including by:

- **a. Establishing clear criteria for the selection of military judges to ensure that individuals who are appointed are chosen on the basis of legal training, qualifications, integrity and merit; and an open, fair and transparent appointment procedure;**
- **b. Ensuring that they are outside the military chain of command and military authority in respect of matters concerning the exercise of their judicial functions; and**
- **c. Ensuring that the procedures and criteria relating to the conditions of tenure and disciplining of military judges guarantee their statutory independence vis-à-vis the military hierarchy and avoid any direct or indirect subordination.**

vii. Proceedings against all persons before military courts are carried out in a manner consistent with minimum guarantees of fair trial, including by:

- **a. Ensuring a person arrested or detained has immediate, regular and confidential access to and assistance of an independent and suitably qualified and experienced lawyer following arrest, during questioning, and prior to, during and following trial and appeal;**
- **b. Ensuring and respecting the right to adequate time and facilities for the preparation of their defence;**
- **c. Ensuring that decisions limiting disclosure of "classified" information to the defence are made by a judge and that restrictions on disclosure are exceptional and do not unduly prejudice the rights of the defence or the overall fairness of the proceedings; and**
- **d. Removing the power of the President to ratify judgments.**

viii. All persons have the right to appeal a conviction and sentence on all grounds, both evidentiary and legal, to a higher independent and impartial civilian tribunal that has the power to reverse the conviction and sentence.

In addition, given the documented flaws of the Emergency Law and the emergency state security courts, the Emergency Law should be amended to:

i. Preclude the establishment of all types of emergency state security courts.

ii. Require that all civilians arrested during a state of emergency are tried before ordinary, independent and impartial courts in proceedings that meet international standards of fairness, including the right to appeal a conviction and sentence before a higher independent and impartial tribunal.

iii. End the possibility of indefinite detention without charge, trial or legal recourse, by ensuring that the detention system under the Emergency Law complies with Article 9 of the ICCPR, including by ensuring that all individuals deprived of their liberty on security grounds or criminal charges are:

- **a. Granted confidential access to and the assistance of a lawyer of choice;**
- **b. Entitled to notify or have notified family members of his or her arrest, detention or imprisonment and any transfers;**
- **c. Brought promptly before an independent and impartial court;**
- **d. Informed immediately of the reasons for arrest and promptly informed of any charges against him or her;**
- **e. Entitled to trial within a reasonable period of time or to release; and**
- **f. Entitled to regular and periodic review by an independent and impartial court of the legality of their detention, particularly given the long history of abuse of administrative detention.**

iv. Explicitly prohibit the use or reliance on statements or other evidence claimed to have been extracted under torture or other ill-treatment or duress, unless such allegations of ill-treatment or duress are proven not to be true.

ANNEX I – PRESIDENTIAL DECREES AGAINST JUDGES

Table of Presidential Decrees Dismissing, Forcibly Retiring or Transferring Judges from August 2013 to February 2016.

No.	Name	Position Prior to Decision	Current situation
1	Akmal Elkilani Elkilani Soliman	Delegate in the State litigation Authority	Dismissed by Presidential Decree No. 511/2013 (signed on 6/8/2013, published in the official gazette on 15/8/2013).
2	Amr Mohamed Osama Ahmed Abdelaal	Judge of the El Mansoura Court of First Instance	Transferred to non-judicial function in the Ministry of Local Development by Presidential Decree No. 661/2013 (signed on 3/12/2013, published in the official gazette on 12/12/2013).
3	Montaser Naif Mohamed Teleb	Judge of the El Mansoura Court of First Instance	Transferred to non-judicial function in the Ministry for Local Development by Presidential Decree No. 668/2013 (signed on 9/12/2013, published in the official gazette on 19/12/2013).
4	Gaafar Mohamed Abdelgwad Abdella	Judge of the Alexandria Court of First Instance	Transferred to non-judicial function in the Ministry of Supply Presidential Decree No. 667/2013 (signed on 9/12/2013, published in the official gazette on 19/12/2013).
5	Medhat Mahmoud Mohamed Mahmoud Elbarbary	Prosecutor in the Osim prosecution office	Transferred to non-judicial function in the Ministry of Manpower and Immigration by Presidential Decree No. 669/2013 (signed on 9/12/2013, published in the official gazette on 27/12/2013).
6	Mina Wageh Mina Hanna	Judge of the Port Said Court of First Instance	Transferred to non-judicial function in the Ministry of Administrative Development by Presidential Decree No. 9/2014 (signed on 5/1/2014, published in the official gazette on 16/1/2014).
7	Osama Aboahmed Elseidi Ahmed	Judge of the Cairo Appeal Court	Transferred to non-judicial function in the Ministry of Manpower and Immigration by Presidential Decree No. 10/2014 (signed on 5/1/2014, published in the official gazette on 16/1/2014).
8	Mina Wageh Mina Hanna	Judge of the Port Said Court of First Instance	Transferred to non-judicial function in the Ministry of Administrative Development by Presidential Decree No. 9/2014 (signed on 5/1/2014, published in the official gazette on 16/1/2014).

9	Mina Wageh Mina Hanna	Judge of the Port Said Court of First Instance	Transferred to non-judicial function in the Ministry of Administrative Development by Presidential Decree No. 9/2014 (signed on 5/1/2014, published in the official gazette on 16/1/2014).
10	Osama Abo-ahmed Elseidi Ahmed	Judge of the Cairo Appeal Court	Transferred to non-judicial function in the Ministry of Manpower and Immigration by Presidential Decree No. 10/2014 (signed on 5/1/2014, published in the official gazette on 16/1/2014).
11	Hisham Mohamed Ibrahim Elsaid Elrefaay	Chief of the El Zagazig Cairo Court of First Instance	Transferred to non-judicial function in the Ministry of Water Resources and Irrigation by Presidential Decree No. 61/2014 (signed on 19/2/2014, published in the official gazette on 27/2/2014).
12	Mohamed Abdelhafeez Abo Elela Abdelhafeez	Chief of the Alexandria Court of First Instance	Transferred to non-judicial function in the Ministry of Manpower and Immigration by Presidential Decree No. 62/2014 (signed on 19/2/2014, published in the official gazette on 27/2/2014).
13	Emad Yahia Mohamed Ahmed	Assistant Delegate in the State Litigation Authority	Transferred to non-judicial function in the Ministry of Local Development and Administrative Development by Presidential Decree No. 152/2014 (signed on 2/5/2014, published in the official gazette on 15/5/2014).
14	Mohamed Elsaid Abdelaziz Elgamal	Judge of the Sohag Court of First Instance Court	Transferred to non-judicial function in the Ministry of Local Development and Administrative Development by Presidential Decree No. 176/2014 (signed on 25/5/2014, published in the official gazette on 5/6/2014).
15	Abdelhai Ismail Abdelhai Ismail	Prosecutor in the South Assiut prosecution office	Transferred to non-judicial function in the Ministry of Manpower and Immigration by Presidential Decree No. 177/2014 (signed on 25/5/2014, published in the official gazette in 5/6/2014).
16	Walid Mohamed Rashad Sharaby	Chief of the North Cairo Court of First Instance	Dismissed by Presidential Decree No. 261/2014 (signed on 10/8/2014, published in the official gazette on 14/8/2014).
17	Samah Mohamed Abdellah Hussin Hassan Elgabas	Administrative prosecutor	Dismissed by Presidential Decree No. 352/2014 (signed on 13/10/2014, published in the official gazette on 23/10/2014).
18	Ezzeldin Abdelazim Adbelhameed Embabi	Chief of the Administrative Prosecution Service	Dismissed by Presidential Decree No. 416/2014 (signed on 11/11/2014, published in the official gazette on 20/11/2014).
19	Talaat Ibrahim Mohamed Abdella	Chief of the Alexandria Appeals Court Attorney-General while President Morsi was in office	Forcibly retired by Presidential Decree No. 438/2014 (signed 23/11/2014, published in the official gazette on 4/12/2014).

20	Haitham Mohamed Ibrahim Elrefaay	Chief of the North Cairo Court of First Instance	Transferred to non-judicial function in the Ministry for Local Development by Presidential Decree No. 439/2014 (signed on 23/11/2014, published in the official gazette on 4/12/2014).
21	Mohamed Abdlhameed Mohamed Salim Elnagar	Judge of the El Mansoura Appeals Court	Transferred to non-judicial function in the Ministry for Local Development by Presidential Decree No. 440/2014 (signed on 23/11/2014, published in the official gazette on 4/12/2014).
22	Ahmed Mohamed Yahia Mohamed	Chief of the Cairo Appeals Court	Forcibly retired by Presidential Decree No. 441/2014 (signed on 23/11/2014 and published in the official gazette on 4/12/2014).
23	Emad Mohamed Abohisham Ahmed	Chief of the El Mansoura of First Instance Court	All forcibly retired by Presidential Decree No. 442/2014 (signed on 23/11/2014, published in the official gazette on 4/12/2014).
24	Hazem Mohamed Mahmoud Hassan	Chief of the El Mansoura Court of First Instance	
25	Mustafa Abdelreheem Mustafa Dowidar	Chief of the South Cairo Court of First Instance	
26	Mohamed Attalla Mohamed Attalla	Chief of the El Mansoura Court of First Instance	
27	Emad Eldin Mohamed Elbendary Ahmed	Chief of the Banha Court of First Instance	
28	Aiman Mohamed Yousef Mustafa	Judge of the Damiatta Court of First Instance	
29	Ahmed Mohamed Ahmed Radwan	Judge of the Damiatta Court of First Instance	
30	Ayman Ahmed Al Wardani Farj Assawi	Chief of the Cairo Appeals Court	Forcibly retired by Presidential Decree No. 100/2015 (signed on 17/2/2015, published in the official gazette on 5 March 2015).
31	Mahmoud Assayed Mahmou Farhat	Judge in the Department of State Affairs	Dismissed by presidential Decree No. 56/2016 (signed 8 February 2016 published in the official gazette on 18 February 2016)
32	Talaat Mohamed Mahmou Al Achry	Judge in the Department of State Affairs	
33	Mohamed Ahmed Abdel Hamid Youssof	Assistant Judge in the Department of State Affairs	
34	Said Mohamed Mohamed Abdel karim	Assistant Judge in the Department of State Affairs	

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International Commission of Jurists

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org