

# **Mass Trials before Egypt's Military Courts: Grossly Abusive and Unfair**

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Case No. 1 of 2021, East Cairo Military Court

A trial observation briefing

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## I. Introduction

In this trial observation briefing, the International Commission of Jurists (ICJ) analyses the findings of the Egyptian Commission of Rights and Freedoms' (ECRF) 2023 trial observation report on the criminal proceedings in Case No.1 of 2021 – including pre-trial, trial, verdict and sentencing hearings – before the East Cairo Military Court, which took place between 2014 and 2022. The briefing documents the Egyptian authorities' arrest and detention of 194 individuals, and eventual prosecution of 184 of this number, despite a manifest lack of incriminating evidence, on charges related to 28 attacks that the Egyptian authorities alleged the Muslim Brotherhood political movement carried out against the Egyptian police, prosecution and vital infrastructures between 2014 and 2016.

In 2013, following the military *coup* that removed the then Egyptian President Mohamad Morsi from power, the Egyptian government banned the Muslim Brotherhood, designated it a "terrorist organization", and killed hundreds of its purported sympathisers, including approximately 1000 supporters of President Morsi at the Midan el Rabaa Adwiya and Al Nahada sit-ins in Cairo, in what have been credibly described as mass killings of hundreds of protesters likely to amount to crimes against humanity.<sup>1</sup>

In August 2014, the Egyptian government went on to outlaw the Muslim Brotherhood-affiliated Freedom and Justice Party,<sup>2</sup> and to carry out arbitrary arrests, detentions and prosecutions of alleged Muslim Brotherhood members,<sup>3</sup> including based on their alleged involvement in "terrorist attacks" against Egyptian security forces and vital infrastructures, which, since 2013 the Egyptian authorities had struggled to curtail.<sup>4</sup>

The Egyptian authorities' crackdown on the preeminent political opposition to President Abdel Fattah el-Sisi has formed part of their broader effort to crush any dissent through the repression of opposition leaders and members, civil society representatives, journalists and human rights defenders.<sup>5</sup>

In this context, Case No.1 of 2021 is emblematic of Egypt's sustained efforts to crush dissent through the use of mass trials, in which the Egyptian authorities bring a litany of identical charges against large numbers of people, while failing to present even a modicum of evidence capable of demonstrating the guilt of each individual as charged. Case No.1 2021 graphically illustrates the grossly abusive and arbitrary nature of these mass trials where a military court, the East Cairo Military court, tried each of the 184 defendants in this mass trial on capital charges, eventually sentencing five defendants to death upon convicting them. In so doing, the Egyptian authorities perpetrated egregious violations of all the defendants' rights to life, with the violations being particularly egregious for the five who received death sentences. Additionally, throughout the Case, the Egyptian authorities carried out arbitrary arrests, detentions, prosecutions, convictions

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1. Human Rights Watch, All According to Plan, the Rab'a Massacre and Mass Killings of Protestors in Egypt, 12 August 2014, available at: <https://www.hrw.org/news/2023/08/14/egypt-raba-massacre-reverberates-10-years-later>. See also: Council on Foreign Relations, Egypt's Muslim Brotherhood, 15 August 2019, available at: <https://www.cfr.org/backgrounder/egypts-muslim-brotherhood>.

2. Id.

3. Amnesty International, Egypt: Death sentences upheld for 12 defendants after shameful mass trial, 14 June 2021, available at: <https://www.amnesty.org/en/latest/news/2021/06/egypt-death-sentences-upheld-for-12-defendants-after-shameful-mass-trial-2/>.

4. US Department of State, Country Reports on Terrorism 2022: Egypt, 2022, available at: <https://www.state.gov/reports/country-reports-on-terrorism-2022/egypt/#:~:text=2022%20Terrorist%20Incidents%3A%20Based%20on,for%20most%20of%20the%20attacks>.

5. ICJ, Egypt: authorities must immediately release political opponent Ahmad Tantawi and quash his politically-motivated and wrongful conviction, 3 June 2024, available at: <https://www.icj.org/egypt-authorities-must-immediately-release-political-opponent-ahmad-tantawi-and-quash-his-politically-motivated-and-wrongful-conviction/>. See also: ICJ, Egypt: End crackdown on journalists, 1 August 2024, available at: <https://www.icj.org/egypt-end-crackdown-on-journalists>. See also: ECRF, Egypt: Immediately Release Prodemocracy Advocate Hesham Kassem and Cease the Targeting of Peaceful Dissidents, 1 September 2023, available at: <https://www.ec-rf.net/egypt-immediately-release-prodemocracy-advocate-hesham-kassem-and-cease-the-targeting-of-peaceful-dissidents/>. See also: ECRF, Egypt adds human rights defenders to new terrorism lists after launch of 'national dialogue', 8 May 2023, available at: <https://www.ec-rf.net/egypt-adds-human-rights-defenders-to-new-terrorism-lists-after-launch-of-national-dialogue/>. See also: ECRF, Egypt: Dismiss charges against members of the Egyptian Coordination for Rights and Freedoms, 4 March 2023, available at: <https://www.ec-rf.net/egypt-dismiss-charges-against-members-of-the-egyptian-coordination-for-rights-and-freedoms/>.

and sentences in a manner that entails severe violations of the defendants' rights to:

- i. liberty and security of person and freedom from arbitrary arrest and detention;
- ii. protection from enforced disappearance;
- iii. freedom from torture and other cruel, inhuman or degrading treatment or punishment;
- iv. equality before the courts; and
- v. a fair trial, including the right to adequate time and facilities for the preparation of a defence and access to counsel, the presumption of innocence and to a public hearing by a competent, independent and impartial tribunal.

### **Case No. 1 of 2021, East Cairo Military Court**

Between 2014 and 2017, Egyptian National Security Agency (NSA) officers arrested and detained 111 people - who would eventually feature among the 194 suspects in Case No. 1 of 2021 - in connection with the alleged perpetration of 28 attacks against the police, prosecution and vital infrastructures between 2014 and 2016. Further to being detained, most detainees reported that NSA officers had stripped them naked and subjected them to electrocution, stress positions, including extended periods hanging by their hands from the ceiling, and physical beatings leading to broken bones to extract confessions from them. One hundred and five of the detainees also attested to being held in detention facilities whose location had not been disclosed to their family members or legal counsel. Despite their lawyers submitting petitions to ascertain their whereabouts and the lawfulness of their detention, the Public Prosecution failed to respond, let alone investigate their alleged disappearances. Further to detention, the NSA released eight of the detainees, who subsequently left Egypt.

On 29 November 2020, the State Security Public Prosecution (SSPP) referred suspects to the Military Prosecution based at the Military Court in East Cairo for investigation. At the time, 20 suspects were already detained in relation to other cases, and 91 out of the 184 were at large. Seventy-three suspects were remanded in custody pending trial; some of them were held on remand at the notorious Tora Prison Complex - Al-Aqrab Prison in Helwan, Cairo,<sup>6</sup> without Public Prosecution or judges making individualized assessments as to the necessity and proportionality of each person's detention. When brought before the Prosecution, the detainees who had sustained injuries during their detention in NSA facilities were either denied access to medical practitioners or had such access extensively delayed such that medical staff could not effectively document the evidence of their ill-treatment in custody. At no stage did the Prosecutorial authorities open investigations into credible reports of torture in custody, notwithstanding the fact that they had been presented with evidence of the injuries sustained by some of the detainees.

During the pre-trial stage, the Military Prosecution renewed the detention pending trial of 73 detainees in their absence, without providing individualized reasons as to why the continued detention of each of them was necessary and proportionate in the circumstances. While they were detained pending trial, the Egyptian authorities denied them access to prompt medical care for chronic illnesses, to family visits or to their lawyers. Furthermore, during the pre-trial stage, the Military Prosecution denied the detainees' lawyers access to the case files.

The Military Prosecution alleged that the Muslim Brotherhood's leadership in exile had orchestrated the 28 attacks from which the charges against the accused arose with the objective of "committing crimes to overthrow the government and establish an Islamic Caliphate". The 28 attacks included 26 incidents of alleged destruction or attempted destruction of electricity, national security or public transportation infrastructure, one alleged attack against an office used by the Public Prosecution and one attempt to murder a police major. According to the defendants' lawyers, the sole "evidence" of the defendants' perpetration of these offences was the mere suspicion that they were members of the Muslim Brotherhood, a claim that was itself unsubstantiated by evidence during the course of the pre-trial proceedings and trial.

On 26 January 2021, despite the ostensible lack of evidence against them, the Military Prosecution referred 184 accused to the East Cairo Military Court for trial, remanding 44 of them

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6. Prison Insider, Egypt: urgent investigation needed after death in notorious Al-Aqrab prison, 23 August 2019, available at: <https://www.prison-insider.com/en/articles/egypte-une-enquete-doit-etre-ouverte-sur-une-mort-en-detention-dans-la-prison-d-al-aqrab>.

into custody pending trial once more without providing reasons as to why their detention was necessary and proportionate. In addition, on the same occasion, the State Security Prosecution granted conditional bail to 29 accused and referred 91 of them for trial in absentia. A further 20 accused remained detained in other cases.

All 184 of the accused were charged with the following offences:

- i. Two charges of homicide under articles 230 and 234 of the Criminal Code, respectively. Both offences are punishable by death or life imprisonment;
- ii. Two charges of establishing a criminal enterprise or using terrorism to overthrow the system of governance, change the constitution or alter the form of government, or to commit political assassinations and or sabotage public facilities under articles 86 and 86 *bis* of the Criminal Code, respectively;
- iii. Two charges of requesting or accepting money from a foreign country with the aim of committing an act prejudicial to Egypt's national interest, and seeking assistance from a foreign entity to commit terrorist acts against Egypt under articles 78 and 86 *bis* of the Criminal Code, respectively;
- iv. One charge of trespass in violation of a military authority ban under article 80.E of the Criminal Code;
- v. One charge of conspiring with others to perpetrate attacks against a community or to use arms to resist public authority officials under article 89 of the Criminal Code;
- vi. Six charges of damaging, destroying or setting fire to public or private assets under articles 89 *bis*, 90, 162, 162 *bis*, 167, 252 and 361 of the Criminal Code, respectively;
- vii. Four charges of obtaining, possessing, using or attempting to use an explosive device under articles 102A-C of the Criminal Code, respectively; and
- viii. One charge of obtaining and possessing firearms, ammunition and firearm parts under articles 1 and 2 of the Firearms Law 1954.

On 1 June 2021, the East Cairo Military Court held the first mass trial hearing of all 184 defendants in Case No. 1 of 2021 at the Tora Prison Complex, with 48 hearings taking place in total over the following 18 months. During the trial, the Military Court persistently hindered the ability of the defendants' lawyers to contest the charges and challenge the evidence against their clients, including by arbitrarily limiting the time of defence pleadings, denying lawyers the right to call defence witnesses and by leading prosecution witnesses in their testimony to the Court. The trial ended on 19 December 2021, with the Military Court reserving judgment until 10 August 2022, when 159 defendants were eventually convicted on some or all of the charges.

On 26 December 2022, the Military Court sentenced five defendants to death by hanging, 31 defendants to life imprisonment, 31 defendants to 15 years' imprisonment with hard labour, 16 defendants to 10 years' imprisonment, five defendants to seven years' imprisonment, 48 defendants to five years' imprisonment and 23 defendants to between one and three years' imprisonment. At the time of writing, the verdict of three of the defendants remains unknown, while 22 of the Defendants did not proceed to sentence either due to reasons of inadmissibility, death during trial or findings of innocence.

## II. Violations in Case No. 1 of 2021 at the East Cairo Military Court

The ICJ and ECRF are gravely concerned that in Case No.1 of 2021, further to a mass trial in which 184 individuals were prosecuted on identical charges with a manifest absence of individualised evidence against each of them, Egypt has grossly failed to respect the accused's human rights, including, their rights to:

- i. life;
- ii. protection from enforced disappearance;
- iii. freedom from torture or other cruel, inhuman or degrading treatment or punishment;
- iv. liberty and security of person;
- v. equality before the courts;
- vi. adequate time and facilities for the preparation of a defence;
- vii. access to counsel;
- viii. the presumption of innocence; and
- ix. a fair and public hearing by a competent, independent and impartial tribunal.

Under its international human rights law obligations, Egypt is required to guarantee these rights, including under the 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>7</sup> and the 1981 African Charter on Human and Peoples' Rights (ACHPR),<sup>8</sup> which Egypt ratified on 14 January 1982 and 20 March 1984, respectively.

### The right to life

Under article 6(1) ICCPR and article 4 of ACHPR, Egypt must guarantee the right to life and protect all persons from the arbitrary deprivation of life. Under the ICCPR, countries that have not abolished the death penalty, such as Egypt, may only apply it in a non-arbitrary manner,<sup>9</sup> which includes the requirement to ensure that any trial that may lead to the imposition of the death penalty must ensure the strictest respect for the fair trial guarantees enshrined in article 14 of the ICCPR.<sup>10</sup> Consequently, violations of article 14 ICCPR rights in the context of trial proceedings that may result in the imposition of the death penalty as a sentence, and indeed to the execution of the convicted person, such as those highlighted below in this briefing, constitute violations of the prohibition against arbitrary deprivation of life.<sup>11</sup> These violations include the admission of forced confessions, failures to allow defendants to question witnesses, lack of access to adequate legal representation, an absence of appeal rights, and failure to establish the guilt of the convicted persons beyond any reasonable doubt.

Additionally, under article 6(2) ICCPR, the death penalty may only be lawfully imposed further to a judgment issued by a competent court. This requires that trial proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and courts. The Human Rights Committee has held that, in order to be considered competent, a court must be sufficiently independent of the executive and legislature, and that in all cases "civilians should not be tried for capital offences before military courts", which cannot be considered competent for civilian trials.<sup>12</sup>

Notwithstanding the above, on 26 December 2022, the East Cairo Military Court convicted five civilian defendants of capital offences and sentenced them to death. This was despite the Court being aware of the very serious reports that the NSA had subjected many of the defendants to severe physical assaults to elicit forced confessions, having presided over trial proceedings throughout which neither the defendants themselves nor their lawyers were presented with

7. ICCPR, available at: <https://www.refworld.org/legal/agreements/unga/1966/en/17703>.

8. ACHPR, available at: <https://au.int/en/treaties/african-charter-human-and-peoples-rights>.

9. The ICJ considers the use of the death penalty in all circumstances as a violation of the right to life and a form of cruel, inhuman and degrading punishment. See ICJ, Egypt: judiciary must reject mass death-penalty trials, 3 February 2015, available at: <https://www.icj.org/egypt-judiciary-must-reject-mass-death-penalty-trials/>.

10. UN Human Rights Committee, General comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, The Right to Life, 2018, para. 16, available at: <https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life#:~:text=The%20right%20to%20life%20is,for%20society%20as%20a%20whole>.

11. Id., paras. 45 and 47.

12. Id., para. 49.

evidence proving the charges, and having denied the defendants' lawyers the opportunity to question witnesses, access case files and advise their clients.

Additionally, under article 97 of the 1966 Military Justice Law (MJL), as amended in 2007,<sup>13</sup> convicted persons have only a limited right to appeal their conviction and sentence. The MJL permits convicted persons to appeal to the Supreme Court for Military Appeal to have their conviction and sentence reviewed on the basis of limited questions of law and procedure, excluding questions of facts underlying the findings of guilt.<sup>14</sup> The Human Rights Committee has confirmed that, "a review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient" to comply with article 14(5) ICCPR, namely that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".<sup>15</sup>

The East Cairo Military Court's imposition of the death penalty following a trial with such gross violations of the right to a fair trial constitutes an egregious violation of Egypt's obligation to guarantee the five Defendants' rights to protection from the arbitrary deprivation of life under articles 6(1) and 6(2) ICCPR and article 4 ACHPR.

### **The right to protection from enforced disappearance**

Under international human rights law, Egypt is bound to guarantee the right of all persons to protection from enforced disappearances,<sup>16</sup> defined under the 2010 International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED) as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State...followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person".<sup>17</sup> The Human Rights Committee has determined that all instances of enforced disappearance violate, ipso facto, article 7 ICCPR, the prohibition on torture or other ill-treatment.<sup>18</sup> Additionally, under article 9 of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance (DPPED), Egypt must guarantee the right to "prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty".<sup>19</sup> Moreover, under articles 2(3) ICCPR and 14(1) UNCAT, Egypt is also bound to guarantee victims' access to effective remedies and redress for any violations of their rights, including as a result of torture, which includes the rights to have their claims decided by a competent judicial, administrative or legislative authority, and to have any granted remedies enforced.

Following arrest, the NSA detained 105 defendants at NSA or other premises not registered as official places of detention under Article 42 of the Criminal Procedure Code (CPC),<sup>20</sup> for periods between two days and one year. NSA officers refused to acknowledge the fact of the defendants' detention to their families, let alone disclose to them the location of the detention facilities where they were held. Additionally, despite the defendants' lawyers submitting petitions to ascertain, if and, if so, where the authorities were holding their clients, the Public Prosecution failed to acknowledge their detention or act upon the requests to investigate the defendants' fate and whereabouts. Consequently, the Egyptian authorities have not only subjected the

13. Military Justice Law No. 25 of 1966, available in Arabic at: <https://manshurat.org/node/1487>.

14. Law No. 16 of 2007 on the amendment of the Judicial Military law of 1966, available in Arabic at: <https://manshurat.org/node/1499>

15. 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, available at: <https://www.refworld.org/legal/general/hrc/2007/en/52583>.

16. UN Working Group on Enforced or Involuntary Disappearances, DA/HRC/51/31/Add.3, 31 August 2022, paras 74-76, available at: [https://ap.ohchr.org/documents/dpage\\_e.aspx?m=119](https://ap.ohchr.org/documents/dpage_e.aspx?m=119).

17. 2010 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), article 2, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced>.

18. UN Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 2018, para. 8, *supra* note 10.

19. DPPED, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-protection-all-persons-enforced-disappearance>.

20. Law No. 112 of 1950 Criminal Procedure Code, available in Arabic at: <https://manshurat.org/node/14676>.

105 Defendants to enforced disappearances, they have also failed to investigate the serious allegations of enforced disappearances with a view to holding those responsible for such egregious violations to account, in violation of the country's obligation under international law.

### **Freedom from torture or other cruel, inhuman or degrading treatment or punishment**

Under article 7 ICCPR, article 2(1) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)<sup>21</sup> and article 5 ACHPR Egypt is prohibited from subjecting any person to torture or to other cruel, inhuman or degrading treatment or punishment. This prohibition entails positive obligations on the part of the State to take measures to protect persons from such treatment or punishment.<sup>22</sup> In accordance with article 1(1) UNCAT, torture is defined as:

*"Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person."*

During the arrest and detention of the defendants in Case No. of 2021, the NSA allegedly subjected all 111 detainees to physical assaults, including by hanging them from the ceiling from their hands, by electrocuting them and by stripping them naked, ostensibly with the intention of obtaining forced confessions in some instances. Additionally, 105 of the 111 Defendants arrested by the NSA were reportedly subjected to prolonged periods of detention without contact with their family members or legal counsel. The Human Rights Committee has stated that prolonged periods of incommunicado detention amount also to a violation of article 7 ICCPR,<sup>23</sup> while the UN Working Group on Enforced or Involuntary Disappearances has confirmed that enforced disappearances also violate article 7 ICCPR.<sup>24</sup> Furthermore, despite being presented with first-hand evidence of the injuries sustained by the defendants in NSA detention, the SSPP and the Military Prosecution failed to order investigations into the NSA's alleged use of torture or other ill-treatment against them, including as a means to obtain forced confessions. Under article 12 UNCAT, the Egyptian authorities are bound to "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed".

Finally, during the trial, the East Cairo Military Court accepted the forced confessions obtained from some of the defendants, allegedly as a result of torture, as evidence of their guilt. The Human Rights Committee has authoritatively confirmed that no statements or confessions obtained in violation of article 7 ICCPR may be used as evidence in criminal proceedings.<sup>25</sup> Additionally, article 15 UNCAT demands that, "each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". Consequently, Egypt has perpetrated numerous gross violations of the defendants' right to protection from torture etc. under articles 6, 10 and 14 ICCPR, article 5 ACHPR and articles 2 and 15 UNCAT.

21. UNCAT, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>. Egypt ratified UNCAT in 1986, and so is bound by its provisions.

22. Under article 2(1), UNCAT "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

23. Human Rights Committee, General Comment No. 35 Article 9 (Liberty and security of person), 16 December 2014, para. 56, available at: <https://undocs.org/Home/Mobile?FinalSymbol=CCPR%2F35&Language=E&DeviceType=Desktop&LangRequested=False>.

24. WGEID, General Comment on article 17 of the Declaration, para. 31, available in Compilations of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance, available at: <https://www.ohchr.org/en/special-procedures/wg-disappearances/general-comments>.

25. UN Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, para. 6, supra note 15.

## The right to liberty and security of person

Under article 9(1) ICCPR and article 6 ACHPR, Egypt was bound to guarantee the defendants' right to liberty and security of person, including freedom from arbitrary arrest and detention. In Case No.1 of 2021, the Egyptian authorities committed flagrant violations of the right to liberty, including freedom from arbitrary arrest and detention, against at least 111 of the Defendants on the following bases:

- i. The Egyptian authorities failed to abide by provisions of Egyptian code of criminal procedure in executing the arrest and detention of the defendants. Under article 9(1) ICCPR, no one shall be deprived of liberty except on such grounds and in accordance with such procedures as are established by law. The violations of domestic law include:
  - a. The failure of the Egyptian authorities to notify the 105 defendants' lawyers as to the suspects initial place of detention as per article 139 CPC. Under articles 9(2) and 14(3)(b) ICCPR,<sup>26</sup> Egypt must permit suspects access to legal representation from the outset of their detention to comply with the right of anyone arrested or detained to have the assistance of legal counsel to protect their rights and to assist in their defence; and
  - b. The SSPP's failure to provide substantive reasons as to why the detention pending trial of 73 of the defendants was necessary and proportionate, and the Military Prosecutor's failure to provide substantive reasons as to why the detention of 44 Defendant pending trial was necessary and proportionate, as per article 143 CPC, including by producing evidence linking the defendants to the alleged offences. Under article 9(3) ICCPR, detention pending trial must be based on an individualized determination that such detention is necessary and proportionate, and must be a measure of last resort.<sup>27</sup>
- ii. The failure of the Egyptian authorities to guarantee the defendants' access to counsel and contact with their family for extended periods of time while detained. According to the Human Rights Committee, "certain conditions of detention (such as denial of access to counsel and family) may result in procedural violations of paragraphs 3 and 4 of article 9".<sup>28</sup> Additionally, international human rights law and standards require Egypt to permit detainees to receive visits and to correspond with the outside world, which is a right that may only be restricted "for a matter of days";<sup>29</sup>
- iii. The failure of the Egyptian authorities to guarantee the defendants' access to prompt medical care for both chronic illnesses and for injuries sustained as a result of alleged torture or other ill-treatment. The Human Rights Committee has confirmed that "several safeguards that are essential for the prevention of torture are also necessary for the protection of persons in any form of detention against arbitrary detention" including "prompt and regular access ...to independent medical personnel";<sup>30</sup>
- iv. The failure of the Egyptian authorities to present 111 of the defendants promptly before a judicial authority in relation to the criminal charges against them and to guarantee their right under article 9(3) ICCPR to have a judge rule on the lawfulness of their arrest or detention, including whether sufficient legal reasons existed for their arrest or detention, and to order release if not, and to safeguard their well-being and prevent violations of their rights. Under article 9(3) ICCPR, there is a presumption of release pending trial, which the authorities must ensure takes place within a reasonable time or else release the detainee. The State bears the burden of proving that the initial arrest or detention was lawful and that continuing detention, if requested, is necessary and proportionate.<sup>31</sup> Under article 9(3) ICCPR,<sup>32</sup> Egypt must ensure that anyone arrested or detained on a criminal charge be

26. Under DPPED, article 10(2), Egypt is also required to promptly provide accurate information on the detention of detainees to the detainees' legal counsel.

27. UN Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and security of person), para. 38, *supra* note 18.

28. *Id.*, para. 57.

29. 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, articles 19 and 15, respectively, available at: <https://digitallibrary.un.org/record/53865?ln=en>.

30. UN Human Rights Committee, General Comment No. 35 on Article 9 (Liberty and security of person), para. 58, *supra* note 18.

31. *Id.*, para 32. As the Human Rights Committee has clarified, "the requirement [to bring any person arrested or detained on a criminal charge promptly before a judge] applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity. The right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control".

32. Under DPPED, article 10(1), Egypt is also required to ensure that any person deprived of liberty is brought

presented promptly before a judge. As such, any form of incommunicado detention that prevents compliance with this right amounts to a violation of it;<sup>33</sup>

- v. The failure by Egyptian authorities to abide by the maximum pre-trial detention period, including by detaining a number of the defendants in pre-trial detention between 2014 and 2021. Under article 143 of the Criminal Procedures code, "pre-trial detention must not exceed ... six months for defendants accused of misdemeanours (offences punished by up to three years in prison), 18 months for felonies and two years for felonies punished by death or life imprisonment".<sup>34</sup> Such extended period of pre-trial detention also violated article 9(1) of the ICCPR. Furthermore, extremely prolonged pre-trial detention would also violate the presumption of innocence guaranteed by article 14(2) of the ICCPR.<sup>35</sup>
- vi. The refusal of the Military Prosecution to provide the defendants' lawyers with access to their clients criminal files and the details of the charges against them. Articles 9(2) and 14(3)(b) ICCPR require Egypt to promptly inform suspects of any charges against them and permit adequate time and facilities for the preparation of a defence; and
- vii. The Egyptian authorities' ostensible use of arrest, detention and prosecution against the defendants in retaliation for their alleged association with the Muslim Brotherhood political organisation. Under article 9(1) ICCPR, arrest or detention as punishment for the legitimate exercise of the right to freedom of association is arbitrary.<sup>36</sup>

### **The right to equality before the courts, the principle of equality of arms and the right to examine evidence**

Under article 14(1) ICCPR, Egypt must guarantee the defendants' rights to equality before the courts. The Human Rights Committee has confirmed that:

*"The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant."*<sup>37</sup>

Egypt's obligations to guarantee the defendants' rights to equality before the court and the principle of equality of arms include the requirement that both the defence and prosecution have "the opportunity to contest all the arguments and evidence adduced."<sup>38</sup> Additionally, article 14(3)(e) ICCPR guarantees the right of the accused to challenge the evidence against them, including through the examination by legal counsel of witnesses against them, and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.

In the context of Case No.1 of 2021, the Military Court violated the defendants' rights to equality before the courts, the principle of equality of arms and the right examine evidence, insofar as the defendants lawyers were denied the opportunity to question prosecution witnesses during the investigation or to call defence witnesses during the trial, and through direct interference in the testimony of prosecution witnesses to the benefit of the prosecution, which "corrected" the narratives provided by witnesses at trial and reminded them of alleged "facts" in the case. Furthermore, during the trial, the East Cairo Military Court arbitrarily limited the time allocated to the defendants' lawyers to plead their clients' cases, thus reducing their chances to properly contest the arguments and challenge the "evidence" against them.

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before a judicial authority promptly.

33. UN Human Rights Committee, General Comment No. 35 Article 9 (Liberty and security of person), para. 35, supra note 18.

34. Law No. 112 of 1950 Criminal Procedure Code, supra note 25.

35. UN Human Rights Committee, General Comment No. 35 Article 9 (Liberty and security of person), para. 37, supra note 30

36. Id., para. 17.

37. UN Human Rights Committee, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, para. 13, supra note 15.

38. Id.

### **The right to adequate time and facilities for the preparation of a defence and to communicate with counsel**

Under article 14(3)(b) ICCPR, Egypt must also guarantee the rights of the defendants to adequate time and facilities for the preparation of a defence and to communicate with counsel. The Human Rights Committee has confirmed that this requires States to ensure that the defendants be able to hold prompt and private consultations with their lawyers free from "undue interference from any quarter."<sup>39</sup> Additionally, States must provide defendants and their lawyers with access to case files, and this access must "include all materials that the prosecution plans to offer in court against the accused or that is exculpatory".<sup>40</sup> In the context of Case No.1 of 2021, the Egyptian authorities further failed to guarantee the Defendants' right to adequate time and facilities for the preparation of a defence and access to counsel, as follows:

- i. Between 2014 and the SSPP's referral of the case to the Military Prosecutor on 29 November 2020, the NSA and the SSPP either completely denied at least 111 defendants access to their lawyers during interrogations or only permitted them to receive legal advice in the presence of a prosecutor; and
- ii. The Military Prosecution denied the defendants' lawyers access to complete copies of the relevant criminal case files and evidence, thus denying them the opportunity to adequately examine evidence, advise their clients and assist them in preparing their defence.

### **The right to the presumption of innocence**

Throughout the course of Case No.1 of 2021, the Egyptian authorities violated the accused's right to the presumption of innocence as guaranteed under article 14(2) ICCPR, which requires that "everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law".

During the pre-trial stage, the authorities held the defendants in prolonged pre-trial detention for at least seven years. The UN Human Rights Committee has stated that, "extremely prolonged pretrial detention may...jeopardize the presumption of innocence".<sup>41</sup> Additionally, during the trial the Egyptian authorities held many of the defendants in iron cages surrounded by bulletproof glass. The Human Rights Committee has stated that presenting defendants during trials "in a manner indicating that they may be dangerous criminals" violates the right to the presumption of innocence.<sup>42</sup>

Finally, and most damningly, despite the protracted investigative and pre-trial stages, the Egyptian authorities failed to produce little, if any, individualized evidence of guilt in connection with the offences with which the 159 defendants were charged and for which they were eventually convicted and sentenced. The Human Rights Committee has stated that the right to the presumption of innocence "imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, [and] ensures that the accused has the benefit of doubt."<sup>43</sup>

### **The right to a fair and public hearing by a competent, independent and impartial tribunal**

Under article 14(1), Egypt should have guaranteed the right of the defendants in Case No.1 of 2021 to be tried before a competent, independent and impartial tribunal established by law. The Human Rights Committee has clarified that such a tribunal must be "independent of the executive and legislative branches of government" with regard to the appointment, tenure, retirement, promotion, transfer and dismissal of judges, and that, "a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable

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39. Id., para. 34.

40. Id., para. 33.

41. UN Human Rights Committee, General Comment No. 35 on Article 9, Liberty and security of person, 16 December 2014, para. 37, supra note 18.

42. UN Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, para. 30, supra note 15.

43. Id.

or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal".<sup>44</sup> Additionally, the Committee has stated that the trial of civilians before military courts must only take place in exceptional circumstances, when doing so is "necessary and justified by objective and serious reasons".<sup>45</sup> In accordance with the 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, "military courts should not in any circumstances whatsoever have jurisdiction over civilians".<sup>46</sup>

In addition to the multiple and serious violations detailed above, the fairness and independence of proceedings before Egyptian military courts, including the East Cairo Military Court, are compromised by the undue influence of the executive over their composition and the proceedings before them. Under article 54 of MJL, the Minister of Defence is responsible for appointing judges to military courts. Military court judges are serving military officers without adequate legal training who are subject to the military chain of command, including in the course of their judicial functions, and are, as such, not independent.<sup>47</sup> Additionally, judgments handed down by military courts do not become final until the President of the Republic ratifies them in accordance with articles 84 and 116 of MJL, under which the President is granted the power to pardon convicted persons, endorse sentences and order retrials. Under article 97 of MJL, defendants have only a limited right to a review of their conviction and sentence before the Court of Cassation, which cannot consider evidence and is limited to a procedural review, constituting not only a violation of article 14(1) ICCPR, given the brazen executive interference over military court proceedings that this entails, but also article 14(5) ICCPR, which guarantees the rights of convicted persons to have their convictions and sentences reviewed "substantively, both on the basis of sufficiency of the evidence and of the law...such that the procedure allows for due consideration of the nature of the case".<sup>48</sup>

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44. Id. paras. 18 and 19.

45. Id. para. 22.

46. G. Right of Civilians not to be tried by military courts, available at: <https://achpr.au.int/index.php/en/node/879>. See also: principle 8 of the 2010 Principles Governing the the Administration of Justice Through Military Tribunals, available at: <https://www.dcaf.ch/resources?type=publications>.

47. ICJ, Egypt Constitutional Amendments: Unaccountable Military, Unchecked President and a Subordinated Judiciary, 2019, pg. 8, available at: <https://www.icj.org/resource/egypt-constitutional-amendments-entrench-repression/>.

48. 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, supra note 15.

### III. Recommendations

In light of the findings outlined above, the ICJ and ECRF call on the Egyptian authorities to comply with their obligations under international human rights law by:

- i. In Case No. 1 of 2021:
  - a. Quashing the convictions of all 159 defendants and immediately releasing them, taking immediate steps to ensure that death sentences are not executed in the interim;
  - b. Providing all 194 individuals arrested, detained and/or prosecuted in the case with access to effective remedies for all violations suffered in the context of the case; and
  - c. Immediately initiating independent, thorough and impartial investigations in the allegations of torture and enforced disappearance arising in the context of the case.
- ii. Ending the use of mass trials in contravention of the right to a fair trial and due process guarantees provided for by article 14 of ICCPR;
- iii. Ending the practice of incommunicado detention and all other forms of arbitrary detention;
- iv. Ending the systematic practice of enforced disappearance, including by ensuring prompt, independent and impartial investigations into disappearances are carried out when credible allegations arise;
- v. Become a party to the ICPPED and enacting legislation to criminalize enforced disappearances;
- vi. Promptly, thoroughly, independently and impartially investigating all allegations of torture or other ill-treatment and bringing to justice State officials and law enforcement officers suspected of carrying out, ordering, instigating or acquiescing in such practices;
- vii. Abolishing the use of the death penalty in all circumstances, and imposing a moratorium on all executions. Pending abolition, the authorities should ensure that proceedings comply with the highest standards of the right to a fair trial;
- viii. Ending the practice of trying civilians before military courts and preventing their weaponization against political opponents;
- ix. Ensuring respect for the rights of detainees, including the right to receive regular visits, the right to have access to their lawyers to prepare their defence and the right to receive medical treatment whilst detained; and
- x. Reforming the pre-trial detention framework, including with a view to ensuring that it is an exceptional measure based on an individualized determination of the necessity and proportionality of detention taking into account all the circumstances, including specific and relevant factors defined in the law.

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