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TORTURE IN EGYPT: SYSTEMIC AND SYSTEMATIC

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Egyptian Commission for Rights and Freedoms

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PRAXIS PAPER

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ABBREVIATIONS

AI	Amnesty International
CAT	UN Committee Against Torture
CFJ	Committee for Justice
CPT	European Committee for the Prevention of Torture
ECHR	European Court of Human Rights
ECRF	Egyptian Commission for Rights and Freedoms
EIPR	Egyptian Initiative for Personal Rights
HRW	Human Rights Watch
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
SSSP	Supreme State Security Prosecution
UNCAT	UN Convention Against Torture
UNSRT	UN Special Rapporteur on Torture

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EXECUTIVE SUMMARY

That torture is practiced systemically and systematically in Egypt is not a recently established fact. The prevalence of torture in Egyptian places of detention has been the subject of numerous inquiries and reports by international human rights bodies and by concerned civil society alike, particularly over the last two decades. These include two especially damning inquiries by the UN Committee Against Torture (CAT), conducted under article 20 of the UN *Convention Against Torture* (UNCAT) (decades apart: see UN CAT 1996, UN CAT 2017), which found torture to be rife in the country. According to article 20, ‘... if the Committee receives reliable information which appears to it to contain well-founded indications that torture is being *systematically* practised...’ it can engage the state in an investigation. These efforts have repeatedly documented how impunity has been (and continues to be) facilitated through the complicity between the politico-executive authorities and different arms of the criminal justice system, namely the police, prosecutors, courts and prison staff.

Experience tells us, however, that *systemic* and *systematic* dynamics are not adequately taken into account where certain *specific* acts and contexts are legally assessed as falling within the scope of torture or other forms of ill-treatment. The exception is the seldom-used article 20. Taking this as a point of departure, we therefore carefully question what is meant by systematic and what might count as evidence. This report applies the words ‘systemic’ and ‘systematic’ to capture related but differing dynamics emerging from Egypt’s torturing *system*; ‘systemic’ pertains to structural, default, pervasive or institutionally or culturally ingrained factors whereas ‘systematic’ refers to the methodical, planned, strategic, habitual, regular and routine practices.

The more conventional isolated focus on individual *perpetrators*, their *intention* and *purpose* serves to obscure the full range of political and institutional dynamics and harms in evidence. For instance, when a prisoner in need of medical attention is left to suffer (and, as has often been the case in Egypt, to die), this is usually (and unduly) characterised as an act lacking in intention or purpose under article 1 of the UNCAT and is therefore classified as ‘only’ amounting to neglect and in turn ‘falling short’ of torture. When a judge undersigns a dubious or ill-conceived retrial or the fourth extension of a political opponent’s detention, returning (and ‘recycling’) them to harmful conditions of confinement, the required intention or purpose is deemed to be insufficient to colour the judge’s actions as complicit in the ensuing punitive harms. Consequently, the rationale of article 20 needs to be harnessed to unearth the extant complexity underpinning these actions and inactions.

This report critiques such disconnects between *systemic*, *systematic* and *specific* torture and aspires to achieve its purpose by connecting these dynamics. In essence, it: i. *examines in detail and dismantles false boundaries between intention, purpose and neglect* (or disregard), ii. *establishes systematicity in institutional and structural dynamics* (connections, continuities and complicity) that facilitate the prevalence of torture and iii. *from systemic and systematic viewpoints, reads and deduces individual officials’ intention and purpose to torture*. To these ends, the report explores three familiar contexts to different degrees:

- I. official (prosecutorial/judicial) failure to exclude confessions and other information obtained under torture
- II. official abuse of the legal process through the practice of case 'recycling'
- III. denial of medical care in detention.

The scope and causes of these practices, particularly against political opponents and human rights defenders, have been well documented elsewhere (see the extensive reference list at the end of this document). When read together, this documentation reveals that torture and other forms of ill-treatment are inflicted and induced (or produced) by a complex machinery situated in an ecology of actors and factors.

Unlike most other human rights documentation, this report emphasises the systemic connections and continuities across different institutional contexts (ie police, prosecution and judicial bodies), where torture is inflicted, enabled and sustained. The report therefore questions prevailing individualist approaches to defining torture, most clearly indexed by the element of intentionality in the definition of torture under article 1 of the UNCAT. Individualist approaches are taken to include a dominant focus on identifying individual actions and actors (victims and perpetrators), thereby establishing facts pertaining to specific individual allegations (decisions and directives) and pursuing responsibility for specific individual perpetrators when these are abstracted from the broader context in which the actions and conditions are shaped and take place. While article 1 is usually interpreted as applying to individual perpetrators, there is, in fact, no explicit mention of individuals beyond the open-ended phrase 'a public official or other person acting in an official capacity'. This report treats this open-endedness as an entry point for discussing dynamics of systemic (that is, institutional) perpetration.

To be more precise, we have been interested in how official decisions are made in these contexts – about recognition of official knowledge, responsibility and disregard of whether an accused or detainee is being violated. We have therefore been interested in *action* as much as *inaction*, in *commission* as well as *omission* – in official knowledge of harm and what has been done or left undone in response. Both conventional jurisprudence, particularly under article 20 of the UNCAT, and relevant critical literature has been drawn upon to broaden the scope of analysis from individual to collective responsibility – moving from individual agency and institutional independence to intra-institutional dynamics and complicity.

The state of exception is also an important background factor facilitating violations in the name of prerogative (namely, security-oriented) imperatives. More generally, this report addresses the question of how a system of law – which normatively (formally and theoretically) upholds the rights of detainees and prisoners – could in practice facilitate a system of torture in its spirit and operation. By analysing the ways in which a sanctioning and abusive culture maintained by state officials has dismantled and incapacitated the normative establishment of the state, the report illustrates how torture, inhumane treatment and degradation are facilitated and legitimated politically. Beyond observations of the Egyptian state's lack of commitment to prevent torture and provide effective remedies for victims, this report demonstrates that the governmental apparatus acts with the intention to torture – concertedly and perniciously – and characterises official action and inaction as instrumentally planned and directed.

The report identifies a system that links individual official actions and responsibilities by critically bridging articles 1 and 20 of the UNCAT to raise awareness, among the national and international communities, of the situation in Egypt to allow all concerned actors to better diagnose the ills and needs regarding the prevalence of torture and impunity, and to demand urgent action in preventing further violations. There is also a need to return to the key drivers creating and sustaining the current state of affairs. As a corollary, the report also aims to contribute to a discussion supporting future opportunities to reform the justice system and to recall the macro conditions to sustain such transition and avoid regression.

The report concludes the following:

- *systemic intention and purpose*: that findings of routine and habitual human rights violations by criminal justice institutions give rise to a general finding of systemic and systematic intention and purpose to harm those targeted
- *individuals are inseparable from their institutions*: that the individual official's actions or omissions must always be seen as conditioned and controlled by their institutional setting; that human rights documentation ought to include broader connections and contexts between perpetrating institutions, viewing the torturing system in its entirety and not violations in isolation and – especially – not by individual perpetrators in isolation; that individual responsibility does not end with those torturing but encompasses those making torture possible and systemic
- *institutions are complicitly connected, collaborating in human rights abuses*: that responsibility for torture should be viewed across institutions and not as contained in institutions; that any contextual analysis dismisses claims of institutional independence (eg prosecutorial or judicial) and instead presumes connections of complicity between the actors; that, given the pervasiveness of the state of exception and the general knowledge of the state system's operations and logics, complicity can be reasonably presumed among all officials involved in facilitating any harmful period of detention
- *actions and omissions are not hierarchically different*: that the Egyptian state apparatus operates through its silences, inactions and refusals to act despite clear identification of violations; actions (eg interrogation techniques, and accepting torture-tainted confessions and statements) cannot be said to be necessarily more harmful or grave than inactions (eg denial of medical treatment)
- *articles 1 and 20 of the UNCAT to be read together*: that interpretations of systematic torture as found under article 20 of the UNCAT stand to complement the focus on individual perpetrators under article 1 of the UNCAT towards a more complete conceptualisation of torture and its practice as well as a wider understanding of those responsible, which, accepting a chain of command, also underscores more multivariate and cross-institutional dynamics; that a general comment from the Committee Against Torture providing such guidance is overdue.

INTRODUCTION

It is becoming increasingly relevant to re-examine the questions of where and with whom the responsibility lies for torture in today's Egypt. Firstly, while accepting the jurisprudence on article 1 of the UNCAT, we hold that its application to date has restricted us to certain individualist readings of torture. When we confront contexts such as the one in Egypt, we must be better at operationalising the definition of systematic torture (under article 20 of the UNCAT) and linking it to the ecological approach (see Celermajer 2018). This approach foregrounds the full range of systemic or situational factors to show that torture is not the result of the pathological dispositions of a few deviant individuals acting out their own individual pathologies, but that it is the product of the complex ecology – metaphorically the situation of the entire orchard, ie the interconnected practices that nourish, nurture and otherwise facilitate the likelihood of a toxic harvest – over and over again, and with seasonal variations (see generally Celermajer 2018, Cakal et al. 2020). To this end, we argue that there is a need to identify how acts and behaviours by different individuals operating within the criminal justice *chain* contribute to creating a system of torture, while all ultimately bear a degree of responsibility in each other's actions and inactions.

This report rings anew the alarm bell for the international community to review its partnership with the Egyptian state, to see the true abusive attitude by Egypt concerning prospects for the rule of law, and for constructive dialogue or collaboration. The report reveals and unravels the dynamics and attitudes endemic to state practices in Egypt: it assists the international community in better understanding and approaching dialogue with the Egyptian state with a view to resolution. The report also suggests that bilateral partnership with Egypt must be informed and take into account the 'quality' (or rather the criminality) of the Egyptian regime. At the same time, the report aspires to speak to the creation of a future democratic Egypt, where human rights are respected and where prerogative and abusive forces are met with control mechanisms that proscribe their return.

CASE STUDIES: EXCLUDING, RECYCLING, DENYING

The report focuses on three distinct yet interrelated contexts: on judicial, prosecutorial and prison-related decision-making practices. Human rights documentation has covered these areas to varying degrees but has often focused on particular actors and practices. Our emphasis here is on their commonalities, connections and continuities. The following will provide a brief background for these contexts. These will then be examined in greater detail in subsequent sections.

i. Courts and confessions: Articles 52 and 55 of the *Egyptian Constitution* articulate freedom from torture. Article 55 provides that any statement that is proven to have been given by the detainee under torture, coercion or physical or mental harm is to be inadmissible and upholds the right to remain silent. The detainee must ordinarily be afforded the opportunity to file a complaint for which an effective investigation must be conducted. This is not expressed in either article (52 or 55) but is implicitly understood under article 55, which states that violating any of the above is a criminal offence and punishable by law. On the surface, this resembles the protection offered under article 15

of the UNCAT, which requires ‘...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’. In practice, this opportunity is never afforded and remains far from reality, with forced confessions central to criminal justice processes – as the case examples presented confirm.

ii. Case recycling is a prosecutorial practice that has emerged relatively recently in relation to politically motivated cases. It involves the arbitrary, persistent and punitive revival of new criminal cases, particularly against political opponents and human rights defenders before a court release order is implemented, hence keeping a detainee in a continuous loop of detention orders. The recycling of defendants is a form of manipulation used by prosecutors to keep detainees locked up indefinitely beyond the maximum periods of pretrial detention prescribed by article 143 of the national *Code of Criminal Procedures*¹. In 2013, an exception was legislatively introduced to article 143 granting the Court of Cassation and the Court of Referral the power to extend detention without any limitations where a case carries charges of a potential life or death sentence and involves a retrial. The crucial difference between ordinary uses of pretrial detention and recycling is that the latter sidesteps legal limits attached to the former under article 143 by arbitrarily activating new ill-founded cases against accused – with no regard for legality. It should also be noted that the power to impose pretrial detention is also in the hands of the public prosecution, as stipulated by article 43 of Egypt’s Anti-Terrorism Act. The majority of the crimes with which human rights defenders (or political opponents) are charged are found under the Anti-Terrorism Act and carry a potential life sentence – thus allowing for pretrial detention of up to two years. Others who are not charged with offences carrying such extreme punishment are subject to shorter time limitations. Recycling has become a means of circumventing time limitations associated primarily with anti-terrorism cases, and secondarily less-serious offences. At the time of writing, a judge has yet to formally question the actions of prosecutors when it comes to recycling, even if, in certain cases, the fabrication of the new charge was clearly deliberate.

Regarding political prisoners, the practice involves both the ordinary prosecution authorities and the Supreme State Security Prosecution (SSSP) bringing a new case against an individual who is currently being (or has recently been) detained in pretrial detention or imprisoned and/or ordered released. These essentially involve ill-grounded charges based on a new National Security Agency report purporting that the individual committed a new crime (during or before their initial detention in the previous case). The prosecution authorities (including the SSSP) are unquestionably propelled to keep political opponents incarcerated and incapacitated, not to mention that the practice is psychologically excruciating for those subjected to it. In numerous cases, detained (in pretrial detention) or (following conviction) imprisoned individuals have been ordered to be released by courts, only to be disappeared and reappear under new accusations – to ‘refresh’ the legal grounds, though dubious, for their detention or imprisonment. Revival of old cases is another manifestation of this practice. Anecdotally, recycling is also practiced by prosecutors in petty crime cases, with the help of local police.

1 Article 143 states: ‘The period of pretrial detention in the primary investigation stage and the other stages of the criminal case may not exceed one-third of the maximum penalty depriving liberty, so that it does not exceed six months in misdemeanours and eighteen months in felonies, and two years if the prescribed punishment for the crime is life imprisonment or death.’

iii. Health provision in Egyptian prisons is seriously sub-standard and may in itself lead to ill-treatment and even torture; irregularity or non-existence of medical screenings, examinations and treatment (as standard procedure, as preventive, upon request or in cases of emergency); inadequacy of the healthcare system (qualified personnel and appropriate medication), and of material conditions in prisons, including sanitation, ventilation, food, exercise, meaningful contact and accommodation; private provision of medication from relatives; and requests for care and transfers to external specialist facilities are also routinely denied, causing suffering and death.

PERSPECTIVE AND PURPOSE

What supports such claims? The evidence is admittedly more contextual and circumstantial than direct. Conceptually, culpability and accountability depend on knowledge, intent and purpose. Having made our claims, we are called on to locate these in the context of the Egyptian criminal justice system. Situating individual actors (police, prosecutors, judges and prison officials) in their institutional, social and political contexts will enable us to move beyond the characterisations of torture as products of individual and deliberate decisions born out of dysfunction and a predisposition to deviant violence, towards a more complete and potent understanding.

The report at hand aims to offer an ecological perspective on torture in Egypt. It aims to foreground the institutional logics and systemic intentionality to harm that may be overlooked with a focus on particular practices by specific state actors – potentially leading to downgrading the gravity of human rights violations, legally or politically. Certainly, interrogational torture is also unmistakably all too common at the hands of Egyptian law enforcement personnel, eg electrocution, beatings, threats, suspensions, which clearly fall within the ambit of the definition of torture under article 1 of the UNCAT. These remain inextricably linked to the three case studies and the theoretical framing in focus. Accepting these as irrefutable everyday reality, the report reorients attention to the wider systemic complicity that facilitates such acts through accepting confessions, refusing investigations and keeping individuals in and returning them to torturing environments. What the Egyptian experience clearly attests to is that torture is structural. It implicates and instrumentalises both individual officials and their institutions and must be viewed as emerging from a complex apparatus that is responsible for its instigation, infliction, investigation, adjudication and attribution. Viewing the interlinkages between judicial, prosecution and prison authorities in their entirety, the report points to a systemic intention and purpose geared to torture.

METHODOLOGY

The research team comprised ECRF, CFJ and DIGNITY staff members. The data collection was primarily the responsibility of ECRF and CFJ, and the data analysis and dissemination was a DIGNITY-led joint responsibility.

Data collection entailed primarily document and case-law reviews. It drew on Egyptian bureaucratic, political and legal documentation, pertaining to both general communications and individual cases, eg administrative communiques internal to relevant authorities such as ministries and prison management, governmental (including executive emergency) decrees and statements; court filings and judgments; ad-hoc trial observations; and testimonies from lawyers, victims of torture and their families². This was not looked upon as an exhaustive list but an indication of the examples of sources that are likely to prove central. Anticipating that some relevant information will not be readily available in the public domain (ie politically sensitive or individual confidential communications), the data collection was adjusted to include other relevant sources as the research team saw fit – with safety and expediency as key priorities.

The data collection aimed to trace and systematise cases, accounts and experiences of individual Egyptians entangled with criminal justice processes in three specific contexts and practices: i. exclusion of torture-tainted evidence (ie whether this is acknowledged, addressed, recorded, downplayed, dismissed by prosecutors or judges); ii. case-recycling: the punitive use (and thereby abuse) of detention and imprisonment (ie whether reasonings take into account legality, proportionality and the necessity of the measure); iii. punitive denial of health-care in prison (official responses to requests for medical care in custody and how denial is reasoned, if at all, and justified, based on individual cases or based on institutional justifications). Much of the collected data dates from 2013 onwards. Secondary data, in terms of reports and jurisprudence, include that which pre-dates 2013.

Data analysis drew on textual, legal and discourse analysis methods. The collected information was analysed in its broader institutional context of procedure and practice in order to identify patterns, commonalities, changes, and challenges as well as broader social contextual explanations in which these institutional practices are produced and perpetuated.

2 This was predominantly derived from the databases with the author organisations and was otherwise publicly available.

FINDINGS AND DISCUSSION

Under the state of emergency in Egypt, the limitations on civil and political rights are nonetheless imposed by ordinary laws and enforced by regular courts. [...] This anomaly reveals the overlap between law and politics despite denials by the state and its jurists [...] for the political targeting of specific groups and individuals. In this context, the law stops being a vehicle for deterrence or predictability and becomes a tool to exclude opponents from any legal protections. (Ezzat 2021, p. 305)

The definition of torture under international law is found in article 1 of the UNCAT. It requires a purposeful and intentional state-sanctioned act causing severe harm. While the modes of culpability foreseen here involve a wide range, from incitement and instigation to infliction, the pursuit of accountability under article 1 has hitherto focused on attribution of individual actions (rather than inactions)³ to individual actors: the victim and the perpetrator. The impetus of the criminal law to manage such procedures has meant that collective accountability and the broader systemic realities are not usually attended to or merely fleetingly in focus. This issue concerns as much the legal imagination as legal application. Intention and purpose are to be interpreted widely but this has not been achieved widely enough; assessments do not require 'reading the mind' of the perpetrator and are usually circumstantial and contextual in nature. Yet, there is a critical limitation to the relevant range of circumstances and contexts that are taken into account – in time and space. What happened, for instance, in a neighbouring police station, six months previously involving other individuals is dismissed as irrelevant. These considerations must be returned to and reconsidered.

Under Article 20 of the UNCAT, however, the CAT is empowered to widen its perspective and conduct a wide yet confidential inquiry of a member state (which has opted into this provision) upon receipt of 'reliable information that appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party'. This allows the circumstance and context to flow and be characterised as material. It also allows for a broader conceptualisation of intention. The CAT (1993, §39) has advanced a working definition of systematic torture as where:

...it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. *Torture may in fact be of a systematic character without resulting from the direct intention of a Government.* It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice. (Emphasis added by the authors of this report)

3

The ICTY has itself pointed this out where it stated "the most characteristic cases of torture involve positive acts": *Prosecutor v. Delalić et al.*, §468; *Prosecutor v. Kunarac*, §483; *Prosecutor v. Brđanin*, §481.

We must bear in mind that this procedure does not look at individual cases as per article 1 but at the systemic conditions prevailing in a state. The working definition, as it widens understandings of intent, has proven relatively expansive. On the whole (though not consistently), the ten inquiries to date have, in this broader vein, not required an ‘explicit Government policy instructing intelligence or law enforcement bodies to use torture’ (Nowak 2019, p. 554). What this wider legal perspective allows is a truer appreciation of how states come to sustain a system of torture – this is true in Egypt, as elsewhere, where the various arms of the state drive an individual to harm through various means as the following illustrates. Instead of a preconceived plan in Egypt, what we have is a state-condoned culture – such is born out in the following discussion.

EGYPT’S STATE OF EXCEPTION

That a ‘state of exception’ has come to characterise Egypt’s politics says nothing new. Its political, as much as its legal, system has been marked by an emergency imperative eroding any semblance of the rule of law and respect for human rights protections. This ‘exception’ has signalled the supremacy of ‘security’ considerations over legal, ethical and democratic ones. We argue that this development is best captured through the contestation between the concepts of the normative state, encompassing all institutions and legal frameworks that are supposed to uphold the rule of law and protect human rights, and the prerogative state, which includes mainly security apparatuses and exceptional juridical powers (see Ezzat 2021). It should be noted that the prerogative state is not only a group of apparatuses but could amount to a policy that could be sustained in institutions of the normative state under certain political circumstances. We also contend that a second move has taken place that has seen the exception become normalised – particularly as evidenced through prevailing practice in giving full jurisdiction to criminal courts specialised in trying cases of a political nature with broad powers to violate substantive and procedural legal and constitutional guarantees.

The interplay between the normative and the prerogative states sits at the heart of political developments in Egyptian society, particularly in the last decade. The normative state here is taken to refer to a more deliberative rule-of-law rationality that shapes, harnesses and controls the practices of the state’s institutions, including economy- and security-oriented institutions, towards stability and consensus. The normative state purportedly operates according to a wide range of values, balancing individual and societal interests; it is characterised by transparency and accountability and recognises the significance of international law. On the other hand, the prerogative state refers exclusively to the state security apparatus and imperatives to suppress activities judged to be an existential threat – this state is imbued with arbitrary, defensive and consequential (the-end-justifies-the-means) logic. Although not presenting a strict binary in reality, these two embodiments of the state have long been, at least nominally, pitted against each other in a co-existence of contest – set up as oppositional in their motives and modes of operation. In more colloquial terms, one may refer to the normative state as civilian oriented and the prerogative state as security oriented. Certainly, the prerogative state consists not only of members of the security apparatus or the executive, but are represented by all state officials who, via their conduct (active or passive), contribute to the very narrative that ignites the prerogative state, ie emergency, security, national threats, etc⁴.

4 Under Sisi, this has extended beyond the state. For example, media channels receive direct orders and even scripts from state officials (Mukhabarat) regarding TV shows – how to depict police, the army, who to hire, fire, what to say, etc. So, the ‘soldiers’ of the ‘prerogative state’ include many more than state officials.

There has been a historical fluctuation between these two faces of the state. During Al-Sisi's counter-revolutionary executive reign, legitimated on a permanence of emergency and state security imperatives, prerogative power has been strengthened and, in turn, the normative guarantees weakened. A state of exception has emerged, increasingly enlarged and normalised almost to the point of indistinction between the norm and the exception (see Ezzat 2021) – with a number of politically active groups rendered inimical to state security and thereby legitimate targets for the use of state force. With the prerogative folded into the normative, the exception has been normalised. Numerous presidential decrees and special laws have created and institutionalised a new prerogative state within the normative one⁵ among the state's lawmakers, police and army, and its prisons, and courts. The prerogative state, as such, has depended on its courts – not exclusively military courts but also through ordinary criminal courts. As rights and freedoms have been increasingly suspended and suppressed, courts have come to incorporate, integrate and institutionalise these security-related developments and considerations into their everyday practices. These have facilitated the arbitrary though sustained suppression of human rights activists through certification of organisational closures, politically motivated arrests and trials based on torture-tainted evidence leading to imprisonment and execution, and have ensured the impunity of state forces to such actions.

CONFESSIONS, COURTS AND COMPLICITY

Every statement proved to have been made by a detainee under any of the foregoing actions [ill-treatment], or threat thereof, shall be disregarded and not be relied upon.

Article 55 (3), Egyptian Constitution

Where allegations of torture or other forms of ill treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment.

Para. 26 (k), UN Special Rapporteur on Torture (2002)

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Article 16, UN Guidelines on the Role of Prosecutors

⁵ Presidential decrees extending the state of emergency every three months since April 2017; Anti-Terrorism Law 94/2015; Terrorism Entities Law 8/2015; Protest Law 107/2013; Law 136 of 2014 for the Securing and Protection of Public and Vital Facilities; the Emergency Law 162/1958, Ministerial Decree 134/2020 expanding the scope of Emergency State Security Courts.

The use of torture and ill-treatment on a widespread, deliberate and systematic basis by Egyptian police and security officials to punish, obtain information and force confessions is well-documented and the near-universal prosecutorial inaction upon requests that these incidents be investigated has also been well-established (see DIGNITY et al. 2019, HRW 2011, 2017). Egyptian courts are known to be ‘often a slow process leading to the impunity of the perpetrators of torture’ (UN CAT 1996, §206)⁶, and that most of the allegations of torture received from NGOs ‘are directed against members of State Security Intelligence... [and] that no investigation has ever been made and no legal action been brought against members of State Security Intelligence’ (UN CAT 1996, §207). The CAT has itself observed that ‘prosecutors, judges and prison officials also facilitate torture by failing to curb practices of torture, arbitrary detention and ill-treatment or to act on complaints’ (see UN CAT 2017, §§58-71).

Knowledge of law enforcement practices in police stations and prisons does not stop at the court door. Such knowledge, or suspicion, of torture or ill-treatment necessitates action when it arrives before a judge. Passivity, through a lack of action, amounts to complicity. In fact, the knowledge runs throughout the entire system – including the political executive. As such, responsibility becomes shared.

As discussed above, this is taking place under the rubric of Egypt’s perpetual state of emergency. These practices are not only in breach of the UNCAT but violate all fair trial principles recognised under international law. There are further interlinkages of responsibility in the Egyptian criminal justice system that we may also consider. Court decisions are occasionally not implemented by the Ministry of Interior, namely police and prison administration (AI 2021, p. 58). Egyptian prosecutors are empowered to visit prisons unannounced and conduct investigations, powers which are not effectively exercised (AI 2021, p. 59). Direct complaints to prosecutors also go unheeded (AI 2021, 59). These give the perpetrating institutions a ‘free hand’ to act with impunity (HRW 2017, p. 6).

This systematic failure of prosecutors to exercise their power to independently and effectively investigate allegations of cruel and inhuman detention conditions, inadequate health care and deliberate denial of health care, including in cases of deaths in custody, and hold officials accountable may amount to complicity in serious human rights violations, including violations of the right to life. (AI 2021, p. 59)

DIGNITY et al. (2019, p. 7) observed that ‘in some cases, especially if the accused has a political background or related to issues of national security, judges arbitrarily convict the accused persons even when they reported that their confession were made under torture’. In 31 cases monitored and directly observed:

...wherein the arresting authorities forced the accused to confess to the charges through physical and psychological means. The documentation available indicates that a total of 212 defendants (belonging to 31 separate cases) were subjected to various forms of torture and other forms of ill-treatment. From the 212 accused, the prosecution referred only 88 defendants to forensic medicine following allegations of torture and failed to act on 124 requests for referral to forensic medicine. (DIGNITY et al. 2019, p. 7)

6 Despite the aforementioned methodological delimitation to include material from 2013 onwards, the CAT’s 1996 report has been relied upon as it remains a significant precedent, and is a useful historical marker that helps to establish that the situation has not improved.

The data generated by the research at hand only add to this picture. The systematic failure can only characterise the prosecution and judiciary as accomplices in sustaining torture. The analysis demonstrates a need here to move from focusing solely on the failure to investigate to the duty to exclude torture-tainted evidence – both by the prosecution and judiciary. With the general and undeniable knowledge that confessions are obtained through torture, neither prosecutors nor judges can deny knowledge or justify inaction. Many cases examined for this report that have involved allegations of torture were only met with the judge not hearing or rejecting the complaints without adequate grounds.

It is customary for judges and prosecutors to ignore allegations of torture during investigations, before trial, or during trial sessions, despite the defendants' assertions and descriptions to them of the method of torture used, especially in cases involving torture by National Security agents. Judges and prosecutors do not explain to defendants or their lawyers why they do not take their torture claims seriously and take action. At best, prosecutors would themselves examine the body of the accused person and note in the investigation *procès-verbal* that they observe traces of scars, often ignoring requests by lawyers to send the accused to be examined by a forensic doctor or ordering so but without following through to make sure the examination takes place. Similarly, during trial, judges do sometimes refer victims to forensic doctors, but as with prosecutors, often this does not actually happen, despite reminders from defendants' lawyers in subsequent court sessions. If the examination takes place, forensic reports are either inconclusive or omitted altogether from the case file, or judges do not wait to receive the reports before issuing sentences in the case at hand.

Certainly, prosecutorial inaction is not absolute; sometimes defendant-victims reveal violations involving torture or enforced disappearance, and their claims are debated by the prosecutor, but even if a forensic investigation is initiated, virtually no cases are raised before the court on behalf, or in defence, of those victims who have been subjected to enforced disappearance and rarely in the case of torture. This is partially because the forensic procedure is usually initiated long after the torture incident. For example, in Case 9115/2016 (Criminal Court Southern Giza) a forensic report of the accused was issued on 23 August 2016 concluding that:

There are signs of healing of an injury in the right wrist and left leg. The defendant's condition has changed owing to healing over time. However, in the absence of contemporary medical papers on the date of the incident reported in the prosecutor's memorandum, it is not possible to confirm the nature of the injury, its date and the instrument used to cause it.

This pursuit of medico-legal evidence, despite its noncompliance with the UN *Istanbul Protocol*, is a rarity. The case of Father Isaiah, a Christian Coptic monk who was sentenced to death on the basis of torture-tainted confessions, reflects reality more closely. During the trial, he was refused visits from his lawyer and family. When he argued that his confessions were obtained under torture, the trial judge made derogatory and mocking comments about his name and ignored his requests for further examination (ECRF and Reprieve 2020, p. 5). He was executed on 9 May 2021.

Another emblematic case of such derision was the high-profile case involving torture-tainted evidence related to the assassination of Public Prosecutor Hisham Barakat on 29 June 2015. In that case, 67 defendants stood trial starting 14 June 2016 at Cairo Appellate

Court, including on charges of membership of an outlawed organisation, attempted murder and espionage. Three accused were charged with murder: Mahmoud al-Ahmadi (21), Abu al-Qassem Ahmed (23), and Youssef Negm (24). On 17 June 2017, the Court referred 30 accused to the Grand Mufti for his opinion on the death sentence, upon which 28 of the 30 were sentenced to death. Nine accused alleged that they were tortured during the investigation phase – including beatings, electrocution and threats against them and their families. The accused informed the prosecution and the court respectively during questioning and during the trial. One of the accused stated:

All the accusations made against me were false. I said them when I was psychologically and physically under duress by the State Security officers and threats they will harm my mother and sister and father. I was forced to memorise statements written on paper and the officer told me I will go to senior people and I need to say the same statements I memorized or I will be returned to them again.

These allegations were not effectively investigated and, in fact, requests were disregarded until too late. Another defendant stated:

I asked the judge to look at the signs of torture on my body, but he ignored it. When I told him I suffered psychological illnesses because of the torture, he responded, 'Maybe you're just possessed'. 15 accused were executed in February 2019 alone. (EIPR 2019)

Even in the face of well-documented instances of torture-tainted confessions, courts provide only cursory and formulaic reasoning when dismissing arguments from defence lawyers to exclude such evidence⁷. In one case that came before a military criminal court, the judge dismissed an injury, seeing it as inflicted as 'an incidental matter' whilst underscoring the court's power to:

...assess the invalidity of the defendant's claims of being coerced into confession *without commenting on the matter*, as long as the court bases its assessment on valid reasons, especially as his confessions were in conformity with the reality and the evidence in the case documents on which the court relied in the reasoning for its ruling. (Case No. 241 of 2014, Alexandria Military Criminal Court, emphasis added by the authors of this report).

In a similar case, another judge also justified his reliance on a tainted confession by simply explaining that its contents conformed 'with the truth and reality' (Case No. 36 of 2015, Alexandria Military Criminal Court). In the case of 9115 of 2016 (South Giza)⁸, the Court extended the flexibility to itself to 'rely on the witness' statements at any stage of the investigation and trial without explaining the reason for that' and that 'the witness'

7 It could be said that this is the best lawyers can do when unable to access some or most of a case file (including accusation orders, investigation reports, rulings and other materials). There are serious administrative and de facto barriers, including the arrest of lawyers themselves, or the threat of doing so, on the basis of 'not respecting the court' or 'humiliating the "state" symbols'. Our field lawyers report that they can hardly speak before the judges or object to their statements, especially in military and SSS Courts.

8 Case No. 9115 for 2016, South Giza, registered under No. 4359 for 2016, Badrashin Criminal Court, and registered under No. 163 of 2016, Supreme State Security Criminal and No. 513 of 2016, Supreme State Security.

contradictions or inconsistencies does not deem the judgment flawed as long as the truth has led to a palatable conclusion that does not involve contradictions'. There is a circuitous reasoning here that can be summed up as: we will rule as we see fit, according to the reality that we perceive, and we need not justify our position.

In the last case cited, the Court refused to exclude torture-tainted confessions underscoring that the 'confessions matched the truth and reality, and do not contradict the rest of the evidence'. The Court also explained that it was its exclusive right to examine the validity of the confessions even if it meant 'to divide the confession and take what it is comfortable with and discard the rest'. Based on this dubious rationale, it accepted the investigators' account that the defendants' injuries resulted from the crimes in question. The Court found that 'it is proven from the statements of the defendants who confessed to the incident that the injuries literally took place during their commission of the crime'. Simply, the injuries are explained away by their own torture-tainted confession. And psychological pressure beyond the physical injuries was dismissed outright with the court finding that 'their fear of the power of the investigator does not constitute a confession that would invalidate the statements'. It is extraordinary that the confessions in question are not only left unscrutinised but are relied upon directly (and circuitously) to excuse the authorities.

We also find this where courts cover up abuse of power related to investigations (arrests and interrogations without a warrant and the presence of a lawyer). The courts have relied on the doctrine of *in flagrante delicto* (that the law enforcement officials acted in the heat of the crime) to provide leeway for procedural irregularities such as not ensuring the presence of a lawyer during interrogation. In other words, this relates to the exception made to standard operating procedures or rules of evidence where the police are seen to be acting under time pressure to deal with a crime. In the representative case (9115/2016), the Court explained that calling in a lawyer may '...take time, and evidence may be lost due to the procedures' mandated by the law – which in this case served as an overriding justification to overlook the absence of a lawyer. Without exception, the courts prefer the prosecution evidence when contradicted by defence evidence. The court's bias towards prosecution witnesses is thus evident in its approvals of prosecution testimonies despite clear inconsistencies, while it rejected or ignored the necessity of re-investigating the defendants. In the same case (9115/2016, p. 103), the court went on to characterise defence claims as 'surrounded by anonymity and shrouded in ambiguity' and as 'only intended to disrupt the adjudication of the case'.

Such court decisions further support the imperatives of the prerogative state. Affording leeway for procedural irregularities, hence damaging the protection of fundamental rights of the accused, amounts to overriding the normative in favour of the prerogative (and abusive). Courts not only favour the prerogative state but are a crucial link in its chains.

We also observed across countless cases that courts overlook prosecutorial irregularities in plain sight beyond forced confessions, including: contradictions of witness statements, absence of evidence to prove the elements of the crime; the fact that arresting officers did not recognise the defendants; the invalidity of the arrest due to the absence of a case of *in flagrante delicto*; the invalidity of the arrest report for dealing with the accused in a collective manner; the anonymity of sources and broadness of accusations in the seizure and investigation reports; the arbitrariness

of the arrest; illegality of investigations and all evidence received in the lawsuit as they came from unknown secret sources, as well as the unreasonability of the incident and the impossibility of conceiving it; the proven torture violations, enforced disappearances, denial of health care, and the trial of juveniles before the military court.

There is a kaleidoscopic continuum of complicity. The courts therefore do more than overlook torture-tainted confessions. In essence, according to the courts, the police are incapable of doing any wrong. So how can lawyers exclude confessions if they are unable to set the record straight in other ways. What we see here is the prosecution collaborating hand in glove with the security actors – laying charges on what is clearly torture-tainted evidence, and overlooking and covering up flawed and violent methods (see also POMED 2017, AI, 2016). When accused risk reprisals and retribution and do complain about their torturous treatment, prosecutors and judges do not effectively acknowledge them – they continue to rely on the torture-tainted confessions, hence becoming a key mechanism of the system of torture.

RECYCLING

No one shall be subjected to arbitrary arrest or detention.

Article 9.1, *International Covenant on Civil and Political Rights*

Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

Article 14, *UN Guidelines on the Role of Prosecutors*

Recent years have seen the practice of extended ill-founded detention for punitive ends. Also referred to as rotation or recycling (*tadweer*), the practice targets individuals identified as political opponents of the regime. This usually involves fresh charges, normally under Anti-Terrorism Law no. 94/2015 (joining or financing a terrorist organisation) or Penal Code Law no. 58/1937, being immediately imposed on those due to finish serving sentences. Specifically, the scenario when someone receives a release order or acquittal in an initial case is to forcibly disappear them from within the detention place, or send them directly to SSSP, and:

- I. interrogate them in newly opened cases (hence, they may forcibly disappear in a National Security Premises for interrogations and extraction of confessions). But this is a rare case, as prosecutors resort to easier ways of keeping the targeted person detained
- II. interrogate them in cases in which they were enrolled while in pretrial detention (hence, they are taken back)
- III. revive old charges of old cases and re-detain them basis on these charges.

'Recycling' is a derogatory term used by Egyptian lawyers to mean the brand-new detention of a detainee on the back of a new judicial case, usually days after having

received a release order from a court in their original case, while still in state custody, or even without having received a release order on the back of the original case, in which event, the new detention order is suspended until a release order is effective in the original case. The detainee is said to have been 'recycled'. In truth, 'recycled' or 'recycling' should refer to the cases rather than the detainees, but since not all detainees accused in one case are subjected to this practice, the term is usually applied to the specific detainee who experienced it. Sometimes when a new case is used to detain only detainees who had been detained previously in different old cases, this new case is called by lawyers: a 'recycling' case.

There are thus two related ways in which cases are 'recycled' (see CFJ, 2021). The first involves detaining the accused for multiple case(s) that appear consecutively after they receive a release/acquittal order in the initial case (indicated by the length of forcible disappearance and its place – the National Security Premises). In one case exemplifying this tactic, the victim was forcibly disappeared from inside the detention premises between 27 December 2019 and 15 February 2020, after which he appeared pending a new case in which the authorities accused him of the same charges as in the first case (joining the Wilayat Sinai Organization). Similarly, another victim (aged 25, Cairo, case verified in February 2021) – was initially detained pending Case 930 of 2019 (Supreme State Security Court Prosecution) and was re-detained on 8 February 2021 for case 1054/2020 (under allegations that they formed a secret organisation inside the prison).

The second manifestation involves charging the accused in multiple simultaneous case(s) from the outset (usually when expectations of them obtaining release/acquittal is stronger, so they guarantee the accused remains detained). In one case, according to his family, the now deceased victim was listed in 13 cases with similar charges during his detention before his death. As a side note, we have observed that prosecutors usually add victims probationally to 'show' they are working on 'fighting terrorism' and thus request promotions, benefits and incentives. Career development is largely contingent on filing more cases against defendants. Our field lawyers who attend investigations and court sessions, or their connections, have observed this throughout recent years. This explains why, in many case files, we find prosecutors asking the suspects 'personal' questions on their childhood, understanding of religion, connection to mosques and cultural centres, ceremonies they have attended, work, activities, hobbies and social relations, instead of investigating the incident described in the charging document. This is simply a way to identify whether that 'person' is recyclable and thus a good 'project' for their career advancement. Therefore, if they find a defendant seemingly religious or liberal or even a person of 'thought', or if a profile shows this clearly, they add the person to as many cases as possible while the individual is detained in the pretrial stage.

These cases, and others below, compiled for this report are illustrative of the overt abuse of legal process. In one case, the victim was arrested in January 2015 and accused by local prosecutors in Cairo (not SSSP) of belonging to a terror group and spreading false information undermining national security. He was released on bail of £5,000, which his family paid. The victim was, however, disappeared only to then appear in September 2016 to be released on bail of £10,000, which was also paid by his family. Again, he was not released and disappeared again and then appeared in October 2016 on fresh charges, of which he was acquitted in a hearing in February 2017, but he was not released and disappeared again until March 2017. He reappeared in June 2017 when he was ordered to be released. This was not implemented and the victim

continued to be detained until October 2017, when another release order was handed down by a court. This was not implemented. In January 2018 he was charged under a new case. A court also ordered release upon bail in this case which was again not followed by the police. In February 2019, a court acquitted the victim of these charges, but the police continued to detain him. In September 2019, the victim appeared before prosecution in a new case involving terrorism and dissent offences in Case no. 1338 in relation to protests that happened in September 2019.

Far from using detention as a last resort, the prosecutor and judge impose renewed charges and detention periods wilfully and punitively. This is not an innocent practice by the prosecution nor by the judiciary. An intra-institutional complicity is again readily identified – with neither the prosecutor nor the judge able to claim any ignorance or shift blame to the other, knowing the history of the case before them. The responsibility is shared and cannot be conveniently divided between the two.

Yet another case that has come to our attention involves a victim arrested in May 2018 from his home in Giza and subjected to a forced disappearance for three days before being presented to the Supreme State Security Prosecution on Case no. 718 of 2018 on charges of protesting against the rise in metro prices. In October 2018, the prosecution ordered their release on probation (police monitoring). The release order was only implemented three weeks later. In May 2019, the victim was again arrested at his local police station and subjected to enforced disappearance for three days apparently for violating the terms of his probation. He appeared in front of the Supreme State Security Prosecution in Case no. 741 of 2019 accused of helping a terrorist group achieve its purposes. He remained in pretrial detention pending a court decision to release him in March 2021, but the decision was not implemented, and he was reaccused under a new case (no. 1956 of 2019) on charges of holding meetings with terror group members inside the prison and while being transferred to SSSP or courts.

Another documented case demonstrates local prosecutors' (not SSSP) prosecutorial persistence to punish. The victim was arrested on 24 October 2014 at 2am in Damietta and appeared, after a week of enforced disappearance, pending case no. 1217 of 2015 and remained remanded in custody for more than three years. In a hearing on 24 January 2018, the victim obtained a court decision to be released and was therefore transported to a police station, where officers refused to release him for two weeks and then denied that he was detained there. The victim was then disappeared on 8 February 2018 and appeared on 18 March 2018, detained pending a new case (no. 531 of 2018). Release was ordered again by a court in October 2018 and he was transported to another detention facility, which denied that he was detained there (amounting to enforced disappearance for nearly a month as the family learned of his location on 27 October 2018) after this detail was presented to the prosecution when the victim was again ordered to be detained pending a new case (no. 2409 of 2018). A court ordered his release on 13 February 2019, which was not implemented. On 23 February 2019, the detention authorities denied his detention. The victim reappeared before the prosecution on 13 March 2019 and was rotated under a new case (no. 568 of 2019), in which he was ordered to be released again on 28 March 2019. He was transferred to a police station in preparation for his release but was disappeared on 1 April 2019. The police denied knowledge of his whereabouts and his disappearance continued until 2 May 2019. He appeared pending a new case, also in Damietta, and remains in custody with his case pending.

As mentioned earlier, the political directive from the prerogative state certainly permeates such actions to recycle. The practice is unwritten and remains unchallenged. Security and prison officials are also taking advantage of this complicity as freedom to disappear individuals and not follow court orders to release them. The examples cited reflect recycling to be an oppressive and arbitrary tool initiated by prosecutors and signed off by judges with clear intent and purpose. We may even go so far as to say that the criminal justice apparatus is instrumentalised and transformed into a torturing environment. It is not always easy to appreciate what constitutes an act of torture and what is part of the torturing environment. We should not only be concerned about distinct instances of beatings and electrocutions. We must see the whole apparatus as a continuous act against its victims. Craig Haney and Shirin Bakhshay (in Başoğlu 2017, p. 143) have sounded a similar call in the following (which is worth reproducing in full):

... intentionality is implicit in the very nature of an official, state-sanctioned institutional context. That is, because of their typically elaborate and structured nature, conditions of involuntary confinement (including contexts of ill-treatment) must be intentionally created and constitutively maintained. Rather than individual discrete acts that might be dismissed as ill-considered, inadvertent, or episodic, institutional settings are by definition configured and arranged environments that their creators have envisioned, implemented, preserved, and chosen not to make more benign. The level of foresight and premeditation required to create such an environment, the level of ongoing knowledge about what transpires inside it, and the willingness to tolerate the negative effects it inflicts on others seem to us to collectively moot the question of whether or not the painful and potentially damaging consequences are 'intended'.

Başoğlu (2017, p. 140) also notes this problem concerning the inclination to treat specific systemic conditions, though harmful, as background factors '... rather than as an independent force or factor that exacerbates the harm, or as a form of torturous treatment itself'. He (2018, p. 144) further finds that increasing awareness of the pains and long-term harms of imprisonment:

... may well mean that the calculus applied to certain forms of previously unquestioned 'lawful' confinement must be modified and made more stringent. Among other things, this knowledge makes it much easier to demonstrate that certain prison procedures and practices were, in fact, 'calculated to disrupt profoundly the senses or personality', given what correctional officials and prison staff knew or should have known about the harmfulness of such conditions and treatment.

The research also reveals that recycling has serious consequences for those subjected to it, including loss of hope, and social and economic disintegration of the defendant's family due to the absence of their relatives without hope of release, leading to hunger strikes (the case of Mohamed Adel), suicides, violent extremism (see Human Rights First 2020), psychological deformation of victims such as

development of Stockholm syndrome⁹, long-term psychological disorders, particularly when prolonged pretrial detention and/or recycling is coupled with prolonged solitary confinement¹⁰. The prevailing situation of arbitrariness and persecution is one that is beyond institutional error; it amounts to a psychological persecution and torture. As the UNSRT (2020, §63) has recently pointed out:

Typical of contexts marked by systemic governance failures, or by the persecution of individuals or groups, sustained institutional arbitrariness fundamentally betrays the human need for communal trust and, depending on the circumstances, can cause severe mental suffering, profound emotional destabilization and lasting individual and collective trauma. In the view of the Special Rapporteur, when institutional arbitrariness or persecution intentionally and purposefully inflicts severe mental pain or suffering on powerless persons, it can constitute or contribute to psychological torture. In practice, this question is of particular, but not exclusive, relevance in relation to the deliberate instrumentalization of arbitrary detention and related judicial or administrative arbitrariness.

The practice of recycling provides further evidence of how the torturing system is built and sustained in Egypt. Firstly, prosecutors and judges know that prolonging the detention period equals continued exposure to torturers' practices by prison guards as well as to continued exposure to inhuman and degrading treatments in detention, most of which will amount to torture. Secondly, but even more relevantly, the judges and prosecutors are the main people responsible for causing psychological suffering to the victim. The arbitrary, punitive and systematic use of detention has engendered and epitomises the new prerogative 'normal', with resort to renewed detention the automatic rule and the denial of case files and evidence for defence lawyers a rarity¹¹. By all accounts, this is having the intended effect: pushing those 'recycled' to the brink of breaking.

DEATH THROUGH DENIAL: HEALTH IN PRISON

The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.

Rule 24 (1), *UN Nelson Mandela Rules*

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- 9 See generally in the Egyptian context: <https://www.middleeasteye.net/opinion/military-complex-egyptians-and-stockholm-syndrome>
- 10 'Solitary confinement is frequently described as "a prison within a prison" – the human brain is ill adapted to such conditions of isolation. Solitary confinement can cause a specific psychiatric syndrome, characterised by hallucinations; panic attacks; overt paranoia; diminished impulse control; hypersensitivity to external stimuli; and difficulties with thinking, concentration and memory. Some inmates may lose the ability to maintain a state of alertness, while others develop crippling obsessions. Physically, the lack of sunlight, fresh air and space to move around can also cause symptoms such as heart palpitations, headaches, sensitivity to light and sound, muscle pain, digestion problem'. Al 2018, 40. <https://www.amnesty.org/download/Documents/MDE1282572018ENGLISH.PDF>; see also DIGNITY Factsheet on Solitary Confinement: <https://www.dignity.dk/en/dignitys-work/health-team/torture-methods/solitary-confinement/>
- 11 Daily Sabah, 'Prisoners in Egypt languish in jails with "no end in sight"', 25 February 2021, <https://www.dailysabah.com/world/mid-east/prisoners-in-egypt-languish-in-jails-with-no-end-in-sight>

Egypt's prison population has exploded since 2013. This is the result of a national policy of mass arrests of any political opponents to the regime of President El-Sisi. National and international human rights groups have documented a long list of systemic problems in detention places, including prisons and police stations, such as overcrowding, poor hygiene and sanitation, insufficient access to ventilation and light, inadequate food, denial of family contact, and medical negligence. While all these issues may seem to be limited to cases of ill-treatment and other cruel, inhuman and degrading treatment, human rights groups have documented that such practices are part of an intentional policy to annihilate political opposition and human rights defenders via their detention.

DIGNITY et al. (2019, p. 14) compiled 'at least 347 cases of denial of health care in places of detention in 2018 alone [and] since 2014 the coalition has reported at least 19 patients with cancer that were not allowed to access specialized medical facilities and that died in detention'. In 2018, 72% of all reported deaths in detention were attributable to denial of health care (DIGNITY et al. 2019, p. 15). As a general rule of torture prevention, health services in places of detention must become a responsibility of the Ministry of Health not the Ministry of Interior (as it is in Egypt and many other contexts where torture is rife). That said, given the power and pervasiveness of the prerogative state, we are also mindful of the limits of this power transferal to effect positive change in health service provision.

Given that there are simply too many cases to convey, the following examples are provided as emblematic of the situation. In one case documented by ECRF, the victim was placed in a narrow, poorly ventilated cell in which she was exposed to second-hand smoking, which led to her severe bronchial asthma. She was initially denied medication but subsequently allowed to obtain it through her parents. Despite the medication, her health conditions worsened as a result of disc prolapse, stiffness in the knees and sciatica and she suffered a perforated ear drum as a result of lack of medical attention for more than a month despite her request. She was eventually taken to a prison doctor and not a specialist doctor as needed, who told her that she did not suffer from anything. When she was later presented to a specialist doctor and told him that she could not hear, he told her, 'Why do you need to hear in the first place, you are stuck next to each other in the cell, it is not important to hear'. She remains in detention without the required medical attention.

In another case documented by ECRF, the victim was arrested from her home in Malloy, Minya, on 30 September 2019. She was detained under Case no. 1490 of 2019, charged with spreading false news, membership of a terrorist group, and planning and instigating violence. The victim, who was pregnant, reported to a family member that she was blindfolded at the local National Security Agency and transported to the National Security Agency in Cairo without anyone being notified. There, she was assaulted with beatings and insults with obscene words, threatened, and forced to confess to allegations she was totally unaware of. She was held in a dark, empty room and was forbidden to speak. She discharged a bloody uterine discharge four times inside Al-Qanater prison. No one responded to her requests for health care. Through her defence lawyer, her family applied to facilitate emergency care, but this was not carried out despite several requests. She was eventually taken to Benha University Hospital to give birth but returned to prison again on the day of the birth without the necessary health care, namely postnatal care both for herself and the baby. Normally, new-borns

are kept with their mothers until the age of two years, after which they are given to a family member. She continues to suffer from a bad psychological condition, especially postnatal.

Yet another case involved a woman who was arrested in November 2018 from her home with her husband and was charged with belonging to and financing a terrorist organisation. She was tortured by the National Security Agency in Cairo, with electricity and beatings, and subjected to psychological intimidation to force her to confess to crimes she did not commit. She was taken to the SSSP three times and returned to the National Security Agency building. The Interior Ministry forced her to appear in a video where large amounts of cash were placed in front of her. She is now in prison and the prosecution has not responded to her medical requests. She suffers from anaplastic anaemia and at each court hearing requests treatment but these requests are rejected without grounds.

The case of medical negligence provides a good example of intentionality; to assert the systemic torturous intention of the Egyptian state instead of settling on the acknowledgment of individual cases of ill-treatment since 2013, the national and international human rights community has referred to the recurring cases of medical negligence in Egyptian prisons as deliberate medical negligence. However, speaking of 'deliberate negligence' is an oxymoron that needs a further elaboration in order to enter a legal realm of responsibility. In a 2021 report, Amnesty International shed light on the practice by referring to it as 'deliberate denial of medical care'.

Yet, when such examples, in Egypt or elsewhere, are invoked, there is difficulty in differentiating between 'medical negligence' and 'deliberate denial of health care' (see AI 2021, pp. 8-9). The uses of 'deliberate' (or intentional) medical 'neglect' (or negligence) in the ECRF report (2020) similarly illustrates the difficulty in this area. Such slippages, we suggest, would be remedied by broader political and institutional contextualisation promoted here. In describing 'medical negligence', for instance, Amnesty International (2021, p. 39) emphasises institutional failures to 'adequately resource and equip prison medical facilities to enable the provision of adequate health care to detainees' and where officials 'frequently delay or refuse to transfer detainees to external facilities with relevant specialist capacity'. Yet, even critical cases concerning prisoners known by prison staff to be in need are included under this heading as follows:

Receiving timely healthcare, including in medical emergencies, is left to the discretion of guards and other prison officials, who regularly dismiss or downplay the severity of detainees' health problems, and routinely delay their transfers for treatment inside and outside prisons. ...Despite knowing that [one prisoner Shady Habash] had ingested methyl alcohol, the prison doctor did not treat him for possible alcohol poisoning and twice sent him back to his cell after giving him antiemetic and antispasmodic medicines. When Shady Habash continued vomiting and became delirious, he returned to the infirmary but was not offered alternative treatment until another doctor arrived and belatedly began procedures to transfer him to an outside hospital. Shady Habash died before the transfer took place. (p. 8)

It is confounding that this is viewed only as negligence, given the prison officials' knowledge of the situation, their discretionary power to act, but failure to act, consequently resulting in them letting the prisoner die.

In comparison, Amnesty International (2021, pp. 9, 17) holds that ‘deliberate denial’ of health care, causing severe pain or suffering, amounts to torture. The differences between this and medical negligence are difficult to qualitatively grasp except that the examples used to support deliberate denial are coupled with the purpose of punishing political prisoners:

... denial of health care appeared to be discriminatory and punitive in some cases as other prisoners held in relation to non-political cases were being routinely – although not promptly – transferred to external hospitals and permitted medication. (p. 17)

High-profile cases where conditions are maintained punitively tend to draw strong criticism from human rights experts. The case of former President Morsi (UN OHCHR 2019) is one such example where he ‘was denied life-saving and ongoing care for his diabetes and high blood pressure’, before eventually (and gradually) dying in detention. The experts went on to draw attention to two other political detainees: Dr. Essam El-Haddad and his son Mr. Gehad El-Haddad, who, they similarly pointed out, were ‘effectively being killed by the conditions under which they are held and the denial of medical treatment. It appears that this is intentional or at the very least allowed to happen through the reckless disregard for their life and fate’ (UN OHCHR, 2019).

According to this logic, when the conditions are individuated and deviated, where authorities ‘go further’ to exacerbate conditions by deciding to not potentially alleviate suffering for an identifiable prisoner, then intention seems to be established. These examples were also characterised relatively actively by ‘prison officials withholding medication’ and being ‘prevented from receiving medicines that are permitted for others’ (AI 2021, p. 9). Yet, it is concluded that ‘Failure to provide adequate treatment or to allow for treatment at external medical institutions amounts to a wilful denial of medical care’ (p. 46) without sufficiently distinguishing this from medical negligence. This is a difficulty that must be engaged with by all concerned. These analyses could well be shaped by the fact that visibility of certain details (individual profiles, needs, ill-treatment) has helped in attracting the term torture – whereas dozens of others are in equally atrocious situations. That is, detailed information and individuation enables qualifications of torture.

In short, this taps into broader confusion that conflates the *negligent*, *reckless* and *deliberate*. This touches on various issues such as *knowledge* and *foreseeability*, systemic intention, *omission* versus *commission*, and *killing* and *letting die*. The latter, ‘letting die’, is a notion that has been used by human rights researchers in looking at health provision in Sierra Leonean prisons to underscore that ‘refusing treatment, giving substandard treatment or simply failing to provide treatment is potentially an extension of a punitive ethos [allowing] the prisoner’s body to do the prison’s punitive work on its behalf’ (Jefferson & Jalloh 2018, p. 585 as framed around Povinelli 2011). They continue, ‘... such an ethos may be at odds with formal policy and new outlooks on corrections but sometimes an ethos lives on in buildings, architecture, staff attitudes, under-resourcing and so on’ (p. 585). There were difficulties with apprehending suffering arising from systemic *omission* (or default conditions) as opposed to *commission*. That is to say that ‘deaths of those killed appear to matter more than the deaths of people allowed to die’ (p. 585).

The bottom line is that denial of health care leading to severe pain can amount to torture and should be called as such – given the presumption of intention and purpose in torturing systems. To keep on generally referring to this as ‘denial of health care’ without simultaneously detailing its well-known impact and naming it as torture and situating it as an essential component of Egypt’s torturing environment (see discussion above re Haney, Bakhshay and Basoglu) creates ambiguity, leaving an opportunity for it to be associated ‘simply’ with violations of the right to health.

CONCLUSIONS AND RECOMMENDATIONS

The foregoing examples and discussions take the Egyptian experience as a point of departure for articulating a need to attend to broader contextual and circumstantial understandings of torture. We are called to better appreciate how torture is practiced within and across state institutions, operating (often invisibly) with distinct default logics. The following summarises the implications in terms of political action and legal interpretation.

TOWARDS INSTITUTIONAL INTENTION

Torture starts with arrest and continues during interrogation and detention by police and security officials. It is instrumentalised and covered up by prosecutors and judges, and perpetuated by prison staff or police officers. Prosecutors and prison staff are also called to enact punishment through their own respective means: through recycling cases and denying health care. By looking the other way, those called to respond to such abuses knowingly perpetuate and hence perpetrate these torturous acts. In all, such harms cannot and should not be consigned to systemic failure based on resource arguments or lack of technical capacity. From this wider perspective, elements of intention and purpose can readily be read and presumed into acts at the hands of the Egyptian state.

The problems in Egypt must therefore be understood not simply legally, individually or criminologically but situationally, institutionally, politically and ecologically. We may well need to draw on related and parallel arenas of international law involving systematic violations and systemic approaches. Yet, there are also clearings in the jurisprudence to locate state structures (and what are bracketed off as ‘root causes’) in the acts of state officials – and to push the thresholds of ‘totality’ as conventionally apprehended. More broadly, explaining how the development of the prerogative state influences or creates an institutional environment (see Ezzat 2021) where torture happens intentionally, will direct the report’s formulations of recommendations on what steps would be needed to support a possible transitional period towards democracy and how to prevent the prerogative state from ‘sabotaging’ such a transition.

POLITICAL IMPLICATIONS

What now for documentation and advocacy? We know that we do not have to read the mind of the state – that we do not need direct evidence of the intention of authorities – but given our findings, what would it now mean to circumstantially/contextually infer intentionally from or situate it in structural (security and political) logics and narratives?

Demonstrating intentionality from a collective and political point of view prompts us to enter into the discussion of the distinction between the so-called ‘normative state’ versus the ‘prerogative state’, the former comprising laws and principle; the latter comprising states of exception and abuses.

DEFINITIONAL DIRECTIONS

What becomes problematic when using article 1 in contexts of systemic torture such as Egypt is that some of the dynamics outlined in the above examples are lost. In differentiating between what is torture and what falls short, we are led to attend to the element of intent and purpose. Where this is not explicit, we must turn to find it in the circumstances. For example, harsh detention conditions, such as those resulting from overcrowding and poor sanitation, may cause prisoners severe pain or suffering, but in the absence of evidence that they are, say, intentionally imposed, it would amount only to a form of ill-treatment falling short of torture (not fully capturing the extent of the culpability). Results of 'poor policies' are often opposed to 'intention to inflict suffering' (UNSR 2015, §51). Given the difficulties of proving intent in systemic violations, it has become widely accepted that these harms are associated with and more easily prosecuted not as torture but other ill-treatment. They become characterised as 'not deliberate but rather the result of organisational failings or inadequate resources' (European Committee for the Prevention of Torture (CPT) 1992, §44). More actively, as in the case of an inquiry conducted by the CAT on Brazil, states also have an interest in objecting to 'equat[ing] torture with problematic conditions of detention' (UN CAT 2009, §249). The all-too-easy conclusion that can be reached by viewing any of the case studies in isolation is that these may fall short of torture.

Similarly, inaction (or omission) is much more readily and dangerously associated with negligence or mere 'side-effects' rather than intention. Though this would be an incorrect interpretation of the UNCAT, as nothing in its drafting supports, for instance, 'a narrow interpretation that would exclude conduct such as intentional deprivation of food, water, and medical treatment from the definition of torture' (Nowak 2006, p. 819, Nowak & McArthur 2008, p. 66, and Boulesbaa 1999, p. 14).

Whether it concerns individuals or institutions, intentionality invokes important factors in the commission of torture, including knowledge, control and purpose. Although these are equally important, leaving *directness* or *explicitness* of torturous acts of the individual behind, a focus on the *insidious* and *structural* is warranted. This requires looking beyond the individual to institutional logics. The element of *intentionality*, a constitutive element of torture under article 1 of the UNCAT, informs a conventional understanding that emphasises torture as direct, deliberate, explicit and individual over institutional and environmental logics underpinning the production of torture.

Finally, and circling back, the implications of the foregoing arguments and analysis must be spelled out: any official with any role in facilitating torturing systems should be held criminally complicit and accountable. This implicates the detaining and imprisoning judge, recycling prosecutor and denying prison officer.

RECOMMENDATIONS

Reiterating the recommendations widely and perennially articulated by prominent civil society for the last decade, the report recommends the following:

To Egyptian state officials and institutions:

Egypt's criminal justice officials and institutions should act towards acknowledging their direct and indirect responsibilities – including criminal responsibilities – in creating Egypt's torturing system; wherever space is left for self-determination, individuals and institutions should choose to take all possible steps towards protecting the right to be free from torture and abandon opposite courses of action. Egypt's institutions can still operate to pre-empt rather than facilitate torturous environments by:

- I. reducing the use of detention, especially pretrial detention
- II. refusing to use confessions extracted under any ill-treatment to prosecute or adjudicate trials; and, relatedly, halting judicial processes (at any stage) if there is any suspicion of torture or ill-treatment
- III. facilitating, instead of limiting or denying, access to health care in prison, including conducting initial medical assessments upon entry as stipulated by the *UN Nelson Mandela Rules*; and by accepting external support by independent monitors and health providers or providers of basic services for detainees
- IV. respecting fair trial rights and the presumption of innocence.

To Egyptian civil society:

It is paramount that processes aimed at facilitating a future process of transition towards democracy, the rule of law and human rights take as a point of departure an analysis of the prerogative state, including:

- I. acknowledging its existence and declaring the aim to dismantle and prevent it from developing again; this should be an explicit foundation of all political processes and parties emerging from a transitional period; it should be acknowledged in preambles of newly proposed legislation
- II. assessing the size and entity of the prerogative state, including identifying institutions that are most compromised as well as empowered individuals; individual responsibilities should be identified in all those who have contributed with intent to sustain grave systemic human rights violations, such as torture; thorough vetting processes accompanied by due process should be put in place (vetting processes should not exclude criminal accountability for those whose actions have more directly and repeatedly contributed to grave violations)

- III. reviewing the legal framework and practice starting with the Constitution and followed by all legal texts setting/regulating criminal responsibility reviewing all legal criteria that may lead to declaring a state of emergency; installing a functioning division of powers between the executive, legislative and judicial powers; strengthening the role of administrative courts to secure in-state internal and impartial oversight to promote the respect of the newly established institutional apparatus.

To the United Nations:

- I. establish without further delay an independent international mechanism to monitor and report on the human rights situation, and to investigate grave human rights violations in Egypt, including torture
- II. the Committee Against Torture should consider a follow up on the past UNCAT article 20 inquiries
- III. the UN Committee Against Torture should consider issuing its Fifth General Comment with the aim of elaborating on the definition of systematic torture and the related implications for redress.

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