

# Access denied: Institutional barriers to justice for victims of torture in Egypt

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## Abstract

This research explores the question - how do practices in key justice institutions affect the incidence and success of prosecutions of torture perpetrators in Egypt? The research question is grounded in the theory that torture prosecutions are crucial to ending the practice of torture, and based on the judgment that the number of prosecutions of torture perpetrators in Egypt is very small compared to the widespread practice of torture. This research observes practices in three main justice institutions: the Department of Public Prosecutions, the Department of Forensic Medicine and the criminal courts. Based on international and local literature, but also on interviews conducted with lawyers, forensic doctors and human rights activists, the research observes the practices most common to the three institutions, while analyzing their impact on the incidence and success of prosecutions. The research finds that different practices, backed by Egyptian legislation, and endorsed by poor institutional capabilities, violate the international standards for investigations, and affect the incidence and outcome of prosecutions.

*Key words:* Torture, Forensic Sciences, Criminal Justice, Egypt

## Introduction

This research deals with the issue of criminal

prosecutions of torture perpetrators in Egypt. In particular, it tackles the following question: how do practices in key justice institutions affect the incidence and success of prosecutions of torture perpetrators in Egypt?

The research question is grounded in the theory that prosecutions for torture perpetrators help in the prevention of torture. Human Rights practitioners state that “impunity for perpetrators remains the biggest obstacle to the prevention of torture and to fair and adequate reparations”.<sup>1</sup> Egyptian Human Rights lawyer Seif Al-Islam communicated this notion remembering the considerable impact of the successful prosecution of the case *Abul Numrus* on another similar case of torture in the same town in Egypt.

The research question is also rooted in the obvious lack of successful prosecutions of torture perpetrators in Egypt. While there is an evident absence of statistics, NGO literature as well as experts in the field assure that the greater number of cases do not reach court. Examining the numbers of prosecutions, Redress states in a report on Egypt “most cases do not result in a trial, let alone the conviction and punishment of alleged Perpetrators”.<sup>2</sup> In the absence of official statistics, lawyers dealing with cases of torture give estimates based on the cases of

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torture they file daily with the prosecutor. One lawyer, Maha Youssef, assured that only about one in every 30 cases of torture that she and her colleagues file at the prosecutor's office ever reach court. Therefore, Youssef regarded reaching court a victory in its own right, notwithstanding the success of the prosecution. Abulnaser, also an expert lawyer in torture cases, reflecting on his experience, estimated that the number of cases reaching court does not exceed 1%. Thus, a very little number of cases ever reach court, let alone end up in successful prosecutions.

That being the case, this research attempts to understand what practices in key justice institutions are responsible for this lack of accountability and how their occurrence affect the incidence of prosecutions, and, if at all, their success.

### **Methodological Overview**

This research was carried out in the period from March 2011 to August 2011, and the relevant fieldwork was conducted in Cairo, Egypt in July 2011. In terms of primary data, the research relies on interviews conducted with key informants with access to relevant information. Eight interviews were conducted: five interviews with lawyers specialized in torture cases, two interviews with psychiatrists and medical experts from El Nadim Center for Rehabilitation of Victims of Violence and one interview conducted with a forensic doctor, current Chief Medical Examiner and former head of the Department of Forensic Medicine.

The research does not include testimonies from victims of torture. Psychiatrists and lawyers in the field advised me to refrain from interviewing victims of torture, because the risk of re-traumatizing them is not met by an added value to the research.

The limited parameters of this research have necessitated the exclusion of some

important aspects. The following are some of the aspects that were excluded, although admittedly their inclusion could have added to the research. Torture is very prevalent in state security premises, and yet this research makes only passing mention of prosecutions of torturers from the state security. This can be justified by the fact that there have been no prosecutions for torture perpetrators from the state security apparatus until June 2012 when the Alexandria Criminal Court in a historic ruling sentenced four state security officers to life imprisonment (in absentia) and a fifth state security officer to 15 years in prison. That being the case, it could have been an addition to the research to understand why the Sayed Bilal was a success compared to all the previous cases of torture allegations in state security premises, and to understand from there what victims of state security torture can do to reach justice.

More significantly, this research has excluded judges and prosecutors from the interviews, again due to the limited parameters of this research. Admittedly, their perspective could have clarified several issues. For instance, as will be shown later, interviewing judges and prosecutors would have given great insights on the alleged personal relationships that connect them with the police and on how this affects their duty to investigate and prosecute.

### **Conceptual Framework: Legislation, Practice and Prosecutions**

Observing the path of justice for victims of state-sponsored crimes, Aldana-Pindell<sup>3</sup> recognizes a set of practices that preside over investigations and prosecutions in many countries. Undue delays, victim intimidation, amnesty provisions and corruption of evidence are the major practices observed by her.<sup>3</sup> All of them, she argues, are in violation of the state duty to effectively investigate and

prosecute, but are also in violation of the victim's right to remedy and prosecutions. Lawyer Seif Al-Islam<sup>4</sup> relates four typical scenarios of how the prosecutors handle torture allegations. The first scenario is referring the case to the court, a scenario that is rather unlikely. The second is prolonging the investigations for months and years, for no announced reason. This is a likely scenario, by which it becomes almost impossible to obtain evidence and witness testimony. The third scenario is keeping the files without further examining the allegation, a legal procedure that keeps the allegation in a limbo. The latter procedure is legally justified by the Egyptian Code of Criminal Procedure<sup>a</sup> and is commonly connected to the lack of evidence or information. The fourth and last scenario is for the prosecutor to refuse the allegation based on lack of evidence or facts. Prosecutors' decisions cannot be appealed. Once a case is refused or kept in limbo, the victim is helpless and has no legal solution.<sup>4</sup>

#### *Legislation on Torture and Definitions*

Egypt signed the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (UNCAT) in June 1986.<sup>5</sup> Yet, Egypt has not signed the Optional Protocol of the Convention Against Torture (OPCAT), and has not made a declaration under Article 22 of the torture convention in order to recognize the competencies of the Committee Against Torture. According to the Egyptian Constitution, treaties "shall have the force of law after their conclusion, ratification and publication according to the established procedure".<sup>6</sup> This means that the UNCAT should have the force of law in Egyptian courts. Nevertheless, the Convention, not only is not used, but is also violated by the lacking Egyptian legislation.

The most notable lacking of the national violation on torture is in its definition of torture, which certainly falls short of the international definition of the convention. Article 126 of Egypt's penal code narrowly defines torture as an act exercised by a public employee or official against an accused person with the aim of extracting information.<sup>b</sup> While the government promised the Human Rights Council in its 2009 Universal Periodic Review (UPR) submission to amend the definition of torture in the national law, the definition remains unchanged until this day.<sup>7</sup> The Egyptian legislation and penal code fail to fully criminalize torture by keeping the definition of torture very limited. According to Seif Al-Islam, the narrow definition of torture is one of the major barriers to justice for victims of torture in Egypt. The most important aspect of this narrowness is the condition in Egyptian law that the torture be carried out to extract confessions. Human Rights Watch<sup>8</sup>, in a lengthy report about torture in Egypt, presents a long, non-exhaustive list of reasons why torture is practiced in Egypt. Extracting confessions is just one reason, among many. In this way, as Seif Al-Islam points out, the same criminal acts committed

a) Egypt's Code of Criminal Procedure, Article 209 (extract): "If the Department of Public Prosecutions found, after investigation, no grounds for the establishment of a criminal lawsuit, it issues an order to that extent and releases the suspect in custody, unless not in custody for some other reason. Issuing the order that a criminal lawsuit is without grounds is only the function of the attorney general or his representative. And it must include the grounds it was based on."

b) Egypt's Penal Code, Article 126: "Any civil servant or public employee who orders or carries out the torture of an accused person in order to extract a confession from that person shall be subject to a penalty of rigorous imprisonment or a term of from 3 to 10 years' imprisonment. If the victim dies, the penalty shall be the one prescribed for intentional homicide."

in the lack of the willingness to extract information cannot amount to torture under Egyptian law. El Nadim's report "Doctors against Torture"<sup>9</sup> reiterates the same problem, while adding that crimes not amounting to torture are treated as "degrading treatment", a crime under the Egyptian penal code that carries with it a maximum sentence of one year or a maximum compensation of EGP 200 (about GBP 20).

The definition of torture in Egyptian legislation is lacking in another aspect, namely in the nature of the torturer. Seif Al-Islam<sup>4</sup> explains this problem, stating that the Egyptian penal code recognizes only two categories of torture perpetrators: the torturer and anyone who assisted or incited the torturer. Seif Al-Islam recognizes how this narrow definition of the torture perpetrator in the Egyptian penal code falls short of the UNCAT and its wider definition of the different actors who can commit the crime of torture.<sup>5</sup> Also, the acts that constitute torture in the Egyptian legislation are

very limited compared to the acts described in the UNCAT. For instance, mental and psychological traumatizations are not mentioned in the Egyptian Criminal Code, and thus are not considered as a type of torture.<sup>4,5</sup>

Another problematic aspect of the law is the "absolute prosecutorial discretion"<sup>7</sup> granted by the Code of Criminal Procedure, which makes the prosecutor the sole decider of whether a case is referred to the criminal court or not.<sup>c</sup> This absolute prosecutorial discretion is even supported by the Code of Criminal Procedure, which prohibits appeals of the prosecutorial decision.<sup>d</sup>

Last, the Egyptian legislation is lacking in the penalties it prescribes for torture perpetrators. While the sentence for torture perpetrators ranges between 3 and 10 years in prison according to article 126 of the Penal Code, the narrow definition of torture makes many cases of what is internationally recognized as torture be referred to court as cases of cruel or humiliating treatment under Egyptian legislation. The sentence of the latter is a maximum one-year imprisonment or a fine of EGP 200.<sup>e</sup>

c) Egypt's Code of Criminal Procedure, Article 232, listing the circumstances when the plaintiff cannot start a lawsuit directly in court reads as follows: "If the lawsuit is directed against a public official or a state employee for a crime committed while carrying out their duty or because of carrying out this duty".

d) Egypt's Code of Criminal Procedure, Article 210: "The plaintiff in the civil rights can challenge the order of the Attorney General that there is no grounds for the criminal case, unless if it was issued in the charge against a state official or a public employee for a crime committed during the performance of his duties or because of it."

e) Egypt's Code of Criminal Procedure, Article 209 (extract): "Any civil servant or public employee and any public service provider who deliberately resorts, in the course of duty, to cruel treatment in order to humiliate or cause physical pain to another person shall be subject to a penalty of up to one year's imprisonment or a fine of up to 200 Egyptian pounds."

*Epidemic Practice: Systematic and Widespread*  
In their 2009 submission to the UPR, Human Rights Watch described torture in Egypt as an "epidemic", and a crime "affecting large numbers of ordinary citizens".<sup>10</sup> Nowak and McArthur<sup>11</sup> refer in their commentary on the torture convention to the Committee Against Torture's visit to Egypt. While the Egyptian government refused to grant the Committee the consent to a visit, the Committee continued with its procedure and inquiry anyway and concluded, "that systematic torture was indeed practiced by security forces in Egypt".<sup>11</sup> The Special Rapporteur on Torture, the World Organization Against Torture and Amnesty

International shared this conclusion.<sup>11</sup>

In an interview with Seif Al-Islam, the Hisham Mubarak Law Center lawyer explained why torture seems to be systematic in Egypt. “The state makes the torture tools available to its officers, the state insists on not changing the [narrow] definition of torture, the state has not announced its intention to end the practice of torture”. Seif Al-Islam explains that maintaining the emergency law itself and the long period of incommunicado detention that it allows, reflects the systematic nature of torture.

*Prosecutions and Conflicting Interests: Impunity for Torture*

Criminal prosecutions of torture perpetrators is largely viewed as an effective remedy and reparation in their own right; Redress states “the right to reparation also entails the obligation of States to afford effective remedies for victims to obtain reparation, including access to justice.”<sup>11</sup> The Special Rapporteur on the right to restitution, compensation and rehabilitation, Mr. Bassiouni, connects the victim’s right to know the truth with their right to hold perpetrators of torture accountable.<sup>1</sup> Referring to the cases of *Ristic v Yugoslavia* and *Nikolic v. Serbia and Montenegro*, Nowak and McArthur illustrate that criminal proceedings are crucial for the establishment of civil proceeding and the right to remedy.<sup>11</sup> The Committee Against Torture noted in reference to the first case, “In the absence of proper criminal investigation, it is not possible to determine whether the rights to compensation of the alleged victim or his family have been violated”.<sup>11</sup> In the second case, the Committee noted, “the absence of criminal proceedings deprived him of the possibility of filing a civil suit for compensation”.<sup>11</sup> Having said that, the Committee makes it clear that the initiation of civil

procedures should not depend on the existence and success of the criminal process, although the latter provides the former with evidence necessary for establishing the truth and the right to remedy.<sup>11</sup>

In her article on access to justice for victims of state-sponsored crimes, Aldana-Pindell<sup>3</sup> takes a human rights approach to prosecutions. Carrying out prosecutions and criminal investigations for torturers is not only a state duty, it is also a human right. Her starting point is that effective prosecutions are an integral part of the victim’s right to remedy. Therefore, what she calls “victims’ rights to prosecutions”<sup>3</sup> need to become the aim of criminal justice reforms worldwide. Different contexts dictate different reform needs, but the right to prosecutions stands unchanged. The author argues that effective prosecutions are in themselves a victim’s remedy and discusses the different practices that lead to the state’s failure to carry out its duty to investigate. On the flip-side, the article places impunity for state-sponsored crimes as “one of the most persistent human rights violations”.<sup>3</sup>

In its national UPR submission to the Human Rights Council, the Egyptian government states that the Department of Public Prosecutions “investigates every complaint it receives about torture or cruel treatment”.<sup>12</sup> Here, the government report offers some figures: in 2008, 38 cases of torture and cruel treatment were referred to the criminal court. In 2009, nine cases of cruel treatment were referred to court. Interestingly, these figures neither mention the number of prosecutions in each case, nor show the original amount of allegations filed with the prosecutor.

Human Rights Watch<sup>7</sup> offers some recent numbers in this respect, ascertaining that only seven officers were sentenced by court in cases of torture between 2006 and 2010,

while “no SSI [State Security Investigations] officer has ever been convicted for torture”. Therefore, Human Rights Watch establishes “Mubarak’s government implicitly condones police abuse by failing to ensure that law enforcement officials accused of torture are investigated and criminally prosecuted, leaving victims without a remedy”.<sup>7</sup> All this has led Human Rights Watch, in its 2009 UPR submission to the Human Rights Council, to state that “the lack of effective public accountability and transparency has led to a culture of impunity”.<sup>10</sup>

Aziz, from El Nadim Center for Rehabilitation of Victims of Violence, confirms, “NGOs working in the field of human rights have documented thousands of torture cases in police stations, prisons and state security headquarters”.<sup>13</sup> That being said, seven prosecutions for torture perpetrators over the period from 2006–2010 seems to be an extremely small number.

This impunity for torturers can be explained by the conflicting interest of the justice authorities in Egypt. Foley<sup>14</sup> views the conflict of interest in accessing justice as follows: “Torture is typically perpetrated by the same state officials who are responsible for upholding and enforcing the law”, and this indeed is an overarching obstacle for successful prosecutions for torturers in Egypt and elsewhere. Redress,<sup>1</sup> in a study of torture in thirty countries, including Egypt, observes that in many countries the permission of the authorities has to be obtained before any investigations can be started. The report establishes that “bodies, which lack independence, often initiate these processes” of criminal investigations and prosecutions.<sup>1</sup> Observing the possible scenarios for accessing criminal justice in Egypt, Seif Al-Islam observes that a direct path to justice does not exist for victims of torture in Egypt. Any access to justice has to be pre-approved by

the authorities, especially the public prosecutors, because the Egyptian law does not allow private prosecutions against public officials.<sup>4</sup>

This discretion in criminal accountability is also discussed by Aldana-Pindell.<sup>3</sup> She focuses on the barriers that state officials create, being also the perpetrators of crimes, including weakened, partial judges and prosecutors. Those barriers consist of practices and procedures, whether supported by the state laws or in violation of it.<sup>3</sup> Aldana-Pindell emphasizes the role that prosecutors play in the criminal justice system and in prosecutions. She contends that prosecutorial powers need to be limited and impartial. According to her, in the absence of a direct path to justice, the victims need to have the right to appeal the prosecutorial decision.<sup>3</sup>

Similarly, Foley<sup>14</sup> gives judges and prosecutors a major role in combating torture. According to Foley, judges and prosecutors have a twofold role: being the shield of prevention and the sword of punishment. For prevention, he points to the role of the judiciary and the prosecutors in monitoring places of detention and not allowing convictions to be based on evidence obtained from torture.<sup>14</sup> The sword of punishment consists in ensuring effective investigations and prosecutions for torture perpetrators. Similar to Aldana-Pindell,<sup>3</sup> Foley recognizes the discretion judges and prosecutors enjoy in deciding each case: “The discretion that judges and prosecutors will enjoy in carrying out their functions will partly depend on what legal system they are operating under” and on whether the criminal justice system is inquisitorial or adversarial.<sup>14</sup>

The recommendation voiced in this respect, is for judges and prosecutors to promptly and impartially investigate any allegation of torture or ill treatment. Foley

states that judges have to investigate any allegations of torture, especially in cases where a defendant's confessions were collected through the use of torture. In addition, article 13 of the UNCAT calls for the right of every individual allegation of torture to be promptly and impartially examined by the relevant authorities.<sup>5</sup>

However, the conflict of interest in Egypt goes beyond what's described by international literature. What Al Nadim Center's report on public prosecutions in Egypt suggests is that the public prosecutor's conflict of interest is beyond what Redress frames, "those responsible for torture are often those responsible for proceedings".<sup>15</sup> The conflict of interest lies at the heart of the prosecutor's office and at the very nature of what public prosecution is about. The theoretical conflict is around the role of the *niyaba* and whether it is part of the judicial, or part of the executive, authority. Because the prosecutor's office has the role of investigation, it is part of the judiciary and has judicial functions. Simultaneously, the Prosecutor's office has the authority of accusation, which gives it executive powers.<sup>15</sup> The Center's report concludes that the prosecutors abandon their judicial powers in favor of their executive powers. Seif Al-Islam articulates the same conflict and equally accuses the public prosecutors of favoring their executive powers over their investigatory and judicial powers.<sup>4</sup>

### **Research Findings: Understanding Different Practices and their Impact**

Interviews conducted with lawyers, activists, medical experts and psychiatrists illustrated observable patterns of practice. These patterns include a wide range of practices and procedures that are backed by the laws and regulations, but also some illegal practices. The thematic organization of the

practices encountered in different institutions was the result of an observable repetitiveness. In fact, the major output of this research lies in examining the resulting observable pattern of practices that persists across the examined justice institutions.

The major inquiry of this research concerned the practices encountered in the different key justice institutions on the path to criminal justice for victims of torture. Doctors were particularly asked about their experience with victims of torture as well as their encounters with the Department of Public Prosecutions and the court. Psychiatrists had a lot to share about the mental state of victims during the process and the intimidation the latter face while seeking justice. Lawyers had a large input especially on practical and legal impediments they faced representing victims of torture in different justice institutions.

Notably, all lawyers interviewed for this research spent significantly more time complaining about the Department of Public Prosecutions than they did about any other institution. This could be explained by the fact that an exceptionally small number of cases ever reach court, making most of the lawyers' time and effort spent at the Prosecutors' office. But it also highlights the sentiment that most interviewees articulated, namely that certain practices within the Department of Public Prosecutions were the main barrier to justice for victims of torture.

#### *Personal Discretion*

The legal framework governing the path to criminal justice for victims of torture makes this path at the discretion of one main justice institution: the Department of Public Prosecutions, so-called *niyaba*. This legal procedure is governed by the Egyptian Code of Criminal Procedure, which does not allow for direct lawsuits against state officials or

state agents.<sup>c</sup> In this way, the prosecutor becomes the gateway for criminal investigations and prosecutions of torture perpetrators. The interviews reveal the nature of this.

The interviews exposed two important facts in this respect: firstly, that the path to justice depends on the personal discretion of the officials. And secondly, that the personal discretion goes beyond the prosecutors, to include judges and forensic doctors as well.

When asked about the path to justice, lawyer Seif Al-Islam envisioned two broad scenarios: one where the prosecutor is responsive and is willing to start a genuine investigation and the other, more common scenario, is when the prosecutor is “not sympathetic”. In the latter scenario, only sham investigations take place. Similarly, lawyer Taher Abulnasr states that the behavior of the Department of Public Prosecutions is “a man behaving, not the law”. Abulnasr explains that this is the case because of the vagueness of the Egyptian codes, and the large discretion given to the prosecutors, especially in collecting evidence and referring the cases to courts. The large discretion articulated in the Egyptian Code of Criminal Procedure grants prosecutors exceptional powers, where prosecutors can choose whether to investigate a case or not, whether to collect the relevant evidence or not, and when to do so, and whether to take a case seriously or keep it in limbo. Prosecutorial decisions in the case of the crime of torture cannot be appealed.<sup>d</sup> In this way, whether the investigations will go further or not depends on the “goodwill of the prosecutor”, says Abulnasr. Maha Youssef, another lawyer from El Nadim Center, also sees that “the personality of the prosecutor makes a difference, it shouldn’t be this way”. In addition, she articulates that the same applies to the courts, where “it depends on the person of the judge”. Interestingly,

Youssef connects this discretion to the nature of criminal cases in Egypt. “Criminal law is a law of certainty, the judge has to be convinced with the evidence presented to him, therefore criminal law in particular gives the judge the authority of estimation”. In that way, the personal discretion in court becomes a consequence of the laws that give the judges and the prosecutors alike wide and vague authorities, confirms Youssef.

The case is not much different in the Department of Forensic Medicine. Admittedly, the decision of the department is not as independent or discretionary as the decisions of the prosecution and the judiciary. For one thing, as Youssef explains, the department’s reports are used as indirect evidence, which means that the judge or prosecutor “can choose to use [the report] or not”. Nevertheless, the content of the report and the type of medical investigations carried out depends on the person of the Chief Medical Examiner. Dr. Foudah states that the role that the Chief Medical Examiner plays in the process heavily “depends on the conscience of the chief medical examiner”.

The interviews provided insights into what factors could affect the personal discretion of the prosecutors, judges or medical examiners. What the interviewees referred to as the “conscience”, the “goodwill” or the “willingness” could be listed as factors affecting the personal discretion of the relevant decision makers in the different institutions. However, there are legal and power structures that enable and affect this personal choice.

#### *The Law of Discretion*

The legal structure can be summed up as the large authority given to the judges and prosecutors in particular, and the special protection that the law provides to state officials. The interviews revealed a deeper

perspective on the inadequacy of legislation. “That the person makes a difference is a problem with the legislation”, explained Youssef. Citing the Penal Code in article 17,<sup>f</sup> Youssef observed that the laws give great powers to the judges in deciding the penalty of the torturer or any criminal for that matter. Following that article means that the judge can legally reduce the sentence of any criminal by two degrees of penalty in the name of compassion with the criminal, something that the judges “almost always use with state officials”. The justification of using the compassion clause, explained Youssef, is completely up to the judges. Judges usually justify using the compassion clause by referring to the torturer’s young age, or career prospects and future. Bearing in mind the already lenient sentences for state officials committing torture, as listed in article 126 of the Penal Code, the compassion clause makes the penalty go from “three to ten years in prison”<sup>b</sup> to a mere suspended one year.

The large authorities given to judges are equaled by other authorities granted to the prosecutors, again under the umbrella of the law. The most disturbing among these authorities is what Seif Al-Islam referred to as “the freezer”, a procedure by which the investigation is frozen at the Prosecutor’s office, or what Seif Al-Islam defined as “the decision of no-decision”. This practice is a consequence of the prosecutors’ large authorities granted in the code of criminal procedure, specifically in Article 209, which grants the prosecutors a right to loosely declare “the establishment of a criminal lawsuit to be groundless”<sup>a</sup> and to stop the investigation on that basis. The law allows this procedure without regulating the instances it can be used for, in this way it can be used for “any reason”. In addition, the prosecutorial discretion is not met with any

appeal rights: as Seif Al-Islam<sup>4</sup> points out, the code of criminal procedure allows only the civil plaintiff to appeal the prosecutorial decisions in general, but in cases concerning state officials no one is allowed to appeal the prosecutorial decision. Abulnahr complains about the code of criminal procedure and the large conflicting authorities it grants to the prosecutors: “authorities of accusation, investigation and final decisions, it is as if this law was specifically tailored to serve them”. This prompts him to carry on, saying that “the number of cases that reach court do not exceed 1% of all allegations of torture”, explaining that the *niyaba* “creates a barrier between the victim and his access to court”.

*“It’s all Political” - Seif Al-Islam*

In addition to the inadequacy of the laws and the wide authorities that the legislation grants to the decision makers in torture allegations, certain power structures that are defined by the Egyptian political context affect the incidence and success of prosecutions. As Seif Al-Islam points out, logistically, the prosecutors’ supplies and facilities come from the police stations. For instance, “the prosecutor, even if sympathetic and responsive, has no means of transportation other than the ones provided by the police station, which means that the police know ahead of time that a prosecutor is on his way to investigate and have time to cover for any irregularities.” In addition, as the literature

f) Egypt’s Penal Code, Article 17: “It is allowed in criminal cases to alter the sentences, if compassion was required by the circumstances of the case, as follows: The death penalty can be switched to life in prison with hard labor or imprisonment with hard labor. The Sentence of life in prison with hard labor can be switched to imprisonment with hard labor or imprisonment, which may not be less than six months. Sentence of imprisonment may be reduced but may not be reduced for a sentence of less than three months.”

has shown, the prosecutor relies on evidence that will be obtained from the police station, where the crime took place. In other words, the prosecutors depend in their investigations on the accused for evidence, a fact seriously compromising the impartiality of the investigations.

The personal relationships between the authorities in Egypt are another decisive factor Seif Al-Islam talks about the closeness between prosecutors and policemen, especially in smaller villages and towns. Abulnasr adds to this that the links persist even beyond smaller villages and towns. The “complicity between the three authorities”, which becomes visible in the common interests of police officers and public prosecutors, is one thing that Abulnasr articulates. In this respect, he observes an interesting fact that partly explains this common interest: because many of the prosecutors and judges are graduates from the police academy, their strong ties to the police and other police officers persist and interfere in executing their tasks as prosecutors or judges. “The friendships they develop at the police academy makes them always ready to return favors to their friends at the police”, Abulnasr explained. Seif Al-Islam also states that judges have an ideal picture of public officials, and therefore are more

likely to believe a policeman than victims complaining of torture. Youssef refers to the close ties, both on the personal and professional level, between policemen and prosecutors from the same circuits, and therefore calls for the establishment of what she calls “an executive judicial branch”, which should be completely independent of the police, unlike the prosecutors.

The political context has another implication that concerns the State Security Investigations. While torture is widespread in the State Security premises,<sup>g</sup> there have been no prosecutions for torture perpetrators committing torture in the State Security premises, until very recently. Seif Al-Islam, who has been working on torture cases for many years, observed that he never had a case of torture in state security premises reach court, because “state security officers are protected and they know it”. Furthermore, Seif Al-Islam related cases when state security officers attacked the prosecutors, thus showing that the “state security apparatus is above everyone”. Legally, Seif Al-Islam explained, there is no difference between torture in police stations and in state security premises. But torture investigations relating to the state security always “die at the prosecutor’s office” and disappear. Perhaps the power and status of the state security officers play a large role in the lack of prosecutions: not only do state security officers exercise their powers on the prosecutors, but they also have unlimited control over the subjects in detention. State security officers can keep the tortured subjects in detention until their wounds heal, and can threaten their lives if they talk about the torture they faced at the hands of the state security apparatus.

g) The State Security Investigations Service (Arabic: Mabahith Amn-Addawla) is Egypt’s main Security apparatus, and is a branch of the Egyptian Ministry of Interior. It played a main role in controlling Egypt’s opposition groups, specially the Islamists. The Committee Against Torture in 2002, reported on acts of torture and ill treatment in the state security premises. Available from: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CAT.C.CR.29.4.En?Opendocument>. Following the Egyptian Revolution, in March 2011, the State Security Apparatus was dissolved and later reestablished under the name “The National Security Apparatus” (Arabic: Mabahith al-Amn Alwatany).

*Evidentiary Barriers: Delays, Laws and Procedures*

When asked about the most lacking of the three main international standards of investigation: effective, adequate and prompt, Youssef listed the lack of promptness as the number one problem, while maintaining that all three standards are very much missing in the criminal investigations of torture in Egypt.

When asked about the biggest problem in the path to justice, Abulnaser replied that the path is full of problems, but if he had to pick one very problematic practice, it would be that “the Department of Public Prosecutions is relaxed”. Abulnaser explained this state of relaxation relating the “intended delays in processing the case” and the “habitual delays” in referring the victims to the Department of Forensic Medicine.

The politics of delay are indeed a major factor in killing the evidence, because cases can habitually take one or two years to be investigated by the prosecutor. Procedurally, the shortest period a victim of torture can be brought before the forensic medical expert is 48 hours, but it usually takes a month, according to Abulnaser. All of this causes the physical signs of torture to disappear, thereby killing the evidence.

Obtaining evidence is problematic in other ways. Human Rights Watch<sup>7</sup> sums up the evidentiary barriers in cases of torture in Egypt by explaining that impartial investigations are impossible, where the police unit responsible for torture is expected to be responsible to gather the evidence for the prosecutor. The burden of evidence falls on the victim almost entirely, and here it becomes clear how the law helps protect crimes conducted by state officials. “It is illogical to ask a normal person to bring evidence incriminating an abnormal person, and this in particular makes obtaining evidence almost impossible”, says Abulnaser

explaining how the victim and his lawyer are expected to find the evidence to convince the prosecutor to refer the investigation to the court. This stands in clear contrast to the burden of evidence procedures in other normal assaults or battery, where a victim does not need to present particular evidence against a specific assailant.

The hardness of obtaining evidence prompted Youssef and others to observe that, “reaching court is considered a victory of its own, notwithstanding the outcome of the court proceedings.” Abulnaser believes that about 1% of investigations at the Department of Public Prosecutions ever reach court, while Youssef maintains that about 1 in 30 cases reach court. The actual numbers remain unavailable.

In cases of torture, the forensic department’s report becomes essential to the investigations. Even as the forensic examination is delayed, the report remains important evidence to the occurrence of torture. Dr. Foudah, former Chief Medical Examiner and current head of the Department of Forensic Medicine, spoke about the role the department plays in criminal investigations of cases of torture. “The Forensic Medicine Report is an important part of the investigations”, he explained, while explaining that the role of the department is to examine the “story” narrated by the prosecutor in his warrant. In other words, the forensic medicine department follows the prosecutors’ instructions and acts as an expert’s opinion serving the prosecutors’ investigations. This becomes important to this research’s analysis in a very significant way: the forensic medicine department is actually not independent in its examination and in writing its reports, it follows the story that the prosecutors narrate. Dr. Foudah explains the problem with the department’s independence stating: “Here, you answer the

questions you get, you cannot donate answers you weren't asked for". In this respect, a psychological report can only be released if the prosecutor request one. And this remains a "restriction on the powers of forensic medicine" in Egypt. Still, if the prosecutors' warrant does not have enough information, the department can ask for the case files, which include all investigations conducted by the prosecutor.

One last point to be factored into the problems concerning evidence is the weight of the forensic evidence report. According to Youssef, the forensic evidence report is only used as supporting indirect evidence (Arabic: qareenah) and does not have the weight of evidence (Arabic: daleel). Both the prosecutors and the judges cannot decide whether to take the evidence in the report or not.

#### *Victimization and Re-victimization*

Victim intimidation is one major aspect of the path to justice that the literature review undertook. Delays and the "response of institutions" have been viewed as "secondary victimization".<sup>16</sup> When I asked my interviewees whether the process of seeking justice re-victimizes the victims, I received some very interesting replies. While I expected everyone to consider the process a form of re-victimization, I never expected some of the reasons that they related to this re-victimization. I expected the reasons to be in line with the international literature, which can be summed up into victim intimidation and systematic delays; however there were other reasons in addition to these.

Witness and victim intimidation exist and can seriously disrupt the process. When asked about witness or victim protection, Abulnaser points that witness protection exists, but in so far as it protects the witnesses from criminals. However, there is no protection from the officers or the authori-

ties, which are supposed to be protecting the witnesses and victims in the first place. Dr. Suzan, a psychiatrist dealing with victims of torture, observed how the way her patients are treated in the prosecutor's office and in court affects their psychological state and becomes apparent in their treatment sessions. Interestingly, she explained how she and other psychiatrists accompany victims of torture to the investigations to help protect them from intimidation or re-traumatization: "The doctor treating the victim is the one person holding most of the victim's trust". In an interview with Human Rights Watch,<sup>7</sup> Maha Youssef stated that "most people" whose cases El Nadim Center encounters, "are too afraid to submit complaints because they fear for their safety". Human Rights Watch<sup>7</sup> adds to this that the police often pressure families of victims of torture into "out-of-court settlements", which are informally condoned by the prosecutors, who are not legally allowed to authorize reconciliations in criminal cases.

Remarkably, victim intimidation is not the only type of intimidation in Egypt. The intimidation extends to activists working on cases of torture, to psychiatrists treating victims of torture, to lawyers representing victims of torture and even to the Chief Medical Examiner, a state official himself. Dr. Suzan and Dr. Aida shortly referred to intimidating phone calls, threats, police visits to the center and other forms of harassments that they faced during their work at El Nadim Center. Similarly, Dr. Foudah related the problems and challenges he faced as Chief Medical Examiner, especially the pressures he faced from the State Security and the State Intelligence. The pressures went from threatening phone calls to attempts to kill and imprison him. "You have to be careful, smart and polite", Dr. Foudah stated, explaining how he dealt with chal-

lenging cases such as the Ayman Nour and Khaled Said cases. In the latter case and others, Dr. Foudah's way of dealing with the pressures of his position was to "use reports from different experts and doctors and cite them, so as to disperse the responsibility" for sensitive reports, which could trigger negative reactions from the authorities.

However, victim intimidation and the previously mentioned delays were not the only response of many interviewees. Rather, many talked about the psychological state of the victims and the lack of training and experience of the courts and prosecutors. Dr. Aida Seif-Aldawla observed the noticeable "lack of trained prosecutors and judges to deal with cases of trauma and loss of perception". Lawyer Seif Al-Islam agreed with Seif-Aldawla and listed this lack of training to deal with cases of trauma as one main aspect of re-victimization: "the untrained prosecutor and untrained judge deals with loss of perception as inconsistency in the victim's narrative and thus as a lie". This also relates to the politicization of torture cases, where Seif Al-Islam explained judges' tendency to believe the policemen, not the victims. The same practice is present with the prosecutors, whose connections to the policemen make them reject the victims' stories. In sum, this form of re-victimization is one where the victim is not being believed and instead, is "dealt with as a criminal". "The refusal to recognize their experience" is what the United Nations Criminal Justice Information Network calls "criminal victimization".<sup>16</sup>

### **Further Analysis: The International Standards**

The international standards for conducting investigations into allegations of torture are promptness, impartiality and effectiveness. These three standards have not only been

reiterated by the UNCAT, but also by non-binding declarations and UN principles. The UNCAT in Article 13 sets the state obligation to "prompt and impartial investigations" in examining allegations of torture.<sup>5</sup> The United Nations Principles on the Effective Investigation and Documentation of Torture assert similar standards for investigations.<sup>17</sup> While these standards do not give rise to state responsibility per se, they have impact on determining the international consensus and the standard rules of investigations that states should follow. The principles on effective investigations clearly communicate the three standards of prompt, impartial and effective. The principles are particularly helpful because they give substance to the three vaguely worded international standards. For instance, the principles explain what it means to be prompt, why promptness is important and what falls short of prompt and expeditious. The Istanbul Protocol is another very useful source on detailing the international standards and what they imply by citing relevant cases from around the world.<sup>18</sup> Nowak and McArthur's commentary on the torture convention, which interprets the text of the convention in light of state practice, court cases and also the travaux préparatoires is another great source explaining the international standards on investigations.<sup>11</sup> Nowak and McArthur, citing exemplar cases, state "experience shows that a prompt, independent and impartial examination of torture allegations, as guaranteed by Article 13, is crucial for establishing the truth and thereby, paving the ground for the victim's claim to a remedy and reparation". Last, but not least, court decisions from around the world are another indication of what the international standards are and how they can be translated into practice. Most relevant were the Inter-American court's decisions,

especially Velásquez-Rodríguez v Honduras.<sup>19</sup>

An important finding resulting from measuring the practice in Egypt against international standards is the importance of public opinion and the media in ensuring the realization of promptness, impartiality and effectiveness. Dr. Fayad states that NGOs in Egypt have strong ties to the media, not only to get to the cases and assist victims, but also to get to the public opinion and force a genuine investigation of the case. This is perhaps most obvious in the popular case of Khaled Said, and afterwards in the June 2012 case of Sayed Bilal, when the Alexandria Public prosecutor had referred five state security officers in October 2011 to the Alexandria criminal court on allegations of torturing Sayed Bilal, an Islamist detained since January 2011, to death.<sup>20</sup> According to many sources, including Human Rights Watch, the Khaled Said case “set off demonstrations across the country” and therefore was one crucial driving force for the Egyptian 25th of January revolution.<sup>h</sup> While the prosecutor had initially closed the investigations into the allegation of torture that Khaled Said family’s brought forward to the office of prosecution, the “escalating public protests” forced the prosecutor to reopen the case.<sup>7</sup> Two policemen have been accused of using excessive force which killed the 28-year-old Alexandrian Said.<sup>21</sup> While human rights activists and Said’s family remain unsatisfied by the lenient sentencing of the police officer, and by the fact that the crime exercised against Said and leading to his death was not found to be the capital

crime of “torture”,<sup>22</sup> Khaled Said’s case remains exceptional, because of the crucial role that media coverage and public outrage played in forcing the Public Prosecutor to reopen the investigation and refer it to court”.<sup>7</sup> The exceptionalism of Said’s case has made it subject to international attention as well, not only from the international media, but also from international forensic experts who issued a report stating their critical evaluation of the forensic report issued for Khaled Said in June 2010.<sup>23</sup>

#### *Promptness: Politics of Delay*

Promptness, being an essential element of investigations, is habitually betrayed in Egyptian investigations of torture allegations. Redress traces in their report the rationale for prompt investigations: this can be summed up as conducting investigations before the traces of torture disappear.<sup>24</sup> In its handbook for public officials, Redress, citing the Inter-American Court, adds to the rationale stating that promptness does not merely relate to how soon the investigation is opened, but also to “how quickly it is completed”.<sup>25</sup> Systematic delays are a very common practice in Egypt, especially at the Department of Public Prosecutions. The interviews reached similar findings. Lawyer Abulnasr complained of “intended delays”, explaining, “delays at the prosecutor’s office are complicity between the three authorities”.

#### *Impartiality: A Question of Conscience and Goodwill*

There are several practices that hinder impartial investigations. The literature review discussed the conflict of interest of the prosecutors, between their authorities of accusation and investigation. The findings of the research also concluded that evidentiary barriers stand on the way to justice for

h) The Facebook group “We Are All Khaled Said” (<https://www.facebook.com/ElShaheed>) played a major role in calling and mobilizing for the mass protests and demonstrations of 25 January.

victims of torture. This is most obvious with the police unit, where torture took place, being responsible for gathering the evidence, thus hindering impartial investigations.<sup>7</sup>

Making justice a matter of a person's goodwill is certainly in conflict with all standards of impartiality, objectivity and neutrality. Redress draws the difference between independence and impartiality, explaining that impartiality means being free from "undue bias" while independence means not having close links to the perpetrators.<sup>24</sup> Nevertheless, the same report concludes, "the two concepts are closely linked, as the lack of independence is commonly seen to result in partiality".<sup>24</sup> Based on the findings of the research, I decided to keep the two concepts linked and treat the lack of independence as resulting in partiality. Having said that, partiality in Egypt has two main sources that are exposed by the findings of this research: first, the personalization of justice, which makes starting investigations into allegations of torture and prosecuting torturers depend on the personal choice of the prosecutor or the judge. Secondly, partiality is also rooted in the lack of independence, which becomes very obvious in the personal and professional ties and relationships that connect the prosecutors with the judges and the policemen, the latter usually being the torture perpetrators. Therefore, one recommendation that this research identifies is that torture cases be investigated by independent prosecutors with no connection to the police academy and with no relationship to the accused officers.

The UN Principles on Effective Investigations lay out the importance of impartiality through independence, stating that investigators "shall be independent of the suspected perpetrators and the agency they serve" and therefore shall be impartial.<sup>17</sup> In addition,

the principles note the importance of the independence and impartiality of medical experts, another problem that the interviewees articulated in this research. Because medical experts play a crucial role in cases of torture, their independence and impartiality is crucial to the investigations. In Egypt, however, as this research shows, medical experts lack independence and impartiality. The Department of Forensic Medicine, a branch of the Ministry of Justice, follows the orders of the prosecutors and only examines and investigates what the prosecutor orders to be examined and investigated. This, as former Chief Medical Examiner Dr. Foudah states, "seriously compromises the independence of the department".

#### *Effectiveness: Just Not Qualified*

The standard of effectiveness is, in my opinion, the most inclusive of the three standards. For an investigation to be effective, it has to be expeditious, but it also has to be impartially and independently conducted. The Committee Against Torture has stated that effectiveness also refers to the fact that "investigations must seek to ascertain the facts and establish the identity of any alleged perpetrators".<sup>25</sup> Foley, in his manual for judges and prosecutors, emphasizes not only the need for impartial and independent experts, but also "competent and qualified" experts.<sup>14</sup> The findings of this research reveal a lack of qualification and competencies of persons and institutions at different stages of the path to criminal justice. I organized these into two parts: the lack of training and the lack of institutional capabilities.

The interviews uncovered a disturbing lack of training on the side of prosecutors and judges in dealing with victims of torture and listening to traumatized witnesses and victims. Seif Al-Islam particularly focused on

this issue relating his experience as a lawyer in cases of torture. He ascertains that some prosecutors are willing to genuinely investigate, while others are not willing to do so. Nevertheless, he establishes that all “investigators are not experienced in dealing with victims of torture” and deal therefore with any inconsistencies of the story as an unreliable statement of someone who’s lying or making up a narrative. “Prosecutors are used to dealing with suspects but not used to dealing with victims of torture”, explains Seif Al-Islam, adding that victims, even if not explicitly intimidated, are not given the confidence they need to narrate their story. Foley details how interviews conducted with victims of torture should be sensitively conducted and stresses the need for establishing a “climate of confidence”.<sup>14</sup> The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states “Victims should be treated with compassion and respect for their dignity”, this is then translated into practical recommendations, such as providing all proper assistance to victims during the process and listening to their concerns and viewpoints.<sup>26</sup>

Part of being effective, according to Redress, is for authorities to have a “proper attitude towards victims and alleged perpetrators”.<sup>25</sup> Because of the close ties between the authorities and the perpetrators, authorities in Egypt do not have a proper attitude towards the perpetrators. Due to the tendency reiterated by many interviewees in this research, to treat victims of torture either as suspects or in the least as normal, not traumatized persons, the proper attitude of the authorities towards the victims is missing. This proper, balanced attitude of the investigators is lacking in Egypt, thus compromising the effectiveness of the investigations.

The second factor uncovered by the

findings of this research is the capabilities of the institutions. While the Department of Public Prosecutions and the court are lacking in many technical capabilities that affects the quality of their work, the most dangerous shortfall, according to the research findings, is the lack of capabilities of the Department of Forensic Medicine. The UN Principles on the Effective Investigations translate effectiveness into practical recommendations for justice institutions. Notably, one article of the declaration undertakes the medical expert report and what it should include at a minimum in order for the medical examination to be effective. Interestingly here, the declaration lists the psychological impact report as one of its main minimum standards of medical examination.<sup>17</sup> Foley elaborates on the importance of the psychological examination by explaining, “torture usually does not leave physical traces”; therefore he recommends “sophisticated medical techniques” for the establishment of effective investigations.<sup>14</sup> With that said, the findings of this research, especially those relating to the capabilities of the Department of Forensic Medicine, can be analyzed as serious impediments to the effectiveness of investigations.

Dr. Foudah articulates the same notion mentioned by Foley,<sup>14</sup> namely the importance of the psychological impact of torture. Referring to cases of torture he encountered as a forensic expert, Dr. Foudah states “physical torture is not as common as psychological torture”, explaining how the most common techniques of torture in Egypt are those that leave long-lasting psychological impact without physical traces. This fact makes the psychological impact of torture key to understanding and proving the occurrence of torture. That being said, the Department of Public Prosecutions lacks the mental health expertise. In other words,

there is no mental health section of the department, making the referral to outside psychiatrists an exceptional measure only taken when ordered by the prosecutors.

Medical experts at El Nadim Center recognize the importance of the psychological impact of torture on the victims as well. Dr. Fayad explains how activist psychiatrists and other medical experts write parallel reports and submit these through the lawyers of the victims to the prosecutors and judges. In the popular case of “Bany Mazar”, explains Dr. Fayad, the parallel psychological report written by experts marked a turning point in the investigations. Similarly, Dr. Foudah recognizes the importance of these expert reports (also referred to as parallel or shadow reports) in courts. Dr. Foudah himself was responsible for an international expert report written on the case of Khaled Said, showing to the court how the official report cannot be accurate, due to technical mistakes in it. Similarly, Dr. Seif-Aldawla explains how private forensic medical experts cooperate with activists on either creating expert reports or making comments to the existing official reports. Dr. Seif-Aldawla concludes however, that the problem remains the same with these reports, albeit some success, with the medical report, whether official or parallel, being used as indirect evidence, not binding on the prosecutors or judges.

This section evaluated some of the practices common to justice institutions in Egypt against the international standards for investigations and prosecutions. The personalization of justice was evaluated against the standard of impartiality, while the personal relationships between the investigators and the alleged perpetrators were measured against the standard of independence. The poor training of authorities, the lack of qualifications in dealing with victims

of violence and the deficient institutional capabilities especially in the forensic medicine department seriously compromise the standards of effective investigations. Analyzing the practices and how they fall short of international standards is key to understanding how they affect the incidence of prosecutions and how they can be held responsible for the lack of successful prosecutions. By falling short of standards of promptness, effectiveness and impartiality, investigations of torture in Egypt mostly do not reach court, and when they do, prosecutions are at the personal discretion of judges. Last, but not least, the practices do not stand on their own, they are backed by and rooted in powerful structures, whether the legislation or the institutional capabilities.

### Conclusion

This research dealt with the impact of certain practices in justice institutions on the incidence and success of prosecutions of torture perpetrators in Egypt. The main contention of this research is that many practices that deny justice are backed by the lack of institutional capabilities and inadequate legislation on criminal procedure, which gives prosecutors and judges large authorities and makes investigations and prosecutions depend on the “conscience” of the official in charge. The research examined different practices, which included systematic delays, lenient sentencing, victim and witness intimidation and evidentiary barriers, and observed how these practices affect the investigation of torture allegations, referrals to the courts and Court prosecutions and sentencing of perpetrators. The research then took these practices further, understanding firstly what supports them and secondly, how they violate the international standards for investigations and prosecutions. The research concludes that the legislation, especially that

on criminal procedure, extends great authorities to persons, and thus makes justice a matter of choice, seriously compromising the impartiality of the investigations and prosecutions. In addition, the poor capabilities and training of judges, prosecutors and medical experts, stand behind the lack of effective investigations. Lastly, the common presence of systematic delays compromise the third and final standard of investigations, that of promptness.

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