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CAIRO INSTITUTE
FOR HUMAN RIGHTS STUDIES
Institut du Caire pour l'étude des droits de l'homme
مركز القاهرة لدراسات حقوق الإنسان

INTERIM TRIAL OBSERVATION REPORT

Public Prosecution

v

Aya Hegazy and others

Abdeen Court, Cairo, Egypt

Report prepared for EuroMed Rights by

Bar Human Rights Committee of England and Wales

September 2016

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Executive Summary

Over the periods 11-14 February 2016 and 18-22 May 2016, observers from the Bar Human Rights Committee (BHRC), commissioned by EuroMed Rights, monitored two hearings in Egypt in the criminal proceedings against Aya Hegazy and seven others.

Ms. Hegazy, together with Mohammed Hassenein, her husband and co-founder of the Belady Foundation as well as 6 others, were arrested in May 2014 and subsequently charged on seven counts. The charges relate to the alleged organisation of a group for the purposes of human trafficking, holding children for the purposes of sexual exploitation, sexually exploiting the children, using the children to disturb the peace in protests against security forces and operating an unregistered civil society organisation (CSO).

Aya Hegazy denies the charges, along with the other 6 defendants. This report focuses only on Ms. Hegazy's case.

Since her arrest on 2 May 2014, Ms. Hegazy has remained in pre-trial detention. The trial date will not be set until the conclusion of the procedural hearings. A further procedural hearing is fixed for 19 November 2016.

In light of the substantial delays in bringing this matter to trial, and concerns arising out of the length of detention to date, this interim report has been commissioned in order to establish whether the criminal proceedings against Ms. Hegazy to date comply with Egypt's international human rights obligations, as ratified by Egypt.

The observers conclude that there are very grave concerns relating to the length of Ms. Hegazy's pre-trial detention, which will be in excess of 30 months by the date of the next listed procedural hearing, on 19 November 2016. No reasons have been provided for the failure to grant her conditional release, and no assessment appears to have been conducted as to whether continued detention is justified, be it according to the provisions of Egyptian law, or by international standards. In the circumstances, the continued pre-trial detention of Ms. Hegazy violates her inherent right to liberty, and is in breach of Egypt's international legal obligations to use pre-trial detention as an instrument of last resort and only by reason of necessity. International law provides that if a trial cannot be achieved in a reasonable timeframe, defendants held in pre-trial detention should be released unless their continued detention can be justified according to key criteria.

Moreover, the observers are aware that pre-trial detention has been and is being used flagrantly and in a punitive way in Egypt, and there are very high numbers of individuals who remain in pre-trial detention for excessive periods.

Noting that irrefutable background, there are many disturbing features in Ms. Hegazy's case to date that provide further cause for alarm:

1. the increasingly lengthy delay between procedural hearings (set without any notable or reasoned consideration of impact upon Ms. Hegazy or upon the consequences for the fairness of any impending trial);
2. the failure to produce any evidence before the court at each rescheduled hearing, despite such a lengthy detention, coupled with tolerance of that incompetence;
3. the unreasoned decision to hold recent procedural hearings in closed session;
4. the failure to permit international observers into those closed sessions as well as the failure

to list the case for trial in an expeditious manner.

These features collectively indicate that the ongoing detention is punitive; possibly being used as a political tool. The observers conclude that Aya Hegazy is being denied her liberty arbitrarily in violation of international law. Moreover, the tardy and dismissive conduct of the matter before the courts to date substantially prejudices the presumption of innocence to which Ms. Hegazy is entitled by law (both domestic and international), which has disturbing implications for the fairness of any trial that may lie ahead. In addition, systemic features of the Egyptian criminal justice system impact on Ms. Hegazy, such as the State's failure to ensure that she, as other defendants, are provided with the opportunity to communicate confidentially with her lawyer to enable her to prepare a defence.

We therefore make the following recommendations, that:

1. Aya Hegazy is promptly released, unless substantial evidence can be provided to show that her continued pre-trial detention is justifiable and necessary;
2. All future hearings are held in public, unless proper and justifiable reasons are provided for them to be held in private;
3. Ms. Hegazy is provided with the opportunity to communicate confidentially with her lawyer so as to enable her to prepare her defence;
4. That the hearing dates are now expedited, such that no further lengthy adjournments are permitted;
5. Such evidence as the Prosecutor relies upon be disclosed to both Ms. Hegazy and her lawyers, as well as to the court, to enable her to prepare a proper defence;
6. That if there is sufficient evidence to justify any trial, such trial be listed at the earliest possible date.

The authors of this report also wish to record that many of the issues identified in this interim report are not unique to the case of Aya Hegazy and instead have become systemic within the Egyptian criminal justice system. They note, for example, a recent EIPR report entitled *Detention Without End*, which records that at least 1,464 people (and probably many more) are currently being held in pre-trial detention in excess of the legal limits and which asserts that the State is using pre-trial detention as a political tool¹.

We have spoken to many lawyers, activists and other international observers to understand the way in which the Egyptian criminal justice system operates, and have themselves observed in part fundamental flaws in the system. These include the use of cages to hold defendants in court, which demean the integrity of defendants and interfere with the presumption of innocence, or the lack of provision for defendants to have confidential communications with their lawyers, both in detention and at court.

We therefore recommend that in addition to the individual measures relating to Aya Hegazy's case, the Egyptian authorities must urgently address these fundamental concerns within the wider criminal justice system.

¹ See below for details of this report.

The Mission's Terms of Reference

The international legal standards applicable to Egypt are set out in the International Covenant on Civil and Political Rights 1966 (“ICCPR”), which Egypt ratified in 1982.

The Mission reports on whether the trial of Aya Hegazy complied with the standards set by the ICCPR and, where appropriate, makes reference to the relevant provisions of the Egyptian Constitution of 2014, which came into effect on 18 January 2014.

In particular, the Mission will assess compliance with the standards set out in the ICCPR as follows:

- The Right to Liberty and Security of Person (Article 9 ICCPR)
- The Right to a Fair Trial (Article 14)

Whilst the mission is to observe the entirety of Ms. Hegazy’s trial, given the excessive length of pre-trial detention that has taken place already, it was agreed by BHRC and EuroMed Rights that an interim report should be issued.

The Report conforms with the trial observation guidelines set out in the following publications:

- Trial Observation Manual for Criminal Proceedings – Practitioners Guide of the International Commission of Jurists, 2009.
- Guidelines for Human Rights Fact Finding Missions - A joint publication of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law of the Lund University and International Bar Association, September 2009.
- Amnesty International's Fair Trial Manual, Second Edition, 2014.
- Front Line Defenders’ trial observation handbook for human rights defenders, 2012.

Composition of the Delegation

EuroMed Rights invited members of the Bar Human Rights Committee of England and Wales (“BHRC”) to undertake this trial observation mission.

BHRC is the international human rights arm of the Bar of England and Wales. It is an independent body, distinct from the Bar Council of England and Wales, dedicated to promoting principles of justice and respect for fundamental human rights through the rule of law. Its membership is comprised of barristers practising at the Bar of England and Wales, legal academic and law students. BHRC’s Executive Committee members and general members offer their services pro bono, alongside their independent legal practices, teaching commitments and/or legal studies. BHRC also employs a full time coordinator.

BHRC aims to:

- Uphold the rule of law and internationally recognised human rights norms and standards;
- To support and protect practising lawyers, judges and human rights defenders who are threatened or oppressed in their work;
- To further interest in and knowledge of human rights and the laws relating to human rights both within and outside the legal profession;
- To advise, support and cooperate with other organisations and individuals;
- Working for the promotion and protection of human rights; and
- To advise the Bar Council of England and Wales in connection with international human rights issues.

As part of its mandate, BHRC undertakes legal observation missions to monitor proceedings where there are reasons to believe that the judiciary may not be independent, impartial and/or that the defendant might otherwise be denied the right to a fair trial.

The remit of BHRC extends to all countries of the world except for its own jurisdiction of England and Wales. This reflects the Committee’s need to maintain its role as an independent but legally qualified observer, critic and advisor.

BHRC usually publishes the names of its observers in accordance with standard practice. For the purposes of this interim report, the names of the two observers will not be published but were provided to the trial judge and are available upon request from BHRC. They will be published in the final report from this Mission.

The observers were greatly assisted by members of the Cairo Institute of Human Rights Studies, who provided Arabic-English interpretation at the Court hearing and some of the meetings. Additionally, they provided written translations of some of the documents in the case.

The report also draws on information provided in meetings and publicly available in news reports and statements.

There have been several hearings to date in Aya Hegazy’s case. Both BHRC observers have attended two of those hearings, on 13 February 2016 and 21 May 2016.

The Mission's Meetings

In Cairo the observers met with:

- Members of Aya Hegazy's family
- Members of Mohammed Fathallah's family
- Members of the legal team (current and past) including Taher Abolnaser and Samir Sameh, both of whom have previously represented Aya Hegazy:
- Civil society representatives from different NGOs in Cairo;
- Human rights and criminal defence lawyers in Cairo.

The observers also had the opportunity to discuss the present case and the situation in Egypt more generally with members of international delegations who have been following Aya Hegazy's trial, including a representative of the British Embassy in Cairo, and from the European Union Delegation to Egypt.

The observers also met with other human rights lawyers and defenders in Cairo. In recognition of the current climate in Egypt where, in particular, lawyers and human rights defenders appear to be being targeted and intimidated (see, for example, the BHRC Statement on Lawyers in Egypt dated 19 September 2016²), we have chosen to anonymise the names of the individuals with whom we have discussed both the specifics of this case, and the wider judicial climate in Egypt.

The observers were unable to meet with the Prosecutor or his team. No official request was made to meet the Prosecutor and no access to the Prosecutor was available at either observation because he did not come into the courtroom for the duration of each session attended.

The reader may benefit from a brief history of the recent political changes in Egypt to be found in Appendix 1.

² <http://www.barhumanrights.org.uk/bhrc-leads-international-outcry-over-treatment-of-egyptian-lawyers-and-human-rights-defenders/>

The Defendant: Aya Hegazy and the Belady Foundation



Aya Mohammed Nabil Ahmed Hegazy (also spelt Higazi and Hijazy), aged 27 at the time of arrest (in 2014), is a founder and director of the Belady Foundation (*Belady*), a civil society organisation (CSO).

Belady was founded by Aya Hegazy and her husband Mohamed Hassanein, working with a number of other volunteers. The association was established in 2013 with the purported intention of assisting street children. Its premises are located in downtown Cairo. According to its stated aims, the association sought to work with children to achieve a number of objectives: to educate; improve behaviour; help overcome addiction; and develop skills. The association also tried to help street children find their way home as they often came from broken families. When a child came into their *association Belady* would initiate contact with the families and invite them to visit the child on its premises. Its purpose was to rehabilitate and reintegrate street children back into society and where possible reunite them with their families.

The authors of this report understand that an official application had been lodged with the Ministry of Social Solidarity (MoSS) to form *Belady* as a registered association over sixty days before the arrests took place. In addition, all required paperwork, which allows *Belady* to legally operate as an organisation under formation until procedures are finalised, was filed. *Belady* was indeed operational and the foundation had been able to open a bank account in its name, which requires the MoSS' agreement in principle. It had started work with a group of street children and had been holding events in its effort to rehabilitate them.

In early May 2014, security forces from Abdeen Police Station entered *Belady* headquarters on the basis of an allegation from a private individual who had claimed that the foundation was holding his son without his consent – a charge that was later revealed to have been contested by other children who stated that the boy had sought to escape his father. The police arrested Mohamed Hassanein, Aya Hegazy, Sherif Talaat (a visual artist), Amira Farag (a volunteer) and a group of resident children.

The Charges against Aya Hegazy

On 8 September 2014, the Referral Order in *Case no. 4252/2014/Abdin*, entered as *Case no. 1106/2014/Central Cairo Plenary* was ordered by Judge Mahmoud Wael Shibl, Public Solicitor, Central Cairo Plenary Prosecution.

The charges are brought against:

1. Mohammed Hassanein Mustafa Fathallah (in custody);
2. Aya Hegazy (in custody);
3. Sherif Talaat Mohammed Mohammed (in custody)
4. Amira Farag Mohammed Qassem (in custody)
5. Ibrahim Abd Rabbih Abu al-Magd al-Salehi, aka Ashhad (in custody)
6. Karim Magdi Mahmoud Fathi (in custody)
7. Mohammed al-Sayyed Mohammed al-Sayyed (in custody)
8. An additional defendant³.

The charges, as unofficially translated, read as follows:

1. Founded, organised, and administered, with other unknown persons, a criminal group organised for the purposes of human trafficking. Namely, they exploited, gave shelter to, and met with natural persons, the victims—children Osama Muhsin Ali Abu al-Ela, Sayyed Galal Imbabi Bayoumi, Ali Said Badr, Mazen Gomaa Abd al-Nabi Nada, Ramadan Hassan Ramadan Mohammed Raslan, Khaled Talaat Abd al-Wahed Mohammed, Seif Salah Mohammed Abdullah, Mohammed Abd al-Ghani Abd al-Moneim, Khaled Wael Abdullah Abu Hureira, Salah Youssef Mohammed, Mohammed Khaled Mohammed, Ahmed Abdullah Mohammed, Hussein Abd al-Halim Khaled Mohammed, Suleiman Mohammed Suleiman al-Sayyed, Ahmed Shawkat Abd al-Aziz Radwan, Mustafa Ali Mhammed Ali, Ahmed Munir Radi Shalabi, Mohammed Ahmed al-Sayyed Mohammed, Ahmed Abu al-Ela Hassanein Farghali, and Mahmoud Kamal Abdullah Salem—and this with the use of force, violence and the threat thereof, abduction, fraud, and deception, exploiting their vulnerability and their need, and this with intent to exploit them sexually and in obscene materials and to use them to participate in demonstrations and collect donations while the victims were under the age of 18, as demonstrated in the interrogations.
2. Sexually assaulted [*hatk al-'ird*], with other unknown persons, victims Mazen Gomaa Abd al-Nabi Nada, Mohammed Abd al-Ghani Abd al-Moneim, Khaled Wael Abu Hureira, Salah Youssef Mohammed Mohammed Suleiman, Mohammed Khaled Mohammed Mahmoud Abd al-Ghani, Mustafa Ali Mohammed Ali, Ahmed Munir Radi Shalabi, Osama Muhsin Ali Abu al-Ela, Seif Salah Mohammed Abdullah, and this with the use of force and threat. Namely, they forced them to remove their clothing thereby exposing and revealing their genitals, took photographs of them, and forced them to engage in indecency and sex, while the victims were under the age of 18, as demonstrated in the interrogations.
3. Sexually exploited, with other unknown persons, all the aforementioned child victims. Namely, they committed the acts described in the first two counts, as demonstrated in the interrogations.
4. Abducted, with other unknown persons, using deception and coercion, male children under the age of 18, the victims named above. Namely, they seized on their poverty, need, and vulnerability with promises of refuge, food, and clothing, thereby luring them to an unexposed

³ We have been asked not to identify the name of this defendant within the body of this report.

place, and they detained them against their will in an apartment prepared for this purpose, as demonstrated in the interrogations.

5. Detained, with other unknown persons, all the aforementioned victims without an order from a competent judge and in conditions not legally authorized. Namely, they lured them to an apartment prepared for this purpose and they tortured some of them physically by beating them to prevent them from fleeing and forcing them to engage in indecency and sex, as demonstrated in the interrogations.
6. Prepared, with other unknown persons, and possessed obscene materials involving children related to sexual exploitation, using the computer to incite them to depravity and compel them to commit crimes and unlawful acts, as demonstrated in the interrogations.
7. Established, with other unknown persons, an entity titled the Belady Association, which operated as an association without following proper legal procedures, as demonstrated in the interrogations.

There are 2 additional charges for defendants 5-8, relating to allegations that they compelled witnesses to give false statements in connection with the crime of human trafficking.

The defendants are charged under the following laws:

- Articles 1(1), 2, 3, 4, 5, 6(1), (6) and 7 of Law 64/2010 on the suppression of human trafficking;
- Articles 268(1) and 2, 280, 282, 288, and 291(1) and (2) of the Penal Code;
- Articles 2(1), 116(bis), and 116(bis)(a) of Law 12/1996, amended by Law 126/2008 on the child;
- Article 76(2)(a) of Law 84/2002 on civic associations⁴.

⁴ There may be further Articles pursuant to which the charges have been laid but it has not been possible to clarify them with certainty at the point of finalising this report.

The Case

The Nature of the Prosecution Case

The prosecution case has yet to be heard in open court. Insofar as the defence lawyers have understood the case against Aya Hegazy, it is said to be based on statements made by three children, the man who alleges that his son had been detained by the Belady Foundation, having made the complaint to the police, and the policemen who attended the Belady Foundation premises and subsequently arrested Ms. Hegazy and some of the other defendants. There is further alleged evidence on computer hard drives, which will form the subject matter of the technical committee's report, due in November 2016.

The Nature of the Defence Case

The defence case has yet to be heard in open court. The charges are contested strongly by the defendants. The defendants' lawyers say that the statements are false, the charges fabricated and that there is no evidence to support the case being brought against them. The defence maintain that the case against its clients is entirely political.

The Court Room and Conduct of the Presiding Judge

All the hearings in Aya Hegazy's case have so far taken place at Abdeen Court in Cairo (the Court).

Court security controls the entrances into the Court building and into the courtroom. Permission to attend the hearings was requested by the Mission in writing on both occasions from the judge. This was handed to the judge in his chambers by the Court clerk. At neither hearing did the judge enter the courtroom, both times conducting all cases from his chambers. The judge extended no communication to the observers before, during or after either hearing.

At the front of the room, there is an elevated bench where the court clerks sit and where the judge is supposed to sit. To the left is the metal cage where defendants are held. During our visits, the defendants were taken out of the cage by security forces to the judge's chambers. Whilst in the cages, their lawyers were not permitted to talk to them and were routinely ushered away by the security guards and asked to sit on one of the benches.

The court has approximately 10 rows of benches where lawyers, family members, the general public, observers and other interested parties sit. The defence lawyers enter from the same entrance as the general public and the defendants. There is no provision made at all for private consultations between the lawyers and their clients.

The prosecutor did not come into open court at either of the hearings observed. It is our understanding that the prosecutor sits with the judge in their chambers before, during and after each session.

The Proceedings Before the Court

There have been several hearings to date in Aya Hegazy's case. The observers attended two of these hearings on 13 February 2016 and 21 May 2016. Before considering those hearings that were observed a chronology of all the hearings that have taken place to date is set out below.

	Date of Hearing	Outcome	EuroMed Rights Observers	EU/international observers present
1	16 March 2015 ⁵	Defence lawyers asked to hear and review attesting evidence, and for conditional release on bail due to lack of cause. Each application was refused without explanation.	NO	Unknown
2	18 May 2015	Although witnesses and exhibits were available, the court decided to adjourn again to 16 November 2015 without hearing witnesses or opening exhibits. No explanation was provided	NO	Unknown
3	16 November 2015	Prosecution and defence witnesses were called. The judge then adjourned the case. He based this decision on the absence of the defendants in the courtroom at the scheduled time of the trial (10:00 am), despite the fact that they did eventually arrive at 11:30 am due to delays on the part of the prison authorities.	NO	Unknown
4	13 February 2016	Adjournment until 17th Feb. No reasons or explanation was provided. It was said that the confiscated material would be reviewed at the next hearing, where the required equipment would be made available in court to enable the viewing of the Prosecutor's electronic evidence in the case. No explanation was provided for why it was not in situ on that date. No opportunity was given to the defence lawyers to approach the judge or make any bail application, or make any representations at all.	YES	At this hearing there were observers from EU Delegation to Egypt Office, the French Embassy and the Embassy of the USA.
5	17 February 2016	Adjourned until 23 March 2016 due to technical issues; it transpired that the court technician was unable to turn on the computer and laptops.	NO	Yes
6	23 March 2016	Referral from the 17 th of Feb. Hearing adjourned to 21 st May due to the wrong technical committee having been constituted. No explanation was provided.	NO	Yes
7	21 May 2016	Correct technical committee was sworn in and the hearing again adjourned for 6 months to 19 November when the committee is due to present its report. (Two desktops and two laptops had apparently been seized). Six-month adjournment. Request for conditional release denied without explanation. Lawyers heard in judges' chambers in presence of Aya and Amira and counsel. None of the international observers were permitted into the chamber.	YES	At this hearing, there were observers from EU Delegation to Egypt Office, the French Embassy and the Embassy of the USA.

⁵ We have been unable to ascertain with certainty whether this hearing took place on 15 or 16 March 2015 at the point of finalising this report.

At the date of this report, Aya Hegazy has been in pre-trial detention for 30 months.

What follows are further details on the two hearings that the Mission observed.

The 13 February 2016 Hearing

On 13 February 2016, the observers attended the Abdeen Court in Downtown Cairo. No specific time was given for the matter against Aya Hegazy to be heard. We therefore presented with our interpreter at 9.30am in time for a session that would begin ordinarily at 10am, and took seats in the courtroom.

At the outset, we sought to present a typed letter, through our interpreter, explaining our status to the judge as British lawyers in attendance to observe the process. The letter was passed to him by one of the clerks, since the Judge remained in private session in Chambers for the entirety of the morning.

At this session, there were observers from the EU Delegation to Egypt, the French Embassy, and the USA Embassy. There were also other lawyers present with whom we were able to discuss specifics relating to the way in which Egyptian criminal law and procedure operated.

The Judge was Yahia Rafat.

At no point did the Judge emerge from his chambers into open court. Nor did we have the opportunity to speak with the Prosecutor, because he was sitting with the Judge inside chambers in an apparent closed private session.

We had the opportunity to speak with Samir Sameh, who represented Aya Hegazy in the initial stages of the proceedings. Mr. Sameh confirmed that he had made a bail application in respect of Ms. Hegazy at each of the detention renewals. These are made after arrest, at the four days mark, 15, 15, 30, 45 days and then at each of the procedural hearings. Mr. Sameh confirmed that there had been three hearings in March, May and November 2015. Mr. Abolnasr was instructed for the last of those hearings and was retained by Ms. Hegazy on the date of this hearing.

Mr. Abolnasr confirmed that the first interrogation of Ms. Hegazy took place on 3rd May 2014. Despite repeated applications for bail, they have been consistently refused. The Judge has neither provided either oral or written reasons for the refusal of bail. Mr. Abolnasr stated that the legal team had been told by the clerks to the court (verbally rather than in writing) that bail had been refused for two reasons. Firstly, the possibility of flight risk, noting that Aya is a US citizen. Secondly, there were alleged concerns of witness interference. These have not been substantiated or corroborated.

Aya Hegazy and the other defendants were brought by prison transportation. They arrived at Abdeen Court soon after 10am. They were placed in the defendants' cage within the courtroom with other defendants whose cases were waiting to be heard. Aya's case, as that of her Belady colleagues and her husband, did not have their cases called until about 11.45am.

Given the non-appearance of the Judge in the public courtroom, the lawyers and observers all made their way to the front of the courtroom in order to seek access to the Judge's Chambers so that they could attend what appeared to be a closed, private hearing. No reason was given by the Judge to the lawyers or observers why Ms. Hegazy's case would take place in a closed session. An instruction was then issued by the clerks in Arabic that the private session would not take place. No further information was provided at this stage.

At that point we noted that, quite suddenly, the atmosphere in the courtroom became very charged. Security guards and the clerks tried to remove people from the courtroom, including us. We indicated, through our interpreter, that we were not willing to leave without an order from the Judge. The security guards tried to prevent anybody present from speaking with the defendants who were being

held in the cage, which until that point had been acceptable. Most significantly, the defendants' lawyers were also prevented from speaking to their clients.

It is our understanding that there is no place or time made available in court for lawyers to speak or take instructions from their clients. There was no right to a legal consultation between lawyer and defendant at court. It appeared, and was confirmed by the lawyers, that the best opportunity was through some snatched words through the cage barriers, surrounded by other defendants and the general noise and crowd within the cage and courtroom up until the point when the security guards required the lawyers to sit down on the benches.

It was further confirmed to us by the lawyers that no provision was made in prison for private consultations or communications, which would take place in open waiting rooms.

At about 12.30pm, the Judge communicated through his clerk that he would make the hearing public and it would take place at the end of the morning. Our interpreter explained to us that the Judge had indicated (through the clerks) that the Prosecutor and court would then consider the confiscated material. Shortly afterwards, a box with confiscated laptops and a hard drive appeared on the judge's bench. However, no computer screen was attached or obviously available and thus we queried how the material would be viewed.

It was explained to us by the Egyptian lawyers present that the usual practice was for confiscated items to be sealed with wax. It is our understanding, from the legal team, that the personal apartment of Aya Hegazy had been sealed after her arrest, but that the Foundation premises had not been sealed.

Both observers managed to speak to Ms. Hegazy very briefly because the guards were endeavouring to keep everyone away from the cage which restrained all defendants. She indicated that she is only allowed to meet her husband when they are together in the defendant's cage during court sessions⁶. She indicated that she was being treated well in prison but that there has been some issues communicating with her husband. At the time of finalising this report, we understand this has now been resolved.

From appearance alone, they both seemed physically well and in good spirits, they were not separated or handcuffed and were holding hands. Ms. Hegazy was veiled and we understood from the lawyers with whom we spoke in court that it was necessary, as a practical measure, to be veiled in prison in order to ensure no harassment occurred. It is our understanding that she does not usually wear hijab.

Mr. Abolnaser had sent a junior member of his chambers to represent Ms. Hegazy at the hearing, since the time given by the court presented him with a clash of professional commitments. Once he did arrive at about 12.45pm, the security guards prevented him from communicating with his client in the cage.

At about 1.45pm, the clerk called the prosecution witnesses. Nobody was present. The prosecution gave no explanation for their failure to attend to the defence and it did not appear that an explanation was required by the Judge.

At around 2pm, the clerk announced that the matter had been adjourned until 17 February 2016 (with no specific time set). The Judge failed to appear in open court. No reasons or explanation were provided for the adjournment, or for the failure to view the confiscated material. No opportunity was afforded to the defence lawyers to approach the Judge or make any bail application, or make any representations at all.

We spoke with a number of international delegates and lawyers who were present at the hearing and subsequently, to discuss our concerns about the manner in which Aya's case was proceeding.

⁶ We add our understanding that Mohammed filed several requests to visit his wife (as is his right, by law) but they were all refused until earlier this month, October 2016, when he was permitted to visit his wife.

The 17 February 2016 Hearing

On 14 February we left Cairo. We requested our interpreter and an observer from the EU Delegation to Cairo, who was present at both hearings, for an update on what had happened at the hearing on 17 February 2016. We also followed news updates in public statements that were made available by others following the hearing.

We learned that the hearing had been postponed again until March 23 2016 because a court-appointed technician had been unable to turn on a laptop that was said to contain key evidence in the case by the Prosecution. The ordinary sequence of events, as confirmed by Mr. Abolnahr, is that the confiscated items would be viewed first, followed by hearing the prosecution witnesses.

At the hearing on 23 March, we understood the Court intended to assemble a committee to prepare a report on the content of the confiscated items, which then would be presented in a further schedule on 20 April 2016.

Mr. Abolnahr informed us that he had requested conditional release for his client, and that request had been documented but refused implicitly by the Judge's order that the defendants remain in detention. It appears neither oral nor written reasons were provided for the refusal.

Mr. Abolnahr also confirmed that prosecution witnesses were present on this occasion, namely two police officers and a child whose name was Usama.

All defendants' lawyers were present.

The 17 May 2016 Hearing

On 17 May 2016, the observers again attended the Abdeen Court in downtown Cairo. As previously, no specific time was given for the matter against Aya Hegazy to be heard. We therefore presented with our interpreter at 10am in time for the hearing to begin and took seats in the courtroom. At court there were observers from the EU Delegation to Egypt, the French Embassy, and the USA Embassy.

As previously, and at the outset, we sought to present a typed letter to the Judge (through our interpreter) explaining our status as British lawyers in attendance to observe the process. The letter was passed to the Judge by one of the clerks, since the Judge again remained in private – apparently in session in Chambers for the entirety of the morning.

By the date of this hearing, Mr. Abolnahr was no longer retained by Ms. Hegazy and her family. However, due to court commitments surrounding the session, we were unable to speak to the new lawyer. We did, however, speak again with Mr. Abolnahr – prior to the hearing – and other lawyers in order to gain a clear picture of the interim circumstances and facts.

The hearing was again heard by the same Judge in Chambers. Neither he nor the prosecution emerged into the public courtroom.

The observers again attempted to gain entry to the closed session through the presentation of their letter and through their interpreters, but neither the observers nor any of the international observer missions were permitted entry into the closed session.

It is our understanding through the lawyers and interpreter present in Court with us that the three members of the technical committee were sworn into their role and formally established.

The hearing was then adjourned until 19 November 2016 for the report to be produced.

An application for conditional bail as made, which was refused. As previously, no written or oral reasons were provided.

On this occasion, neither of the observers were able to speak with Ms. Hegazy since she was only briefly kept in the courtroom cage before being taken down to the courtroom cells where it was not possible to visit her. From both her outward appearance, and upon talking to her mother and sister afterwards outside of the hearing, Ms. Hegazy's spirits were low and she was upset by the continued delays in proceedings. The family were very concerned that no progress was being made in court, that the adjournments were each becoming longer and that the delays appeared to be perfunctory.

International Trial Rights

The applicable legal standards are found in the International Covenant on Civil and Political Rights 1966 (ICCPR), chiefly Article 9 and 14, which are set out below.

They are followed by the relevant rights as set out in the Egyptian Constitution of 2014 and relevant sections of the African Charter, which Egypt has ratified⁷.

Following those legal provisions is a short analysis of the relevant international law (including summaries quoted from the Trial Observation Manual for Criminal Proceedings – Practitioners’ Guide of the International Commission of Jurists, 2009), and a consideration of how each provision applies to the relevant facts.

a. RIGHT TO LIBERTY

Article 9, ICCPR

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 71, Egyptian Constitution

Any person arrested or detained shall be informed forthwith of the reasons for his arrest or his detention. He shall have the right to communicate with whoever he sees fit and inform them of what has taken place and to ask for help in the way organised by law. He must be notified, as soon as possible, with the charges directed against him. Any person may lodge a complaint to the Courts against any measure taken to restrict his personal freedom. The Law shall regulate the right of complaint in a manner ensuring a decision regarding it within a definite period or else release shall be imperative.”

African Charter

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

⁷ Where the relevant provision of the Egyptian Constitution has not been provided, it is because we have been unable to confirm a translation at the time of drafting this interim report and it will be set out in the final trial monitoring report.

Article 7

Every individual shall have the right to have his cause heard. This comprises:

1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
2. The right to be presumed innocent until proved guilty by a competent court or tribunal;
3. The right to defence, including the right to be defended by counsel of his choice;
4. The right to be tried within a reasonable time by an impartial court or tribunal.

The provisions of the African Charter are supplemented by the **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** which require:

M. (1)

- (a) States shall ensure that the right of everyone on its territory and under its jurisdiction to liberty and security of person is respected.
- (b) States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.
- (c) Each State shall establish rules under its national law indicating those officials authorised to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.
- (d) Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.
- (e) Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release may be subject to certain conditions or guarantees, including the payment of bail.

Summary of International legal principles

Everyone detained shall be entitled to trial within “a reasonable time” or to release pending trial. Pre-trial detention should not be the general rule and it should be used in criminal proceedings only where necessary and as a last resort. It should be used for the shortest possible time period, when required to meet the needs of justice, or of the investigation of the alleged offence or in order to protect society and the victim. Pre-trial detention should be the exception and bail should be granted, except in situations where it is likely that the accused would abscond, destroy evidence, influence witnesses or flee from the jurisdiction of the State.⁸ However, even in such circumstances, the risk of such dangers must be properly assessed and explained by the court without resorting to blanket statements.

Further, the court must assess properly what other measures short of detention could address any of the risks posed. “Arbitrariness” has been defined to include an element of inappropriateness, injustice, lack of predictability and lack of due process of law. Where trial does not proceed in a reasonable time, continuing detention must be reviewed by a judge and assessed in terms of its length and continuing necessity.

Further, the right to a fair trial incorporates a reasoned decision from the judge, which must be provided in respect of any refusal to release an individual from detention. There must also be a

⁸ Human Rights Committee, Views of 2 April 1997, *Michael and Brian Hill v. Spain*, Communication No. 526/1993, para. 12.3.

right to appeal to a higher judicial or competent authority where an application for release is refused. Detention must not be arbitrary.

The right to challenge the lawfulness of detention before a tribunal, court or judge is a non-derogable right.⁹ It is crucial for protecting the right to liberty and preventing arbitrary detention.

FACTS

Aya Hegazy has been held in pre-trial detention since 2 May 2014. Her detention, at the time of writing, exceeds 30 months. Her detention is renewed at each adjourned hearing. When lawyers have had the opportunity to request her release (including conditional release), it has been denied through the renewal of her detention. As far as we understand, no reason for detention has ever been provided by the judge either orally or in writing. The length of the delays between each hearing has grown increasingly, such that the current delay between procedural hearings is six months.

FINDINGS

International law provides that if a trial cannot be achieved in a reasonable timeframe, defendants held in pre-trial detention should be released unless their continued detention can be justified according to key criteria.

The observers find that Aya Hegazy's right to liberty under Article 9 ICCPR has been violated.

Aya Hegazy has been detained for a period now exceeding 30 months. No meaningful assessment appears to have been conducted as to any risk that may justify detention as a necessary last resort since no evidence has been provided to the court to justify any risk of absconding, nor any measures sought to guarantee Aya Hegazy's presence in court. No supporting evidence has been provided by the prosecutor that conditional release would endanger the proceedings. No reasons whatsoever have been provided for the continued detention or the refusal to release.

Despite such a lengthy detention, there appears to be little imminent prospect of a trial since the next hearing listed in November 2016 remains a procedural hearing when the Technical Committee is expected to report back to the Court. The trial has not been listed.

The observers find that Aya Hegazy's right to be tried within a reasonable time, or to release, has been breached.

As far as we understand, there is no right of appeal against the refusal to release a defendant from pre-trial detention. There is therefore no effective domestic remedy to challenge obvious procedural flaws in her continued detention.

It is necessary to note that there is a significant systemic background to this particular case. A recent report from the Egyptian Initiative for Personal Rights (EIPR)¹⁰ records that at least 1464 individuals

⁹ See, *inter alia*: Human Rights Committee, *General Comment No. 29*, paras. 14 and 16 and *Concluding Observations of the Human Rights Committee on Albania*, CCPR/CO/82/ALB, 2 December 2004, para. 9; Inter-American Court of Human Rights, *Advisory Opinion OC-8/87 of 30 January 1987, "Habeas corpus in emergency situations"*, Series A No. 8, and *Advisory Opinion OC-9/87 of 6 October 1987, "Judicial guarantees in states of emergency"*, Series A No. 9; Article 27 of the *American Convention on Human Rights*; Articles 4 and 14 of the *Arab Charter on Human Rights*; Article 17.2(f) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; Principle 32 of *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; Principle M (5)(e) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; Article 9 of the *Declaration on the Protection of All Persons from Enforced Disappearances* and Resolution 1992/35 of the former UN Commission on Human Rights, entitled *habeas corpus*.

¹⁰ Detention Without End, 10 May 2016 – EIPR:

http://eipr.org/sites/default/files/reports/pdf/endless_imprisonment_0.pdf

The authors also note a report by the Robert Kennedy Centre of February 2016: *The Problem of Punitive Pre-trial Detention in Egypt*, which asserts: "Since June 2013, Egyptian authorities have increasingly used pretrial detention as a punitive measure to silence activists, journalists, and peaceful political dissidents. The number of pretrial detainees in Egypt has exponentially increased and the periods of pretrial detention have exceeded international legal standards and even domestic maximums."

(and probably many more) are currently being held in pre-trial detention in excess of the legal limits. The report asserts that the State is using pre-trial detention as a political and punitive tool. In recognition of the lack of appeal rights, EIPR has submitted a request to the Prime Minister, the speaker of the House of Representatives, and the chair of the Judicial Bodies Council, urging any or all of them to formally request an interpretation from the Supreme Constitutional Court regarding courts' divergent interpretations of Articles 143 of the Code of Criminal Procedure which sets a maximum limit on pre-trial detention of 18 months to 2 years in criminal cases, and another provision, Article 380, which sets no limit.

We also note that there are particular concerns relating to the way in which Aya Hegazy has been treated in pre-trial detention. She has been banned from the prison library, her writing material has been confiscated and there have been purposeful attempts by the authorities to prevent communication between her and her husband. As far as we understand, no reasons for these restrictions have been provided. However, the timing of these restrictions coincided with the international publicity associated with her case and therefore they appear to be both punitive and politically motivated.

Accordingly, and noting both the individual features of this case as well as the background evidence which suggests a widespread use of excessive and politically-motivated pre-trial detention, the continued pre-trial detention of Ms. Hegazy violates her inherent right to liberty, and is in breach of Article 9 ICCPR which requires the use of pre-trial detention as an instrument of last resort and only by reason of necessity. In these circumstances, and also noting the aspects of the criminal proceedings which are considered below in relation to Article 14 ICCPR, Ms. Hegazy's detention now appears to be arbitrary and punitive, and the impression created by the serious failings identified above and below is that her continuing detention may be politically motivated.

b. THE RIGHT TO A PUBLIC HEARING AND THE PRESUMPTION OF INNOCENCE

Article 14 ICCPR

- (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
- (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 169, Egyptian Constitution

The sessions of Courts shall be public, unless a Court decides to hold them in camera for considerations of public order or morality. In all cases, judgments shall be pronounced in public sessions."

Article 67, Egyptian Constitution

The accused is innocent until proven guilty in a fair court of law, which provides guarantees for him to defend himself.

Summary of International legal principles

All trials in criminal matters must in principle be conducted orally and publicly. Having a public hearing ensures transparency of proceedings and thus provides an important safeguard for the interest of the individual and society at large.¹¹ This includes that adequate facilities should be provided to enable interested members of the public to attend hearings and trials; and all hearings should be open to the general public and not, for instance, be limited to a particular category of people.¹² Only in exceptional circumstances, courts and judges have the power to exclude the public.

The right to be presumed innocent until proven guilty according to law is an absolute right, which can never be derogated from, restricted or limited¹³.

The presumption of innocence: i. places the burden of proof on the prosecution; ii. guarantees that guilt cannot be presumed unless the charge has been proven beyond reasonable doubt¹⁴; iii. ensures that the accused has the benefit of doubt; and iv. requires persons accused of an offence to be treated in accordance with this principle.

Persons undergoing trial, whether or not in detention, should be treated as innocent as long as their guilt has not been established by a court in accordance with the law. Normally defendants should not be shackled or caged during trial or presented to the court in any other way that gives the impression they may be dangerous criminals. They should also not appear in the courtroom in prison uniform but have the right to wear civilian clothes.

[Trial Observation Manual for Criminal Proceedings – Practitioners Guide of the International Commission of Jurists, 2009]

FACTS

Hearings take place in Abdeen Court. As far as access to the courtroom is concerned, it is open and accessible to the public subject to approval by the court security. However, access was not straightforward since our interpreter had to negotiate our entry with the court security. Undoubtedly, this may have been a routine security check. However, during the first hearing we attended in February 2016, there were several attempts to remove us from the court room by security guards. We insisted that our removal must be ordered by the judge; consequently, we were allowed to remain.

In terms of the public nature of the hearings, at neither hearing did the judge enter the courtroom. He remained in his chambers for the duration of the session. We did not see the prosecutor enter the courtroom at any stage. It was our understanding that the prosecutor was already present before the hearing began at 10am, and we did not see him leave either. Defendants were taken into the judge's chambers by the court security. Only the defence lawyers were allowed to enter the chambers; none of the international observers were allowed entry at either of the hearings. No reasons were provided as to why the hearing was held in the judge's private chambers and not in the public courtroom.

¹¹ Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 28. See also: European Court of Human Rights, Judgment of 8 December 1983, *Axen v. Germany*, Application No. 8273/78, para. 25; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 172.

¹² Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 29.

¹³ Human Rights Committee, *General Comment No. 29*, para. 11, and *General Comment No. 32*, para. 6; InterAmerican Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 247, 253 and 261; and Inter-American Commission on Human Rights, Report No. 49/00 of 13 April 2000, Case No. 11.182, Rodolfo Gerbert Asensios Lindo et al. (Peru), para. 86.

¹⁴ Human Rights Committee, Views of 24 July 2006, Francisco Juan Larrañaga v. The Philippines, Communication No. 1421/2005, para. 7.4.

Indeed, in the 17 February hearing, it was our understanding that the matter would be conducted in open court. We understand that this information was conveyed accordingly to the defendants and their lawyers, but that the Judge changed his mind during the session.

The commotion seemingly caused to the court clerks and security guards by the presence of international observers, and the sudden decision to adjourn the case to a date three days ahead for no discernible reason, gave the impression that that the presence of international observers (including those from the US and French embassies as well as from the EU Mission) may have been the reason for the judge's change of heart. If that was not the reason, no other (or any) explanation was provided either to the court or to the defendants' lawyers who were at court as to why the hearing was conducted behind closed doors

Insofar as the prosecutor's role is concerned, at both sessions of the sessions at which we were present he remained inside with the judge throughout. He therefore appeared to have privileged access to the judge before, during and after the session whereas the defence lawyers were required to wait outside in the public courtroom.

FINDING

The observers find that Aya Hegazy has not been given a public hearing in violation of Article 14(1) ICCPR and Article 169 of the Egyptian Constitution. As set out above, both hearings attended by the observers were held in the judge's private chambers and not in the public courtroom, with no reasons given. In addition, the observers find that there has been an interference with Ms. Hegazy's right to be presumed innocent.

Ms. Hegazy has been denied open and public hearings. In the absence of any reasoning being provided by the judge, none of the exceptions provided by Article 14(1) to the right to a public hearing apply. Nor do the observers consider that they would have been applicable or justifiable, in any event, noting that each of the hearings previously was conducted in open court. On the face of it, it appears that the reason for open justice to be denied may have been to prevent publicity before international observers and missions.

The violation of Ms Hegazy's Article 14(1) right sits alongside a further violation of her Article 14(2) right to the presumption of innocence. She, as the other defendants at proceedings in the courtroom, are caged for the duration of their time in court, other than when they are called before the judge. This, together with the nature of the charges (relating to child pornography) and the duration of her pre-trial detention, negatively impacts on her character and also serves to erode the public's perception of her innocence.¹⁵

¹⁵ By way of example: over recent years the ECtHR's acceptance of the metal cage in any circumstance has narrowed considerably. Last year, in *Svinarenko and Slyadnev v. Russia* App. nos. 32541/08 and 43441/08, (17 July 2014), the Court finally decided that under no circumstances could the use of the cage be justified in criminal proceedings:

... holding a person in a metal cage during a trial constitutes in itself – having regard to its objectively degrading nature which is incompatible with the standards of civilised behaviour that are the hallmark of a democratic society – an affront to human dignity in breach of Article 3 [138].

In the case of *Yaroslav Belousov v Russia*, App. nos. 2653/13 and 60980/14 (4 October 2016), the Court reiterated this finding but also extended its reasoning to find a violation of article 6 ECHR. The Court held that:

...it is incumbent on the domestic courts to choose the most appropriate security arrangement for a given case, taking into account the interests of administration of justice, the appearance of the proceedings as fair, and the presumption of innocence; they must at the same time secure the rights of the accused to participate effectively in the proceedings and to receive practical and effective legal assistance [152].

3. RIGHT TO PREPARE DEFENCE

Article 14(b) ICCPR

To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

Summary of International legal principles

The right of the accused to have adequate facilities to prepare their defence requires that they should have the ability to communicate, consult with and receive visits from their lawyer without interference or censorship and in full confidentiality. ¹⁶ Interviews between detainees and their lawyers may be conducted within sight, but not within the hearing, of law enforcement officials.¹⁷

[Trial Observation Manual for Criminal Proceedings – Practitioners Guide of the International Commission of Jurists, 2009]

FACTS

Our understanding is that Aya Hegazy has never been able to communicate with her lawyer in private. All visits by her lawyer take place during general visitation times in the same room as other visits with prison guards patrolling the room. Nor do facilities exist at court for defendants to meet with their lawyer. The only opportunity for them to communicate and consult is if the lawyer can approach the cage where all defendants are held and communicate with their client before being ushered away by the court security.

We note that this issue is not unique to Ms. Hegazy's case and is a systemic issue within the Egyptian criminal justice system.

FINDING

The observers find that there has been a violation of Ms. Hegazy's right to prepare a defence and to communicate with her lawyer. The extremely limited right to communicate with counsel in circumstances where they are overheard by law enforcement officials, and thus without confidentiality, interferes with Aya Hegazy's rights pursuant to Article 14(b) ICCPR. Recognising that this is a systemic issue within the Egyptian criminal justice system, we also recommend that steps be taken urgently by the Egyptian government to address this.

4. RIGHT TO TIMELY TRIAL

Article 14(3)(c) ICCPR

To be tried without undue delay.

Summary of International legal principles

The right of the accused to be tried without undue delay means that he or she must be tried within a reasonable time. The authorities must ensure that the entire criminal proceedings, from the pre-trial investigation stages until the final appeal, are completed within a reasonable time. The time period considered in determining whether this right has been respected begins from the time of

¹⁶ Human Rights Committee, *General Comment No. 32*, para. 34; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 18 (3) and the *UN Basic Principles on the Role of Lawyers*, Principle 8.

¹⁷ Principle 18 (4) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

the very first step in the proceedings (for example, and depending on the circumstances, when the suspect is arrested, when he or she is informed that charges have been brought against them or when they are notified that they are going to be tried) and ends when all possible review and appeal mechanisms have been exhausted and final judgment is pronounced.¹⁸

Anyone arrested or detained on a criminal charge has the right to be tried within a reasonable time and without undue delay, or to be released pending trial.¹⁹ Both prolonged detention without trial and prolonged detention while awaiting trial that have been unduly delayed are prohibited by international law and constitute arbitrary detention. In cases involving serious offences such as murder, and where the accused is denied bail by the court, the accused must be tried as quickly as possible.²⁰

In cases in which the court has refused to grant the defendants bail, the latter must be tried as quickly as possible.²¹

[Trial Observation Manual for Criminal Proceedings – Practitioners Guide of the International Commission of Jurists, 2009]

FACTS

Despite the fact that Aya Hegazy has been held in pre-trial detention for 2 years and 6 months, the trial has yet to begin. There has been excessive delay. None of the adjournments have been required as a result of Ms. Hegazy's or her legal team's conduct.

Some of the adjournments have been the result of bad case management by the prosecutor, the court or both: prosecution witnesses have not been in attendance, prosecution evidence has not been ready to be presented to the court, or the wrong committee has been constituted by the court. The total period of adjournments amounts to approximately 20 months. We also note that the adjournments are for an average of four months each. The latest adjournment was for six months, which is manifestly excessive given the delays already incurred. No reasons were provided as to why a further delay of six months was necessary, proportionate or appropriate in the circumstances. At the time of writing, there is no indication as to whether a trial date will be set.

FINDING

The observers find that there has been a violation of Aya Hegazy's right to a timely trial as provided by Article 14(3)(c) ICCPR. None of the delays can be attributed to the defendant or defence lawyers.

5. RIGHT TO LEGAL ASSISTANCE

Article 14(3)(d) ICCPR

To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

¹⁸ Human Rights Committee: *General Comment No. 13*, para. 10; Inter-American Court of Human Rights, Judgment of 12 November 1997, *Suárez Rosero v. Ecuador*, Series C No. 35 paras. 70-72.

¹⁹ See, Article 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and Human Rights Committee, Views of 4 April 1995, *Leroy Shalto v. Trinidad and Tobago*, Communication No. 447/1991, para. 7.2.

²⁰ See, *inter alia*, Human Rights Committee: *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 35; Views of 19 July 1995, *Isidora Barroso on behalf of her nephew, Mario Abel del Cid Gomez, v. Panama*, Communication No. 473/1991, para. 8.5; and Views of 16 July 2001, *Sandy Sextus v. Trinidad and Tobago*, Communication No. 818/1998, para. 7.2.

²¹ Human Rights Committee: *General Comment No. 32*, para. 35.

FACTS & FINDINGS

Aya Hegazy has had legal representation during all hearings. Technically, therefore, there has been no breach of this provision.

However, although legal representation has been permitted, the role of the lawyer has been significantly undermined by the prohibition on confidential communication, limited (if any) communication at court, and the lack of disclosure. These have a significant impact on Ms. Hegazy's right and ability to be able to prepare a proper defence, and therefore on her right to a fair trial more generally.

Conclusion

For the reasons above the observers find that the pre-trial detention and criminal proceedings to which Aya Hegazy has been subjected to date represent serious violations of her rights pursuant to Articles 9 and 14 ICCPR.

We regard the decisions to remand the Defendant into custody at various stages during the proceedings as unreasoned and arbitrary. These decisions have impacted severely upon Ms. Hegazy's right to a fair trial, and they breach her absolute right to a presumption of innocence.

We find that there has been a violation of the following rights:

1. Article 9 ICCPR: Right to liberty, in relation to length and the lack of evidential basis and absence of judicial reasoning.
2. Article 14(1) ICCPR: Right to a public hearing, by reason of the fact that the hearings were held in the judge's private chambers and not in the public courtroom with no reasons provided.
3. Article 14(2) ICCPR: Right to be presumed innocent, due to the length of pre-trial detention.
4. Article 14(3)(b) ICCPR: Right to prepare her defence, in terms of both inadequate facilities and the inability to communicate confidentially with her lawyers.
5. Article 14 (3)(c) ICCPR: Right to a trial without undue delay, given that the excessive adjournments are not attributable to the defendant and are for the most part unjustifiably long.

There are many disturbing features in Ms. Hegazy's case to date:

1. The unreasonable length of the pre-trial detention and total failure to give reasons for this;
2. the increasingly lengthy delay between procedural hearings (set without any notable or reasoned consideration of impact upon Ms. Hegazy or upon the consequences for the fairness of any impending trial);
3. the failure to produce any evidence before the court after such a lengthy detention coupled with tolerance of incompetent failures to produce that evidence at a scheduled hearing;
4. the unreasoned decision to hold recent procedural hearings in closed session;
5. the failure to permit international observers into that closed session, as well as the failure to list this matter for trial in an expeditious manner all suggest that the ongoing detention is punitive and may be being used as a political tool.

The above represent violations of Egypt's international obligations towards Ms. Hegazy.

All of these very serious breaches lead these observers to the conclusion that Aya Hegazy is being denied her liberty arbitrarily in violation of international law.

Moreover, the tardy and dismissive conduct of the matter before the courts to date substantially prejudices the presumption of innocence to which Ms. Hegazy is entitled by both domestic and international law. This has disturbing implications for the fairness of any future trial.

Recommendations

We make the following recommendations that:

1. Ms. Hegazy is promptly released, unless substantial admissible evidence can be provided to show that her continued pre-trial detention is justifiable and necessary;
2. All future hearings are held in public, unless proper and justifiable reasons are provided for them to be held in private;
3. Ms. Hegazy is provided with the opportunity to communicate confidentially with her lawyer so as to enable her to prepare her defence;
4. That the hearing dates are now expedited, such that no further lengthy adjournments are permitted;
5. Such evidence as the Prosecutor relies upon be provided to both Ms. Hegazy and her lawyers, as well as to the court, such that if there is sufficient evidence to justify any trial, it be listed at the earliest possible date.

The authors of this report also wish to record that many of the issues identified in this interim report are not unique to the case of Aya Hegazy, and instead have become systemic within the Egyptian criminal justice system.

The observers have spoken to many lawyers, activists and other international observers to understand the way in which the Egyptian criminal justice system operates, and have themselves observed in part fundamental flaws in the system, such as the use of cages to hold defendants in court, which demean the integrity of defendants and interfere with the presumption of innocence, or the lack of provision for defendants to have confidential communications with their lawyers, both in detention and at court.

In addition to the individual measures relating to Ms. Hegazy's case, the Egyptian authorities urgently must address these systemic problems to ensure a criminal justice system that enables the State to uphold the rule of law whilst protecting the rights and freedoms of those within it.

We support the application by EIPR for the Egyptian Supreme Court, or as may be appropriate, to provide urgent clarification on the status of Article 143 of the Egyptian Constitution in respect of the ceiling limits on pre-trial detention;

We therefore recommend that steps be taken by the Egyptian government to address these failings, particularly (but not limited) to:

- The holding of defendants in cages at court, which is demeaning and dehumanising and which can negatively influence the presumption of innocence;
- The lack of provision for confidential client-lawyer communications, both in detention and at court;
- The apparent ease, frequency and excessive use of pre-trial detention which may be arbitrary and constitutes an interference both with a defendant's right to liberty and which may interfere with the presumption of innocence;
- Frequent failure to provide reasons for refusal to order conditional release;
- Reforms to ensure that there is an effective and prompt right to appeal any refusal to order conditional release and that there is provision for compensation for any unlawful detention.

Appendix 1 - Recent Political and Historical Background²²

In October 1981 Hosni Mubarak became President of Egypt and ruled the country for thirty years. In early 2011 a popular uprising led to his removal on 11 February, when he passed on executive powers to Egypt's top military body, the Supreme Council of the Armed Forces (SCAF) for a transitional period. The latter took control of government, dissolved the Parliament and suspended the Constitution, then had it amended by referendum on March 19. SCAF promised a transition to democracy. However, the "transition" that followed has been long and bloody, with many setbacks, and the struggle for democracy and fundamental rights in Egypt is ongoing.

Between November 2011 and January 2012, in legislative elections to Egypt's lower house of Parliament, the People's Assembly, the Muslim Brotherhood's Freedom and Justice Party won the greatest share of the vote, with Salafi parties winning a large minority as well; elections to the Shura Council, the upper house, followed. In June 2012, the Supreme Constitutional Court declared the electoral law unconstitutional and called for fresh elections for the People's Assembly; the recently elected Shura Council assumed legislative power temporarily. In the run-up to the presidential election, when the Freedom and Justice Party candidate Mohammad Morsi appeared to stand a good chance of winning, the SCAF passed some last-minute decrees that effectively diminished presidential powers.

Following the highly contested two-round election, Mohammed Morsi was sworn in as President of Egypt on 30 June 2012, and promised inclusive government. However, discontent against his rule grew rapidly as the Executive focused on power struggles with other institutions, particularly the judiciary, and on the contentious composition of a constituent assembly. Opposition to President Morsi crystallised after he passed a constitutional decree stating his decisions were "*final and unchallengeable by any individual or body until a new constitution has been ratified and new parliament has been elected,*" on 22 November 2012. Masses of Egyptians took to the street in protest. Egypt's most senior judges condemned President Morsi's decision, saying that the new powers amounted to an "unprecedented assault" on the independence of the judiciary.

In December 2012, President Morsi agreed to rescind most of his contested decrees, but went ahead with the referendum on the new draft Constitution—written by the contested constituent assembly—which was successful. In April 2013, the Tamarrod ("rebellion" or "revolt") movement was founded, and called for mass protests against President Morsi's rule on 30 June 2013; by 29 June 2013, Tamarrod claimed to have gathered twenty-two million signatures on a petition calling for early presidential elections. The petition drive and call to protest had considerable support from security bodies and the military apparatus. Millions of Egyptians took to the streets on 30 June 2013. The next day, Defence Minister and Commander of the armed forces Abdelfattah al-Sisi announced an ultimatum to President Morsi, giving "all political forces" 48 hours to "respond to the people's demands", or else the army "would have to implement a road map" for transition.

President Morsi refused to make concessions or step down, and on 3 July 2013, the military removed him from office and announced a "road map" for a post-Morsi era, including new parliamentary and presidential elections. SCAF declared the 2013 Constitution suspended, and appointed Adly Mansour, head of Egypt's Supreme Constitutional Court, as Egypt's interim President. In July 2013, a committee of ten legal experts was appointed to amend the Constitution. Their proposed text was sent to a larger group of fifty, made up of politicians and representatives from various different groups. A final draft was sent by this Committee to the President in December 2013. A referendum on this draft constitution took place on 14-15 January 2014. It passed, but against a backdrop of fear.

²² BHRC trial observers are grateful for the provision of this political and legal background by EuroMed Rights.

Since July 2013, the repression of political dissent and opposition has been significant. Thousands of Morsi supporters were arrested following his removal from power and in August 2013, hundreds of people were killed when the authorities stormed and dispersed two protest sit-in camps, at Rab'aa al-'Adawiya Square and al-Nahda Square. It did not take long for State repression to extend beyond Morsi supporters *per se*, to various dissenters and peaceful opponents, including human rights activists, journalists and citizens who dared to criticise the authorities' decisions and how they ruled. From this period on, widespread insecurity was manipulated to induce the mainstream media and the public to unanimously back the government, embodied by Al-Sisi who figured prominently all over the political scene, far more than nominal Head of State Adly Mansour, whose name was often forgotten. Fear of terrorism, anger against the Muslim Brotherhood for their poor record in power, and pro-military nationalism were frequently stirred up in support of Al-Sisi personally as well as the military, and to undermine any kind of protest, criticism or even contradiction of the State narrative.

On 26-28 May 2014, Egypt's second presidential election since the revolution took place and on 3 June, Al-Sisi was confirmed as the new President of Egypt. The country's electoral commission announced he had won by 96.1% against his one rival, Nasserist Hamdeen Sabbahi and estimated that 47% of eligible voters had cast their ballots. The turnout was considered the main political stake in this contest for Al-Sisi; this official figure was deemed a disappointment, compared to the high figures he had called for, even extending polling for a third day.²³

After many postponements, legislative elections to the People's Assembly were held in October and December 2015. Since 2013, organised opposition parties and movements had been slowly pushed out of the political field, due to repression and the gradual closure of the public sphere; throughout 2015, different State bodies apparently became involved in the formation of compliant electoral lists supportive of the government and its policies.²⁴ President Al-Sisi appealed to candidates to form a united movement in support of the State. In preparation for the elections, security was tightened across the country. The President made public appeals for Egyptians to vote, and in mid-October, public sector employees were given half a day's holiday to encourage them to take part. But most of the electorate was already too disillusioned with this electoral protest and knew the political choices available were very few. Again, the turnout was the only unknown and the only stake. Though the authorities announced a figure of 28%, most polling places had remained conspicuously empty, particularly of youth. The real turnout would likely have been a fraction of that—a public disavowal of President Al-Sisi's mode of rule, policies and record which was widely regarded as a setback for the regime.

President Al-Sisi (and Adly Mansour's government) issued many draconian laws which directly threaten the freedoms of assembly, association and expression from 2013 to 2015. Law 107/2013, known as the Protest Law, was issued by presidential decree in November 2013, despite a chorus of objections of rights groups, various political forces, six ministers and the UN High Commissioner for Human Rights. 16 Egyptian rights NGOs underlined that *"Joining a peaceful demonstration carries numerous risks, from the arbitrary killing to arrest and sentencing of up to five years in prison in some cases, or prolonged pre-trial detention. [...] The law requires organizers of assemblies to meet several unreasonable, impractical conditions while giving the Ministry of Interior the right to object to any "notice" of an impending demonstration on vague grounds..."* in violation of the constitutionally guaranteed right of peaceful assembly.²⁵

²³ <https://www.theguardian.com/world/2014/jun/03/abdel-fatah-al-sisi-presidential-election-vote-egypt>

²⁴ <http://www.madamasr.com/en/2016/03/14/feature/politics/anatomy-of-an-election/>

²⁵ See <http://www.cihrs.org/?p=17651&lang=en>. The right is guaranteed both under the 2014 constitution (Articles 73) and the constitutional declaration of July 8, 2013 (Article 10), which was in force when Adly Mansour decreed the Protest Law.

On 27 October 2014, President Al-Sisi issued a decree extending the jurisdiction of military courts to civilians who attack or obstruct "vital" public facilities. In February and August 2015, Al-Sisi issued the Terrorist Entities Law (Law 8/2015) and the Counter-terrorism Law (Law 94/2015), which give a vague and expansive definition of terrorism to include various peaceful activities by students, labour activists, civil society, political parties, journalists... "by any means", in the name of preserving "social peace" or "national unity".²⁶ These decrees criminalise many peaceful actions in violation of the constitutionally protected freedoms of association, peaceful assembly and strike, as well as the freedoms of opinion and expression, and the freedom to circulate information online and in the press. Law 94/2015 also reinforces impunity, encouraging law-enforcement personnel to use lethal force, and allows for citizens to be sentenced to death for non-violent, non-lethal acts. Finally, it allows for procedures that entrench an undeclared state of emergency, allowing the President to take any measures "to preserve public security and order" in the event of any terrorist danger.²⁷

According to the 2014 Constitution, the People's Assembly was entrusted with reviewing the hundreds of laws that had been passed by the Executive in the previous 30 months without a parliament. They did so in less than a month, reinforcing the widespread impression they would act as a rubber stamp for the Executive.

In 2016, independent civil society, and in particular the human rights movement, is under threat of total disappearance in Egypt. The authorities seem determined to eliminate it through a "ruthless chain of reprisals against organisations actively defending victims of human rights violations in Egypt, and part of an apparent state plan to eliminate the Egyptian rights movement..." A month after President al-Sisi took office, human rights organisations were subject to an ultimatum to close if they were registered under another legal framework than the repressive Civic Association Law [no. 84/2002]. This was followed by an attempt to pass an even more draconian law nationalizing civil society...²⁸

Several types of harassment measures have been used to target independent civil society since then. The most prominent has been the "foreign funding case" no 173, first launched in 2011 against international NGOs, and now targeting local ones, especially those most noted for exposing the national security apparatus' crimes against Egyptian citizens, and for opposing unjust laws.²⁹ Within the case, many leading human rights defenders including Nasser Amin³⁰, Hoda Abdelwahab, Reda el Danbouky, Mohamed Zaree³¹, Mozn Hassan³², Gamal Eid³³, Hossam Bahgat have been subjected to travel bans. NGO staff and directors have been summoned for questioning by an investigative judge.

A series of rights and democracy activists were arrested in 2016 and charged with serious criminal offences including Malek Adly, Ahmad Abdallah, Mina Thabet, Haytham Mohammadein, Zizo Abdo.³⁴ Rights lawyer Malek Adly was held in solitary confinement for four months in violation of relevant laws and regulations, until his recent release. Though released on bail, charges against these activists still stand and they may be tried.

²⁶ See <http://www.cihrs.org/?p=11031&lang=en>

²⁷ See CIHRS and EIPR's legal briefing on the Counterterrorism Law at <http://www.cihrs.org/?p=17219&lang=en>

²⁸ See <http://www.cihrs.org/?p=18988&lang=en> and <http://euomedrights.org/publication/egypt-civil-society-faces-existential-threat/>

²⁹ On the case, see <http://www.cihrs.org/?p=18362&lang=en>

³⁰ See <http://euomedrights.org/publication/alert-egypt-travel-ban-imposed-on-human-rights-lawyer-nasser-amin/>

³¹ See <http://euomedrights.org/publication/alert-reprisals-against-prominent-activists-from-egypt/>

³² See <http://euomedrights.org/publication/egypt-woman-human-rights-defender-mozn-hassan-banned-from-travel/> and <http://euomedrights.org/publication/bin-travel-ban-lift-undue-restrictions-mozn-hassan-egyptian-civil-societys-right-freedom-association/>

³³ See <http://euomedrights.org/publication/egypt-lift-gamal-eids-travel-ban/>

³⁴ See <http://euomedrights.org/publication/egypt-court-to-freeze-human-rights-defenders-assets-a-finishing-blow-for-civil-society/> and <http://euomedrights.org/publication/alert-egypt-massive-arrests-versus-peaceful-protests/>

At least 37 Egyptian rights organisations are at risk of imminent prosecution in case 173/2011, for heavy criminal charges, including some under the amended article 78 of the Penal Code, which carries a life sentence. On 17 September 2016, a Cairo court froze the assets of five prominent human rights defenders—Hossam Bahgat, Gamal Eid, Bahey el din Hassan, Mostafa el Hassan and Abdel Hafiz Tayel—and of the independent human rights NGOs run by the last three of them, the Cairo Institute for Human Rights Studies, the Hisham Mubarak Law Centre, and the Centre for the Right to Education. This measure *“was designed to paralyze the ability of human rights NGOs to function, and silence their voices indefinitely. It smothers any dissent against the security apparatus, ensuring that no opposing voice can be heard”* according to CIHRS.³⁵

A new draft NGO law was devised by the Ministry of Social Solidarity (MoSS) in September 2016, then approved by the Cabinet and the State Council, and forwarded to Parliament for review. This very repressive text foresees compulsory registration of NGOs with the MoSS, while banning the registration of entities doing human rights NGO work under any other relevant legal frameworks (as law firms or companies, for instance). It sets a very narrow definition of acceptable NGO activity, limited to development or social objectives and excluding human rights work. It adds new obstacles to the establishment of NGOs, in violation of the Constitution; it also makes licensing of international NGOs to work in Egypt very difficult. In addition, the draft law hinders the activity of licensed NGOs in many ways, requiring prior approval for Egyptian NGOs to cooperate with international entities, to receive foreign funding, to open new offices in Egypt or abroad, etc.³⁶

The Egyptian Judiciary and Prosecution

The general principle of judicial independence has been constitutionally guaranteed in Egypt for many decades. Article 184 of the 2014 Constitution provides that “[t]he judiciary is independent” and makes interference in judicial affairs a criminal offence subject to no statute of limitations.

However, this principle of judicial independence has been severely undermined in many ways. The Ministry of Justice has wide powers over judges which provide scope for abuse. These include the right to assign judges to particular courts, to decide which judges are seconded to work in government ministries, and to initiate disciplinary action against judges. These powers threaten the judiciary's independence as they allow a government minister to reward or punish serving judges, and provide an incentive for judges to please the executive.

The legal framework also gives a role to the executive branch in the judicial appointment system, particularly at the higher levels, allowing for politicised decision-making. In 2016, a number of disciplinary actions were taken against judges seen as supportive of the Muslim Brotherhood. At the same time, a blind eye has been turned to the highly questionable (or even illegal) rulings of judges who openly and enthusiastically support President Sisi, and who are often selected to try political dissidents.³⁷ Thus, the principles of judicial impartiality and of judicial accountability to the law and constitution are severely undermined in Egypt as well.

According to the IBA Minimum Standards of Judicial Independence, “the power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge’s consent”. The current system does not comply with this recommendation.

A similar “on paper” independence can be found regarding Egypt’s Prosecution. The 2014 Constitution states that the Prosecutor-General in Egypt must be appointed by the judge-led Supreme Judicial Council (SJC). However, the 2014 Constitution also allows the Minister of Justice to have a role in the appointment of investigating judges, and in transferring prosecutors to other posts. Graduates of

³⁵ <http://www.cihrs.org/?p=18988&lang=en>

³⁶ See <http://euromedrights.org/publication/egypt-crackdown-civil-society-intensifies/>

³⁷ See <http://www.cihrs.org/?p=18415&lang=en>

Egypt's Police Academy are automatically granted a law degree and can move easily from police station to the Prosecutor's Offices. Experience in Egypt's police force is not an appropriate training ground for public servants, such as supposedly independent State prosecutors. Thus, Egypt's powerful prosecutorial authority is highly politicised and is not autonomous, in practice, from the security bodies or the Executive.