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The American University in Cairo

School of Global Affairs and Public Policy

JUSTICE DENIED:

HOW THE EGYPTIAN LEGAL SYSTEM PERPETUATES IMPUNITY

A Thesis Submitted to the

Department of Law

in partial fulfillment of the requirements for the degree of

Master of Arts in International Human Rights Law

By

Salma Nasser El Hosseiny

December 2013

The American University in Cairo
School of Global Affairs and Public Policy

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Master of Arts in International Human Rights Law
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The American University in Cairo

School of Global Affairs and Public Policy

Department of Law

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Salma Nasser El Hosseiny

Supervised by Professor Hani Sayed

ABSTRACT

Retribution to the martyrs of the Revolution is one of the core demands of Egypt's 2011 Revolution. Almost three years later, this demand is yet to be fulfilled. The purpose of this paper is not to prove the existence of impunity in Egypt but rather to propose an analytical framework that can show *how* the Egyptian legal system perpetuates impunity. I examine two case studies: the Maspero massacre and Ramlat Boulaq protests. I argue that impunity is multi-dimensional, and accordingly I define two dimensions for analysis of the cases: strategic and structural dimensions of impunity. Strategic impunity is defined as ad-hoc measures taken by the authorities to derail processes of accountability or demands for truth and justice, and structural impunity is defined as inherent, structural traits of the legal system that prevent successful prosecutions of human rights violations. In the final chapter, I examine some measures taken by the authorities' for legislative and security sector reforms. Through this examination, I highlight their lack of political will to break the cycle of impunity. In contrast, I analyze a proposal made by the "Police for Egypt" initiative for security sector reform and transitional justice. I conclude that maintaining the Egyptian legal system as it is will continue to result in impunity for human rights violations.

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I. Introduction

On January 25th 2011, National Police day, thousands of Egyptians took to the streets to protest police brutality, corruption and the deteriorating economic and social conditions gripping the country over the last decades. The calls for protests were made by activist youth groups including “We are all Khalid Said”; a face-book page dedicated to the memory of a 28-year-old Egyptian from Alexandria who was beaten to death by police officers in broad day light. The organizers intended to “subvert the celebration of the police and turn the day into an occasion to indict the institution in charge of policing—in a sense, putting it on public trial”.¹ Ironically, the biggest demand of the organizers then, was the removal of Habib al-Adly, the Minister of Interior.

The significance of the Revolution starting on National Police day cannot be overlooked as Salwa Ismail rightly noted, “the popular support for the [R]evolution was to a large extent motivated by antagonism towards the police, guided by the structure of feelings of humiliation, anger, disdain, and revulsion...[where] police practices of government, which had affect as their object, undermined the ordinary citizen's sense of self and her moral person-hood.”² It is then no surprise that at least 99 police stations were burned across the country during the first few days of the Revolution.³ These police stations were infamous for practicing torture not only against political opponents but also “ordinary citizens due to the deterioration of police professional standards and the absence of legal accountability”.⁴

The massive unprecedented protests resulted in the removal of Hosni Mubarak. The protests also tragically resulted in the death of at least 846 protesters and the injury of at least 6467.⁵ The massive scale of human rights violations committed in Mubarak's

¹ Salwa Ismail, *The Egyptian Revolution against the Police*, 79:2 Social Research. 435, 435 (2012).

² *Id.*

³ *Id.*

⁴ Cherif Bassiouni, *The Fight for Democracy in Egypt's Liberation Square*, Chicago Council on Global Affairs, 3 (2011).

⁵ International Federation for Human Rights [hereinafter FIDH], *The Price of Hope: Human Rights Abuses During the Egyptian Revolution*, 6 (2011), available at <http://www.fidh.org/en/north-africa-middle-east/Egypt/The-Price-of-Hope-Human-Rights>; See also Amntesy International, *Egypt rises: Killings, detentions and torture in the 25 January Revolution* (2011) available at

era and particularly during his last days has prompted Egyptians to demand accountability. As Cherif Bassiouni rightly noted, “subjecting the police to the Rule of Law is indispensable.”⁶ However, the constant demands by protesters and civil society groups of accountability for human rights violations have fallen on deaf ears.

When the Supreme Council of Armed Forces (SCAF) assumed power on February 11th 2011, it pledged to assist transition into civilian and democratic rule, to ensure retribution to the martyrs and respect the right to peaceful protest. Instead, SCAF deceived millions of Egyptians and “unleashed violent repression against peaceful protesters and took steps to retain as much power as possible and remain beyond the reach of the law.”⁷ The 16-month rule of SCAF was characterized by aggression against peaceful protesters, torture, arbitrary detention, military trials and other gross human rights violations. Egypt's infamous police, aided by its military counterparts, returned with a vengeance against Egyptian protesters who are still heroically struggling to fulfill the demands of the Revolution.

In November 2011, security forces attacked peaceful protesters for an entire week causing the death of at least 51 and injuring hundreds; many of them suffered from permanent eye loss.⁸ In February 2012, following protests against the killing of 70 al-Ahly football club fans in Port Said stadium, security forces attacked peaceful protesters killing at least 16 and injuring hundreds.⁹ In October 2011, military police attacked a peaceful demonstration of Coptic Christians by live ammunition and crushed them with military armored vehicles, causing at least 28 deaths and injury of hundreds.¹⁰ In December 2011, military police violently dispersed a sit-in at the Cabinet of Ministers resulting in the death of at least 17 protesters.¹¹

<http://www.amnesty.org/en/library/asset/MDE12/027/2011/en/b33cf2ea-e057-4a34-905b-46a897c4fe6d/mde120272011en.pdf>.

⁶ Bassiouni, *supra* note 4, at 3.

⁷ Amnesty International, *Brutally Unpunished and Unchecked: Egypt's Military Kill and Torture Protesters with Impunity*, 5 (2012), available at <https://www.amnesty.org/en/library/asset/.../mde120172012en.pdf>.

⁸ Amnesty International, *Agents of Repression: Egypt's Police and the Case for Reform*, 7 (2012), available at <http://www.amnesty.org/en/library/asset/MDE12/029/2012/en/576aa9cc-bd07-4724-a410-95b02009c317/mde120292012en.pdf>.

⁹ *Id.* at 14.

¹⁰ Amnesty International, *supra* note 7, at 6.

¹¹ *Id.*

These incidents reveal a policy of systematic state repression, in which government forces continue to commit grave human rights violations with complete impunity. Furthermore, it is important to emphasize that widespread human rights violations committed with impunity is not a new phenomenon that is associated with post-revolutionary Egypt. Rather, this state policy is a continuation of a pattern of abuses that have continued for several decades and remained mostly unpunished.

Since the creation of the Egyptian republic, the state continued to be “dominated by an extremely powerful executive who enjoys expansive constitutional (and extra-constitutional) grants of authority, thereby exerting significant control over all facets of government from the nominally autonomous legislature to the judicial branch.”¹² After Mubarak took power in 1981, he pledged to maintain the rule of law, however shortly after he “extended the state of emergency, promulgated laws to exclude opposition parties from local councils and tightened the grip of the ruling National Democratic Party (NDP) over parliament.”¹³ In addition, the Mubarak regime used “police powers to preserve and enhance their grasp of the country and to support a corrupt oligarchy...[where as] the police became, *de facto*, the private security apparatus of the oligarchy, as well as the visible oppressor of the people.”¹⁴ Furthermore, the infamous Emergency Law¹⁵ had been continuously in force since 1967 with the exception of eighteen months between 1980 and 1981. This law gave tremendous powers to the executive authority and sanctioned the systematic repression by the police. It also allowed “for extended detention without trial, denies detainees *habeas corpus*, bans labor strikes, prohibits demonstrations without police permission, justifies press censorship, and sanctions trials of political prisoners by special courts to deliver “swift justice” and restrict defendants' right to appeal.”¹⁶

¹² Charles Robert Davidson, *Reform and Repression in Mubarak's Egypt*, 24 Fletcher F. World Aff. 75, 5 (2000).

¹³ A.M Lesch, *Egypt's Spring: Causes of the Revolution*, 18:3 Middle East Policy 35–48 (2011); During Mubarak's last decade, the two houses of parliament, the People's Assembly and the Shoura Council were largely dominated by the NDP. In the last parliament elections in 2010, the NDP got 97% of the seats, thus ceding all the legislative powers to the executive, See Davidson, *supra* note, 12, at 5.

¹⁴ Bassiouni, *supra* note 4, at 3.

¹⁵ Law No. 162 of 1958 (Presidential Decree enacting the Emergency Law), *al-Jarīdah al-rasmīyah*, 27 September 1958 (Egypt).

¹⁶ Hazem Kandil, *Soldiers, Spies and Statesmen: Egypt's Road to Revolt* 199 (1st. ed. 2012).

Armed with sweeping powers of the Emergency Law, the police became infamous for their brutality. Hossam Bahgat, former director of the Egyptian Initiative for Personal Rights (EIPR) explained that “an ordinary, law abiding citizen will cross the road to avoid any contact with police [because] they know that, even if they have not done anything wrong, the police are notoriously abusive and act with complete impunity-- and not in the interest of the citizen.”¹⁷ The Ministry of Interior had long been associated with “routinized violent practices against civilians held in police stations, including torture and sexual violation, the internment of political dissidents by its state security organs, the surveillance of activists, the rigging of elections, and the protection of core ruling regime interests.”¹⁸ It is important to note that torture is not only practiced against political opponents but also ordinary citizens.¹⁹ The police are also infamous for their corruption; whether by taking bribes or even fabrication of drug charges where the latter became “a common procedure and understood as a mechanism of control of young men.”²⁰ These patterns of aggression have largely contributed to the people perceiving the police as a “vast network of aggressive overseers”²¹ rather than their protectors, as well as the police perceiving themselves as above the law due to the fact that “successful prosecutions of ordinary police officers are still extremely rare.”²²

Police abuses, in particularly torture, have formed a systematic pattern that has gone largely unpunished.²³ A 2011 Human Rights Watch report on torture found that the

¹⁷ Noha El Hennawy, *The making of a police state: From the battle of Ismailiya to Khaled Saeed*, 'Al Masry 'Al Youm, Jan. 27, 2011, available at <http://www.egyptindependent.com/news/making-police-state-battle-ismailiya-khaled-saeed>.

¹⁸ Ismail, *supra* note 1, at 435.

¹⁹ Egyptian human rights organizations have explained this phenomenon in their submission to the Human Rights Council during the Universal Periodic Review of Egypt in 2010. They explain: "torture is now used for a long list of reasons, including to intimidate or recruit police informers, to discipline or punish at the behest of a third party, to force a citizen to renounce an apartment or plot of land, as part of a hostage-taking policy that usually nets women and children related to a suspect, and to punish those who dare to challenge policemen's absolute authority or demand to see judicial warrants or arrest and search orders." Human Rights Watch, *Work on Hum until He Confesses: Impunity for Torture in Egypt*, 12, (2011), available at www.hrw.org/sites/default/files/reports/egypt0111webwcover.pdf.

²⁰ Ismail, *supra* note 1, at 441; A former police officer admitted that in the 1990s in Cairo alone, the police fabricated 57,000 drug possession charges on an annual basis. *Id.*

²¹ *Id.* at 442.

²² Human Rights Watch, *supra* note 19, at 12.

²³ Amnesty International concluded that torture was “systematic in police stations, prisons and [State Security Investigations] SSI detention centers and, for the most part, committed with impunity.... [Security and plainclothes police assault people] openly and in public as if unconcerned about

Egyptian government is “failing miserably to provide victims of torture and ill-treatment effective remedy, or to deter such abuses from occurring in the future.”²⁴ The report concluded that impunity “prevails with regard to torture and ill-treatment, since those guilty of such abuses have little expectation or reason to fear [that] they will be held to account.”²⁵ The government, until this day, has continuously denied that acts of torture are systematic, and claims that they are only isolated incidents who are all investigated and those involved are punished.²⁶

When victims of torture eventually file a complaint at the Public Prosecution, they are faced with slow and denied justice.²⁷ The Public Prosecution does open official investigations in each complaint it receives, however rarely do these complaints reach the phase of a trial due to “an inadequate legal framework, police intimidation of victims who then withdraw complaints, and ineffective and delayed investigations.”²⁸ There have only been six convictions of police officers between 2006 and 2009.²⁹ Even in the cases where torture complaints do reach the courts, the verdicts issued against the police officers do not match the gravity of the crime and do not provide any redress to the victims.

One famous case is that of actress Habiba Said who was sentenced to 10 years imprisonment for killing her husband; the sentence was based on an extracted confession under torture.³⁰ After serving five years in prison, the police were able to arrest the actual murderers. A Giza Criminal Court then acquitted Said and sentenced the police officer who extracted her confession to a suspended sentence of six months imprisonment and his removal from his post for one year.³¹ The Court did not however

possible consequences. Amnesty International, *Annual Report for 2010*, (2011), available at <http://www.amnesty.org/en/region/egypt/report-2010> ; Human Rights Watch reached the same conclusion where it stated that “law enforcement officials have used torture and ill-treatment on a widespread, deliberate, and systematic basis over the past two decades to glean confessions and information, or to punish detainees.” See Human Rights Watch, *supra* note 19, at 2.

²⁴ Human Rights Watch, *supra* note 19, at 2.

²⁵ *Id.*

²⁶ *Id.* The Ministry of Interior has also developed the tactic of discrediting the information, and slandering the victims, *Id.*

²⁷ The Public Prosecution “closes the majority of complaints without indicting anyone.” *Id.* at 40.

²⁸ *Id.* at 2.

²⁹ According to government statistics made public, *Id.*

³⁰ *Id.* at 82.

³¹ Ahmad Shalaby, *Habiba Innocent of Killing her Husband... Five Thieves Convicted and the Officer*, 'Al Masry 'Al Youm, May 9, 2007, available at <http://www.almasry-alyoum.com/article2.aspx?>

order any reparation to Said. This case can give the reader a glimpse of the legal reality of prosecuting police crimes in national courts. The verdict did not provide adequate reparation to the victim which she rightfully deserved, and it did not actually imprison the officer or remove him permanently from his post. One can then imagine how police officers believe that they can practice torture with impunity. In the rare cases in which they are actually prosecuted, they will still roam the streets free and eventually return to their jobs, only to continue the practice they are so deeply accustomed to.

One of the rare cases where impunity did not prevail is that of Emad al-Kebir, a micro bus driver who was tortured and sodomized by police officers in Boulaq al-Daqrur police station. The officers filmed the ordeal and circulated it in al-Kebir's neighborhood. The video was found by bloggers who circulated it on-line, and eventually al-Kebir filed a lawsuit against the officers. A Giza Criminal Court sentenced the officer Ismail Nabih and policeman Reda Fathi to three years imprisonment.³² While this sentence presents a rare case of accountability for police abuse; Ismail Nabih returned to work after serving a third of his sentence. Human rights lawyers appealed this decision before the State Administrative Court, however the Court rejected their case and upheld the reinstatement of Nabih in the police.³³

Another important case is that popularly referred to as the “Black Wednesday” incident. In May 2005, female protesters and journalists who were covering protests against the proposed 2005 constitutional amendments were attacked by police men and men in civilians clothes who were associated with the police. The women were sexually assaulted, had their clothes torn, molested and verbally abused.³⁴ Four of the female protesters “testified that they were called ‘sluts’ and ‘whores’ as well as being

ArticleID=56888&IssueID=661.

³² BBC News, *Egypt police jailed for torture*, Nov. 5, 2007, available at <http://news.bbc.co.uk/2/hi/7078785.stm>.

³³ Sahar Ṭal'at, *al-qadā' al-idārī yarfuḍ man' Islam Nabih min al-'amal, al-yawm al-sābi'*, Jan. 26, 2010, available at <http://www.youm7.com/News.asp?NewsID=181978&SecID=97&IssueID=62#.UpDmkUOXXL8>.

³⁴ See Press Release, Egyptian Initiative for Personal Rights [hereinafter EIPR], *Egypt held to account for failing to protect women demonstrators from sexual assault - Commission tells Egyptian Government to compensate women as well as to investigate the assaults and punish those responsible*, Mar. 14, 2013, available at <http://eipr.org/en/pressrelease/2013/03/14/1657>.

touched inappropriately on their breasts and private parts.”³⁵ The four women then lodged formal complaints at the Public Prosecution which “refused to take the testimony of several eyewitnesses and failed to conduct thorough independent investigations...the women were later threatened, by unidentified individuals.”³⁶ Shortly after, the Public Prosecution decided to shelve the case citing that the women failed to present adequate evidence and that their testimonies contained inconsistencies.³⁷ After domestic efforts for justice proved to be futile, the women took up their complaint to the African Commission on Human and People's Rights. In 2013, the Commission delivered its communication stating that the “violations perpetrated were palpable physically as well as medically proven...the State did not need further information to proceed with the investigations that should have brought the perpetrators to justice...the Commission urged Egypt to hold an investigation and punish those found responsible.”³⁸ The present case here demonstrates the climate of impunity that the state has fostered where as the bodies in charge of investigations and prosecutions have chosen to accommodate the wishes of the executive and deny justice to the victims. The victims, who resorted to regional human rights mechanisms, were able to shed light on this crucial aspect of the state's failure and lack of willingness to prosecute human rights violations.

It then becomes easier for the reader to understand why Egyptians have been demanding accountability, as well as their aspirations for a free democratic country that respects their basic right to life, freedom and dignity. This brings me to the purpose of this paper. First, I would like to emphasize that my goal here is not to prove the existence of impunity in Egypt, as this might be common knowledge to most of the Egyptian population and thus an abundant aspect to prove. At the same time, while this impunity may be obvious, the reasons behind it are not. In trying to identify the causes of impunity in Egypt, I faced several difficulties as I could not pin point its primary cause. Is it due to Egyptian legislation? Is it due to the non-independence of the Public Prosecution and the Forensics Department? Is it due to the lack of political will of the state to prosecute abuses of its apparatus? These possible reasons are not all

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

exclusively features of the legal system as some of them are political decisions. The diversity of these reasons and their different sources are precisely the reason why it is difficult to study impunity in Egypt. Impunity has different and multiple dimensions, in which none of these dimensions are exclusively responsible for it.

Then, several important questions arise: what role does the Egyptian legal system play in perpetuating impunity? In other words, what are the features of the legal system that contribute to the perpetuation of impunity? How do all these features of the legal system operate to produce the end result of impunity? How does the state's lack of political will affect legal proceedings for human rights violations? The latter question is particularly important as it captures important instances that are not necessarily inherent features of the legal system.

Thus, the goal of this paper is to propose an analytical framework that can overcome these difficulties by identifying all these different dimensions of impunity, and also explain how do they operate to produce impunity. This framework could be applied to different cases before the civilian and military judiciaries. It is crucial to understand all these multiple dimensions of impunity and explain how they operate in different ways, in order to be able to propose effective measures that can combat impunity.

The following chapter discusses impunity in the framework of international law, then I review selected literature on the definitions of impunity. I end the chapter by defining my analytical framework for studying impunity in Egypt. The third chapter discusses the case of the killing of 28 Coptic Christians by military forces, popularly known as Maspero. The fourth chapter discusses the case of the Nile City Towers protests, also known as Ramlat Boulaq protests. The final chapter discusses some measures of legislative and security sector reforms taken by the authorities and the “Police for Egypt” initiative on security sector reform and transitional justice.

II. The Multiple Dimensions of Impunity

A. Developments in International Law

In the past, international law was solely focused on governing relationships between states. Steven R. Ratner argues that “the notion that the law would govern behavior of governments vis-a-vis their own citizens, let alone prescribe accountability for individuals for violations of such norms, was anathema to the entire exercise”.³⁹

However, international law changed in the aftermath of the Second World War, where as prior to the Nuremberg trials,⁴⁰ it “had not previously addressed a state's treatment of its own citizens, much less imposed criminal sanctions for such conduct”.⁴¹ The Nuremberg precedent not only presented the new concept of individual criminal responsibility but also paved the way for the adoption of several conventions on international crimes that explicitly prescribed a duty to prosecute grave breaches of their provisions.

The four Geneva Conventions, adopted in 1949, set a legal obligation on State Parties to “to search for, prosecute and punish those individuals suspected of committing grave breaches of the Geneva Conventions”.⁴² The Genocide Convention not only prohibited genocide but also set up an obligation of states to prevent and punish.⁴³ The United Nations Convention against Torture also sets an obligation on State Parties to either prosecute or extradite any persons found in their territory who allegedly committed torture.⁴⁴

³⁹ Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 Geo. L.J. 707, 711 (1999).

⁴⁰ The International Military Tribunal at Nuremberg, was set up by the Allied forces to try Nazi officials for war crimes and crimes against humanity.

⁴¹ Diane F. Orentlicher, *The Duty to Prosecute Human Rights Violations of a Prior Regime*, The Yale Law Journal 100:8 2537, 2555 (1991).

⁴² Mary Margaret Penrose, *Impunity- Inertia, Inaction, and Invalidity: A Literature Review*, 17 B.U. Int'l L.J. 269, 286. These grave breaches may include “such acts as willful killing, torture or inhuman treatment, and willfully causing great suffering or serious bodily injury ” in times of armed conflict. *Id.*

⁴³ Art. 1 states that “the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. I, 78 U.N.T.S.

⁴⁴ Articles 5, 6, 7, 8. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

Despite the establishment of the duty to prosecute grave violations of the above mentioned covenants, the claim of a customary duty to prosecute gross human rights violations is a fairly recent claim.⁴⁵ Due to the inconsistency of state practice for prosecution of gross human rights violations including the numerous amnesty laws issued by states, scholars have argued that the duty to prosecute *jus cogens* crimes is practically non-existent.⁴⁶ On the other hand, other legal scholars have argued that there is an emerging norm of a duty to prosecute in international customary law.⁴⁷

Several developments that occurred in the 1990s tend to support the claims of the latter group. The jurisprudence of the Inter-American Commission and Court on Human Rights declared the illegality of amnesty laws and affirmed the duty to investigate, prosecute and punish perpetrators of gross human rights violations and international humanitarian law.⁴⁸ In 1992, the Inter-American Commission issued a landmark communication on the 'Due Obedience and Full Stop' amnesties laws in Argentina where it found that that the amnesty law violated Argentina's obligations under the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.⁴⁹ The Inter-American Court and Commission also

⁴⁵ Ranter, *supra* note 39, at 730.

⁴⁶ Cherif Bassiouni notes that “the practice of states evidences that, more often than not, impunity has been allowed for *jus cogens* crimes...and the duty to prosecute or extradite is more inchoate than established”. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 *Law & Contemp. Probs.* 63, 66 (1996). Mary Margaret Penrose makes a similar assertion arguing that “state practice for prosecution of international crimes based on torture, genocide, and other similarly heinous crimes is practically non-existent”. Mary Margaret Penrose, *It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law*, 39 *Colum. J. Transnat'l L.* 193, 204 (2000-2001). See also Ratner, *supra* note 39. See also Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 *Law & Contemp. Probs.* 41(1996).

⁴⁷ See e.g. Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 *Calif. L. Rev.* 449 (1990). Christopher Joyner argues that the “corpus of international law that has evolved since 1945 clearly imposes obligations upon government parties to investigate and prosecute suspected violators of humanitarian law (i.e., the laws of war) and other high human rights crimes (including genocide, torture, and crimes against humanity)”. Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 *Denv. J. Int'l L. & Pol'y.* 591, 597 (1998).

⁴⁸ See, e.g., Velisquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), 11 172, 174 and Juan Meneses v. Chile, Case 11.228, Inter-Am. C.H.R., Report No. 34/96, OEA/SER.L.V.II.95 doc. 7 rev. 11 67-69 (1997) .

⁴⁹ The Commission observed that: “the effect of the passage of the Laws and Decrees was to cancel all proceedings pending against those responsible for past human rights violations. These measures closed off any judicial possibility of continuing the criminal trials intended to establish the crimes denounced; identify their authors, accomplices and accessories after the fact, and impose the corresponding punishments. The petitioners, relatives or those injured by the human rights

declared that amnesty laws in Uruguay, El Salvador, Chile and Peru were incompatible with the American Convention.⁵⁰ The jurisprudence of the Inter-American human rights system affirms that “any similar measures that hinder the investigation, prosecution, and punishment of serious human rights violations are considered as incompatible with the State Parties' obligations and therefore have no force or effect”.⁵¹ Furthermore, the Court also enforced the principle of the State Parties' duty to protect individuals from torture including the duty to prosecute torture claims.⁵² The jurisprudence of the Inter-American System has indeed significantly “given rise to and reinforced international legal principles and standards governing the obligations of states to ensure individual accountability for serious human rights violations.”⁵³

Another important case that helped in the development of the doctrine of prosecutions is that of former Chilean President General Augusto Pinochet where an arrest warrant was issued against him in 1998, in response to an extradition request by Spain for crimes of torture against Chileans and others. The case triggered intensive debate on the validity of head-of-state immunity for international crimes and was examined by Britain's highest court where nine of the twelve judges ruled that Pinochet was not protected by any doctrine of immunity as a former head of state.⁵⁴ The case also

violations have been denied their right to a recourse, to a thorough and impartial judicial investigation to ascertain the facts...Under Article 1.1 of the [American] Convention, the State Parties are obliged "to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms....The Laws and the Decree [of amnesty] sought to, and effectively did obstruct, the exercise of the petitioners' right [to a fair trial]." Alicia Consuelo Herrera et al. v. Argentina, Case 10.147, Inter-Am. C.H.R. Report 28/ 92, OEA/Ser.LN/II.83 doc. 14 corr. 1 32 (1992-93) .

⁵⁰ For example, see the judgment of the Barrios Altos Case where the Court stated that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations.” Brian D. Tittmore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 Sw. J. L. & Trade Am. 429, 446- 7 (2005-2006) .

⁵¹ *Id.*, at 448-9.

⁵² In the case of Velasquez-Rodriguez, the Court noted that: “the State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.” *Id.*, at 449.

⁵³ *Id.*

⁵⁴ The court found later that he was too ill to fit trial. It is important to also note that the judges did not merely rely on British national legislations but have largely invoked international customary law. Susan Waltz, *Prosecuting Dictators: International Law and the Pinochet Case*, 18 World Policy Journal 101 (2001).

“reinforced the prohibition of torture as a peremptory norm of international law and specifically tested the extradition provisions of the 1984 Torture Convention and provided [an] opinion on claims of universal jurisdiction relevant to egregious abuse of human rights”.⁵⁵

This period also witnessed the establishment of several international criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. These courts played a prominent role in advancing accountability for serious crimes under international law.⁵⁶ The statutes of the international criminal tribunals and courts also affirmed the principle of individual criminal responsibility, which was first introduced in the Nuremberg trials, though it had remained mostly not enforced.

International human rights mechanisms also played a role the development of international law where they have “formulated a doctrine that places positive obligations upon states to investigate, prosecute and punish violations of the rights protected under their governing instruments, including those that constitute serious crimes under international law.”⁵⁷ While these mechanisms are mostly treaty-based, they have nevertheless supported the trend towards accountability in general. For example, while the International Covenant on Political and Civil Rights (ICCPR) is textually silent on the duty of State Parties to punish violations of the rights it ensures, the UN Human Rights Committee established in some cases that states have a “duty to investigate and prosecute those committing disappearances, summary executions, ill-treatment, and arbitrary arrest and detention.”⁵⁸

B. Definitions of Impunity

The United Nations defines impunity as “the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry

⁵⁵ *Id.* at 103.

⁵⁶ Tittmore, *supra* note 50, at 430.

⁵⁷ *Id.*

⁵⁸ *See, e.g.*, Human Rights Committee, Comments on Nigeria, P284, in Report of the Human Rights Committee, U.N. GAOR, 51st Sess., Supp. No. 40, at 41, U.N. Doc. A/51/40 (1996).

that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”⁵⁹ Thus, the UN definition of impunity means non-punishment and lack of reparations to victims. Since the UN definition focuses on non-punishment, it excludes other measures of accountability and other forms of social reconciliation that may include “symbolic and public forms of compensation, such as national truth and reconciliation commissions”.⁶⁰ It also excludes the standards of participation of victims in the proceedings such as “restoration [which] might include compensatory payments, the right of return, and rehabilitation”.⁶¹ While the UN definition can satisfy explaining the meaning of the word impunity, it does not explain how this impunity comes to exist. In other words, the definition is not sufficient to explain the reasons contributing to the existence of a climate of impunity. These reasons are crucial to understand any context of impunity as it can differ in each situation. For example, impunity in the context of a civil war can be very different from impunity in the context of authoritarian regimes. These conflicts and ambiguities in the definition do not provide any help to address the multiple dimensions of impunity in different contexts. Several authors have used the UN definition as a starting point for defining impunity but have expanded their analysis to explain the causes and reasons for impunity in its multiple dimensions.

Madeline Morris argues that there are three main reasons for impunity: insufficient resources, political impediments, and a lack of government willingness to prosecute.⁶² She adds that political constraints can limit accountability, where they may arise “from the need to continue to live with, and perhaps to share power with or even to work toward reconciliation with the perpetrator population or constituency”.⁶³ She argues that a state can be faced with a situation where the violations are too massive and include a large number of perpetrators and victims, that the judicial system cannot handle due to lack of training of judges and other insufficient resources. This leads to

⁵⁹ U.N. ESC, Rep. of the Independent Expert to Update the Set of Principles to Combat Impunity on its 61st Sess., Feb. 8, 2005, UN. Doc. E/CN.4/2005/102/Add.1 (by Diane F. Orentlicher).

⁶⁰ C. Joyner, *supra* note 47, at 617.

⁶¹ *Id.*

⁶² Madeline H. Morris, *International Guidelines against Impunity: Facilitating Accountability*, 59 *Law & Contemp. Probs.* 29, 30 (1996).

⁶³ *Id.*

a situation where “prosecutions and other accountability mechanisms as well as victim compensation schemes all therefore demand extensive financial, physical, and human resources.”⁶⁴ It can also be due to the lack of will at the local and international level.⁶⁵ The author here presents important insight into the circumstances of impunity that the UN definition fails to explain. The analysis of these imminent constraints are particularly important as it can present an opportunity to provide solutions to address these issues. Morris does indeed propose four second-best approaches as a “taxonomy of compromise”.⁶⁶ These compromises also challenge the zero-sum game that the UN definition implies in its strict non-punishment approach.

Another setback of the UN definition is its failure to address different levels of impunity. By focusing on a general criteria of non-punishment, it fails to provide a measure that addresses situations in which some, and not widespread impunity exists. In other words, the UN definition considers impunity as a general constant factor, however different situations have produced varying contexts of impunity. Nick Jorgensen conducted a study on analyzing the different levels of impunity in different countries in which he set three categories of impunity “none, moderate and widespread/severe”.⁶⁷ In testing the levels of impunity, he used several predictors including the presence of civil wars, restrictions on the media, electoral democracies, and levels of corruption.⁶⁸ The importance of classifying different levels of impunity as well as measuring the effect of the above-mentioned predictors on the result of

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Morris proposes the following approaches: first, a “decision may be made to pursue accountability only for some subset of the individuals responsible for the crimes by the international courts” and the remaining bulk to be prosecuted in national courts. Second, utilization of plea-bargaining that can include “a substantial sentence reduction in return for a full confession, a guilty plea, and an apology to the victim”. Third, “a sentence-reduction may be provided for all perpetrators without the requirement of any plea bargain” which can relieve the state “the long-term burden of supporting a massive prison population and/or in the interests of reconciliation”. Fourth, “legal action [could be taken] against perpetrators for lesser offenses than the genocide, war crimes, crimes against humanity, or other serious human rights violations actually committed”. She also adds that civil reparations to victims can also be used as a second-best approach where the successor government can provide reparations to victims rather than the perpetrators doing so. She also adds that other approaches of accountability can be pursued such as lustrations and truth commissions however she insists that these measures do not achieve full accountability. *Id.*, at 31-32.

⁶⁷ Nick Jorgensen, *Impunity and Oversight: When Do Governments Police Themselves?*, 8:4 J. Human Rights. 385, 386 (2009).

⁶⁸ *Id.*

impunity is crucial as it can explain how different circumstances can have a decisive effect on the *varying* climate of impunity.

Furthermore, Jorgensen provides an expansive description of different contexts of impunity that the UN definition fails to address. First, it can be the result of “a trade-off (either tacit or explicit) between a state’s security apparatus and other branches of government.”⁶⁹ Second, it can also be due to “the relative lack of salience of human rights violations compared to other political values during political crises.”⁷⁰ The population could be more lenient towards stability rather than accountability in times of crises, or they could have other pressing problems on their minds such as poor economic and social conditions, thus making the issue of impunity more of a “luxury rather than a necessity.”⁷¹ Third, it may also be “a consequence of weak or underdeveloped legal institutions...[or] poorly designed legal rules that create perverse incentives for members of a state’s coercive apparatus.”⁷² Fourth, it could be “the result or outcome of deliberate policies of repression or the consequence of unbalanced power relations across the various arms of the state.”⁷³ Fifth, it can be created by cases of exceptional circumstances where decrees and laws are passed giving police and military powers a wide range of discretion in detentions, arrests, and surveillance; for example, the suspension of constitutional rights of citizens.⁷⁴ Sixth, victims of human rights violations can be from a marginal or vulnerable group that lacks “the financial, legal, political, and social resources to make successful complaints against state actors”.⁷⁵

While Jorgensen's discussion of the different contexts of impunity is important, it does not set a methodological framework that can capture the multi-dimensional aspects of impunity in different situations. In other words, the results of his study reveal the relationship between the predictors and the levels of impunity, but do not explain how impunity functions or operates in each country.

⁶⁹ *Id.* at 389.

⁷⁰ *Id.* at 390.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 387.

In a more specific case study of the Romanian legal system, Monica L. Macovei examined the institutional traits of the legal system that have enabled police misconduct and lack of accountability.⁷⁶ She referred to several factors such as the militarization and centralization of the police, military trials for police misconduct, inability to appeal prosecution's decisions, police investigations of allegations of police misconduct, and the impossibility of civil remedies to victims in the absence of criminal prosecutions.⁷⁷ More importantly, she does not only examine incidents of non-punishment of violations, as the UN definition suggests, but also goes on to explain *how* this non-punishment came about. However, she only focuses on institutional traits of the system where as there could be other factors that lay outside of the institutional dimensions of a legal system that can also contribute to impunity.

Christopher C. Joyner's analysis of impunity acknowledges this issue where he provides two-dimensional distinctions for describing impunity; normative and factual. He defines factual impunity as impunity facilitated by the government where as “the particular circumstances and internal political-social conditions permit gross human rights violators to evade prosecution in some state.”⁷⁸ On the other hand, the normative dimension of impunity is “often tied to the presence of a military justice system and various national impunity laws.”⁷⁹ The military judiciary often leads to acquittals and there is a general logical link between it and impunity.⁸⁰ Other factors falling under the normative dimension include national amnesty laws. The Latin American experiences of transition to civilian governments provide a clear example of this tactic where military regimes ensured the issuance of general amnesties for past human rights abuses by their forces. In Argentina, President Alfonsín issued a law “that exonerated all military personnel below the rank of brigadier general from any criminal liability for acts committed between 1976 and 1983.”⁸¹ In 1978, the Pinochet government passed a “self-amnesty law... which "forgot" all crimes committed by the

⁷⁶ Monica L. Macovei, *Police impunity in Romania: Military jurisdiction over misconduct cases*, 10:1 International Journal of Research and Policy 107 (2012).

⁷⁷ *Id.*

⁷⁸ C. Joyner, *supra* note 47, at 616.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Jon M. Van Dyke & Gerald W. Berkely, *Redressing Human Rights Abuses*, 20 Denv. J. Int'l L. & Pol'y. 243, 250 (1991-1992).

military after September 11, 1973.”⁸² Similarly, in 1979, a “reciprocal amnesty” was issued in Brazil preventing investigations of abuses by military and police forces.⁸³ In Uruguay, the “Impunity Law” was passed via a referendum which shields all military personnel from appearing before civilian courts for human rights violations.⁸⁴

Joyner argues that the causes of impunity are more factual than normative. The power and influence that security and military institutions possess ultimately produce impunity as “explained by the facts and circumstances of situations, rather than the normative instruction or legal mandate of international criminal law.”⁸⁵ Impunity is thus determined by the “distribution of political and social power in that society [where as] control of that power determines the likelihood of impunity.”⁸⁶ Accordingly, it is not the law that determines impunity but rather the political power in charge of applying and interpreting the law.⁸⁷ I disagree with Joyner's assertion that the factual is more responsible for perpetuating impunity than the normative. I think both factors play an equally important role in determining the result of impunity. It is true that impunity may not be a direct result of law, as Egyptian legislations criminalize torture and extra-judicial killings, but it is also not only a direct result of the power relations of security and military forces in society. There are normative institutional traits present in the Egyptian context that widely contribute to impunity, such as the military courts. In all fairness, Joyner does concludes that impunity is “multi-dimensional where it stems from a complex nexus of normative, circumstantial, and situational causes” and not a “construct normally found in positive law”.⁸⁸

Joyner's approach tackles the gaps within the UN definition by presenting a framework that could be applied in different specific situations that also captures the different dimensions of impunity and its modes of operation. But an even more comprehensive approach is offered by J. Patrice McSherry and Raúl Molina Mejía where they set

⁸² J. Patrice McSherry, *Military Power, Impunity and State-Society Change in Latin America*, 25:3 *Can. J. Polit. Sci.* 463, 471 (1992).

⁸³ C. Joyner, *supra* note 47, at 620.

⁸⁴ *Id.*

⁸⁵ *Id.* at 616.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 620.

three dimensions of impunity. First is the *strategic* impunity, defined as:

Active measures taken by state officials at specific moments, whether laws, decrees, amnesties, or pardons, to derail processes of or demands for truth and justice. Another manifestation of strategic impunity is a form of complicity between the civilian regime and the security forces, where civilian leaders publicly defend repressive measures or military forces that carry them out, repeat and legitimize army disinformation, or attack human rights advocates or those who demand accountability.⁸⁹

Guatemalan President Vinicio Cerezo who was elected in 1985, refused to repeal the Decree 8-86 granting amnesty to the military for past abuses; this is an example of *strategic* impunity.⁹⁰ In response to the killings, disappearances and torture committed by the army in 1989, President Cerezo dismissed the documentation collected by human rights group.⁹¹ Another example is the appointment of General Jose Luis Quilo Ayuso, the former commander of a military zone where massive atrocities were committed by the army, as Minister of Defense.⁹²

Secondly, they define *structural* impunity as “mechanisms and structures, institutionalized and legalized in the state, that serve to protect a judicial system of military courts that protects those who abuse state power”.⁹³ The authors use the examples of the use of military courts and the 1985 Guatemalan constitution which although sets a progressive set of liberal rights, it also provides the “legal basis for the national-security doctrine and ideology...[that] gives the army the role of guaranteeing external and internal security and puts the entire state under the hegemony of the army.”⁹⁴ Another example of *structural* impunity is the use of military trials for all matters involving military personnel. For example, if a civilian is involved in a car accident where the second party is a member of the military, then the military tribunal will have jurisdiction.⁹⁵ The military tribunals in Guatemala serve to shield military personnel from any accountability.⁹⁶ Military tribunals do not

⁸⁹ J. Patrice McSherry & Raúl Molina Mejía, *Confronting the Question of Justice in Guatemala*, 19:3(49) Social Justice 1, 3 (1992).

⁹⁰ *Id.* at 8.

⁹¹ *Id.*

⁹² *Id.* at 11.

⁹³ *Id.* at 3.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

recognize international humanitarian laws or human rights laws.⁹⁷ In the case of an American citizen found tortured and beheaded in Guatemala in 1990, military involvement was suspected, and after heavy U.S pressure on the civilian government, a military official was tried before a military court which not surprisingly freed him.⁹⁸

The third *political/psychological* dimension results “from state terror, by which political options in a polity are restricted and controlled through the state's manipulation of fear in the population; citizens' fear of state terror is exploited to maintain the status quo.”⁹⁹ This type of impunity “serves to truncate the aspirations and possibilities imagined by the affected populations, thus shaping the political environment of a country...[and] to perpetuate the reign of terror and silence, preempting demands for greater social equality and justice.”¹⁰⁰ An example of this dimension is illustrated by the Guatemalan experience through the Civil Patrol system where “virtually all men in the countryside (up to one million mostly indigenous males) have been forcibly recruited for unpaid duty for the army.”¹⁰¹ This system not only ensured the army's control over the population but it also forced its members to spy on their own Mayan communities by “keeping the “order” through intimidation and to perform unpaid labor on construction projects and road building to advance military counter insurgency projects.”¹⁰²

The approach offered by the authors tackles the gaps and ambiguities in the UN definition by providing a more comprehensive framework that goes beyond the scope of non-punishment. For example, the third dimension of *psychological/political* is not referred to at all in the UN definition. In addition, the classification of “*de jure* or *de facto*” of the UN definition remains too general and too simple. On the other hand, the distinction of *structural/strategic* is able to capture how these different dimensions of impunity can function.

I will use the approach offered by Mc.Sherry and Mejía by identifying two dimensions

⁹⁷ *Id.*

⁹⁸ *Id.* at 10.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 14.

¹⁰¹ *Id.* at 3.

¹⁰² *Id.*

of impunity: *strategic* and *structural*. For the purpose of this paper, I will not use the third *political/psychological* dimension. Firstly, I will refer to *strategic* impunity as certain ad-hoc actions taken by the state in response to a specific development in a specific circumstance to derail processes of accountability or demands for truth and justice. Examples of strategic impunity include the decisions of the Prosecution to close investigations of human rights violations, the denial of human rights violations by the state, and the issuance of amnesty laws for former regime members.

Secondly, I will use the term *structural* impunity to refer to institutional traits of the Egyptian legal system such as laws, decrees, constitutions, the military judiciary, and the Public Prosecution. It is important to note that *structural* is distinguished from *strategic* as being an inherent trait of the system; not an ad-hoc decision taken by the state. For example, the decision by the state to try cases before military tribunals, which ultimately result in impunity for military personnel, will fall under *structural*; as the state is following the relevant provisions in Egyptian legislations prescribing it to do so in case of the involvement of a military party in the dispute. Thus the impunity here is a result of the laws that do not allow for trials of military personnel before civilian courts; i.e. an institutional trait of the system.

Furthermore, I would like to stress that the distinction between *structural* and *strategic* is not legal vs. non-legal as *strategic* impunity is not necessarily an illegal action. For example, the issuance of amnesty laws for military ex-rulers is an example of *strategic* impunity as it is an ad-hoc action taken in response to a certain development, i.e. military rulers transferring power to a civilian government. On the other hand, the key distinction between these two dimensions is that one is a constant, inherent condition of the legal system (*structural*), while the other is an ad-hoc, varying element of the entire context of impunity (*strategic*). The reason I am stressing this distinction is because of the different implications they have for understanding the causes of impunity. For example, the Egyptian Criminal Proceedings Code gives the Prosecution the exclusive discretion to close off investigations without an independent mechanism of appeal: this is an example of *structural* impunity. On the other hand, the decision by the Prosecution to close off the investigations is an example of *strategic* impunity.

The approach offered by Mc.Sherry and Mejía manages to address the difficulties of studying impunity by setting an analytical framework that identifies the multiple dimensions of impunity and also explains how these dimensions operate to produce impunity. I have chosen to use this approach in analyzing how the Egyptian legal system perpetuates impunity for several reasons. First, the approach identifies different multiple dimensions of impunity that are not restricted to institutional traits of the system such as legislations or the structure of the Prosecution, and other institutions. While these institutional features of the legal system play a very important role in contributing to impunity, they are not exclusively responsible for it. There are other factors that fall outside of the institutional scope of the legal system that not only allow but assist the perpetuation of impunity. The strategic dimension of impunity is able to capture such decisions by the state that are not necessarily inherent features of the legal system, but can result from the power relations in the state.

For example, in examining why most torture complaints do not end in successful prosecutions, I can identify various reasons: the loopholes in the definition of torture in the Penal Code, the fact that the same police station in which the torture occurred is in charge of investigating the incident, the non-independence of the Forensics Department which could lead to an inaccurate forensic report, the exclusive discretion of the Prosecution to close off the investigation without adequate appeal recourses to the victims, the lack of will of the Prosecution to adequately investigate the complaint, and the probable decision of the Prosecution to close off the case after investigation. All of these reasons have different dimensions: some arise due to structural and institutional traits of the system, and others depend on the political will of these institutions and their decisions regarding each case. In order to capture all of these elements in a unified methodological framework, I must apply the framework of *structural/strategic*. The distinction between these two dimensions are quite important as each have different implications and operate differently to result in the impunity.

Second, the two case studies I will examine exist in different legal systems: the civilian and military judiciary. These judiciaries have different structures and operate in quite

different ways. Despite their differences, the *structural/strategic* framework enables me to capture their distinct features that contribute to the impunity. Thirdly, there are some incidents that can embody both dimensions of impunity. Thus, this framework enables me to identify the interplay between the different dimensions of impunity and show how none of them exhaust the causes of impunity exclusively. In short, the *structural/strategic* framework enables me to identify and assess the different and varying features of the legal system, and other instances that fall outside of the legal system, and also examine *how* these features and instances operate in *which* way to produce impunity.

I will apply this framework to two case studies, popularly referred to as Ramlat Boulaq and Maspero, in order to illustrate how the Egyptian legal system perpetuates impunity. I chose the case of Ramlat Boulaq to provide an example of the civilian judiciary, and the Maspero case as an example of the military judiciary. Through this analysis, I will highlight inherent traits of the Egyptian legal system that have contributed to the impunity as well as the lack of political will of the state to prosecute human rights violations, and accordingly show how this impunity is not an exceptional circumstance but is rather an institutionalized system that is a core pillar of the modern Egyptian state.

III. The Maspero Massacre

The first case study that I will use is that popularly known as Maspero. I first will review the facts of the incident that took place on October 9th 2011, and the legal proceedings that followed in the military and civilian courts. I also will present the reader with a brief overview of the military judiciary through an analysis of the Code of Military Justice (CMJ). Through the analysis of the legal proceedings and the CMJ, I will show how the legal system has perpetuated impunity whether via *structural* or *strategic* dimensions.

A. What happened on October 9th 2011?

On October 9th 2011, the military police attacked a peaceful march of thousands of Coptic Christians who were protesting the demolition of Mar Girgis church in Aswan. The march started from Shoubra and ended in Maspero. The organizers of the protest informed the military in advance about the march and its planned route. The Egyptian Initiative for Personal Rights (EIPR) conducted an investigation into the events where they interviewed eye witnesses, injured protesters, and workers in the hospitals which received the injured protesters.¹⁰³ The report found that the half hour between 6 and 6:30 PM was the deadliest period which witnessed violations to the right to life and safety.¹⁰⁴ The attacks of the military police developed from the use of sticks and firing gun shots in the air, to the military vehicles moving at a high speed, crushing the protesters, and ended with the use of live ammunition and tear gas.¹⁰⁵

From that evening until the next morning, the streets surrounding Maspero witnessed chasing and searching on the basis of religious identity where Coptic Christians were attacked.¹⁰⁶ In addition, at midnight, tens of Muslims went to the Coptic hospital which was filled with bodies of the victims and the injured that were still undergoing

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EIPR, *al-aqbāṭ taḥṭa ḥukm al-‘askar: waqā’i’ ‘ām wa niṣf min jarā’im al-marḥalah al-intiqāīyah*, Dec. 2012, available at <http://eipr.org/report/2012/10/09/1520>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

treatment.¹⁰⁷ A mob of Muslim men tried to storm the hospital and attacked cars and other private property around the hospital.¹⁰⁸ One eye-witness told Amnesty International that “men in plain clothes [were] attacking Copts with knives and glass bottles around the Maspero area, as well as at the Coptic Hospital.”¹⁰⁹ Relatives of those injured also told Amnesty International that they “were prevented from entering the Coptic Hospital by men in plain clothes who threatened to attack the hospital and visitors...other relatives said that the hospital was pelted with rocks by unidentified men in plain clothes, who also used tear gas near the area.”¹¹⁰

The report published by Amnesty International, which was based on various eye witness accounts found that “as numbers of protesters grew at Maspero, military police attempted to disperse them, using batons and firing what seemed initially as to be blank bullets in the air.”¹¹¹ Tens of soldiers clashed with the protesters; they beat them violently with electric sticks and rods which led a number of youths coming from the march to throw stones at the soldiers.¹¹² At this point there were some injuries in the lines of the protesters.¹¹³ As the violence escalated, the protesters persisted to reach the empty space near the State Television building (Maspero).¹¹⁴ Then, the military retreated to the back and the armored personnel carriers (APCs) started to move forward.¹¹⁵ Four APCs started to crush the protesters who then fled to either the fence surrounding the banks of the Nile, or entered into the surrounding buildings on the other side, or the surrounding near-by streets.¹¹⁶

The Amnesty International report stated that “consistent testimonies by protesters, other witnesses and investigators, corroborated by video evidence, confirm that armored personnel carriers (APCs) and cars drove recklessly and at high speed into protesters in an attempt to disperse the demonstration”.¹¹⁷ The footage of the APCs

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Amnesty International, *supra* note 7, at 12.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ EIPR, *supra* note 103.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Amnesty International, *supra* note 7, at 11.

running over protesters was caught on camera and broadcast on several local and international channels, as well as the Internet.¹¹⁸ The APCs crushed bodies of the victims several times, going back and forth, and neither the military police, the armed forces nor the Central Security Forces (CSF) gave the protesters a chance to carry the bodies of the dead from the ground.¹¹⁹ Military police and CSF attacked the bodies laying on the pavement as well as the injured protesters with sticks and rods.¹²⁰

According to eye-witness accounts, the military started to fire live ammunition simultaneously while the APCs stormed recklessly through the protesters.¹²¹ The gun fire came from different places; shots were fired from on top of the APCs, shots were fired by the military police situated at the front of the State Television building; and shots from unknown persons were fired from on top of the 6th of October bridge.¹²² Some of the protesters “used stones and sticks in clashes with armed and security forces to try to stop the assaults...they also tried to stop the APCs by climbing on them.”¹²³ Some of them then “attacked two unoccupied military vehicles parked by the Nile with wooden sticks and metal rods.”¹²⁴ Another eye-witness told Human Rights Watch that the crowd “attacked another vehicle that came down the Corniche, lighting a gas canister under it and setting it aflame...two soldiers inside escaped...protesters beat one of them, who was rescued by a priest...[and] the other fled towards Maspero.”¹²⁵ Then, civilians carrying guns and other weapons appeared standing near the military police.¹²⁶ Civilians coming from the entrance of the side-streets clashed with the Coptic protesters near Ramses Hilton.¹²⁷ One eye witness told Human Rights Watch that she encountered “a group of men in civilian clothing brandishing what she described as a sword and chanting anti-Christian slogans.”¹²⁸

¹¹⁸ EIPR, *supra* note 103.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Amnesty International, *supra* note 7, at 11.

¹²⁴ See Press Release, Human Rights Watch, *Egypt: Don't Cover up Military Killing of Protesters*, 25 October 2011, available at <http://www.hrw.org/news/2011/10/25/egypt-don-t-cover-military-killing-copt-protesters>.

¹²⁵ *Id.*

¹²⁶ EIPR, *supra* note 103.

¹²⁷ *Id.*

¹²⁸ Human Rights Watch, *supra* note 124.

State television had broadcast earlier the killing of three conscript soldiers by Coptic protesters, which was shown to be untrue later as forensic officials reported the death of only one soldier. One TV presenter called on the “honorable citizens to defend the army against the attack”. Hossam Bahgat, former director of EIPR, told Human Rights Watch that “a short time after the government channels broadcast the reports, he encountered groups of armed men in civilian clothes from the Boulaq neighborhood, next to Maspero, who said they had heard that armed Christians were attacking the army...[and] he witnessed attacks on Copts that evening by people in civilian clothes.”¹²⁹ Downtown Cairo and the surrounding areas witnessed a hunt for Christians in the streets who were then attacked by live ammunition and other weapons.¹³⁰ During that period from 9 PM until the next morning, these hunts and attacks were committed within the presence of the military police and the CSF.¹³¹

The military police were able to disperse the protest and only a limited number of protesters remained hiding in the entrances of the surrounding buildings.¹³² The Military police conducted random arrests based on religious identity.¹³³ They tortured the detainees inside the State Television building, by violent beatings. 28 were arrested; 25 of them were Coptic Christians.¹³⁴ The detainees said that they were arrested in random areas by civilians, including from public transport.¹³⁵

The Ministry of Health announced the death of 24 people; 14 were killed as a result of crushing by the APCs and 11 were killed by live ammunition.¹³⁶ The Ministry announced that 329 were injured; some from live ammunition, others from the crushing of the APCs, and others suffered from broken bones as a result of attacks by sharp objects.¹³⁷ According to forensic officials, one soldier was killed by a gunshot wound.¹³⁸

¹²⁹ *Id.*

¹³⁰ EIPR, *supra* note 103.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* Four other protesters died later as a result of their injuries.

¹³⁷ *Id.*

¹³⁸ *Id.*

B. The Military's Response

On October 12th 2011, SCAF held a press conference about the Maspero massacre. During the press conference, the authorities “attempted to cover up the truth and blame the violence on protesters, sectarian tensions and “hidden elements”.”¹³⁹ SCAF “dismissed criticism of its handling of the unrest as proof of the attempts to drive a wedge between the army and the people”.¹⁴⁰ Generals Mahmoud Hegazy and Adel Emara denied any wrongdoing of the army, claimed that armed protesters are the ones who attacked the military, and that “the armed forces would never and have never opened fire on the people.”¹⁴¹

Despite the various footage showing the implication of the army in the massacre, the generals insisted that “the soldiers driving armored vehicles were trying to avoid protesters, who were throwing stones and Molotov cocktail bombs at them...[the soldiers] were in an unprecedented psychological state.”¹⁴² General Emara concluded that “I can’t deny that some people may have been hit, but it was not systematic.”¹⁴³

On October 27th 2011, the head of SCAF issued a communiqué stating that investigations of the Maspero massacre will be referred to the civilian judiciary, specifically the State Security Prosecution.¹⁴⁴ Yet despite this announcement, the Maspero case was divided in to two sections; the case of the killing of the protesters by the APCs before the military court, and the case of the killing of protesters by live ammunition and other means before the civilian judiciary. Indeed, SCAF has resisted “calls by human rights organizations, victims’ families and the National Council for Human Rights to refer the entire investigation to an independent body empowered to compel members of the armed and security forces to testify.”¹⁴⁵

C. Dimensions of Impunity in the Maspero Case

¹³⁹ Amnesty International, *supra* note 7, at 14.

¹⁴⁰ *Id.*

¹⁴¹ Human Rights Watch, *supra* note 124.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ EIPR, *supra* note 103.

¹⁴⁵ Amnesty International, *supra* note 7, at 14.

The Maspero case was first referred to the State Security Courts, which referred it to an investigative judge from the Ministry of Justice, Counsellor Tharwat Hamad.¹⁴⁶ On April 24th 2012, the civilian judge decided to shelve the investigations with the 54 defendants, which included activists, members of the State Television and Coptic priests. Alaa Abdel Fattah, the well-known human rights defender and blogger, was arrested by the military on October 30th 2011 on charges of inciting violence against the military.¹⁴⁷ The 54-list also included Mina Daniel, a young activist who was shot dead by the military police in the Maspero massacre.¹⁴⁸ At least 30 people were detained under these investigations; the charges included “stealing weapons and engaging in arson or other disorderly behavior.”¹⁴⁹ Eventually, the case was closed as the judge stated that there was not enough evidence. He then dropped the charges, and mandated the police to continue investigations to strengthen the evidence. Then, the Public Prosecution appealed this decision, however in May 2013, the Court of Appeals found that there is no basis to re open the case, and accordingly supported the earlier decision by the investigative judge.¹⁵⁰

Though, the investigative judge referred two Coptic protesters, Maikal Adel Naguib, and Maikal Mosaad Shaker, to the criminal court on charges of stealing and possession of firearms that belonged to the military.¹⁵¹ On February 4th 2012, a North Cairo Criminal Court sentenced them to three years imprisonment.¹⁵² During the Court's examination of this case (No. 2121 of 2011 in Bolaq Abu al-Ela), it affirmed that it will only look at the incident of theft of the military's weapons without examining the context of the theft.¹⁵³

The second part of the proceedings were conducted before the military judiciary

¹⁴⁶ EIPR, *supra* note 103.

¹⁴⁷ See Press Release The Observatory for the Protection of Human Rights Defenders and the Euromediterranean Human Rights Network (EMHRN), *Blogger detained by the military for denouncing the repression of the Maspero demonstration*, 3 Nov. 2011, available at <http://www.fidh.org/en/north-africa-middle-east/egypt/Blogger-detained-by-the-military>.

¹⁴⁸ EIPR, *supra* note 103.

¹⁴⁹ Amnesty International, *supra* note 7, at 16.

¹⁵⁰ See Press Release, EIPR, *fī al-dhikrā al-thānīyah lī-madhbaḥat māsbīrū: al-mubādarah al-miṣrīyah tutālib bī-ihqālat qiyādāt al-qūwāt al-musallahah al-mutawarrīn lī-l-muhākamah*, Oct. 9 2013, available at <http://eipr.org/pressrelease/2013/10/09/1846>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

where the military prosecution referred case No. 5447 of 2011 to court. The military court charged three soldiers with manslaughter according to article 238 (a) of the Penal Code.¹⁵⁴ The Military Court started the trial on December 27th 2011.¹⁵⁵

1. Structural Impunity

I have defined *structural* impunity as inherent features of the legal system such as legislations, constitutions, and structures of the judiciary. In the Maspero case, the referral of the three soldiers to a military court constitutes *structural* impunity for two reasons. First, the current structure of the military judiciary leaves it with little independence from the executive. Second, the Code of Military Justice (CMJ) prescribes exclusive jurisdiction to all disputes involving military personnel.

First, although the 2012 suspended Constitution and the 8th of July 2013 Constitutional Declaration consider the military judiciary as an independent body, the structure of this institution proves to be otherwise.¹⁵⁶ The CMJ explicitly states that the military judiciary is an organ of the armed forces¹⁵⁷ where its head is a subordinate of the Minister of Defense;¹⁵⁸ all its members must be members of the armed forces¹⁵⁹ and are appointed by the President after conferring with the Minister of Defense. The reader can realize that there is an underlying problem of independence. The military

¹⁵⁴ *Id.* Art. 238(a) states that whoever causes the death of someone as a result of his negligence, or recklessness, or his non-compliance with the laws, decisions and regulations, shall be punished by no less than six months imprisonment and a fine of no more than 200 EGP, or either penalties. The penalty for imprisonment shall be no less than one year and no more than five years and the fine no less than 100 EGP and no more than 500 EGP, or either penalties, if the crime occurred as a result of the offender's grave breach of his profession, or as a result of his intoxication when he committed the crime resulting in the incident, or if during the incident he did not help the victim. Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *al-Jarīdah al-rasmīyah* (Egypt).

¹⁵⁵ EIPR, *supra* note 103.

¹⁵⁶ Art. 198 stated that the military judiciary is an independent judicial body which has exclusive jurisdiction to try all crimes relating to the armed forces and its members; civilians cannot be tried before military courts except in crimes that harm the armed forces and the law defines these crimes and the competence of the military judiciary; members of the military judiciary are independent, cannot be removed from their posts, and possess all the guarantees, rights and duties prescribed for members of the judiciary. Constitution of the Arab Republic of Egypt, Dec. 25, 2012, suspended on July 3, 2013. Art. 19 of the current Constitutional Declaration states that the military judiciary is an independent judicial body which has exclusive jurisdiction to try all crimes relating to the armed forces and its members. Constitutional Declaration of the Arab Republic of Egypt, July 8, 2013. Art. 183 of the 1971 Constitution stated that the law shall organize the military judiciary and prescribe its competence within the limits prescribed by the Constitution. Constitution of the Arab Republic of Egypt, 11 Sept. 1971, suspended on Feb. 10, 2011.

¹⁵⁷ Art. 1, Law No. 25 of 1966 (Code of Military Justice), *al-Jarīdah al-rasmīyah* (Egypt).

¹⁵⁸ *Id.* at art. 2.

¹⁵⁹ *Id.* at art. 55.

prosecution and the military courts are not independent entities but are rather sub-organs of the military institution. Furthermore, members of the military prosecution, including military judges, must possess a high-ranking status in the military. This presents another serious problem where the members of the military judiciary are appointed based on hierarchy, and not experience or competence. It also presents another problem of impartiality where as the members of the military judiciary come from the same military family and can often have personal ties or sympathies with their colleagues on trial.¹⁶⁰ In addition, members of the military judiciary are subject to the orders of their superiors where they cannot ignore such orders, or else they could themselves face trial.

It is important to refer here to the UN Basic Principles of the Independence of the Judiciary where it states that:

It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary...[and the judiciary] shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.¹⁶¹

By default of its structure, the military judiciary does not conform with the standards set forth by the UN principles. The fact that members of the military judiciary are subordinates of the executive makes the entire institution more of an organ of the state, rather than an independent judicial body.

Furthermore, the interference of the executive in the legal process of the military judiciary is also highlighted by its system of ratification of sentences. All sentences by the military courts must be ratified by the President or the officer the President mandates, to enter into force.¹⁶² If the sentence has been ratified, then it cannot be appealed, except in cases of the death penalty or with the knowledge of the President

¹⁶⁰ Macovei, *supra* note 76, at 114.

¹⁶¹ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Madrid, Spain, Aug 26- Sep. 6, 1985, *Basic Principles on the Independence of the Judiciary* (Sep. 6 1985), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

¹⁶² Art. 97, Law No. 25 of 1966 (Code of Military Justice), *al-Jarīdah al-rasmīyah* (Egypt).

or whom he mandates.¹⁶³ When examining the appeal, the superior of the “ratification officer”¹⁶⁴ has the complete discretion to cancel the sentence, order a re-trial, mediate or suspend the sentence.¹⁶⁵ In an independent judicial system, judicial decisions “cannot be subject to change by authorities other than superior courts.”¹⁶⁶ This is affirmed by the UN Basic Principles on the Independence of the Judiciary which state that “there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.”¹⁶⁷

The above discussion of the structure of the military judiciary shows how it is not an independent judicial body, but rather a sub-organ of the executive. Thus, the use of the military court to try the three soldiers is an example of the *structural* dimension of impunity, as it is due to the inherent structure of the military judiciary. By using the military judiciary to prosecute human rights violations committed by a branch of the executive (military personnel), the result will most likely be impunity because the same body that committed the violations is in charge of investigating itself.

Second, the referral of the three soldiers to the military courts is due to the provisions of the CMJ where it states that the military courts have jurisdiction over all members of the armed forces, including students at military universities or schools, and employees of the Ministry of Defense,¹⁶⁸ as well as crimes that occur in areas managed by the armed forces.¹⁶⁹ However, the jurisprudence of international and regional human rights mechanisms have affirmed that incidents involving serious human rights violations should not be tried before a military court,¹⁷⁰ as it undermines essential

¹⁶³ *Id.* at art. 102.

¹⁶⁴ The “ratification officer” is the officers mandated by the President to ratify sentences, *Id.* at art. 97.

¹⁶⁵ *Id.* at art. 99, 112, 116. The articles do not provide any detailed descriptions on what the officer can modify, cancel or suspend the sentence; thus leaving him with complete discretion that can be ultimately abused.

¹⁶⁶ Human Rights Watch, *The Road Ahead: Human Rights Agenda for Egypt's New Parliament*, 12 (2012) available at www.hrw.org/sites/default/files/reports/egypt0112webwcover.pdf.

¹⁶⁷ See Basic Principles on the Independence of the Judiciary, *supra* note 161.

¹⁶⁸ Art. 4, Law No. 25 of 1966 (Code of Military Justice), *al-Jarīdah al-rasmīyah* (Egypt).

¹⁶⁹ *Id.* at art. 5. Military courts apply the penalties of the Penal Code, *Id.* at art. 122. There are other penalties relating exclusively to military officers prescribed in the law; such as suspension from the armed forces and degradation of military status, *Id.* at art. 120, 121.

¹⁷⁰ See Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Draft Principles Governing the Administration of Justice Through Military Tribunals*, Commission on Human Rights, U.N. Doc. E/CN.4/2006/58 (January 13, 2006) (by Emmanuel Decaux), where it stated in principle No. 7 that “in all circumstances, the jurisdiction of military courts should be set

safeguards that could eventually determine the outcome of the trial. The fact that the investigation for the Maspero massacre was carried out by the military prosecution “casts serious doubt over its impartiality and independence.”¹⁷¹ The military trial “is deprived of the minimal guarantees of justice and constitutes a continuation of SCAF's position of refusing to admit any responsibility for this horrific crime [Maspero].”¹⁷² The military prosecution’s investigation into the case is a “part of the [same] military institution that the injured protesters have accused it of murder and so it cannot be considered an unbiased party in this [present] case.”¹⁷³ Egyptian human rights organizations have blamed SCAF for “continuing to shield members of the military police from criminal prosecution by referring three soldiers to a military trial before the investigative judge mandated by the Public Prosecution finished his investigations into the incident.”¹⁷⁴ These serious concerns over the impartiality and integrity of the military trial are well in place.

Thus, the trial of the three soldiers before the military court is an element of *structural* impunity as it is due to an inherent trait of the legal system, i.e. the CMJ's exclusive jurisdiction over all crimes committed by the military. By exclusively prescribing jurisdiction to the military courts, the CMJ prevents trials of military personnel before the civilian judiciary. In light of the non-independence and bias of the military court as discussed above, the outcome of military trials for military abuses will most likely result in impunity. Furthermore, given the entrenchment of the military in Egyptian politics, this law further supports the military's existence as a state within a state, above the law, governed by their own rules, on their own terms.

aside in favor of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extra-judicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.”; The Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child, the African Commission on Human and Peoples’ Rights, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights and the country-specific and thematic procedures of the United Nations Commission on Human Rights, have reached an unanimous position: “military tribunals are not competent to try military personnel responsible for serious human rights violations against civilians.” *Id.*

¹⁷¹ Amnesty International, *supra* note 7, at 15.

¹⁷² See Press Release EIPR, *Three Soldiers to Be Tried for 'Manslaughter' in The Maspero Military Attacks*, 26 Dec. 2011, available at <http://eipr.org/pressrelease/2011/12/26/1324>.

¹⁷³ See Press Release EIPR, *Maspero: State Incitement of Sectarian Violence and Policy of Extrajudicial Killings*, 16 Oct. 2011, available at <http://eipr.org/pressrelease/2011/10/16/1266>.

¹⁷⁴ EIPR, *supra* note 150.

On April 11th 2012, EIPR, al-Nadim Center for the Rehabilitation of Victims of Violence and lawyers of the families of the victims decided to withdraw from the proceedings before the military court. In their joint statement, the organizations stated that “after 12 hearings, the military judiciary has proved once again to not be concerned with achieving justice.”¹⁷⁵ The organizations noted that they found out about the proceedings by surprise when the head of the military judiciary issued a statement on December 20th 2011 stating that the case of Maspero and the virginity tests are currently being processed before the military courts.¹⁷⁶ As the organizations were presenting the families of the victims, as civil parties to the case, the law does not guarantee that they are informed about the proceedings.¹⁷⁷ The Court of Appeal has upheld in several cases that once a military court has issued its final verdict, the victim can file a civil suit for reparation before civilian courts.¹⁷⁸ The military and civilian courts work simultaneously in this regard where as the victims and civil parties are not guaranteed a presence in the military court's proceedings, however the civilians courts can then step in to provide the victims with civil reparations. These simultaneous roles can be used as a justification by the authorities to maintain the use of military courts; they can argue that while victims cannot find their place in the military courts, they will find it in the civilian courts. However, there are several loopholes within this system that prevent the victims from truly engaging in the legal process.

First, the lawyers of the victims were not allowed to access the investigation papers, as well as other documents in the prosecution file.¹⁷⁹ This decision comes in blatant violation of the principle of equality of arms enshrined in international human rights standards.¹⁸⁰ Article 67 of the CMJ states that all parties to the case have the right to access all the files of the cases, with the exception of confidential files.¹⁸¹ While this

¹⁷⁵ See Press Release, EIPR, *īnsihāb al-munazzamāt al-huqūqīyah wa usar shuhadā' māsbūrū min amām al-mahkāmah al-'askarīyah*, Apr. 11, 2011, available at <http://eipr.org/pressrelease/2012/04/11/1402>.

¹⁷⁶ *Id.*

¹⁷⁷ See art. 68, Law No. 25 of 1966 (Code of Military Justice), *al-Jarīdah al-rasmīyah* (Egypt), where it states that the courts are obliged to inform the defendants and witnesses of the proceedings. It does not mention the civil parties or victims.

¹⁷⁸ Case no. 2189/55/Court of Appeal (Egypt), Case no. 3753/61/Court of Appeal (Egypt).

¹⁷⁹ EIPR *supra* note 175.

¹⁸⁰ See art. 14, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (March 23, 1967).

¹⁸¹ See art. 67, Law No. 25 of 1966 (Code of Military Justice), *al-Jarīdah al-rasmīyah* (Egypt).

point can be valid in cases where the crimes are strictly involving the armed forces and military matters, it can be very problematic for crimes that involve civilians, in particularly human rights violations committed by the military. Indeed, this is what happened in this case where the lawyers of the families of the victims were not allowed to access to several documents. Hence, Article 67 of the CMJ is an element of *structural* impunity as it is an inherent trait prescribed in the legal system. This provision can be used to prevent victims' lawyers from accessing important files, thus severely restricting victims' participation in the proceedings. This restriction can affect the victims' plea in the case which can ultimately determine the verdict against the perpetrators.

Secondly, while the military judiciary is obliged to examine all the evidence submitted to it by the military prosecution and defendants, this does not mean that the judges are obliged to look into evidence submitted by the civil parties (the victims' lawyers).¹⁸² Thirdly, the military judiciary is not obliged to listen to the requests of the civil parties; it can even refuse to allow them to attend the hearings.¹⁸³ These are elements of *structural* impunity as they are due to inherent features of the legal system, i.e. the limited rights civil parties have in proceedings before the military courts. These elements of *structural* impunity have allowed the judges to refuse to examine evidence submitted by the victims' lawyers which contained incriminating material, not only against the soldiers, but also against their superiors. Furthermore, the lack of obligation of the military judge to examine the requests by the civil parties which included requests to change the charges from misdemeanor to crime, and including high-ranking military officials in the list of defendants, have contributed to the impunity. The three year imprisonment sentence against the three soldiers is not proportionate to the gravity of the crime. In addition, it has exonerated all their superiors who gave the orders from any punishment.

Furthermore, I believe that victims should be able to engage in the criminal part of the proceedings; restricting their role to only applying for monetary compensation is neither appropriate nor fair. The right to effective remedy is not limited to monetary

¹⁸² Interview with Ishak Ibrahim, Head of the Sectarian Violence in EIPR, in Cairo (Nov. 12, 2013).

¹⁸³ *Id.*

compensation, but also includes the right to establish the truth, and the right to testify and engage in the judicial criminal proceedings.¹⁸⁴

Moreover, the organizations noted the grave conflict in the case as it was processed by two judiciaries; the civilian investigative judge and the military judiciary. There should be only one body investigating the case in order to be able to identify the actual perpetrators of the crime and punish them. The decision by the authorities to process two parallel legal proceedings presents both *structural* and *strategic* examples of impunity. First, the element of *structural* impunity is primarily related to the fact that the civilian judiciary, even if it wanted to, is unable to prosecute military personnel for crimes committed against civilians. This was supported by the jurisprudence of the Court of Appeal where it has ruled that civilians courts have no jurisdiction to try cases that were processed before a military court; nor can it rule on cases involving the jurisdiction of the military courts.¹⁸⁵

2. Strategic Impunity

Second, I have defined *strategic* impunity as ad-hoc actions taken by the state in response to a specific development in a specific circumstance to derail a process of accountability or demands for truth and justice. Examples of strategic impunity include the affirmation and legitimization of army disinformation, discrediting of information documented by human rights groups and attacks against human rights advocates or those who demand accountability. I believe that the decision to separate the cases according to the causes of death presents an example of *strategic* impunity as it is an ad-hoc decision taken by the state to affirm and legitimize army misinformation. The official narrative presented by SCAF is that the military did not intentionally kill the protesters, but rather the three soldiers drove recklessly which resulted in their collision with the protesters, thus killing them, by accident. On the other hand, the other causes of death such as live ammunition was referred to the civilian judiciary. The investigations that were presented by the Military Police and the

¹⁸⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147 (Dec. 16, 2005) *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

¹⁸⁵ Case no.898/31/Court of Appeal (Egypt).

State Security aimed at accusing the protesters of killing each other and attacking the military, rather than the military firing live ammunition at the protesters. By putting these two facts together, the reader will realize that the decision by the authorities to divide the cases in this regard, does indeed support the scenario that was presented by SCAF during the press conference (that they did not open fire on the protesters). In sum, the decision to separate the cases according to the cause of death is an example of *strategic* impunity as it not only affirmed the denial of atrocities by SCAF, but also prevented the families of the victims who died from live ammunition and other causes, from prosecuting the military officers responsible for their deaths.

Furthermore, I would like to draw the reader's attention to the fact that the entire proceedings before the civilian judiciary was aimed at one thing: prosecuting the protesters, and blaming them for the violence, instead of identifying the real perpetrators and holding them accountable. I can support my claim by the following reasons. First, the investigative judge decided to close the case against the 54 defendants because the investigations failed to identify the real perpetrators of the crime, failed to identify the type of weapons that killed the victims, and that there were no evidence to suggest that the suspects that were presented by the investigations of the Military Police and State Security, have participated or incited others who participated in the crime.¹⁸⁶ Second, Wael Sabry Bshay, whose brother was killed in the events, told Amnesty International that he was asked to testify before the civilian and military judiciaries.¹⁸⁷ He reported that “he was asked questions they knew he would not be able to answer, and complained that the military prosecutor intimidated witnesses, including by accusing them of “seeking to invade the [Maspero] building” and by “screaming at them.”¹⁸⁸ Amnesty International reported other similar complaints by other witnesses and relatives of those killed, including that “the military prosecution’s demeanor and types of questions shook their faith in the independence and impartiality of the investigation, and left them feeling like the accused rather than the victims.”¹⁸⁹

¹⁸⁶ EIPR, *supra* note 150..

¹⁸⁷ Amnesty International, *supra* note 7, at 17.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

I would like to add that this method of prosecuting victims and protesters instead of the real perpetrators is not a unique or individual case. Since the Revolution, the Public Prosecution and the courts have embarked on this methodology and continue to use it until this very day. These are demonstrations of *strategic* impunity as they are active measures taken by the state to deny human rights violations committed by its apparatus, attack those who demand accountability and derail the demands for truth and justice. This approach has been used excessively by the Egyptian legal institutions, where as the institutions responsible for investigating and prosecuting human rights violations have focused on exonerating the perpetrators of any punishment and instead punishing the victims.

Moreover, the adoption of this narrative was supported by the military judiciary's approach in dealing with the case. First, the organizations observed that the military court focused on discrediting the content of any evidence submitted by the victims' lawyers.¹⁹⁰ Secondly, they also noted that the military judiciary kept postponing the decision of the requests to modify the charges from the misdemeanor of manslaughter to premeditated murder.¹⁹¹ Thirdly, the court overlooked the requests of the lawyers to include suspects other than the three soldiers in to the trial for their responsibility in the killings of the protesters.¹⁹² Fourthly, the investigations conducted by the military prosecution as well as the civilian judiciary revolve around one purpose and that is to find a way to condemn the protesters.¹⁹³ These are all examples of *strategic* impunity as they are ad-hoc actions taken by the judges to discredit information documented by human rights groups, and affirm the army's official narrative. The discrediting of the evidence submitted by the victims' lawyers, the refusal to include the soldiers' superiors in the list of defendants, and maintaining that the crime was a misdemeanor and not premeditated murder affirms the army's scenario that the soldiers were not acting out of orders, but rather acted recklessly due to their “unprecedented psychological state”. In addition, by focusing on blaming the protesters for the violence, the judges have affirmed the military's scenario that the protesters were the ones who attacked the army. In sum, the military judiciary's actions ensured that the

¹⁹⁰ EIPR, *supra* note 175.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

official narrative is upheld, and that the high-ranking military officers who gave the orders are not incriminated in the case, thus resulting in their impunity.

The organizations finally withdrew stating that they felt that continuing to work in this direction, amidst the obvious bias of the military judiciary, will only lead to adding legitimacy to a trial that wastes away the rights of the victims.¹⁹⁴ EIPR stated that the main purpose of this trial was to “affirm the scenario presented by SCAF about the massacre in the press conference held on October 12th 2011, where they denied that any of soldiers charged with securing the [State] Television building were armed, and it considered that the protesters are the ones who attacked the military police, and the drivers of the military vehicles were struck by confusion so they crushed the protesters.”¹⁹⁵ Amnesty International reached a similar conclusion where it stated that the military courts have been “unwilling to provide justice in cases where people have been killed, injured or tortured by members of the armed forces, even in prominent cases where the victim or their family was able to bring a member of the army to trial.”¹⁹⁶ Indeed, as the reader reviews the course of both proceedings before the military and civilian courts, s/he can conclude that the purpose of the trial was not only to condemn the protesters but also focus on affirming the official narrative that the military was not responsible for the deaths, but rather that the three soldiers acted recklessly, and without orders from their superiors.

The reader will then not be surprised to read that on September 2nd 2012, the East Military Misdemeanor Court sentenced the soldiers Mahmoud Sayed Abdel Hamid Soliman, 27 years old, Karam Hamed Mohamed Hamed, 27 years old, to two years imprisonment, and the soldier Mahmoud Gamal Taha Mahmoud, 22 years old, to three years imprisonment on charges of manslaughter.¹⁹⁷ The court ruled that the three soldiers “caused the death of 14 people in front of the State Television building, by mistake, as a result of their neglect while driving the military armored personnel carriers, which they drove in a random manner that was not appropriate to the roads

¹⁹⁴ *Id.*

¹⁹⁵ EIPR, *supra* note 103.

¹⁹⁶ Amnesty International, *supra* note 7, at 42.

¹⁹⁷ EIPR *supra* note 150.

crowded with people, which resulted in their collision with the victims”.¹⁹⁸ Several relatives of those killed in Maspero “received compensation of 30,000 Egyptian pounds (around US\$5,000), but have not been provided with any other form of reparation.”¹⁹⁹ It is important to note that this compensation came in light of the decision to include the victims of the Maspero massacre as part of the “martyrs of the Revolution”, and thus benefiting from the fund set up to provide them with monetary compensation.

In addition, former President Mohamed Morsy issued a presidential decree establishing a fact-finding commission mandated to “collect information, evidence and conduct fact-finding in the incidents of attempted murder, murder and injury of protesters between the period of 25 January 2011 until 30 June 2012; in order to collect the full facts regarding the perpetrators, whether they were direct or indirect perpetrators.”²⁰⁰ The Maspero massacre was included in the list of incidents that the commission investigated. The commission finalized its report and submitted to the President and the Public Prosecution in January 2013. At the time of writing, the Prosecution has not started any investigations into this case. The decision by the Prosecution to not re-open its investigation is an example of *strategic* impunity as it is an ad-hoc decision taken to prevent any punishment of the military for the Maspero massacre. It is important to recall that the investigations of the civilian judge were closed due to lack of evidence. Hence, the fact-finding report could have been used by the Prosecution as additional evidence to re-open the case. However, the Prosecution refrained from using the report and has consequently assured that incriminating evidence against the military will not be used to prosecute and eventually punish the perpetrators of this massacre.

Finally, the former President even honored former head of SCAF, Field Marshal Mohamed Hussein Tantawi, and former chief of Army Staff, Sami Enan in August 2012 after their forced retirement. These two men, by virtue of their posts, have engaged in superior responsibility for the grave human rights violations committed by

¹⁹⁸ *Id.*

¹⁹⁹ Amnesty International, *supra* note 7, at 17.

²⁰⁰ EIPR *supra* note 150.

their subordinates. Yet, Morsy followed in the same paths as his Latin American counterparts, and embarked on that same strategy of awarding former military heads rather than punishing them for the atrocities they managed. The rewarding of SCAF members is an example of *strategic* impunity as it is an ad-hoc decision taken to affirm the denial of human rights violations committed under their rule. This decision supports the narrative of SCAF that they have never opened fire on protesters, and accordingly has contributed to their lack of punishment for all human rights violations committed during their reign.

IV. Ramlat Boulaq

In this chapter I will discuss the second case of Ramlat Boulaq. I first will provide a brief background about this area and then review the facts of the incident that took place on August 2nd 2012 and the legal proceedings that followed in the civilian courts. I will show how the legal system has perpetuated impunity through these proceedings, whether via *structural* or *strategic* dimensions of impunity. I will use the information provided by the Egyptian Center for Economic and Social Rights (ECESR) and EIPR, who both conducted an investigation based on eye witness accounts from the residents of Ramlat Boulaq regarding the killing of Amr al-Bunni by the tourism police.

A. Historical Background

Eshash al-Kafrawi is a slum area in Ramlat Boulaq Abu al-Ela on the banks of the Nile Corniche in Cairo. According to official papers released by the Slum Development Fund, the area is referred to as “Ramlat Boulaq Nile Towers”.²⁰¹ In the 1990s, Orascom Company purchased land from the owners in order to build the Nile City Towers and the Fairmont hotel.²⁰² On one side lies the fancy hotel and mall which hosts a number of offices of multinational corporations, and on the other side lies one of the poorest slums in Cairo, Eshash al-Kafrawi, where around 3000 residents live without access to water or sewage.²⁰³ Most of the families there live all together in one or two rooms, in homes that are partly demolished, where they have no proper waste management or access to basic services.²⁰⁴

Since the 1990s, the residents of this area have been facing harassment by security forces and attempts to forcibly evict them from their lands as part of the alleged plan to develop this area.²⁰⁵ However, there was no clear information about these plans of development nor was there information available about the compensation given to the

²⁰¹ Egyptian Center for Social and Economic Rights [hereinafter ECESR], *Ramlat Būlā: .man al-qatīl wa man al-dāhīyah*, Aug. 12, 2012, available at <http://ecesr.com/report/5321>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

families who had been forcibly evicted.²⁰⁶ On June 20th 2012, Abdel Qaqi Khalifa, the Cairo governor, issued a decision ordering the governorate's seizure of the property of the slums of "Nile Towers" in Boulaq for a period of three years.²⁰⁷ EIPR and ECESR filed a lawsuit against this decision before the Administrative Court and on August 28th 2013, the Court ruled against the government decision and banned the government order of land acquisition and eviction of the residents.²⁰⁸

The interaction between the residents of Eshash al-Kafrawi and the management of the Nile Towers began with the start of the Revolution in 2011. On January 28th 2011, residents of the area volunteered to counter the attempts of assault and looting of the towers, after the near-by Arcadia mall was looted and destroyed.²⁰⁹ Amr al-Dalli, the director of security of the towers, praised the residents' efforts and asked some of them to cooperate with him in protecting the towers in return for a monthly monetary compensation.²¹⁰ This agreement was customary and not done in an official written contract however EIPR was able to collect copies of the cards that the hotel issued for the residents in charge of security.²¹¹ This cooperation continued since then until the events of August 2nd 2012.

B. The Ramlat Boulaq Protests

The events started when the management of the Fairmont hotel stopped paying the monthly monetary compensation to some of the residents that were assigned to protect the towers, and then the consequent killing of Amr al-Bunni and the injury of others. There are two scenarios to what happened that day: the scenario of the residents and the official scenario announced by the Ministry of Interior.

According to the residents' account, Amr al-Bunni went to the Fairmont hotel to collect his monthly fee for securing the towers and the hotel. Then, the security of the

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Egypt court halts seizure order of Ramlat Boulaq*, *Ahram Online*, Aug. 28, 2013, available at <http://english.ahram.org.eg/News/80169.aspx>.

²⁰⁹ ECESR, *supra* note 201.

²¹⁰ *Id.*

²¹¹ See Press Release, EIPR, *fī 'ahḍāth Ramlat Būlāq : al-dābit al-muttaham bī-l-qatl mutḡallaq al-sarāh wa 'āhālī al-minṭaqah dahāyā lī-l-i'tiqālāt al-'ashwā'yah wa al-taruwwī'*, Aug. 14, 2012, available at <http://eipr.org/pressrelease/2012/08/14/1466>.

hotel and the tourism police refused to allow him entry into the building; as per the orders of the new security director of the hotel who ordered the halt to the payments.²¹² A quarrel emerged between al-Bunni, the security of the hotel and the police which escalated into a fight where a police officer fired gun shots at al-Bunni's thigh and another shot to his back, killing him.²¹³ Eye witnesses confirmed that al-Bunni was not armed when he went to the hotel to collect his monthly fee.²¹⁴ The testimonies also confirmed that the police officer shot al-Bunni in the leg at first, which was enough to keep him paralyzed and thus disperse the threat he allegedly posed.²¹⁵ But then he shot him again in his back which led to his death.²¹⁶

The testimonies showed that one of the residents, Anwar Ramadan, was the first person to arrive at the hotel after al-Bunni was shot.²¹⁷ He carried his body to the ambulance outside the building but the paramedics informed him that al-Bunni has already died and they advised him to return the body to the same place where he found it, until the Prosecution arrives.²¹⁸ When Ramadan returned to the hotel carrying the body of al-Bunni, a quarrel occurred between him and the same police officer that shot al-Bunni, where the latter shot Ramadan in his leg.²¹⁹ Ramadan told EIPR that he called his son to come and take him to a hospital, however upon his son's arrival, his son was also shot in his leg by the police.²²⁰

After news spread about the death of al-Bunni, the injury of Ramadan and his son at the hands of the police, a number of residents gathered around the hotel, breaking its front and setting fire to a number of cars in the vicinity of the Nile Corniche.²²¹ Police forces from Boulaq police station and CSF confronted the attacks and the clashes ended at around 8 PM that day.²²²

²¹² *Id.*

²¹³ ECSEER, *supra* note 201.

²¹⁴ EIPR, *supra* note 211.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

According to the scenario offered by the Ministry of Interior, a group of thugs stormed the Fairmont hotel demanding a fee.²²³ When the employees of the hotel refused, they attacked them with weapons (including bird-shot pellets).²²⁴ When the police officer tried to force them to leave, they attacked him and tried to steal his weapon.²²⁵ Clashes erupted between them, forcing the police officer to use his weapon in self-defense where he fired one gun shot at his [al-Bunni] abdomen, killing him.²²⁶ The person killed turned out to be Omar Fathi Amer, also known as Amr al-Bunni, who is a registered offender in various cases involving drugs and car theft.²²⁷ He was previously detained and released in July 2012.²²⁸

The events concluded with the death of one person, the injury of three persons by gun shots and tens of persons by other means.²²⁹ There were no injuries or deaths of any police officer, and the damages of the hotel and the towers amounted to seven million Egyptian pounds.²³⁰

On August 8th 2012, security forces raided Eshash al-Kafrawi where they stormed all the houses in the area, destroyed its contents, intimidated the residents and randomly arrested most of the males.²³¹ The raid continued from 4 AM until 8 AM.²³² Police forces returned and raided the area in the evening, using the same violence and random manner of arrests.²³³ The number of arrested residents reached around 75 people that day.²³⁴ The police released most of those arrested on the same day with the exception of 10 persons who had arrest warrants issued against them.²³⁵ Those who were released reported that they were severely beaten by the police during their detention.²³⁶

²²³ ECSER, *supra* note 201.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ EIPR, *supra* note 211.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

EIPR assessed the area that same evening and found that the police intended to destroy all the doors and contents of the houses.²³⁷ The residents reported that the police officers conducting the raids were all masked so they were unable to identify them.²³⁸ The police forces attacked the men and women without discrimination, beating and insulting them.²³⁹ Some residents even reported that some of their belongings were stolen during the raids.²⁴⁰ Some families left their houses and went to stay with their relatives as they were afraid that their male family members will get arrested.²⁴¹ Most of those who remained in the area were children and women whereas most of the men had been arrested or fled their homes.²⁴² There were also reports of the police arresting women from the area as hostages so that they force their relatives to surrender themselves to the police.²⁴³

EIPR met with Abdullah Anwar, the brother and son of the two who were injured by gun shots by the police.²⁴⁴ He reported that he was arrested on August 3rd while walking in the street.²⁴⁵ He was tortured, severely beaten and four of his front teeth were broken by the police officer, Mohamed al-Qosi during his two day detention in Boulaq police station.²⁴⁶ His mother took the boy to the Forensics Department, with the front teeth her son lost, in order to prove his injury.²⁴⁷ The forensic report confirmed Anwar's claims.²⁴⁸

Over all, EIPR's investigations documented a number human rights violations against the residents including premeditated murder, excessive use of force, live ammunition and tear gas, violent raids against the residents' houses including intimidation and damaging of their belongings, random arrests and torture of those arrested during

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See Press Release, EIPR, *mutaḍḍāmunūn ma'a ahālī Ramlat Būlāq*, Mar. 17, 2013, available at <http://www.eipr.org/pressrelease/2013/03/17/1660>.

²⁴⁴ *EIPR supra* note 211.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ EIPR, *ī'āqat al-musā'alah: dawr al-niyābah al-'ammah fī taḥṣīn al-shurtāh min al-muhāsabah wa-al-'iqāb*, Jan. 2013, available at <http://eipr.org/report/2013/01/22/1604>.

²⁴⁸ *Id.*

detention, including against children.²⁴⁹

C. The Multiple Dimensions of Impunity in the Ramlat Boulaq Case

As this case was widely covered by the media, the Prosecution rushed to the scene of the incident and started its investigations, examined all the suspects and took the testimonies of the victims and ordered their examination by the Forensics Department.²⁵⁰ However, the result was, as usual: impunity for police officers and the accusation of the victims and their referral to trial. None of the police officers were referred to trial for the murder, injury and torture of the victims despite the charges against them supported by the forensic reports. On the other hand, 51 of the residents are now facing a criminal trial.

On October 9th 2013, the Prosecution finished its investigation and decided to refer 51 suspects from the residents of Ramlat Boulaq to a criminal trial on charges of murder, endangering the safety of public transportation, disrupting traffic, using violence against public employees and possession of weapons.²⁵¹ 17 people were arrested and were presented before the Prosecution on August 3rd 2012.²⁵² They were charged with possession of non-firearm weapons, disrupting traffic, damaging touristic properties, thuggery, resisting the authorities, and using violence against the Fairmont hotel employees.²⁵³ The Prosecution also pressed charges of possession of bird shot fire arms against one of the suspects.²⁵⁴ The Prosecution ordered the detention of 16 persons for 4 days in case No. 3842 of 2012.²⁵⁵ On August 5th, the Prosecution renewed the detention of all suspects for 15 days.²⁵⁶ At the time of writing, they remain in detention. The Prosecution also ordered the arrest of another 21 persons on charges of use of force and violence against the employees of the hotel and security forces assigned for its protection, and use of force against government employees from the

²⁴⁹ EIPR, *supra* note 211.

²⁵⁰ EIPR, *supra* note 247.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

police force.²⁵⁷

Yasser Ali (the police officer who killed al-Bunni) had claimed that the incident was a fight between the designated police officer for the hotel and the victim, and that the bullet came out of his weapon by mistake during his attempt to break up the fight.²⁵⁸ Ali's forensic report stated that the injuries he sustained in his left forearm, neck and chest are a result of his friction with a sharp body or rough surface.²⁵⁹ On September 11, the forensic report of al-Bunni confirmed that the scenario offered by Ali was untrue.²⁶⁰ The report concluded that the deceased suffered from injuries in the back and abdomen as a result of gun shots. The report also confirmed that the deceased was not fighting with the police officer at the time and the latter shot him in the back intentionally killing him.²⁶¹ On August 3rd, the Prosecution charged Ali with the murder of al-Bunni stating that he used his police weapon to fire at the victim, intending to kill him.²⁶² It also charged him with the injury of Anwar Ramadan.²⁶³ In the investigations of the case, the Prosecution went through the recordings of the hotel cameras which showed that Ali killed al-Bunni.²⁶⁴ The recordings showed that al-Bunni was not armed in any way which denies Ali's claim of self-defense.²⁶⁵

On August 3rd 2012, during the interrogation of Walid Hassan, one of the arrested residents, he accused the police officer Hisham Etman of firing gun shots at him and injuring him.²⁶⁶ The Prosecution then mandated the following day a forensic doctor to examine Hassan to prove his injuries, and explain its cause.²⁶⁷ On August 3rd 2012, the Prosecution interrogated Etman and charged him with attempted murder of Hassan, stating that he fired gun shots injuring the victim in his thigh.²⁶⁸ The forensic

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

report stated that the testimony of the victim is plausible thus supporting the charges against Etman.²⁶⁹ Furthermore, the camera footage processed by the Prosecution showed that Etman used excessive force against the residents, which supports their testimonies.²⁷⁰

The head of the Prosecution ordered the copying of the files of the cases against the police officers and its referral to the Public Prosecutor. These files included the charges against Ali for the killing of al-Bunni, and the injury of Anwar Ramadan Abdel Latif; the torture of Abdullah Anwar Ramadan by Mohamed al-Qosi; the injury of Hassan by Etman; and another incident of the injury of 5 citizens by gun shots from police officers.²⁷¹ The ‘order of copying the files’ procedurally means that each incident will be referred under a new case number that shall be investigated, and eventually the decision will be made whether to shelve the case or refer it to trial.²⁷² One film processed by the Prosecution showed Ali stepping on al-Bunni's body.²⁷³ This evidence was sufficient for the Prosecution to charge Ali in the first case; however it ordered the copying of the files which allowed for the police to tamper with the evidence.²⁷⁴ When the evidence was re-processed, it had become damaged.²⁷⁵ The judges decided to shelve the case of Ali for the murder of al-Bunni, and the case of Etman for the attempted murder of Hassan, claiming that there were no reasons to institute proceedings.²⁷⁶ The Prosecution also investigated the case of violent raids against the residents’ houses by the police; however it did not refer any of the police officers to trial.²⁷⁷

1. Structural impunity

I have defined previously *structural* impunity as inherent features of the legal system

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Interview with Mohamed Khedr, EIPR lawyer (Nov. 16, 2013).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ EIPR, *supra* note 247. EIPR has decided to file a complaint on the killing of Al Bunni to the African Commission on Human and People's Rights.

²⁷⁷ *Id.*

such as legislations and the structure of the Public Prosecution. When the Prosecution re-processed the evidence against Ali, it found that it was damaged. This incident sheds light on a crucial problem in the legal system: the fact that police officers are in charge of providing the Prosecution with investigations of police crimes. This feature is an element of *structural* impunity as it is an inherent feature of the legal system. This *structural* dimension of impunity presents a severe conflict of interest that has contributed to impunity for police abuses for two primary reasons. First, it allows the police to refrain from collecting evidence, knowing that there will probably be no cross-examination of their police reports. Second, it allows for the police to pressure the victims and witnesses, and damage evidence that incriminates their colleagues (as in the present case).

Furthermore, this conflict of interest arises from “placing the responsibility to monitor detention facilities, order forensic exams, and investigate and prosecute abuses by law enforcement officials within the same office that is responsible for ordering arrests, obtaining confessions, and prosecuting criminal suspects.”²⁷⁸ A former prosecutor told Human Rights Watch that:

The other problem is that the Public Prosecution does not do the investigations itself, it relies on the police. It’s not the prosecutor’s job to look for the evidence, unless they take a personal interest in it. The prosecutor is usually much too overloaded to question the evidence presented by the police. It’s the police that bring the witnesses and the evidence. So if I order the police to go and summon a witness and they come back saying they couldn’t find him or he no longer lives there, there’s not much I can do about it. Plus they can always tamper with the evidence or pressure witnesses to change their testimony.²⁷⁹

This crucial and honest testimony sheds light upon the critical dilemma of having the police investigate themselves. Given the malignant corruption present inside the Egyptian police, one cannot expect that they will conduct investigations against their colleagues with integrity. The UN Special Rapporteur on Torture has acknowledged

²⁷⁸ Human Rights Watch, *supra* note 19, at 63.

²⁷⁹ *Id.* at 62. *See also* art. 189 of the Instructions of the Prosecution where it states that “if an investigator, after due scrutiny, wants to exclude information that he obtained from a law enforcement official and does not want to depend upon it as evidence in any specific case, he should do that tactfully in order not to devalue the effort exerted by the law enforcement official and not to lose the trust of those who cooperate with him in fulfilling his duties.” *Id.*

this problem and stated that “the conflict of interest inherent in having the same institutions responsible for the investigation and prosecution of ordinary law-breaking being also responsible for the same functions in respect of law-breaking by members of those very institutions.”²⁸⁰ Moreover, the Committee against Torture made a specific recommendation to Egypt regarding this matter. The Committee recommended that the government “set up an independent investigation machinery, including in its composition judges, lawyers and medical doctors that should efficiently examine all the allegations of torture, in order to bring them expeditiously before the courts.”²⁸¹ This recommendation was issued in 1999 and to this date the Egyptian authorities are yet to implement it.

Another crucial issue in the legal system is the lack of independence of the Public Prosecution.²⁸² This is an element of *structural* impunity because its due to the inherent features in the structure of the Prosecution. The head of the Prosecution is appointed by the President, who then can appoint other members of the Prosecution who are formally supervised by the Ministry of Justice.²⁸³ This current structure of “investigative and prosecutorial powers creates structural tensions, as well as challenges the impartiality of investigations.”²⁸⁴ The result of this non-independent structure has been the perpetuation of impunity as it has allowed for the executive to interfere in the investigations of the Prosecution, particularly in cases involving police officers. As a result of this interference, the Prosecution has repeatedly decided to close off investigations of police abuses.

²⁸⁰ Special Rapporteur on Torture, *Civil and Political Rights including the Questions of Torture and Detention*, Commission on Human Rights, E/CN.4/2001/66 (Jan. 25, 2001)(by Sir Nigel Rodley).

²⁸¹ U.N. Committee against Torture, *art. 20 Examinations Re: Systematic Torture*, May 7-12, 1999, UN. Doc. CAT A/51/44 (1999).

²⁸² The Public Prosecution is a “a judicial body under the minister of justice, entrusted with investigating and prosecuting crimes and protecting citizens in the criminal justice system”, Human Rights Watch, *supra* note 19 , at 36. Since its creation in 1875 has been “has been trapped between the executive and the judicial authority and has lacked real independence from the Ministry of Justice”, *Id.*

²⁸³ Art. 125 of the Law on judicial authority which states that “the members of the prosecution are subordinate to their superiors and the Public Prosecutor, and all are subordinate to the Minister of Justice. The minister has the right to monitor and supervise the prosecution and its members; the Public Prosecutor has the right to monitor and supervise all members of the prosecution. The District Prosecutor [attached] to the courts has the right to monitor and supervise the members of the prosecution [attached] to the courts.” *Id.*

²⁸⁴ *Id.*

In cases involving crimes of government employees committed on official duty, the Prosecution is the only body entitled to initiate criminal proceedings against them: whether to refer a case to trial or to close off the investigations or re-open them, or to bring charges against the perpetrators and modify them²⁸⁵ or to appeal court verdicts.²⁸⁶ These features present elements of *structural* impunity as they constitute inherent features of the legal system, i.e. the Criminal Proceedings Code. Due to these features of the legal system, the Prosecution is left with exclusive jurisdiction to prosecute police abuses, as well as the utter discretion to decide on the fate of the proceedings. In light of its lack of independence from the executive authority as discussed above, leaving the Prosecution with such wide discretionary powers can ultimately lead to decisions favoring the police, rather than the victims.

Indeed, this is exactly what happened in the case of Ramlat Boulaq, where the Public Prosecution used this discretionary power to close off the cases against the police officers. It is important to note that this practice of shelving cases has been widely used by the Prosecution in cases of police abuse. A Human Rights Watch report on torture published in January 2011 reviewed a number of cases of torture and ill-treatment that did not reach court because the Prosecution decided to close the investigations, as in the present case.²⁸⁷ Once a case is shelved, victims can appeal this decision to a superior prosecutor, whose decision is final.²⁸⁸ In most cases, the public prosecutors do not rule in favor of the appeal of the victims.²⁸⁹ In the rare cases where the Public Prosecutor decides to re-open the case, then he refers it to a different local

²⁸⁵ *Id.* In most cases of torture, the Public Prosecutors have used their discretionary power to reduce the charges. *Id.*

²⁸⁶ According to art. 63, only the prosecution can summon a public employee to trial and the victim can only join in the case as a civil party. Law No. 150 of 1950 (Code on Criminal Proceedings), *al-Jarīdah al-rasmīyah* (Egypt). See also art. 210(1) and 232(2) of Law No. 150 of 1950 (Code on Criminal Proceedings), *al-Jarīdah al-rasmīyah* (Egypt).

²⁸⁷ The report revealed an “an impunity gap between the number of torture incidents that allegedly occur and the smaller number of torture complaints that victims or their families file that actually reach court” Human Rights Watch, *supra* note 19, at 42. It attributed a number of reasons of why most torture cases do not reach the courts, these include: “Egypt’s inadequate legal framework, which does not properly criminalize torture or provide sufficiently strong penalties; prosecutorial discretion to close investigations; intimidation of victims and witnesses; delays and poor quality of forensic medical examination; conflicts of interest in relying on the police for evidence; drawn out investigations; failure to conduct impartial investigations; and impunity for state security officers.” *Id.*

²⁸⁸ Art. 210(1) and 232(2) of Law No. 150 of 1950 (Code on Criminal Proceedings), *al-Jarīdah al-rasmīyah* (Egypt).

²⁸⁹ Human Rights Watch, *supra* note 19, at 42.

prosecutor for investigation.²⁹⁰ This mechanism of appeal is another example of *structural* impunity as it is an inherent feature of the legal system. The fact that the appeal is lodged to the same body that issued the decision further supports the exclusive discretionary authority of the Prosecution to decide on the fate of proceedings. As the Human Rights Report has shown, due to the lack of independent judicial review, most appeals filed against the decisions of the prosecutors' to close off investigations have been rejected, and accordingly have contributed to the perpetuation of impunity.

Over all, the above mentioned features of the Egyptian legal framework can be attributed to the *structural* dimension of impunity. The legal system provides very few and restricted avenues for the victims to effectively engage in the process, and eventually leaves them with no legal means to pursue their perpetrators. Furthermore, it does not provide any safeguards which guarantee that abuses of government employees will be duly investigated and prosecuted.

2. Strategic Impunity

I have defined strategic impunity as ad-hoc decisions taken by the state in response to a specific circumstance to derail a process of accountability or demands for truth and justice; for example the decisions of the Prosecution to close off investigations of human rights violations. While the Prosecution ordered the detention of 51 residents, it ordered the release Ali.²⁹¹ One of the most important reasons behind pre-trial detention is to limit the ability of the suspect to tamper with the evidence and affect the witnesses. There is no doubt that the suspect here, being a police officer charged with murder, has the ability by virtue of his authority to affect the witnesses and also go after the injured victims and pressure their families to change their testimonies, as well as tamper with the evidence.²⁹² The decision by the Prosecution to release Ali is an example of *strategic* impunity as it is not an inherent feature of the legal system since the reasons prescribed in the law for pre-trial detention is to prevent suspects from tampering with the evidence or affect witnesses. On the other hand, the decision was

²⁹⁰ *Id.*

²⁹¹ EIPR, supra note 247.

²⁹² *Id.*

precisely taken, despite the criteria set forth for the conditions of pre-trial detention, to derail the accountability process against the officer by giving him the opportunity to tamper with the evidence. Furthermore, this decision has shown the Prosecution's bias in the present case where it ordered the detention of the residents, who do not have the power or means to neither tamper with the evidence nor affect the witnesses, unlike their police counterparts.

Finally, the investigative judge decided to shelve the cases on the basis that there was no reason to institute proceedings.²⁹³ This decision is an example of *strategic* impunity as it is an active measure taken to derail accountability of the police officers. The evidence could have eventually led to the sentencing of the police officers if it had reached a criminal trial. However, the Prosecution anticipated this and accordingly made the decision to dismiss the evidence and shelve the case, thus derailing the process of accountability.

It is important to note that the residents have reported that on September 9th 2012, the police officer Hisham Etman, fired gun shots at them and terrorized them.²⁹⁴ By releasing police officers accused of such crimes and not holding them accountable, the Prosecution has not only allowed them to intimidate the victims and the residents, but also to continue their abuse. The police officers, despite having faced criminal charges, remain confident enough to further terrorize their victims. This incident presents a glimpse inside the mentality of police officers: they do believe that they are above the law, and thus they continue to further abuse their power.

3. Political/Psychological Impunity

Although I do not use the *political/psychological* dimension offered by Mc Sherry & Mejía,²⁹⁵ I think it is important to note this dimension here as the following incident

²⁹³ The closure of investigations is decided after the prosecutor determines that there are no sufficient grounds to initiate proceedings where the case is put on file (*hifz*). According to Article 805 of the Instructions of the Prosecution, there are three mentioned reasons to shelve the case: “inability to identify the perpetrator; or insufficient evidence; or non-relevance of the complaint”. Prosecutors cannot close off investigations before they complete the initial investigations of the evidence and collect the testimonies of the victims, their families, or their lawyers. Human Rights Watch, *supra* note 19, at 42

²⁹⁴ Interview with Mohamed Khedr, EIPR lawyer (Nov. 16, 2013).

²⁹⁵ Mc. Sherry & Mejía, *supra* note 89 at 3.

cannot be fully captured through the structural or strategic dimensions. On August 3rd 2012, Lieutenant Ahmed Gamal al- Din, the Minister of Interior, honored the police officers involved in the incidents for their alleged protection of the buildings against the attacks by the “thugs and registered offenders” who imposed fees on the hotel.²⁹⁶ The honoring of the police officers occurred before the conclusion of an investigation and an assessment of the conduct of the police in the events.²⁹⁷ al-Masry al-Youm published videos on the Internet showing police officers appearing half naked, without shirts and in their underwear, showing extreme unprofessional conduct.²⁹⁸ Furthermore, the residents complained that the police used tear gas excessively inside the residential areas that are already overcrowded which led to the injury of a number of residents including children.²⁹⁹ Yet despite these accounts, and the footage showing police officers engaging in unprofessional conduct and excessive use of force, the Minister of Interior honored them.

This decision by the Minister can be captured under the *political/psychological* as it was aimed at sending a certain political message to the public. The Ministry claimed that the victims were *baltagiyya*, a “socially disruptive and potentially criminal subject.”³⁰⁰ This concept has been continuously presented by the authorities to the public as an association of the “expansion of informality in housing”³⁰¹ such as the slums of Ramlat Boulaq where the management of these populations became “diagnosed as a social problem relating to a type of social deviance which required normalization interventions”³⁰² and the enforcement of “tougher policing”.³⁰³ This stigmatization of the popular neighborhoods in the public discourse has enforced the rhetoric of the Ministry which considers that those *baltagiyya* must be subjected to that excessive use of force, as it is the only way to neutralize their danger in society. Accordingly, the decision of the Minister to honor the police officers enforces the

²⁹⁶ EIPR, *supra* note 211.

²⁹⁷ *Id.*

²⁹⁸ Video: *silāḥ al-fānilāt al-dākhilīyah yazḥar fī mawqīʿat Nile City* (ʿAl Masry ʿAl Youm 2013) available at <http://www.youtube.com/watch?v=wRCJNsZHZ2Q&feature=share&list=UUP4rilfFKdjXRC1guWNZ85g&index=1989>.

²⁹⁹ EIPR, *supra* note 211.

³⁰⁰ Ismail, *supra* note 1, at 450.

³⁰¹ *Id.* at 451.

³⁰² *Id.*

³⁰³ *Id.* at 453.

following notions: police abuse is not only acceptable but also preferable when dealing with the residents of popular neighborhoods, and it gives the *political/psychological* message to the public that the death of such victims is not only justified, but also necessary to maintain public order and safety.

V. Breaking the Cycle of Impunity

I have highlighted in the previous chapters some *structural* and *strategic* elements of impunity within the Egyptian legal system. However, there are other important elements that were not particularly raised in the cases of Maspero and Ramlat Boulaq. For example, civil society organizations have raised other issues such as military trials for civilians, the definitions of torture in the Penal Code, and the Forensics Department. In this chapter, I will use the structural/strategic framework to discuss briefly these issues.

Furthermore, the distinction between both dimensions has enabled me to highlight the inherent features of the legal system and the ad-hoc state actions separately, and assess how they operate together. I found that strategic impunity is not always the result of the “factual”, i.e. outside of the legal system, but it can also be the result of the “structural”, i.e. the legal system. In other words, the *structural* impunity embodied in legal system can allow for the *strategic* impunity to occur.

Building on this idea, I will refer to “structural reform” as a reform initiative that seeks to repeal elements of structural impunity by anticipating opportunities for strategic impunity and accordingly prescribing guarantees that can prevent the ad-hoc decision of the state from derailing accountability. The form of the 'structural reform' is not the main factor, as each element of structural impunity can have different ways to address it (e.g. constitutional amendments, legislations, administrative regulations,...etc). Rather, the prerequisite for a reform initiative to be “structural” is that it takes into consideration the instances of strategic impunity and its design is fit for preventing the ad-hoc decisions of the state from affecting the process of accountability. In addition, the “structural reform” must address *all* elements of structural impunity that arise from a specific issue, and not only some of them. In other words, for the reform to be “structural”, it has to be comprehensive. From this perspective, I will use the structural/strategic framework to analyze some reform measures taken by the authorities since the Revolution and the “Police for Egypt” Initiative.

A. The Military Judiciary

I have shown through my analysis of the CMJ and the Maspero case that the military judiciary has largely contributed to the perpetuation of impunity due to its lack of independence and its exclusive jurisdiction over military abuses. During their time in office, the first elected parliament and President after the Revolution never discussed in public the issue of prosecuting military personnel involved in human rights violations before civilian courts. The democratically elected authorities chose to overlook this inherent *structural* dimension of impunity, not because they do not realize that military trials will result in impunity, but rather they did not want to challenge the military by providing the opportunity to hold its members accountable.

Furthermore, the 2012 suspended constitution and the new draft constitution use the same language of the CMJ by stating that the military judiciary has the exclusive jurisdiction to resolve disputes of the military. This means that the upcoming parliament must undergo a constitutional amendment, rather than legislative amendments, to allow for trials of military human rights abuses before the civilian judiciary.³⁰⁴ If the new draft constitution is adopted, it will uphold this crucial element of *structural* impunity where as none of the gross human rights violations committed by SCAF while in power, and the ongoing human rights violations committed by the military, can be duly punished.

The only issue discussed by the authorities regarding the military judiciary was trials of civilians before military courts.³⁰⁵ After the fall of Mubarak, the military was deployed across the country. The military has continuously argued that all crimes occurring in locations managed by it falls under the jurisdiction of the military courts. This argument is supported by Article 48 of the CMJ as it gives the military judiciary the exclusive right to decide on its jurisdiction.³⁰⁶ This situation has led to the massive number of military trials for civilians. General Adel Morsy, member of the SCAF,

³⁰⁴ Adel Ramadan, *Dawlat Qādī al-Qudāh al-'Askarī*, EIPR (Dec. 22, 2013), *available at* <http://eipr.org/blog/post/2013/12/22/1906>.

³⁰⁵ *Majlis al-sha' b yunāqish mashrū' qānūn lī-mana' muḥākamat al-madanīyīn amām al-qaḍā' al-'askarī*, ONA-EG, Apr. 10, 2012, *available at* <http://onaeg.com/?p=52905>.

³⁰⁶ The ECSER filed a lawsuit number 33151 of 65 before the State Council, arguing that Article 48 is unconstitutional. The State Council referred the case to the Supreme Constitutional Court; at the time of writing, the Court has not issued its decision yet.

mentioned in a press conference in September 2011 that between January 28 and August 29 [2011], military tribunals tried 11,879 civilians...the tribunals convicted 8,071, including 1,836 suspended sentences; a further 1,225 convictions are awaiting ratification by the military."³⁰⁷ Military trials for civilians are an element of *structural* impunity as it is a feature of the legal system, i.e. the CMJ and the former and current draft constitutions. These trials have resulted in human rights violations such as the right to fair trial where as victims of military trials have no means to seek redress for the violations they have endured, thus resulting in impunity.

The dissolved parliament realized this important *structural* dimension of impunity where they agreed on the removal of Article 48 and Article 6 which allows the President to refer civilians to military courts.³⁰⁸ They also agreed that the military prosecution should refer all the cases of civilians currently being processed before it to the Public Prosecution, and to cancel all the verdicts against civilians issued by the military courts and their retrial before civilian courts.³⁰⁹ During the discussions in parliament, the military was quiet resistant to all these calls of reform.³¹⁰ One parliamentarian member proposed the compromise that instead of canceling all the verdicts, the appeals can be submitted to the Public Prosecution.³¹¹ However, General Mamduh Shahin also rejected this proposal.³¹² The parliament was later dissolved in June 2012 and none of these proposals were ever passed.

The 2012 suspended constitution did not ban trials of civilians before military courts³¹³ although earlier drafts explicitly prohibited it, then it was abruptly changed in the latest version of the draft. Furthermore, the current constitutional declaration in force upholds the long-standing principle of allowing civilians to be tried before military courts by; first not explicitly banning it, and secondly by vaguely mentioning that the

³⁰⁷ See Press Release, Human Rights Watch, *Egypt: Retry or Free 12,000 After Unfair Military Trials*, 10 Sept. 2011, available at <http://www.hrw.org/news/2011/09/10/egypt-retry-or-free-12000-after-unfair-military-trials>. These trials were mostly for regular crimes and not political cases.

³⁰⁸ *Majlis al-sha' b yunāqish mashrū' qānūn lī-mana' muḥākamat al-madanīyīn amām al-qaḍā' al-'askarī*, ONA-EG, Apr. 10, 2012, available at <http://onaeg.com/?p=52905>.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ Art. 198, Constitution of the Arab Republic of Egypt, Dec. 25, 2012, suspended on July 3, 2013.

military judiciary has jurisdiction to try all crimes relating to the armed forces.³¹⁴ Furthermore, the military exerted pressure on the committee drafting the constitutional amendments against the ban of trials of civilians before military courts.³¹⁵ Article 198 of the final draft constitution did not only allow military trials for civilians, but also included the detailed text from the CMJ's jurisdiction provision.³¹⁶ Supporters of this provision have argued that the current draft specifies the circumstances in which civilians can be tried before military courts. However these circumstances expand the jurisdiction of military courts rather than limit it. Notably, the head of the military judiciary openly stated that anyone who gets into a fight inside a gas station owned by the armed forces will be referred to a military trial.³¹⁷

While these articles are elements of *structural* impunity, the pressure exerted by the military on the members of the constitutional-committee, and the dissolved parliament are examples of *strategic* impunity, as they were ad-hoc actions taken by the military in response to demands of justice, i.e., the calls of banning military trials for civilians and the canceling of verdicts against civilians issued by the military courts. In this instance, the ad-hoc decision of the military to prevent the prohibition of military trials for civilians has enabled the *structural* dimension of impunity to prevail.

B. Torture

The current definitions of torture in the Egyptian penal code are examples of *structural* impunity as they present an inherent feature of the legal system. Article 128 requires that torture occurs with the aim of extracting a confession, thus excluding all cases where police have tortured citizens for other reasons.³¹⁸ For example, if a victim

³¹⁴ Art. 18, Constitutional Declaration of the Arab Republic of Egypt, July 8, 2013.

³¹⁵ *Egyptian activists protest military trials in new draft constitution*, Al Monitor, Nov. 23, 2013, available at <http://www.al-monitor.com/pulse/originals/2013/11/egypt-military-trials-civilians-draft-constitution-protests.html#ixzz2lUp8yz1u>.

³¹⁶ Art. 198 states that “no civilian can be tried before a military court except in the crimes that constitute a direct attack against military buildings, camps, or whatever lies under its control, military areas and borders, equipment, boats, weapons, ammunition, documents, secrets, general funds, factories, crimes relating to military conscription, or crimes that constitute a direct attack against its officers, or members while on duty”. draft Constitution of the Arab Republic of Egypt, available at http://egelections-2011.appspot.com/Dostour/Dostour_update2013.pdf.

³¹⁷ *Birnāmiġ Hunā al-‘Āšimat* (CBC television broadcast Dec. 1, 2013), available at <https://www.youtube.com/watch?v=qiKYizlKu3U>.

³¹⁸ Art. 128 states that any public servant or official who orders, or participates in, the torture of an accused person with a view to inducing him to make a confession shall be punished by imprisonment at hard labor or a term of 3 to 10 years in prison. If the victim dies, the penalty shall

is tortured by the police for purposes of intimidation or revenge, then the penal code does not recognize the crime as torture. This inadequate definition of torture has led prosecutors to rely on other articles such as Article 129.³¹⁹ This article defines the crime as excessive use of force by public servants and accordingly prescribe must less severe penalties (no more than one year imprisonment or a fine of 200 EGP). So even in the case of a successful prosecution of torture, the result will be impunity as the punishment is in no way appropriate to the nature of the crime.

The issue of the penalty for torture was discussed by the dissolved parliament in May 2012. They agreed to increase the penalty of torture to 5 years, and to add a provision stating that anyone who was aware of an incident of torture and did not report it, shall be punished by one year imprisonment.³²⁰ These proposals were not passed as the parliament was dissolved in June 2012. The 2012 suspended constitution did in fact provide a better definition of torture,³²¹ however this is yet to be translated into amendments of the Penal Code. The 50-member committee that drafted amendments to the 2012 suspended constitution stated that the provision of torture was amended according to the UN definition, and accordingly the Penal Code will be amended after

be that prescribed for premeditated murder. Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *al-Jarīdah al-rasmīyah* (Egypt). The provision falls short of the definition provided by Art. 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which Egypt has ratified in 1986. The article defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. A/RES/39/46, 93rd Sess. (Dec. 10, 1984).

³¹⁹ Art. 129 states that any public servant or official who uses excessive force on duty shall be punished by no more than one year or a fine of no more than 200 EGP. *See also* Art. 282 which states that in all cases, [for] anyone who unlawfully arrests a person and threatens to kill him or subject him to physical torture shall be punished by imprisonment at hard labor or a term of 3 to 10 years in prison. If the victim dies, the penalty shall be that prescribed for premeditated murder. Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *al-Jarīdah al-rasmīyah* (Egypt).

³²⁰ *Parliament committee approves harsher penalties for torture*, Egypt Independent, May. 5, 2012, available at <http://www.egyptindependent.com/news/parliament-committee-approves-harsher-penalties-torture>.

³²¹ Art. 36 states that any person placed under arrest or detained or whose freedom is restricted in any way shall receive treatment that respects human dignity. Such person may not be subjected to torture, intimidation, coercion and/or physical or mental abuse. No person may be detained or arrested unless placed in a humanly decent and healthy place that is subject to judicial supervision. Constitution of the Arab Republic of Egypt, Dec. 25, 2012, suspended on July 3, 2013.

the adoption of the new constitution.³²² However, the final draft constitution did not adopt the UN definition as claimed but only “prohibited torture in all its forms”.³²³

In the absence of legislations amending the definitions of torture in the Penal Code, the *structural* dimension of impunity will prevail. At the same time, even if the Penal Code adopts the comprehensive UN definition, this will not be enough to end the systematic use of torture. The inadequate definition is not the only reason for the perpetuation of impunity, as there other elements of *structural* and *strategic* impunity that play an equally important role. For example, inaccurate forensic reports, tampering of the evidence by the police and decisions of the Prosecution to close off investigations are all examples of both *strategic* and *structural* impunity. Thus, the above mentioned reform initiatives cannot be considered 'structural' for two reasons: first, it is not comprehensive as it focuses on amending the Penal Code only, thus excluding other important elements of structural impunity. Second, it does not anticipate the opportunities for strategic impunity, since the state's interference through an ad-hoc decision is not deterred.

C. The Public Prosecution

There have been no measures taken by the authorities to reform the structure of the Public Prosecution. The lack of independence of the Prosecution is a crucial element of the *structural* dimension of impunity where as its subordination to the Ministry of Justice has allowed for the executive authorities to severely interfere in legal proceedings against police officers. I have highlighted through out this paper several examples of *strategic* impunity that the Prosecution has taken. One of the main causes for these decisions is this *structural* impunity where as the Prosecution became an apparatus of enforcing the state's ad-hoc decisions to derail accountability. In other words, this structural impunity (non-independence) paves the way for the strategic impunity to occur. Thus, any reform initiative that does not address this crucial element of *structural* impunity will be irrelevant.

³²² *Egypt's New Constitution to Curtail Torture*, All Africa, Oct. 27, 2013, available at <http://allafrica.com/view/group/main/main/id/00027195.html>.

³²³ Art. 52, draft Constitution of the Arab Republic of Egypt, available at http://egelections-2011.appspot.com/Dostour/Dostour_update2013.pdf.

Another element of *structural* impunity that I have discussed in the previous chapter is Article 63 of the Law on Criminal Proceedings where it allows only the Public Prosecution to bring a case against a public servant. In May 2012, the dissolved parliament approved the removal of this article, however these amendments were not passed due to the dissolution of the parliament.³²⁴ However, the parliament did not address other elements of *structural* impunity in this law such as articles 210(1) and 232(2) of the criminal proceedings code where victims can only appeal the prosecutor's decision to more senior members of the Prosecution.

D. The Forensics Department

The non-independence of the Forensic Department is another element of *structural* impunity where as the law considers it to be a subordinate body of the Ministry of Justice. This inherent *structural* feature of the department has led to the interference of the executive in the issuance of forensic reports in cases of torture. One can recall the infamous case of Khalid Said, where he was beaten to death by police officers, but the forensic report stated that he died from asphyxiation. This is an example of *strategic* impunity where the executive has pressured the Forensics Department to issue a false report confirming the police's scenario that Said swallowed a packet of marijuana and was not killed by the police. Even after the Revolution, this scenario was repeated in March 2013. The Minister of Justice stated that Mohamed al-Gendi, who died from torture by the police, had died as a result of a car accident, four days before the Forensics Department issued its report.³²⁵ The first report issued confirmed the Minister's claims, then his family appealed to the Prosecution to order a re-examination.³²⁶ The final report confirmed that he died from torture.³²⁷ Again, these are examples of *strategic* impunity where the Minister of Justice denied the torture of al-Gendi and pressured the Forensics Department to confirm his scenario. The *strategic* impunity occurred because the *structural* dimension of impunity allows it. If the Forensics Department was an independent body that did not have to answer to the Ministry of Justice, then the executive's ad-hoc decisions of exerting pressure on the

³²⁴ *Tashrī'iyat al-sha' b tuwāfiq 'alá ta' dīlāt al-'uqūbāt al-khāṣṣah bī-jarīmat al-ta' dhīb*, Al Masry 'Al Youm, May. 15, 2012, available at <http://www.almasryalyoum.com/node/839851>.

³²⁵ *Egypt: False Forensics in Gendi's Death - Popular Current*, All Africa, Feb. 13, 2013, available at <http://allafrica.com/stories/201302141311.html>.

³²⁶ *Id.*

³²⁷ *Id.*

department to issue false reports, may not determine the outcome of the forensic report.

The manipulation of this department by the executive powers has led to several calls for removing it from the control of the Ministry of Justice. In March 2012, forensic experts submitted to the parliament a draft law on restructuring the Forensics Department. The draft law proposed the repeal of Law No. 69 of 1952 which considers the department as a consultative body to the Ministry of Justice.³²⁸ It also proposed the formation of a high council to manage the department, instead of the Ministry of Justice.³²⁹ However, this draft was not discussed by the parliament. The head of Forensics Experts Club called upon the 50-member committee to amend Article 182 so that it affirms its independence, including providing its members with judicial immunity.³³⁰ However, the final draft constitution did not meet their demands.³³¹

E. Security Sector Reform

The restructuring of the Ministry of Interior is one of the main demands of the Revolution. Almost three years after the Revolution, police and security forces continue to use the same excessive force and systematic use of torture amongst other abuses. Despite the significance of the Revolution starting on National Police day, the authorities are yet to develop a political will for reforming the Ministry of Interior. Instead, they have embarked on a series of limited reforms that only aim to add cosmetic changes, rather than addressing the legacy of abuse and seeking to put an end to it.

After succumbing to public pressure during the July 2011 sit-in in Tahrir, Mansur al-Isawi, the Minister of Interior, ordered the largest reshuffle in the history of the Ministry. He claimed that this procedure was aimed at cleansing the Ministry of those

³²⁸ *Mashrū' qānūn l-istiqlāl al-ṭibb al-shar'ī 'an wizārat al-'adal*, Masress, Mar. 24, 2013, available at <http://www.masress.com/ahram/138978>.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ Art. 199 states that judicial experts, forensic experts, and experts of the estate registration are independent in doing their jobs, and enjoy the needed guarantees and protection for performing their job, in accordance with the law. draft Constitution of the Arab Republic of Egypt, available at http://egelections-2011.appspot.com/Dostour/Dostour_update2013.pdf.

responsible for the killing of the protesters in January 2011. However, this process did not in fact achieve its aim, but quite the opposite. Several police officers currently on trial for the killing of protesters were moved to positions with higher pay and better benefits.³³² In November 2012, the Human Rights Department and Community Outreach, was established by a presidential decree. Lieutenant Hussein Fekry, the Director, explained that the department aims to change the mentality of police officers, by providing them with human rights trainings in the Police Academy, and conducting campaigns aimed at raising their awareness.³³³ He added that the department has printed posters with excerpts from the Universal Declaration of Human Rights to be hung inside police stations.³³⁴

In June 2012, the parliament passed legislative amendments to the police law.³³⁵ The amendments included the removal of the President as head of the police.³³⁶ It also legislated changes in the bonus and per diem for police officers.³³⁷ It also allowed police officers to request to serve in their hometowns, as long as they have fulfilled three transfer periods.³³⁸ It also banned military trials for police officers, and instead has established a disciplinary committee, appointed by the Minister of Interior, and it includes a member of the State Council.³³⁹ Also, the secretaries of the police can now request to be promoted to honorary lieutenants and officers.³⁴⁰ These amendments achieved some demands of the police as several protests and strikes were held by low-ranking police officers demanding changes to the police law, including a ban on military trials for the police and instead referral to disciplinary committees, and pay

³³² For example, Wael El Komi has been transferred to the General Electricity Administration where he was given a higher position and a salary raise. Mutaz Al Askalani was transferred to the Police Academy, Mohamaed Saafan was transferred to the General Police Administration and Mostafa El Dami was transferred to the Training Department, *See* Press Release, FIDH, *Egypt's Revolutionary road, one year on: still awaiting respect for human rights and democratic reforms*, Feb. 9, 2012, available at <http://www.fidh.org/en/north-africa-middle-east/egypt/Egypt-s-Revolutionary-road-one>.

³³³ FIDH Interview with Lt. Hussein Fekry, Head of the Human Rights and Community Outreach Department of the Ministry of Interior, Cairo (May 19, 2013).

³³⁴ *Id.*

³³⁵ Law No. 25 of 2012 (Amending Law No. 109 of 1971 on the Police), *al-Jarīdah al-rasmīyah* (Egypt).

³³⁶ *Id.* at art. 1 (1).

³³⁷ *Id.* at art. 21(1), 21(2), 22(2)

³³⁸ *Id.* at art. 27.

³³⁹ *Id.* at art. 77, 99

³⁴⁰ *Id.* at art. 79.

increases.³⁴¹

Furthermore, the Ministry of Interior has been resisting external attempts to intervene in its reform. Instead, it has continued to insist that it is able to reform itself. In May 2012, during the discussion of the amendments to the Police Law in the parliament, the head of the Ministry's legal department rejected the proposal to establish a monitoring mechanism over the Ministry.³⁴² He claimed that such mechanism is an insult to the Ministry as it assumes that it adopts torture as its methodology.³⁴³ He added that there is no need for such a mechanism as all incidents of abuse and torture were individual acts before the Revolution and now the Ministry is able to monitor itself and refer those individuals to disciplinary actions.³⁴⁴ Certainly, the Ministry of Interior continues to deny that abuses by police forces are systematic and insists that they are individual isolated acts that are punished. Yet they have continuously failed to provide statistics on the exact number of police officers charged and put on trial for human rights abuses.³⁴⁵

These limited measures do not address any of the structural or strategic dimensions of impunity. One important element of *structural* impunity is the lack of independent oversight over the Ministry which has helped transform it into a body above the law. The newly established Ministry's Human Rights Department can in no way be considered a mechanism of oversight over its human rights practices as it is part of the same entity that is responsible for gross human rights violations. Furthermore, the Ministry's refusal to admit that torture is systematic and to have external oversight over it, is a continuation of its decisions of *strategic* impunity where it continues to deny its responsibility for human rights violations, and exerts pressure to assure that violations

³⁴¹ *Muẓāharāt Umanā al-Shurṭah fi 8 Muhāfazāt Dīdd El-Eisawy wa al-Muhākamāt al-'Askariyah*, al-Masry al-Youm, Mar. 22, 2011, available at <http://www.almasryalyoum.com/news/details/120692#>. See also *Intifādah Umanā al-Shurṭah*, al-Balad, Mar. 22, 2012, available at <http://www.el-balad.com/116098.aspx>.

³⁴² *Wizārat al-dākhilīyah tarfud muqtarāḥ al-barlamān bī-ta'sīs hay'ah l-riqābah' alā al-shurṭah*, Copts Today, May. 8, 2012, available at <http://www.coptstoday.com/Egypt-News/Detail.php?Id=13939>.

³⁴³ *Id.*

³⁴⁴ *Id.* See also art. 47 of the Police Law which states that each officer who violates the provisions of this law or the orders given by the Ministry of Interior or exceeds his line of work, shall be subjected to disciplinary action, without prejudice to any criminal or civil suits against him. Law No. 109 of 1971 on the Police), *al-Jarīdah al-rasmīyah* (Egypt).

³⁴⁵ Amnesty International, *supra* note 8, at 26.

of its personnel will remain unchecked and unpunished. The cosmetic measures of “training of police officers” and “human rights posters in police stations” are not sufficient to change the mentality of the police or end their abuses. This requires much more measures that must include the complete cleansing of the Ministry and full accountability. These two prerequisites, which can produce deterrence for future human rights violations, were not addressed in the above mentioned state reforms.

Over all, the measures taken by the authorities for legislative and security sector reforms do not even reach the minimal standards needed for combating impunity. The reforms did not comprehensively address the *structural* elements of impunity, or take into consideration instances of *strategic* impunity so as to prevent it from occurring. The first democratically elected President and two houses of parliament had the opportunity to take the necessary measures to enact the much needed structural reforms. The reason they missed this opportunity is not because they fail to understand the several dimensions of impunity within the system, but because they lacked the political will to end it. Mc Sherry & Mejía make a very important observation where they state that:

Impunity is a central pillar of systems of repression; if the perpetrators can be condemned and held accountable to civil society, the system begins to crumble. Conversely, military institutions and individual murderers and torturers may continue to act outside the law if impunity is upheld by civilian governments.³⁴⁶

I think that the authorities realized that reforming the legal system and ending impunity can threaten their grip on power. Their reluctance to hold the police accountable and reform the security sector can be attributed to their desire in maintaining the status quo for future use against their opponents. For example in January 2013, during the second anniversary of the Revolution, the police attacked anti-Morsy demonstrations leaving at least 53 dead.³⁴⁷ Also, Morsy promised prior to his election to ensure retribution to the martyrs of the Revolution if he is elected.

³⁴⁶ Mc Sherry & Meija, *supra* note 89, at 5.

³⁴⁷ See Press Release, FIDH, *Egypt: Post Revolution president following in Mubarak's footsteps?*, Jan. 31, 2013, available at <http://www.fidh.org/en/north-africa-middle-east/egypt/Egypt-Post-Revolution-president-12811>; Former President Morsy also applauded the police for their actions in a televised speech on 27th of January 2013 available at <http://www.youtube.com/watch?v=sRdV74amMRY>.

Shortly after his election, he set up the fact-finding commission, however the report was never made public and none of the incidents covered by it was ever referred to trial.³⁴⁸ Morsy's decision to not publicize the report is an example of *strategic* impunity as it not only denies the victims the right to truth, but also prevents the potential legal cases that they can file based on the evidence collected by the fact-finding committee. This decision has assured that the crimes committed under SCAF's rule will remain unpunished.

F. “Police for Egypt” Initiative

While the authorities have failed to provide sufficient measures to end impunity, civil society groups have presented several proposals for transitional justice, and security sector reform. One of the proposals that tackles impunity through its multiple dimensions is the Initiative for the Re-building of the Egyptian Police (“Police for Egypt”).³⁴⁹ This initiative includes academics, human rights lawyers and activists, business men, former police officers and other political activists.³⁵⁰ The members of the initiative bring a wide range of expertise; firstly, the two police colonels provide insight into the functions of the police, secondly, human rights experts give the initiative a rights-based perspective, and thirdly, academics and legal scholars provide the much needed legal background and expertise.

The initiative proposes measures for institutional reform of the Ministry of Interior, monitoring mechanisms of the Ministry and a mechanism of transitional justice. I will not discuss the measures of institutional reform of the Ministry as it falls outside the scope of this paper. Instead, I will analyze only the measures proposed for transitional

³⁴⁸ Former President Mohamed Morsy issued a presidential Decree No. 10 of 2012, establishing a fact-finding commission mandated to “collect information, evidence and conduct fact-finding in the incidents of attempted murder, murder and injury of protesters between the period of 25 January 2011 until 30 June 2012; in order to collect the full facts regarding the perpetrators, whether they were direct or indirect perpetrators.”, EIPR, *supra* note 150.

³⁴⁹ *Al-mubādarah al-waṭanīyah lī-i’ādat binā’ al-shurṭah* [hereinafter “Police for Egypt”] (4th ed. 2013) available at <http://www.policeforegypt.org>. The paper was originally drafted by the former police colonel, Mohamed Mahfuz during a conference in May 2011 and underwent vigorous discussion until it was finally published in July 2011. Since then, the working group discussed the proposal in the media, in the parliament and with the executive authorities. It is continuously being discussed by consultation with several institutions and updated with the new developments, as well through examination of past experiences of countries that underwent similar security reforms. A fourth edition was published in June 2013.

³⁵⁰ *Id.* at 2.

justice and monitoring of the Ministry. At the same time, it is important to note that the proposed institutional reforms of the Ministry³⁵¹ may assist in changing its modes of operation, but they are not enough to combat impunity. These institutional reforms must be made *alongside* the transitional justice and monitoring mechanisms discussed below.

1. Monitoring Mechanisms

The lack of independent monitoring mechanisms over the Ministry of Interior, is an element of *structural* impunity as the legal framework does not provide sufficient avenues for the independent monitoring of the Ministry, particularly by civil society organizations. The Special Rapporteur on Prisons and Conditions of Detention of the African Commission on Human and Peoples' Rights has stated in his report that "it is now widely accepted that one of the best safeguards against torture and ill treatment is for places of detention to be as transparent as possible..[as] regular and periodic visits by independent monitoring groups are central to protecting the rights of detainees."³⁵² Combating impunity should not only be about ensuring the punishment of perpetrators of human rights violations, but also preventing human rights violations from occurring in the first place.

The initiative addresses this point and proposes that the Ministry should allow civil society organizations (lawyers and doctors from the syndicate, human rights organizations, civil associations) to make announced visits to all police stations and

³⁵¹ These include maintaining the Ministry's civilian nature, by appointing a civilian as its head; the decentralization of the Ministry, and its transformation into a more localized police force; the repeal of the Minister of Defense Decree No. 11 of 1891 which considers the Ministry of Interior as a military-related institution, and article 2 (b) of the CMJ which allows for military conscripts to join the Ministry of Interior as part of their military duty; providing the police with training and technological resources for law-enforcement; the removal of the National Security from the control of the Ministry and transferring it to an independent body, with clear oversight, defined regulations, and parliamentary review; ending the infiltration of the Ministry in state bureaucracy by allocating these departments (the lottery for the pilgrimage, civil records, work permits abroad, immigration services, traffic, and prisons) to the relevant ministries; removal of the Central Security Forces department and replacing it with a professional riot police unit; restructuring of the education process in the Police Academy; improvement of the working conditions of the employees of the Ministry including by establishing an independent syndicate and restructuring of the system of salaries/bonuses; amendments to article 19 and 71 of the Police law. *Id.*, at 13-19.

³⁵² African Commission on Human and Peoples' Rights, Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa (Oct. 9-22, 2012), *available at* <http://www.achpr.org/sessions/52nd/intersession-activity-reports/prisons-and-conditions-of-detention/>.

detention centers and receive all requested information.³⁵³ It is important to note that this should not be left to the Ministry's discretion, but rather the right of access to independent monitors should be guaranteed. However, legislations prescribing that right can be inefficient if the Ministry chooses to not comply with them or implement them. Thus, in order to propose structural reforms that can combat this element of *structural* impunity, it must anticipate the strategic dimension of impunity. In other words, the structural reforms should prescribe strict guarantees against the non-compliance of the Ministry of Interior so as to prevent the opportunity to reject visits or limit them.

Furthermore, the initiative demands that the Prosecution conducts unannounced visits to police stations regularly, and report on their findings.³⁵⁴ Article 22 of the Criminal Proceedings Code already gives the Public Prosecution the right to search and conduct visits to detention centers.³⁵⁵ However, it rarely does so, and even when it does, the visit is announced to the police station beforehand. Thus, the implementation of this article will be irrelevant if the Prosecution's *structural* dimension of impunity remains unchanged.

In addition, the initiative presents an excellent idea: the setting up of surveillance cameras inside all police stations and detention places.³⁵⁶ While this measure can help in transparency, deterrence and documentation of human rights violations inside police stations and detention centers, it lacks the guarantees against *strategic* impunity. If the surveillance cameras are managed by the police, then they could still tamper with evidence, destroy footage,...etc. Thus, the measure should have a second dimension: oversight and cross-examination of these cameras by an independent body. Furthermore, this can provide checks and balances against the investigation body and the Forensics Department. In the situation of an inaccurate forensic report or

³⁵³ Police for Egypt, *supra* note 349, at 23.

³⁵⁴ *Id.* at 21. It also proposes that the Prosecution should also establish a hot-line to receive complaints about human rights violations in police stations. *Id.*

³⁵⁵ Art. 22 states that those mandated with judicial arrest are subordinates to the Public Prosecution and subjected to his supervision regarding their methods of work. The Public Prosecutor can ask the relevant body to look into all incidents of negligence or wrongdoing of their duties in work and take disciplinary actions against them; without prejudice to criminal proceedings. Law No. 150 of 1950 (Code on Criminal Proceedings), *al-Jarīdah al-rasmīyah* (Egypt).

³⁵⁶ Police for Egypt, *supra* note 349, at 19.

inadequate investigations, the video footage can then guarantee the availability of evidence.

As noted in chapter four, one of the main elements of *structural* impunity is the fact that the police are in charge of investigating themselves. The initiative proposes a method of overcoming this conflict of interest, by establishing an independent committee mandated to investigate all cases of death and severe injury at the hands of the police.³⁵⁷ This committee would conduct investigations in cooperation with the Public Prosecution, as well as receive complaints from citizens. In order for this measure to combat this element of *structural* impunity, it has to anticipate the *strategic* impunity and provide strict guarantees to prevent it. Thus, the measure should include guarantees for the independence of the members, access to all files and detention centers, powers to summon police officers for investigations, and order their detention if needed. In addition, structural reform for one element of structural impunity has to address other elements of structural impunity that affect it. Since this committee will cooperate with Prosecution, then another element of structural impunity (its non-independence) must be addressed. Furthermore, in order to provide checks-and-balances to the powers of the Prosecution, there must be guarantees ensuring that the Prosecution cannot intervene to derail the investigations of the committee.

I have highlighted earlier how the torture articles in the Penal Code are elements of the *structural* impunity. I have also noted that legislative amendments to the Penal Code are not enough to combat torture. A more comprehensive plan needs to be developed and implemented. The initiative addresses this issue and proposes the establishment of a national institution for the combat of torture.³⁵⁸ This institution will consist of members of the civil society, lawyers, doctors, psychologists,...etc. In order to ensure its independence, the committee cannot include any member currently holding a post in the state.³⁵⁹ This committee shall conduct unannounced visits to all detention places, and police stations, report quarterly on its visits, make recommendations to the

³⁵⁷ *Id.* at 22.

³⁵⁸ *Id.* at 22.

³⁵⁹ *Id.* at 22.

relevant authorities, meet with detainees, witnesses in private, receive complaints of torture from citizens and human rights groups, access all information, and develop strategies for the prevention of torture.³⁶⁰ While this measure addresses several elements of strategic and structural impunity, it must also provide guarantees for the committee's independence and implementation of its activities, in order to preempt instances of strategic impunity (e.g., state pressure to derail/prevent their activities). This committee should also be able to coordinate with the investigations committee.

2. Transitional Justice

The initiative presents a good proposal for a transitional justice mechanism that addresses several dimensions of structural and strategic impunity raised above. It presents two parallel dimensions to accountability; the legal dimension which includes measures of transitional justice, and a mechanism of reviewing the records of police officers “vetting”.³⁶¹ The initiative defined transitional justice as a method of ordinary justice that deals with the crimes of the former regime where the defendants enjoy the right to a fair trial.³⁶² It includes all those who have been harmed or their families, physically or psychologically, or had their rights violated through direct acts or negligence.³⁶³ The definition of victims provided by the initiative is comprehensive as it adheres to international human rights standards, thus it can overcome elements of *structural* impunity in the national legal system.

The crimes defined by the initiative are crimes of plundering the peoples' money, torture, extra-judicial killings, arbitrary detention, and other crimes whether political or economic.³⁶⁴ The inclusion of economic crimes is indeed the correct approach as it overcomes the moral dilemma of only recognizing crimes related to political activities. For example, one cannot claim that a victim of torture is more important than a victim of poverty, corruption, or negligence of health care, transportation,...etc. Thus, by including both types of violations in the definition of the victim, the initiative has provided a morally correct and comprehensive approach to transitional justice.

³⁶⁰ *Id.* at 22.

³⁶¹ *Id.* at 8.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

While the decision to include economic crimes presents a positive aspect, the definitions provided in the initiative are a bit vague and thus do not address elements of *structural* impunity arising from inadequate definitions of certain crimes in national legislations. I think that the proposal should include a reference to violations of the rights prescribed by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which Egypt has ratified. The inclusion of violations of these rights in the 'crimes' can address elements of structural impunity by overcoming the inadequate definitions in legislations. It will also add the recognition of some sets of rights that are not enshrined in the constitution and legislations. This can then guarantee that all human rights violations are covered, regardless of the existing elements of structural impunity in the legal system.

As for the definition of “criminals of the former regime”, it provides a comprehensive approach as it includes all persons who have held supervisory or executive posts in all sectors of the state, including the executive, legislative, and judicial sectors, and have committed themselves crimes prescribed in the initiative, or used others to commit these crimes, since 1981 until June 2012 (when former President Mohamed Morsy took office).³⁶⁵ While this definition includes officials “who used others to commit crimes”, it does not address elements of *structural* impunity in legislations regarding superior responsibility.³⁶⁶ In order to overcome the restriction of “giving the order” to commit the crime, international standards for command/superior responsibility should be adopted, to include “knew, or had reason to know” about the commission of the crime by their subordinates, and “did not take all necessary and reasonable measures in their power to prevent the commission, or if such crimes were committed, to punish the persons responsible”.³⁶⁷ This is important because high-ranking officials in the

³⁶⁵ *Id.*

³⁶⁶ Police officers must implement the orders given precisely within the limits of the law and that each superior is responsible for the orders that he gives and the proper functioning of the order within his jurisdiction. Art. 41(c) of Law No. 109 of 1971 (Police Law), *al-Jarīdah al-rasmīyah* (Egypt).

³⁶⁷ “Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.” The International Committee of the Red Cross, *Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War*

Ministry of Interior have repeatedly stated that they are not aware of the “individual” cases of torture in police stations across the country. Thus, by adhering to the “knew, or had reason to know” standard, the command responsibility of these officials will be recognized and so they cannot escape punishment due to the *structural* elements of impunity. This can also help overcoming limitations of criminal trials in proving the commission of the order from high-ranking officials.³⁶⁸

Furthermore, most of the current trials that have started after the Revolution focus mostly on the killings of the protesters during the Revolution. This presents a severe problem where crimes of the past have not been addressed in any way. It is believed that “governments should prosecute their predecessors' atrocious crimes because the trials can advance a nation's transition to democracy”.³⁶⁹ By doing so, the states demonstrate that “no sector is above the law, prosecutions of state crimes can foster respect for democratic institutions and thereby deepen a society's democratic culture.”³⁷⁰ In that sense, the initiative takes the correct approach to include human rights violations prior to the Revolution.

At the same time, I think that setting the starting date at 1981 presents a moral and methodological problem. Instead, I would propose the starting date at 1952; where excessive human rights violations had been committed under Nasser and Sadat.³⁷¹

Crimes, available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule153. This standard is not only applicable in armed conflicts but has also been applied in torture cases in national courts. See e.g. Beth Vaan Schaak, *Romagoza v. García, Proving Command Responsibility under the Alien Tort Claims Act and the Torture Victim Protection Act*, 59 *Guild Prac.* 170 (2002). Furthermore, the International Criminal Tribunal for Former Yugoslavia, and Rwanda and the Apartheid Convention "have provided guidance on just how far-reaching command responsibility extends and further reinforces its status as a general principle of international humanitarian law as well as human rights law." Francisco Forrest Martin et al., *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* 114 (1st ed. 2006).

³⁶⁸ For example, in the verdict issued on June 22 2012, in the trial of Habib Al Adly's six aides: Ahmed Ramzy, Adly Fayed, Hassan Abdel Rahman, Hassan Youssef, Ismail El Shaer, Osama El Marasi, and Omar Afifi, the Court stated that there was no evidence of any communication or orders given or meetings held or an agreement between the defendants reached or incitement or assistance to other police officers to commit the alleged crimes. The Court ruled that they were innocent. In addition, it also said that the records failed to prove that there were orders given to the police to fire at protesters. The Court also stated that while the medical records show that there has been injuries and deaths, it is not enough to attribute these crimes to the defendants. Case no 1227/2011/Kasr al- Nil Criminal Court, and Case no. 3642/2011/Kasr al- Nil Criminal Court.

³⁶⁹ Orentlicher, *supra* note 41, at 2543.

³⁷⁰ *Id.*

³⁷¹ See e.g. Kandil, *supra* note 16.

Given the obvious time and historical constraints of including these periods, there is a need to provide a practical solution to include this period. I firmly believe that in order to turn the page on the country's sixty year rule of oppression and state brutality, all these periods must be equally addressed. I fully understand the practical constraints of pursuing criminal legal proceedings for crimes committed since 1952; it can be difficult to find evidence for a criminal trial, and most of the perpetrators are possibly dead by now. However, I think that there is a need to develop other mechanisms of accountability that are not restricted to criminal legal proceedings. For example, a commission can be set up to provide the truth of what happened, and victims or their families can be given reparation. This mechanism will be designed for the purpose of telling the truth, and provide a sort of “national collective memory” of what happened during these periods.

Moreover, the transitional justice system proposed by the initiative includes three institutions: an institution for accountability, justice, and complaints; an institution for reparations; and a Revolution Criminal Court.³⁷² The first institution is mandated to receive complaints of human rights violations committed since 1981.³⁷³ This mechanism will consist of current and former judges as well as national figures that enjoy a consensus, given that none of them have held executive posts in the former regime, or were known for their loyalty to the former regime.³⁷⁴ The decision to include non-judicial figures in this mechanism can be an asset, as it opens the door for involving human right organizations in the process, which can positively affect its outcome.

The “accountability and justice” institution will be responsible for collecting information about members of the former regime who are suspected of crimes in accordance with legal procedures defined by the law and international human rights treaties, as well as through consultation with national human rights organizations.³⁷⁵ The reference to international human rights treaties is particularly important as it can overcome elements of structural impunity present in national legislations.

³⁷² Police for Egypt, *supra* note 349, at 10.

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 9.

The files gathered by this institution will then be submitted to the investigative judges (appointed by the High Council of the Judiciary) and then referred to the Revolution Criminal Court.³⁷⁶ In addition, the institution will compile information on members of the High Council for the Police since January 25th until June 2012, as well as all General Security directors and assistants, directors of the Criminal Investigations Department, directors of the Central Security Forces, and State Security departments, in all the governorates that witnessed death and injury of protesters since January 25th until the end of the mandate of the institution.³⁷⁷ It will also compile information about police officers, and individuals involved in the killings of protesters in the clashes during SCAF's rule, as well all police officers and other individuals involved in violations of human rights and corruption since 1981 until the end of the mandate of the institution.³⁷⁸ These lists provide a comprehensive methodology that can ensure that none of the employees of the Ministry can escape accountability. It is not merely focused on crimes of killing and torture, but also corruption. However, the list does not explicitly refer to the incidents where police officers have forged cases against individuals; a practice that was quiet common during Mubarak's rule.³⁷⁹

At the same time, the crimes that will be covered by this mechanism will incriminate a large section of the state apparatus, and so it is logical to expect that they may exert pressure over the institution's members to derail the accountability process (strategic impunity). Thus, the proposal must include guarantees for the independence and protection of the institution's members, in order to prevent *strategic* impunity from occurring.

Furthermore, victims and their families who have participated in the legal proceedings against police officers involved in the killing and injury of the protesters during the Revolution have reported that they have faced pressure, threats and intimidation by the police.³⁸⁰ These are all examples of *strategic* impunity where state agents have used their power to affect the course of the proceedings by pressuring the victims, thus

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ See Ismail, *supra* note 1 at 441.

³⁸⁰ FIDH, *supra* note 332.

derailing the process of accountability. The *strategic* impunity here was allowed due to the *structural* dimension of impunity where as the legal system does not adopt efficient measures to protect witnesses and victims. The proposal states that the protection of witnesses, informants, and victims will be guaranteed and their identity will not be revealed.³⁸¹ However, the legal system already states that it will guarantee their protection, but the lack of efficient mechanisms to achieve this goal has rendered it ineffective. Thus, the proposal should prescribe specific programs and measures to ensure the implementation of the protection.

In order to ensure a comprehensive approach to accountability, members of the military who were involved in human rights violations must be held accountable. All of the cases that were previously tried before military tribunals for human rights violations, such as the Maspero and the virginity tests, must be referred to the Revolution Criminal Court. Unfortunately, the initiative does not make any explicit reference to members of the armed forces.³⁸² As I have discussed previously, during SCAF's rule, military personnel were involved in grave human rights violations including extra-judicial killing, torture, virginity tests, and arbitrary detentions. I have also noted earlier how the exclusive jurisdiction of the CMJ over all military abuses is an element of *structural* impunity. In order to ensure that this element of impunity is overcome, legal measures need to be adopted prescribing that all past and ongoing human rights violations committed by the military will be tried before civilian courts. This is crucially important as the current jurisprudence of the Egyptian courts do not allow for crimes that were previously tried before military tribunals to be re-tried before civilian courts.³⁸³

The second dimension to the transitional justice mechanism proposed by the initiative is the establishment of an institution mandated to provide reparation to victims from 1981 until 30 June 2012.³⁸⁴ Given the difficult economic conditions gripping the

³⁸¹ *Id.*

³⁸² Although I do realize that the proposal is strictly related to police reform, the initiative does propose a mechanism of transitional justice, and thus reference to the military is essential.

³⁸³ All sentences issued by the military courts cannot be appealed before any other court. This was upheld by various rulings of the Court of Appeals, *See e.g.* Case no, 1212/60/Court of Appeal, Case no.2189/55/Court of Appeal, Case no.3753/61/Court of Appeal.

³⁸⁴ Police for Egypt, *supra* note 349, at 9.

country since the Revolution, and the high deficit of government spending, the initiative provides a great solution to securing the funds for reparation to victims. The initiative proposes that all fines and confiscation of funds arising from court verdicts against the former regime shall be entirely allocated to this institution, through a transparent procedure that is announced to the public.³⁸⁵ The current Council for the Care of Martyrs and the Injured of the January 25 Revolution, which has received wide criticism from victims and their families, will be dissolved, and all its files and funds will be reallocated to the this institution.³⁸⁶ In light of the criticism and corruption allegations against the current Council, the institution should adopt measures that can guarantee transparency and independent monitoring by civil society organizations. Civil society organizations, in particular must be able to effectively engage with this institution.

Furthermore, reparation is defined by the initiative according to three main principles: compensation, restitution, and assistance.³⁸⁷ The proposal should instead explicitly refer to international standards for reparation which include “providing full and effective reparation to the victims and their families in its five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”³⁸⁸ The adoption of this standard is crucial because combating impunity is not only about punishing the perpetrators, but also providing the victims with redress. In addition, the inclusion of “guarantees of non-repetition” is extremely important as it paves the way for extensive structural reforms of all elements of *structural* impunity.

The third dimension of accountability proposed by the initiative is the Revolution Criminal Court. This court, which will consist of ordinary judges appointed by the High Council for the Judiciary, has jurisdiction to try former regime members which are referred to it by the investigative judges, who receive the files from the “accountability and justice” institution referred to above.³⁸⁹ The proposal not only mandates the court to rely on Egyptian legislations, but also international human

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ See U.N. Principles on Remedy, *supra* note 184.

³⁸⁹ Police for Egypt, *supra* note 349, at 9.

rights treaties.³⁹⁰ The reference to international human rights treaties in the court's jurisprudence is important as it can overcome structural elements of impunity present in national legislations. Furthermore, the court will have an appellate degree, thus ensuring that all these crimes are covered by one court.³⁹¹ The proposal provides another important and positive aspect when it explicitly refers to guarantees of the right to fair trial according to international standards, including the publicity of the trials and the right to appeal.³⁹² This will not only ensure that the trials are not politically motivated, but will help in strengthening of the rule of law in the country.

In addition, Egyptian legislations does not allow for government employees to be suspended from their posts during the course of the trial, i.e., before the issuance of a guilty verdict. This *structural* dimension of impunity has led to the situation where police officers undergoing trials remain in their posts, and so are able to pressure and intimidate witnesses and victims. The proposal then tackles this problem and allows for the investigative judge and the Revolution Criminal Court to issue decisions to suspend suspects from their posts, or take other necessary measures in order to ensure that they do not affect witnesses or tamper with the evidence.³⁹³ At the same time, it provides the police the right to appeal these decisions.³⁹⁴

One of the problems that rose during the course of the investigations of the killing and injury of the protesters during the Revolution was the non-cooperation of the Ministry with the Public Prosecution where it ignored their requests and refused to provide them with information.³⁹⁵ These are examples of *strategic* impunity where as the Ministry took ad-hoc decisions to derail the process of accountability. In order to overcome this imminent problem, the initiative obliges all state sectors to provide the transitional justice mechanisms with all the information it requests, as well as ensuring its non-interference in the process, and its obligation to implement all

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ EIPR, *Muḥākamat Mubarak al-ula Fursāḥ muhadara l-Tahqīq al-'Adālah*, available at <http://eipr.org/report/2013/01/17/1591>.

decisions issued by the institutions.³⁹⁶ At the same time, prescribing obligation is not enough as it can still allow for the *strategic* impunity to occur, i.e. non-compliance and derailing of the accountability process. As I mentioned earlier, structural reforms should be able to anticipate opportunities of *strategic* impunity. Thus, this obligation should prescribe guarantees for its implementation.

The Public Prosecution is also an essential element of both *structural* and *strategic* impunity where as it proved to be more of an obstacle rather than an administrator of justice. This was demonstrated by the poor investigations, the decisions to shelve cases and other decisions that aim at shielding officials from accountability. The initiative thus overcomes this crucial problem by referring all investigations and cases (of the “crimes of the former regime”) handled currently by the Prosecution to the transitional justice mechanisms.³⁹⁷ It also allows for these mechanisms to add charges, re-investigate, and take all necessary measures to ensure that the evidence is not tampered with and that the witnesses are not pressured.³⁹⁸

Furthermore, the proposal presents an administrative dimension to accountability. This mechanism referred to as “vetting” will establish an independent committee that consists of judges, legal experts, police experts and experts in other fields who will examine all records of police officers and take the necessary measures against them; whether it be their continuation in their posts, their expulsion, or a change in the nature of their work.³⁹⁹ This mechanism is of high importance as it will ensure that all members of the police will be evaluated based on their education, competence, behavior and in particular adherence to human rights.⁴⁰⁰ This procedure will not only result in the increase of professionalism of the Ministry, but will also substantially assist the Ministry in its re-training and capacity-building of its employees. This procedure addresses the *strategic* dimension of impunity where as if perpetrators of human rights violations remain in their posts, they can use their powers to derail the processes of accountability. In addition, such a vetting mechanism, if

³⁹⁶ Police for Egypt, *supra* note 349, at 9.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

successfully implemented, will not only combat impunity by punishing perpetrators of human rights violations and removing them from their posts, but will also provide deterrence for future human rights violations. It can thus help change the mentality of police officers. After seeing their colleagues criminally punished and removed from their posts due to their involvement in human rights violations, the police will soon realize that they are no longer above the law.

Finally, the committee will not only rely on the files of the employees in the Ministry, but will also examine reports of the courts, human rights groups and fact-finding commissions.⁴⁰¹ More importantly, it will consult with victims of human rights violations, as well as citizens who are familiar with their local police force.⁴⁰² This point is of crucial importance as police officers who are known for their corruption and abusive behavior are well-known in their communities; in addition, the Ministry's files of the employees may be biased and not accurate. Thus, by including all these diverse sources in the evaluation of the police force, the committee can then ensure that its results are accurate and effective. At the same time, in order to ensure fairness, the committee will hear out the police officer during his evaluation.⁴⁰³

⁴⁰¹ *Id* at 12.

⁴⁰² *Id.*

⁴⁰³ *Id.*

VI. Conclusion

While the legal framework that I have adopted has helped to identify the multiple dimensions of impunity in the legal system and their modes of operation, the elements of impunity that I have raised in this paper are anything but exhaustive. More research is needed to analyze more cases in various contexts. The application of this framework can help highlight not only the structural dimension of impunity, but also the strategic. By identifying how the state uses strategic impunity, proposals for structural reforms can be able to anticipate repetition of such decisions and accordingly include guarantees that can prevent it from affecting the accountability process.

Finally, the importance of accountability for human rights abuses is crucial to Egypt's transition to democracy. If the police and military remain above the law, there will be no deterrence for future regimes to respect their citizens' rights and uphold the rule of law. At the same time, the Egyptian authorities have demonstrated minimal, if any, political will to end this cycle of impunity. There will be no measures of serious security sector reform, or a fight against impunity, without immense public pressure that the authorities could eventually succumb to. Until then, the situation will remain as it, where the victims can be punished for the crimes committed against them, and the perpetrators walk free.