

**Address for correspondence**

REDRESS  
c/o Judy Oder  
87, Vauxhall Walk  
SE11 5HJ London  
United Kingdom  
Tel: +44 (0) 20 7793 1777  
Email [judy@redress.org](mailto:judy@redress.org)

Dr. Mary Maboreke  
Executive Secretary  
African Commission on  
Human and Peoples' Rights  
31 Bijilo Annex Layout, Kombo North District  
Western Region | P.O. Box 673 | Banjul  
Email: [au-banjul@africa-union.org](mailto:au-banjul@africa-union.org)  
[africancommission@yahoo.com](mailto:africancommission@yahoo.com)

**BY EMAIL**

10 June 2016

**RE: Admissibility of Communication 597/16: Mohammad Atta (represented by the El Nadim Centre, the Egyptian Initiative for Personal Rights (EIPR) and The Redress Trust (REDRESS)) against Egypt**

Dear Dr. Maboreke,

Pursuant to Rule 105(1) of the Rules of the Procedure of the African Commission on Human and Peoples' Rights, The Redress Trust, the El Nadim Centre for Rehabilitation of Victims of Violence and the Egyptian Initiative for Personal Rights submit these admissibility arguments in the above Communication on behalf of Mr. Mohammad Atta.

Sincerely,

Carla Ferstman  
Director, REDRESS

Gasser Abdel Razek  
Executive Director, EIPR

Dr Aida Seif Al-Dawla  
Coordinator Director, El Nadim  
Center for Rehabilitation of Victims of  
Violence

**BEFORE THE AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS**

**Communication 597/16**

**Mohammed Atta**

**(represented by REDRESS, El Nadim Center and EIPR)**

**V**

**The Arab Republic of Egypt**

**THE COMPLAINANT'S ADMISSIBILITY BRIEF**

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## **I. Introduction**

1. Mr. Mohammed Atta ('the Complainant') respectfully submits the following arguments on the admissibility of Communication 596/16 ('the Communication') to the African Commission on Human and Peoples' Rights ('the Commission'). The Complainant is represented by The Redress Trust (REDRESS), the El Nadim Center for Rehabilitation of Victims of Violence (El Nadim Centre) and the Egyptian Initiative for Personal Rights (EIPR) (together 'the Organisations'). The original complaint ('the Complaint') was submitted to the Commission on 26 January 2016. The Commission was seized of the matter at its 19th Extra-Ordinary Session (16-25 February 2016). On 11 March 2016, the Commission requested the Complainant to present evidence and arguments on Admissibility, within two months, in accordance with Rule 105 (1) of its Rules of Procedure. On 9 May 2016, the Commission granted the Organisations an extension of time within which to submit their arguments.
2. The Complainant is the brother of late Essam Ali Atta Ali Shalabi<sup>1</sup> ('Mr Essam Atta') who the Complainant submits has been tortured to death in custody by Egyptian authorities.
3. The Communication is brought pursuant to Article 55 of the African Charter on Human and Peoples' Rights ('the African Charter' or 'the Charter'). It alleges violations of the Charter by the Arab Republic of Egypt, State party to the Charter, specifically Articles 4, 5, 7, 16, and 26.

## **II. Summary of facts**

4. Mr Essam Atta was an Egyptian national born on 24 January 1986 who, prior to his arrest in February 2011, worked as a shoemaker. He was single and lived with his family in the Abdeen neighbourhood in Cairo, Egypt.<sup>2</sup>
5. Egyptian Military Police arrested Mr Essam Atta on 25 February 2011 at around 3pm for allegedly being involved in a street fight in the Al-Muqattam neighbourhood in Cairo. The arrest was made in the context of ongoing nationwide demonstrations that had led to the resignation of the then President Hosni Mubarak on 11 February 2011. Mr Essam Atta was taken into custody and charged by the military prosecutor with illegally taking

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<sup>1</sup> Mr Essam Atta's name is spelt differently in a variety of publications due to divergences in translation from Arabic into English. For the purposes of this complaint, the spelling Essam Atta is used, while the original spelling in publications referred to remains unchanged.

<sup>2</sup> See Photo of Mr Essam Atta's identification card, Annex 1.

over/seizing a housing unit (an apartment) owned by the state and possessing a ‘white weapon’ (a knife).

6. Mr. Essam Atta appeared before a Military Court in Cairo the next day, 26 February 2011. On the same day, the Court convicted him of “thuggery” and sentenced him to two years imprisonment.<sup>3</sup> He did not have legal representation at any time either following his arrest or before or during his trial. He was not informed about his right to counsel to assist him at trial. Following the trial and conviction, he was taken to the Appeals Prison at the Cairo Security Directorate where he was detained for about three months prior to being transferred to Tora High Security Prison in Cairo. Mr Essam Atta was not informed of his right to appeal the conviction. In the absence of legal assistance to advise him on the possibility of appealing the judgment, he was unable to file an appeal against the judgment.
7. In addition, Mr. Essam Atta did not have access to his family following his arrest. His father and brother only learned about his arrest and conviction three days later, on 28 February 2011, when a prison official at the Appeals Prison informed them that Mr. Essam Atta had been arrested, convicted and sentenced. Subsequently, his family was able to visit him several times.
8. On Tuesday 25 October 2011, Mr. Essam Atta’s mother, Enam Hassan Ragheb and his fiancé who accompanied Mrs Ragheb visited Mr. Essam Atta in Tora Prison in Cairo. They arrived at the prison at approximately 11am and the visit took place at around 12pm. His mother stated that Mr Essam Atta was in good health when she saw him and that he did not suffer from any illness. She brought him food, clothes and a blanket. During the visit, Mr. Essam Atta had an argument with one of the inmates in the visiting area after asking him to return five Egyptian Pounds that the other prisoner had borrowed from him earlier. Following the argument, that inmate went to the guard supervising the visiting area to tell him something that Mr. Essam Atta and his visitors could not hear. Immediately afterwards, the guard ordered Mrs Ragheb and his fiancé to leave. In total, the visit lasted less than 15 minutes. According to Mrs Ragheb, upon leaving the prison, she heard her son shouting loudly in pain.

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<sup>3</sup> The Complainant requested the military court to provide him with a copy of the verdict, yet the Court refused to provide him with any document. The crime of “thuggery” is defined as “displaying force or threatening to use force against a victim with the intention to intimidate or cause harm to him or his property”; see on the use of the crime of thuggery to prosecute civilians before military courts, Special Rapporteur on the independence of judges and lawyers, Letter to the government of Egypt, Reference: AL G/SO 214 (3-3-16), 31 January 2012; see also Human Rights Watch on how the crime of “thuggery” was used to prosecute and convict peaceful protesters in 2011: “Since February 2011, military officers have arrested and military tribunals have wrongfully convicted hundreds of peaceful protesters for alleged “thuggery,” only releasing them after months of campaigning on their behalf”, in Human Rights Watch, “*Exceptions to Ending Emergency Law Invite Abuse*”, 25 January 2012, at <http://www.hrw.org/news/2012/01/24/egypt-exceptions-ending-emergency-law-invite-abuse>.

9. Later that day, around 6pm, Mr Essam Atta called his mother.<sup>4</sup> He was crying and very upset and said that an officer called Nour had abused him. The following day, Wednesday, 26 October 2011, at around 11:30pm and again at midnight, Mr. Essam Atta again called his parents and his brother. He sounded exhausted and was crying. He gave a fuller explanation of what had transpired after his mother's visit the day before. He said an officer called Nour Abdel Hamid took him to a room inside the prison where he beat him and accused him of having smuggled drugs into the prison brought to him by his mother and fiancé.
10. When Mr Essam Atta denied of having smuggled anything into the prison, officer Nour then forced him to drink water that he believed to have contained a mix of laundry detergent, oil and tobacco. According to Mr Essam Atta, officer Nour also ordered another officer to insert his fingers in his anus and then placed a hose with running water in his anus as well as in his mouth to flush out the drugs officer Nour said he smuggled into the prison. Mr Essam Atta told his family that he was bleeding and that he believed he was dying. He asked his family to take action and complain against the officers with the prosecution. However, despite Mr Essam Atta's request, his brother decided not to file a complaint with the authorities, fearing that doing so would expose his brother to further reprisals in prison.<sup>5</sup>
11. On Thursday 27 October 2011 at around 2pm, Mr. Essam Atta's mother received a call from one of his fellow inmates informing her that her son was very sick.<sup>6</sup> She received two more calls from other inmates later that day informing her that Mr Essam Atta was to be transferred to Al-Manyal Hospital in Cairo.<sup>7</sup> When his mother arrived at the hospital, staff informed her that her son had died and that he was in the hospital's morgue. She was not allowed to see her son's body, despite having requested to see it. Mr. Essam Atta's father, his uncle and the Complainant arrived at the hospital shortly after.
12. Prior to leaving for the hospital, the Complainant had informed Dr. Aida Seif El-Dawla of the El Nadim Center for the Rehabilitation of Victims of Violence (El Nadim Center)<sup>8</sup> about his brother's transfer to the hospital. Dr Aida Seif El-Dawla contacted several lawyers and activists through social media to urge them to come to the hospital. Among the lawyers who arrived at the hospital were prominent human rights lawyers, including Advocate Malek Adly. The lawyers insisted on seeing the body, and along with the

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<sup>4</sup> Although it is illegal to have a phone while in Egyptian prisons, it is not unusual for inmates to possess them. However, inmates found with phones are punished.

<sup>5</sup> Association for Freedom of Thought and Expression, "*Interrogation with Essam Atta's Brother has Finished*", 30 October 2011, at: [http://afteegypt.org/law\\_unit/2011/10/30/431-afteegypt.html](http://afteegypt.org/law_unit/2011/10/30/431-afteegypt.html) (in Arabic).

<sup>6</sup> Mr Sayed Ahmed Othman was one of the fellow inmates who called Mr Essam Atta's mother, see further below.

<sup>7</sup> Note that the hospital is part of Kasr Al-Aini Medical School and is also referred to as the Kasr Al-Aini or Qasr Alaini Hospital.

<sup>8</sup> For further information on the El Nadim Center for the Rehabilitation of Victims of Violence see <http://alnadeem.org/>.

Complainant and his parents went to the morgue where they eventually were allowed to see his body. The Complainant and Mr Adly testified that blood and water was coming out of Mr Atta's anus, mouth and nose. There was a piece of cloth in his mouth and it looked as if Mr. Essam Atta had been soaked in water.<sup>9</sup>

13. Learning that Mr. Essam Atta had died, the lawyers and activists called on the authorities, particularly the police present in the hospital, to hold those responsible for Mr. Essam Atta's death to account. Police at the hospital then called the prosecution services to come to the hospital. Upon arrival, a prosecutor requested the activists and others, including the Complainant and his mother, to leave the hospital. Only Mr. Essam Atta's father and his uncle remained in the hospital, and the prosecutor asked them not to demand an autopsy of Mr Essam Atta and to "take your son and bury him." His father, however, insisted that an autopsy be carried out.<sup>10</sup>
14. According to Mr. Sayyed Ahmad Othman, an inmate at Tora Prison detained at the same time as Mr Essam Atta, and who later testified about Mr Essam Atta's torture by officer Nour, Mr. Essam Atta had felt very sick on 27 October and was repeatedly vomiting.<sup>11</sup> The prison doctor gave him an injection at around 2pm to stop the vomiting, yet following the injection, Mr. Essam Atta's condition worsened. At around 3pm his cellmates asked the doctor and the prison warden to arrange for him to be transferred to the hospital but neither the doctor nor the prison warden took any action. According to Mr Othman, Mr. Essam Atta died in the prison shortly before his body was transferred to the hospital, where it arrived at around 6:30pm.<sup>12</sup> Advocate Malek Adly stated that the Old Cairo Police Department had informed him that an officer called Peter Sami Ibrahim Fahmy had transported Mr Essam Atta to the hospital.<sup>13</sup> The medical report issued by Al-Manyal Hospital confirms that upon Mr Essam Atta's arrival at the hospital he was not breathing, no pulse could be heard during the stethoscope examination, his blood pressure could not be measured, and he was in Level 3 coma.<sup>14</sup>

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<sup>9</sup> See photos taken by the Complainant of Mr Essam Atta in the morgue, Annex 2; see also TV interview with Mr Malek Adly and Mona Seif, 28 October 2011, at <https://www.youtube.com/watch?v=kTlQis8ifgo> (in Arabic); a video clip taken of Mr Essam Atta in the morgue showing Mr Essam Atta is available at <https://www.youtube.com/watch?v=kQjezvxunEM>, taken by two human rights activists who want to remain anonymous for security reasons.

<sup>10</sup> Correspondence with the Complainant.

<sup>11</sup> See unofficial summary translation into English of transcript of Mr Sayyed Ahmad Othman's online testimony, dated 15 April 2012, at: <https://www.youtube.com/watch?v=X7Ni2iYw9Bg> (in Arabic), Annex 3.

<sup>12</sup> Ibid; see also Summary in English of Forensic Report 108/2013, referring to the medical report of the National Centre for Clinical and Environmental Toxicology of the Hospital of Cairo University, which states that the "patient arrived to the Centre on Thursday, 27 October 2013 at 6:30pm." According to the report, he was not breathing, did not have any pulse, had blue lips and white foam from the mouth at suction, Annex 4; see Annex 4a for copy of Arabic Original Forensic Report.

<sup>13</sup> See TV interview with Mr Malek Adly and Mona Seif, 28 October 2011, at <https://www.youtube.com/watch?v=kTlQis8ifgo> (in Arabic) and its English transcription (Annex 8)

<sup>14</sup> The medical report by Al-Manyal Hospital on 27 October 2011 is referred to in the Forensic Report No.108/2013, Annex 4 / 4a.



15. Advocate Malek Adly stated further that Dr. Inas al-Qattan,<sup>15</sup> the doctor who received and examined Mr. Essam Atta at Al-Manyal Hospital, had informed him that Mr. Essam Atta's vital functions had already ceased functioning when he arrived at the hospital and that he could not be resuscitated.<sup>16</sup> Advocate Adly asked Dr. Inas if they had conducted any tests to find out the cause of death but she replied negatively saying they didn't have time to do it but that the Forensics Department would take care of it.<sup>17</sup>
16. Mr Adly further inquired if the cause of death could potentially be the result of forcing a running water hose into the victim's anus and mouth as Mr. Essam Atta's family had reported. Dr. Inas replied saying that only an autopsy could identify the exact cause of death. However, according to Dr. Inas, an autopsy would not be able to show that a water hose was forced into the victim's mouth as the doctors at the hospital had inserted a laryngeal tube in an attempt to resuscitate the victim.

### **III. Alleged violations of the African Charter**

17. The Organisations submit that the Respondent State's officials subjected Mr Atta to treatment amounting to torture in violation of Articles 5 and 16 of the Charter, resulting in Mr Atta's death in violation of Article 4. The authorities' failure to adequately investigate the circumstances of Mr Essam Atta's death, and the additional failures to keep the Complainant and other members of Mr Essam Atta's family informed about the progress of the investigation; and to withhold access to key information about the causes of his death constitute additional violations by the Respondent State. The Organisations submit further that the authorities failed to provide Mr Essam Atta his procedural rights upon arrest (access to a lawyer; access to family members; adequate information and time and facilities to prepare a defence) and denied Mr Essam Atta a fair trial contrary to Articles 7 and 26 of the Charter.
18. The alleged violations are summarised further below for the purposes of the admissibility of this Complaint. The Organisations will analyse the different violations in more detail once the Commission has made a finding on the admissibility of the communication.

#### **III.1. Violation of Article 4 of the Charter: Arbitrary deprivation of life**

19. The Organisations submit that the Respondent State is responsible for Mr Atta's death in custody in violation of Article 4 of the African Charter.

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<sup>15</sup> Also spelt as Dr Enas.

<sup>16</sup> See Annex 4/4a.

<sup>17</sup> See TV interview with Mr Malek Adly and Mona Seif, 28 October 2011, at <https://www.youtube.com/watch?v=kTlQis8ifgo> (in Arabic) and its English transcription (Annex 8), See his testimony Annex 16, 16a

20. The Commission has confirmed that the right to life “constitutes a norm of customary international law and is one of the central rights recognized in international human rights treaties.”<sup>18</sup> Indeed, according to the Commission, “the right to life is the fulcrum of all other rights, it is the fountain through which all other rights flow and any violation of this right without due process amounts to arbitrary deprivation of life.”<sup>19</sup>
21. In examining whether there has been a violation of the Charter, the African Commission draws “inspiration from international law on human and peoples’ rights” and “instruments adopted by the United Nations and by African countries.”<sup>20</sup> The Commission for instance takes into account the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, considering that “[T]hese Principles are relevant in determining the scope of what constitutes unlawful deprivations of life.”<sup>21</sup> The Principles expressly refer to the absolute prohibition of extra-legal, arbitrary and summary executions also in “situations in which deaths occur in custody”<sup>22</sup> and require States to ensure “strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment.”<sup>23</sup>
22. Other human rights bodies have similarly emphasised that the obligation to respect the right to life is particularly important for those in custody as “they are in a vulnerable position and the authorities are under a duty to protect them.”<sup>24</sup> Article 4 of the Charter therefore places an obligation upon States to both respect and to ensure the right to life, and this obligation is particularly relevant where persons are detained in custody or imprisonment. In cases where individuals were tortured to “the point of death” while in detention, the Commission has held that this showed a “shocking lack of respect for life and constitutes a violation of Article 4.”<sup>25</sup>
23. In the present case, the Respondent State failed in its obligation to respect and ensure the right to life of Mr Essam Atta during his incarceration in Tora prison. As outlined above

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<sup>18</sup> African Commission, *Noah Kazingachire et al (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, Communication 295/04, para.136.

<sup>19</sup> African Commission, *Forum of Conscience v Sierra Leone*, Communication 223/98, para.19.

<sup>20</sup> Article 60 African Charter.

<sup>21</sup> African Commission, *Noah Kazingachire et al (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, Communication 295/04, para.96.

<sup>22</sup> UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, principle 1.

<sup>23</sup> *Ibid*, principle 2.

<sup>24</sup> ECtHR, *Mojsiejew v Poland*, application no. 11818/02, Judgment, 24 March 2009, para. 51.

<sup>25</sup> African Commission, *Malawi African Association and others v Mauritania*, Communications 54/91-61/91-96/93-98/93-164/97\_196/97-210/98, para.120.

on 25 October 2011, a prison officer named Nour Abdel Hamid forced Mr Atta to drink a mix of what was believed to be laundry detergent, oil and tobacco and instructed another officer to place a water hose in Mr Atta's anus and his mouth, accusing Mr Atta of having smuggled drugs in his body.<sup>26</sup> As a result, Mr Essam Atta fell sick and on 27 October 2011 was repeatedly vomiting. The prison authorities then failed to ensure that Mr Atta received adequate medical attention.<sup>27</sup> Despite Mr Atta's worsening condition, Dr Inas al-Qattan of the Al-Manyal Hospital confirmed that Mr Essam Atta was only transferred to Al-Manyal Hospital when he had already stopped breathing, and upon arrival at the hospital at around 6:30pm, he could not be resuscitated.<sup>28</sup>

24. This is supported by ample evidence, as will be set out in further detail in the submission on the merits of the case, including video evidence of Mr Essam Atta's body in the morgue, witness testimonies, the report of Al-Manyal Hospital and the findings of the independent forensic expert in relation to the official autopsy report.

### **III.2. Violation of Article 5: Prohibition of torture and ill-treatment**

25. The Organisations submit that the prison officials' treatment of Mr Atta in Tora Prison constituted torture and ill-treatment in violation of Article 5 of the Charter.
26. The Commission, in interpreting Article 5 of the Charter, has referred to Article 1 of the UN Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment,<sup>29</sup> which defines torture as:

[A]ny 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.<sup>30</sup>

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<sup>26</sup> See above, Section II.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46, 10 December 1984, available at: <http://www.un.org/documents/ga/res/39/a39r046.htm>.

<sup>30</sup> Ibid, Article 1.

27. The Commission has also drawn on the jurisprudence of the European Court of Human Rights (ECtHR) on Article 3 of the European Convention on Human Rights (prohibition of torture). For example in *Huri Laws v. Nigeria*, the Commission referred to the ECtHR's definition of torture in *Ireland v. United Kingdom*, which defines torture as "deliberate inhuman treatment causing very serious and cruel suffering."<sup>31</sup>
28. The vulnerability of the victim as well as the environment and totality of the cumulative circumstances should be taken into account to determine whether a case amounts to torture.<sup>32</sup> Specifically, in the context of detention and in cases where "an individual is taken into police custody in good health but found to be injured on release, it is incumbent upon the State to provide a plausible explanation."<sup>33</sup>
29. Mr Essam Atta was a healthy, 23-year old man. When his mother and his fiancé visited him on 25 October 2011 at 2pm, he was in good health. He was dead two days later. Fellow prison inmates stated that following his mother's and fiancé's visit, prison officials in Tora prison had subjected Mr Atta to beatings and forced him to drink what they believed was a mix of laundry detergent, oil and tobacco.<sup>34</sup> At the orders of Officer Nour Abdel Hamid, an officer forcefully placed his fingers in Mr Atta's anus and forced a hose with running water into it and into his mouth.<sup>35</sup> Mr Essam Atta himself spoke to his family about this ordeal on 26 October, stating that he was suffering and believed he was dying.<sup>36</sup>
30. The treatment, singly and in combination, resulted in the deliberate infliction of severe pain and suffering, ultimately leading to Mr Essam Atta's death. Officer Nour and other, unidentified officers at Tora prison inflicted this treatment upon Mr Atta so as to forcing him to confess that he had smuggled drugs into prison.
31. Furthermore, the Organisations submit, and will outline in detail when submitting on the merits of this case, that the insertion of a tube into Mr Essam Atta's anus constituted rape amounting to torture in violation of Article 5 of the Charter.<sup>37</sup> In light of the foregoing,

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<sup>31</sup> African Commission, *Huri Laws v Nigeria*, Communication No. 225/98, para. 41.

<sup>32</sup> African Commission, *Gabriel Shumba v Zimbabwe*, Communication 288/04, para.139.

<sup>33</sup> ECtHR, *Aksoy v Turkey*, Application 21987/93, 26 November 1996.

<sup>34</sup> See Section II above.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> See for instance Inter-American Commission on Human Rights, *Raquel Marti de Mejia v Peru* (1996), Case 10.970, Report No. 5/96, 1 March 1996; ECtHR, *Aydin v Turkey* (1997) Application No. 57/1996/676/866, Judgment of 25 September 1997, paras.83, 86; Committee against Torture, *C. T. and K. M. v. Sweden*, Communication No. 279/2005, 17 November 2006, para. 7.5; Inter-American Court of Human Rights, *Case of the Miguel Castro-Castro Prison v Peru*, Judgment of 25 November 2006 (Merits, Reparations and Costs), para.311.

the Organisations submit that this treatment amounted to torture in violation of Article 5 of the African Charter.

### **III.3. Failure to conduct an impartial and effective investigation in violation of Articles 4 and 5 of the African Charter**

18. It is the Commission's established jurisprudence that a State party to the Charter is obliged to investigate serious human rights violations such as those enshrined in Articles 4 and 5 of the African Charter. An investigation must be prompt, impartial and effective, that is, the investigation must be capable of leading to the identification and prosecution of those responsible for the violations.<sup>38</sup>
19. In reference to the analysis of the authorities' failure to investigate in the context of the exhaustion of domestic remedies outlined further below, the Organisations submit that the Respondent State failed to provide a plausible explanation for Mr Essam Atta's death in custody and its failure to investigate impartially and effectively the allegations with a view to hold those responsible to account constituted a procedural violation of Articles 4 and 5 of the Charter.

### **III.4. Violation of the right to know the truth and to information under Articles 4 and 5 of the African Charter**

20. An integral part of the obligation to investigate and prosecute those responsible for violations of the African Charter such as those enshrined in Articles 4 and 5 is the notion of the right to truth, that is, the right to an "accurate account of the suffering endured and the role of those responsible for that ordeal."<sup>39</sup> The right to truth is widely recognised in the jurisprudence of and instruments adopted by the African Commission and other mechanisms.<sup>40</sup>
21. In the Complaint, the Organisations submit that the Respondent State's failure to adequately investigate the alleged violations constituted a violation of Mr Essam Atta's family's- including the Complainant's- right to know the truth and to information about the circumstances of Mr Essam's Atta's death. The Organisations submit further that the authorities' failure to ensure the Complainant's and his family's participation in the

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<sup>38</sup> See for instance African Commission, *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 334/06, para.204; *Amnesty International and Others v Sudan*, Communications 48/90, 50/91, 52/91, 89/93, para.56; see also the Commission's Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), adopted in October 2002, paras.17-19, 49.

<sup>39</sup> See further ECtHR, *Case of El-Masri v The Former Yugoslav Republic of Macedonia*, Application no.39630/09, Judgment, 13 December 2012, para. 192.

<sup>40</sup> See for instance, African Commission, Resolution 111 on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, adopted during the African Commission's 42<sup>nd</sup> Ordinary Session from 15-28 November 2007, at <http://www.achpr.org/sessions/42nd/resolutions/111/>.

investigation and further public scrutiny constituted an additional violation of Articles 4 and 5 of the Charter.

### III.5. Violation of Article 7: Right to Fair Trial<sup>41</sup>

32. Article 7 of the African Charter sets out a number of elements required to ensure that a trial is fair, including the right to an appeal, to be presumed innocent and the right to counsel. The Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide further guidance on Article 7 and list a number of "essential elements of a fair hearing", including

1. Equality of arms;
2. Adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
3. An entitlement to consult and be represented by a legal representative;
4. An entitlement to an appeal to a higher judicial body.

33. The Commission's "Resolution on the Right to Recourse and Fair Trial" provide that Article 7 of the Charter includes "an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of proceedings" and the right to have "adequate time and facilities for the preparation of their defence and to communicate in confidence with the counsel of their choice." According to the Commission's established jurisprudence, authorities must therefore give arrested and detained persons prompt access to a lawyer.<sup>42</sup> The right to counsel applies "at all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings."<sup>43</sup> The Organisations submit that Mr Atta's trial on 26 October 2011 by the Military Court in Cairo did not provide for any of these "essential elements."

34. Egyptian Military Police arrested Mr Atta on 25 February 2011 and the Military Prosecutor charged Mr Atta shortly after on the same day with illegally taking over/ seizing an apartment owned by the State and with possessing a knife. A military Court in Cairo convicted him on 26 February 2011 for 'thuggery' and sentenced him to two years imprisonment. At no point following his arrest up to conviction did Mr Atta have access to a lawyer, and he was not represented during his 'trial'. Mr Atta therefore did not have

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<sup>41</sup> See also further below, Section III.7 on the Duty to Guarantee the Independence of the Courts.

<sup>42</sup> See for instance African Commission, *Media Rights Agenda and Constitutional Rights Project v Nigeria*, Communication Nos.105/93, 130/94, and 152/96, paras.55-56, and *Zegveld and Ephrem v Eritrea*, Communication 250/2002, para.55.

<sup>43</sup> African Commission, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, Principle N (2) (c), at [http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33\\_guide\\_fair\\_trial\\_legal\\_assistance\\_2003\\_eng.pdf](http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf).

the opportunity to prepare his case, present arguments and evidence and challenge the evidence presented by the prosecutor. The authorities' failure to provide him with a lawyer and to inform Mr Atta about the possibility to appeal his conviction furthermore prevented him from appealing the conviction to a higher judicial body.

35. In light of the foregoing, the Organisations submit that therefore Mr Atta's trial was unfair contrary to Article 7 of the Charter.

### **III.6. Violation of Article 16: Right to Health**

36. It is generally recognised that rape and other forms of torture and ill-treatment cause severe mental and physical trauma on the victim, "a trauma that can be long lasting and may never fully disappear." The resulting ill-health as a consequence of torture can be attributed to the State as the author of the torture, which can thus be interpreted as a violation of the rights of individuals to enjoy the best attainable state of physical and mental health as enshrined in Article 16 of the Charter.

37. In the present case, prison officers subjected Mr Atta to physical and mental torture and other ill-treatment, resulting in severe injuries and eventually in Mr Essam Atta's death. The Organisations submit that the torture inflicted upon Mr Atta in prison violated Article 16 of the African Charter. Furthermore, the Organisations submit that the authorities failed to provide Mr Atta with adequate medical care while in Tora Prison in violation of his right to health under Article 16.<sup>44</sup>

### **III.7. Violation of Article 26: Duty to Guarantee Independence of Courts**

38. Article 26 of the African Charter, providing for the independence of the Courts, highlights the institutions needed to ensure implementation of the rights enshrined in Article 7. The Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of 2003 set out what constitutes an independent court:

[t]here shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law.<sup>45</sup>

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<sup>44</sup> See for instance, African Commission, *International Pen and others v. Nigeria*, Communications 137/94-139/94; 154/96-161/97, providing in para.112: "[T]he responsibility of the government [to ensure an individual's right to health] is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities. The State has a direct responsibility in this case."

<sup>45</sup> African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of 2003, Principle A (4) (f).

39. The Fair Trial Principles also require that “[a]ll judicial bodies shall be independent from the executive branch,” a position reaffirmed by the Commission’s jurisprudence on Article 26 of the Charter, stating that “the independence of a court refers to the independence of the court vis a vis the Executive. This implies the consideration of the mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence.”<sup>46</sup> Specifically in the context of military trials, the Commission’s Fair Trial Principles stipulate that “[M]ilitary courts should not in any circumstances whatsoever have jurisdiction over civilians.”<sup>47</sup> The Commission considered similarly that “civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial.”<sup>48</sup>
40. In the present case, Mr Atta, a civilian, was prosecuted before, tried and convicted by a military court in Cairo. The Organisations submit that the military justice system in Egypt that led to Mr Atta’s conviction lacks independence and therefore is in violation of Article 26 of the Charter.
41. The lack of independence of the military courts in the Respondent State has led the UN Human Rights Committee to express “its alarm at the fact that Military Courts and State Security Courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those Courts’ independence and their decisions are not subject to appeal before a higher Court.”<sup>49</sup> While this statement was made in 2002, serious concerns about the independence of the military courts in the Respondent State persist for the following reasons: Judges sitting in military courts must be active members of the armed forces. The judges are selected by the head of the military justice system, and are appointed by the Minister of Defence, a member of the executive. In addition to their selection process, the judges’ tenure is also not guaranteed and remains at the behest of the executive.<sup>50</sup>
42. The Military Court’s lack of independence in the Respondent State is furthermore underlined by the fact that all officers, including judges, must take an oath of allegiance

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<sup>46</sup> See for instance African Commission, *Marcel Wetsh'okonda Koso and others v Democratic Republic of Congo*, Communication 281/03, para.78.

<sup>47</sup> n.45, Principle L(c)

<sup>48</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, L.

<sup>49</sup> Human Rights Committee, Concluding Observations on Egypt, UN doc. CCPR/CO/76/EGY (2002), para. 16 (b).

<sup>50</sup> The Code of Military Justice provides that judges may only be removed in accordance with the disciplinary procedures in the Code of Military Services, determined solely by a committee of officers of the armed forces, see Code for the Conditions of Service and Promotion of Officers of the Armed Forces, Law 232/1959, Articles 110, 112, 134.



to a person or entity determined by the President of the Republic (the head of the executive branch) before commencing their service. It is submitted that therefore the judges must make decisions within a framework that does not provide structural independence from the executive branch.

43. Mr Atta's trial before the Military Court in Cairo therefore amounted to a violation of Article 26 of the Charter.

#### **IV. Compliance with Article 56 requirements**

44. The Complainants submit that the Communication fulfils the seven requirements listed in Article 56 of the African Charter.

##### **Article 56 (1)**

45. The author of the Communication is clearly identified; Mr Mohammed Atta represented by the Organizations.

##### **Article 56 (2)**

46. The Communication is compatible with the Charter of the Organization of African Unity and with the African Charter; it alleges serious violations of the rights protected by the latter.

##### **Article 56 (3)**

47. The Communication is written in a respectful manner, without using disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity.

##### **Article 56 (4)**

48. The allegations in the Communication are not exclusively based on news disseminated through the mass media, but are rather based on information provided by a variety of sources, including official legal documents, medical reports, and testimonies, as well as reports from national and international reputable human rights organizations.

##### **Article 56 (5) – Exhaustion of domestic remedies**

49. According to the African Commission's established jurisprudence, the underlying rationale of the requirement to exhaust domestic remedies is to ensure that the State concerned had the opportunity to remedy the matter through its own local system before

proceedings were brought before an international body. Furthermore, domestic remedies need to be available, effective and sufficient.<sup>51</sup>

50. The Organisations respectfully submit that the Complainant made all possible attempts to exhaust domestic remedies, on numerous occasions and that there are no effective and sufficient remedies available to the Complainant in the Respondent State pursuant to Article 56 (5) of the Charter.

### **I. The Complainant attempted to seek redress in the Respondent State**

#### *I.1. The Complainant's first complaint and subsequent investigation*

51. On 27 October 2011, the El Nadim Center filed a complaint with the prosecution authorities, naming individual prison guards as being responsible for torturing Mr Essam Atta to death.<sup>52</sup> The prosecution opened an investigation the same day (case file number 5537/2011). As outlined in detail below, this investigation did not adhere to international standards.
52. The prosecution requested an initial examination of Mr. Essam Atta's body. Doctors at Al-Manyal hospital carried out the examination on 27 October 2011, reportedly concluding that the cause of death was "severe Hematemesis [vomiting of blood] that caused a sharp drop in the blood circulation and a cardiac arrest due to poisoning of unknown causes."<sup>53</sup>
53. The Ministry of Interior issued a statement the next day, Friday 28 October 2011, stating that Mr. Essam Atta had suffered a state of extreme exhaustion on Thursday 27 October 2011, that he had lost consciousness and that foamy secretions had formed around his mouth and nose. According to the statement, the doctor at Tora Prison had suspected acute drug poisoning, and Mr Essam Atta was immediately transferred to the Department of Toxicology of Al-Manyal Hospital, where he died while receiving first aid.<sup>54</sup> The

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<sup>51</sup> African Commission, *Sir Dawda K. Jawara v The Gambia* (2000), Communication 147/95-149/96, paras.31, 32.

<sup>52</sup> The complaint was sent by phone on the evening of the same day the El Nadim centre received the news of Mr Essam Atta's death. There is no copy available to the El Nadim Centre.

<sup>53</sup> Al-Masry Al-Youm, in Arabic "*Prisoner dies in Am-Manyal College Hospital. His family accuses the prison of torturing him... The Ministry of Interior denies...*" 29 October 2011, at: <http://today.almasryalyoum.com/printerfriendly.aspx?ArticleID=315550> (in Arabic); lawyers of the El Nadim Centre had tried to obtain a copy of the medical report, without success. Mr Essam Atta's family has not obtained a copy of the report despite requesting it.

<sup>54</sup> The Ministry of Interior's statement was included in several newspapers, including here <http://www.youm7.com/story/0000/0/0/-/522375#.VjOSkYBFC1t> and here <http://www.elfagr.org/76128>; reference to the statement is made in a press release by Egyptian Initiative for Personal Rights, "*The Interior Ministry Must Take Full Responsibility for the Death of Essam Atta*", 31 October 2011, at: <http://eipr.org/en/pressrelease/2011/10/31/1282>.

Ministry's statement also referred to the prison authorities confirming that Mr. Sayyed Ahmad Othman testified he saw Mr. Essam Atta swallowing a drug.<sup>55</sup>

54. As part of the investigation, on 28 October 2011, Dr Soad Abdul-Ghaffar, the director general of the anatomy department and Dr Amr Mahmoud, carried out an autopsy of Mr. Essam Atta' body at Zenhom morgue. The autopsy was carried out on behalf of the Forensic Medicine Authority of the Ministry of Justice. As detailed further below, this autopsy did not correspond to international standards.

55. Mr Essam Atta's family did not receive the autopsy report until 2 February 2012, more than three months after the autopsy was carried out. The report, dated 25 December 2011, stated that the autopsy did not find any marks around the mouth or the anus. The report indicated that inside Mr. Essam Atta's stomach, a capsule shaped object covered with the finger of a latex glove of approximately 1.5-2 cm width and 5 cm length was found. According to the report, the latex covering decomposed due to the digestive fluids in the stomach causing a leak of its contents. The contents were a black substance identified as cannabis as well as a dozen of red liquidated capsules which were later revealed to be Tramadol pills.<sup>56</sup>

56. The autopsy concludes that the "death occurred as a result of a cardiovascular and respiratory arrest caused by the intake of a large dose of the drugs Tramadol and cannabis. Accordingly, there is no suspicion of criminal death."<sup>57</sup>

57. On 17 April 2012, the prosecution put the investigation on hold on the basis of the autopsy report and its investigation, finding that there was a lack of evidence to support the torture allegations.

### *1.2. The second complaint and independent expert opinion*

58. In July 2012, the El Nadim Centre on behalf of the Complainant filed a request with the prosecution to re-activate the investigation.<sup>58</sup> The request was based on new testimony by Mr. Sayed Ahmed Othman following his release from Tora prison. Mr. Othman stated to

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<sup>55</sup> As outlined below, Mr Othman later withdrew this testimony, stating that the Prosecution forced inmates to testify that Mr Essam Atta had not been tortured and the Officer Nour was good to them.

<sup>56</sup> According to the World Health Organisation, Tramadol is a centrally acting analgesic with a potency of about one tenth that of morphine. It is used to treat both acute and chronic pain of moderate to (moderately) severe intensity, see World Health Organisation, 'Tramadol- Update Review Report, Agenda item 6.1', Expert Committee on Drug Dependence, 36<sup>th</sup> Meeting, 16-20 June 2014, at [http://www.who.int/medicines/areas/quality\\_safety/6\\_1\\_Update.pdf](http://www.who.int/medicines/areas/quality_safety/6_1_Update.pdf).

<sup>57</sup> Ibid.

<sup>58</sup> See El Nadim, Request to re-open the case submitted to Prosecutor General, unofficial translation into English, Annex 6; Annex 6a, Arabic original.

the El Nadim Centre that investigators had threatened him and other inmates during their interrogation in Tora Prison “not to mention what really happened.”

59. The complaint was furthermore based on an independent forensic expert report dated June 2012 prepared by Dr Ibrahim Mohammad Salim, former Head of the Forensic Medicine Department at the request of the El Nadim Centre. Following Dr Salim’s review of the forensic medical report of February 2012, he concluded that the cause of death could not have been drug intoxication as stated in the autopsy report.<sup>59</sup>
60. The Public Prosecutor re-activated the investigation in September 2012 on the basis of Dr Salim’s report yet only established an official committee from the Forensic Medicine Authority to examine the new evidence. The investigation did not extend to Mr. Othman’s statement and his allegations that the first investigation was based on false testimonies obtained under duress. The committee included three doctors: Dr Emad El-Deeb, Dr Ayman Kamal El din and Dr Maged Hammam. All three were colleagues of the first examiners, and were employed by the same government agency. The Committee issued a report in which it confirmed the earlier findings as reflected in forensic report No 945/2011.<sup>60</sup>
61. The prosecution then again ‘suspended’ the case on 10 June 2013.<sup>61</sup>

### *1.3. Failure to respond to further complaints*

62. The Arab Penal Reform Organisation (APRO) filed a complaint on 28 October 2013 requesting the Prosecutor General Hesham Barakat to re-activate the investigation into Mr. Essam Atta’s case.<sup>62</sup> The complaint included new evidence, such as two testimonies of fellow detainees who had testified that prison guards had tortured and ill-treated Mr. Essam Atta.
63. It also referred to an interview of Dr. Ehsan Kameel, the head of the Forensic Medicine Department. Dr Kameel claimed that Mr. Essam Atta’s brother, Mohammad Atta, had been able to attend the autopsy and that Mohammad himself took the bag of drugs out of

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<sup>59</sup> See further below, analysis of autopsy; Independent Forensic Opinion by Doctor Ibrahim Mohammad Salim, June 2012, Annex 7 (English) and Annex 7a (Arabic).

<sup>60</sup> Forensic Report No 108/2013, dated 26/3/2013 with its English translation, see Annexes 4a/4.

<sup>61</sup> Daily News Egypt, “*Essam Atta case reopened*”, 10 September 2012, at: <http://www.dailynewsegypt.com/2012/09/10/essam-atta-case-reopened/> and Daily News Egypt, “*Essam Atta remembered, two years on*”, 28 October 2013, at: <http://www.dailynewsegypt.com/2013/10/28/essam-atta-remembered-two-years-on/>.

<sup>62</sup> Arab Penal Reform Organisation, Request to reopen the investigation into Mr Essam Atta’s case, submitted on 28 October 2013 (‘APRO Complaint’, see Annex 9 of Complaint); see also: Daily News Egypt, “*Essam Atta remembered, two years on*”, 28 October 2013, at: <http://www.dailynewsegypt.com/2013/10/28/essam-atta-remembered-two-years-on/>.

his brother's stomach, and that four (rather than two) doctors from the Al-Tahrir Association were present throughout the autopsy.<sup>63</sup> Dr. Kameel further stated that Mr. Essam Atta's mother brought him the drugs in a chicken that she brought to him when she visited him before his death.<sup>64</sup>

64. According to APRO, Dr Ehsan Kameel's interview undermined his and generally the Forensic Medicine Department's credibility: the Complainant had not been able to attend the autopsy and therefore never took anything out of his brother's stomach. In addition, his mother never brought a chicken to Mr Essam Atta in prison, which is also confirmed by her testimony to the prosecutor.<sup>65</sup> The two witness testimonies in the APRO complaint described Officer Nour's abuse of Mr Essam Atta. APRO requested that this evidence be properly investigated.<sup>66</sup> Neither APRO, nor Mr Mohammed Atta as the Complainant ever received any official correspondence from the Prosecution's Office regarding whether an investigation had been re-opened into the case and/ or the progress of the investigation into the complaint filed.

65. Following the inaction of the public prosecutor's office, on 11 March 2015, the Complainant, with the support of EIPR, filed a new complaint with the Prosecutor General,<sup>67</sup> alleging that his brother died as a result of the prison authorities' treatment and because of the failure of medical staff at Tora prison to afford his brother necessary medical assistance required because of the treatment inflicted upon him. In this complaint, the two testimonies submitted by APRO earlier and again by EIPR evidenced information that would if shown to be true, give rise to criminal responsibility on the part of the prison's medical staff and authorities. According to Mr. Sayed Ahmed Othman:

Officer Nour ordered me to take Essam away from him or else he'll take him to the discipline room again. Essam was so sick and he went again to Officer Nour to see a doctor, he refused again. That's when Essam fainted so Officer Nour asked me to take him anywhere [meaning the clinic]. I took him to Dr. Mohamed Diab at the clinic. Dr. Diab asked if Essam ingested anything, he said he ate sandwiches. The doctor asked if the sandwiches were covered or not, Essam said they weren't. The Doctor gave him an antiemetic injection and asked me to take him back to his cell. After he was injected his condition worsened and his face was turning blue.

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<sup>63</sup> See further below, analysis of the autopsy.

<sup>64</sup> APRO Complaint.

<sup>65</sup> Ibid.

<sup>66</sup> Daily News Egypt, "Essam Atta remembered, two years on", 28 October 2013, at: <http://www.dailynewsegypt.com/2013/10/28/essam-atta-remembered-two-years-on/>.

<sup>67</sup> Complaint number 4643

At 3pm he was not breathing, his face was blue and he couldn't speak. I took him again to Dr. Diab telling him that Essam needs a hospital, he said you won't teach me how to do my job, and yelled at me to get out.<sup>68</sup>

66. Accordingly, as per Article 197 of the code of criminal procedure,<sup>69</sup> EIPR submitted that Mr. Othman's testimony was sufficient evidence to re-open the investigation into the criminal responsibility for the torture and death of Mr. Essam Atta, punishable under Article 236 and 238 of the Egyptian Penal Code. EIPR's complaint specifically requested the prosecution to "investigate the criminal responsibility that falls on the prison doctor, Dr. Mohamed Diab, and the prison officer in charge at the time of the incident."<sup>70</sup>

67. Upon his inquiry into the matter, in April 2015, the Complainant was informed that the "complaint was referred to the Appeal prosecution, requesting the Masr-el Qadima Prosecution for an information memorandum about the case."<sup>71</sup> The Appeal prosecution then informed the Complainant on 16 April 2015 that the complaint had been "suspended" on 14 April 2015. The Complainant and his lawyer unsuccessfully sought to obtain official written confirmation of the "suspension" of the investigation into the complaint or, alternatively, confirmation of the reasons for said "suspension". Their request for information about how the "suspension" could be lifted was denied.<sup>72</sup> No further investigation in the matter, according to Egyptian law can be resumed unless new evidence is found. On 10 January 2015, the Prosecution issued a certificate which indicates that the investigation was closed on 11 June 2013.<sup>73</sup>

## **II. The Prosecution's investigations were partial and ineffective**

68. As outlined above, the Complainant took all possible steps to pursue domestic remedies. The Organisations submit that the Respondent State failed to carry out an impartial and effective investigation into the allegations with a view to holding the alleged perpetrators to account. It did not provide a plausible explanation for Mr. Essam Atta's death in custody. This is particularly evident from the authorities' investigation in Tora prison, the statements made by the authorities, as well as the circumstances surrounding the autopsy

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<sup>68</sup> Testimony of Sayyed Ahmed Othman, See Annex 3 as well as Annexes 9/9a and Annex 10.

<sup>69</sup> According to Article 197 of the Egyptian Code of Criminal Procedure, if investigations have been suspended by the prosecution, there is no way to re-open them "unless new evidence appears prior to the elapse of the period of time specified for the abatement of a criminal lawsuit. Witness testimonies, reports and other documents not presented to the investigating magistrate or the accusation chamber and fostering the evidence found insufficient or clarifying the matter for revelation of the truth shall be deemed new evidence," see Annex 12.

<sup>70</sup> EIPR complaint, 2015, final page, see Annex 10.

<sup>71</sup> Correspondence with the Complainant.

<sup>72</sup> Ibid.

<sup>73</sup> Annex 14, Certificate from the Public Prosecutor's Office: Receipt and on suspension of complaint, dated 4 July 2012 (in Arabic)

and the autopsy itself. Furthermore, the Organisations submit that the investigation was flawed as it did not provide the Complainant and his family with access to information contrary to international standards.

69. The Commission has reiterated that a State party to the Charter is obliged to investigate allegations of violations of the African Charter, including violations as alleged in the present case such as Articles 4 and 5. According to the Commission as well as other regional and international human rights bodies, an investigation must be prompt, impartial and effective, that is, the investigation must be capable of leading to the identification and prosecution of those responsible for the violations.<sup>74</sup>
70. Where there are allegations suggesting an unnatural death such as in the present case, authorities are obliged to carry out a prompt, thorough and impartial investigation so as to “determine the cause, manner and time of death, the person responsible and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses.”<sup>75</sup> Where the family of the victim raises concerns about inadequate investigations, an independent commission of inquiry or similar procedure should be established, with members of the commission being chosen for “their recognized impartiality, competence and independence as individuals. They shall be independent of any institution, agency or person that may be the subject of the inquiry.”<sup>76</sup>
71. According to the African Commission’s General Comment on the Right to Life, “Where a person dies in State custody, there is a presumption of State responsibility and the burden of proof rests upon the State to prove otherwise through a prompt, impartial, thorough and transparent investigation carried out by an independent body.”<sup>77</sup> The

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<sup>74</sup>African Commission, *Malawi African Association and Others v. Mauritania*, Communications.54/91, 61/91, 98/93, 164/97, 196/97, 210/98, para.142; in this case, the African Commission instructed Mauritania to launch an independent inquiry in order to clarify the fates of disappeared and to “identify and bring to book the authors of the violations perpetrated;” see also *Amnesty International and Others v. Sudan*, Communications 48/90, 50/91, 52/91, 89/93, para.51; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, paras.58-70; see also Office of the High Commissioner for Human Rights (OHCHR), Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”), 2004, HR/P/PT/8/Rev.1, Para. 74.

<sup>75</sup> UN Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions, Resolution 1989/65, 24 May 1989, Principle 9.

<sup>76</sup> *Ibid*, principle 11.

<sup>77</sup> African Commission, General Comment No.3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), November 2015, para.37, at [http://www.achpr.org/files/instruments/general-comments-right-to-life/general\\_comment\\_no\\_3\\_english.pdf](http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf); this is also reflected in the African Commission’s Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, adopted in May 2014, stipulating that “Given the control that the State exercises over persons held in police custody or pre-trial detention, States shall provide a satisfactory explanation, and make available information on the circumstances surrounding custody or detention, in every case of death or serious injury of persons who are deprived of their liberty”, see Guideline 20, at [http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines\\_arrest\\_police\\_custody\\_detention.pdf](http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf).

European Court of Human Rights, in cases of death in custody, similarly considered that the minimum standards of effective investigation require a hierarchical, institutional and practical independence of persons carrying out the investigation from the persons implicated in the events under investigation.<sup>78</sup>

72. National authorities must comply with similar criteria when investigating allegations of torture, as set out for instance in the ‘Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (“Istanbul Protocol”). In direct reference to the Istanbul Protocol, the African Commission’s ‘Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa’ (Robben Island Guidelines) similarly stipulate that “[I]nvestigations into all allegations of torture or ill-treatment shall be conducted promptly, impartially and effectively.”<sup>79</sup>

73. These standards for investigating cases of death in custody and allegations of torture are common in the jurisprudence of the African Commission and other human rights bodies. Accordingly, for an investigation to be effective, “the persons responsible for and carrying out the investigation must be independent and impartial.”<sup>80</sup> According to the European Court of Human Rights, “the fact that an investigation was under the control of the very persons whom the victim and his relatives had accused and the fact that it failed to follow one of the possible lines of inquiry which clearly appeared to be relevant, undermined decisively its effectiveness.”<sup>81</sup> The impartiality of an investigation is called into question where public statements by senior authorities “prejudge the assessment of the facts by the competent authorities.”<sup>82</sup> For an investigation to be thorough, the authorities in charge “must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis for their decisions.”<sup>83</sup>

74. Furthermore, throughout the investigation, States must ensure that witnesses are protected from violence, threats of violence or any other form of intimidation or reprisal that may

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<sup>78</sup> ECtHR, *Paul and Audrey Edwards*, Application No 4647/99) March 14 2002 para 70.

<sup>79</sup> Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, para. 19, at <http://www.achpr.org/instruments/robben-island-guidelines-2008/>.

<sup>80</sup> African Commission, *Monim Elgak, Osman Hummeida and Amir Suliman V Sudan*, Communication 379/09 para 100. See also *Malawi African Association & Ors v Mauritania*, Communication 54/91-61/91-96/93-98/93-164/97196/97-210/98, orders in that decision.

<sup>81</sup> ECtHR, *Kolevi v Bulgaria* Application no. 1108/02, para 212.

<sup>82</sup> ECtHR, *Affaire Seidova et autres c. Bulgarie*, Requête no 310/ 04, para 59-60.

<sup>83</sup> ECtHR, *Jasar v The Former Yugoslav Republic of Macedonia*, ECtHR, Judgment of 15 February 2007, para.55; see also generally on “Basic standards for investigating deaths in custody”, the International Committee for the Red Cross, ‘Guidelines for Investigating Deaths in Custody,’ October 2013, p.13, at <https://www.icrc.org/eng/assets/files/publications/icrc-002-4126.pdf>.



arise pursuant to the report or investigation.<sup>84</sup> In order to comply with the obligation to investigate within the framework of the guarantees of due process, the State must take all necessary measures to protect, *inter alia*, witnesses and the victims' next of kin from harassment and threats intended to obstruct the proceedings, preclude the establishment of the facts, and prevent the identification of the perpetrators.<sup>85</sup>

75. The Organisations submit that the Respondent State's authorities did not adhere to the above standards when investigating Mr Essam Atta's death. Rather, the authorities' investigation was prejudged by statements made by the authorities, fraught with the intimidation of witnesses and based upon an autopsy that did not correspond to international standards.

### *II.1. The authorities' public statements prior to and after the release of the autopsy report*

76. The lack of the authorities' impartiality is demonstrated by their conduct prior to the autopsy as well as their statements made before the release of the autopsy report. The prosecution authorities met with Mr Atta's parents at the hospital on 27 October 2011 shortly after they had learned about their son's death. The prosecution immediately asked the family not to demand an autopsy. When Mr Atta's father and uncle insisted that an autopsy be carried out, the authorities proceeded to disseminate different and inconsistent versions of the cause of death prior to the conclusion of the autopsy.

77. Rather than waiting for the findings of the autopsy report, the Ministry of Interior on 28 October 2011 for instance issued a public statement referring to the Tora prison doctor's suspicion of 'acute drug poisoning' and stated that Mr Essam Atta's "death was due to acute vomiting of blood which led to a decline in blood circulation and failure of the heart muscle, as a result of unknown poison."<sup>86</sup> Already prior to the publication of the autopsy report, government officials were quoted as having stated that Mr Atta had taken drugs and was suffering from exhaustion, leading to heart failure.<sup>87</sup>

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<sup>84</sup> African Commission, The Robben Island Guidelines Part III, 49. African Commission, The Robben Island Guidelines Part III, 49; (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev.1, para 112 available at: <http://www.refworld.org/docid/4638aca62.html> [accessed 8 June 2016].

<sup>85</sup> IACtHR, *Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163. Para. 171, *Nelson Carvajal and Family v Colombia*, Case 12.462 Reports on Merits No. 21/15, para 135.

<sup>86</sup> The Ministry of Interior's statement was included in several newspapers, including here <http://www.youm7.com/story/0000/0/0/-/522375#.VjOSkYBFC1t> and here <http://www.elfagr.org/76128>; reference to the statement is made in a press release by Egyptian Initiative for Personal Rights, "The Interior Ministry Must Take Full Responsibility for the Death of Essam Atta", 31 October 2011, at: <http://eipr.org/en/pressrelease/2011/10/31/1282>; see also forensic report 108/2013, Annex 4 (English) / Annex 4a (Arabic), which includes a summary of a testimony by Major Mahmoud Ahmad Al-Deeb.

<sup>87</sup> See for instance Al Jazeera, 'Egypt prison guards accused of torture death', 29 October 2011, at <http://www.aljazeera.com/news/middleeast/2011/10/2011102911326932794.html>.

78. Similarly, as outlined above, Dr. Ehsan Kameel as head of the Forensic Medicine Department stated that the Complainant had taken the drugs out of his brother's body during the autopsy. There is ample evidence<sup>88</sup> that the Complainant did not participate in, nor was allowed to have a representative present during the autopsy. Dr Kameel's statement that Mr Essam Atta's mother smuggled drugs in a chicken into the prison are similarly implausible. However, the Organisations submit that these statements buttressed the authorities' preferred version of events which was in alignment with the theory that Mr. Essam had died after complications that stemmed from drugs ingestion.
79. The Organisations submit further that these statements by senior government officials about the reasons for Mr Essam Atta's death indicated the direction of the prosecution's investigation. At a minimum, these statements prejudged the prosecution's assessment of the facts, thereby undermining the prosecutor's impartiality. This is further confirmed by the prosecution's failure to investigate the inconsistencies between the different accounts as to the circumstances of Mr Essam Atta's death and its failure to thoroughly investigate the allegations of torture as to the cause of Mr Essam Atta's death.

## *II.2. Investigations at Tora prison*

80. The prosecution services carried out interviews with inmates of Tora prison yet failed to ensure that witnesses could speak freely and without fear of repercussions. To the contrary, according to Mr. Othman's statement, during the interview which took place in the Warden's office and not in the Prosecutor's office, he and three inmates were intimidated by police inspectors and prison officials who were present throughout the interview. Mr. Othman states that before the questioning started, four police inspectors asked them to answer interview questions as they had been coached, otherwise Mr. Othman would be transferred to Al-Gharabani prison and his fellow inmates at the interview would be released. Mr. Othman and the three inmates were specifically requested not to mention the circumstances surrounding Mr. Essam Etta's death. They were also asked to state that Officer Nour had treated them well.<sup>89</sup>
81. The threats notwithstanding, Mr Othman testified as to what he had seen and what Mr Essam Atta had told him. As the interview progressed, however, parts of Mr. Othman's statement implicating prison staff were not recorded by the secretary taking notes. The

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<sup>88</sup> See testimony of Dr. Aida Ismat Seif Al-Dawla, Annex 6.

<sup>89</sup> See Mr. Sayyad Ahmad Othman's testimony Annex 3 attached to the APRO complaint dated 28 October, 2013 (Annexes 9/9a) as well as attached to the later complaint No 4643 by EIPR dated 2015 (Annex 10).

secretary did not record his account of the water hose incident and Mr. Essam Atta's remark that Officer Nour was godless.<sup>90</sup>

### *II.3. Circumstances surrounding the autopsy underline the partiality of the investigation*

82. In cases of suspicious deaths such as in the present case, an autopsy should be conducted by an expert in forensic pathology so as to establish the circumstances and causes of such deaths. Importantly, "in order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities."<sup>91</sup> The family of the deceased "shall have the right to insist that a medical or other qualified representative be present at the autopsy."<sup>92</sup>
83. The autopsy carried out by Dr Soad Abdul Ghafar and Dr Yousef Hamed on behalf of the Forensic Medicine Authority did not commit to these international standards. Indeed, the circumstances surrounding the autopsy point to the partiality of those who carried it out raising serious questions about the credibility of the ensuing results. The secretive nature of the process as well as the manner in which the officials treated Mr. Essam Atta's representatives suggest that the authorities had pre-determined the direction in which they wanted the results to go. They were thus more concerned with concealing the cause of Mr. Essam Atta's death in order to exonerate prison officials implicated in the death of Mr Essam Atta, than finding the truth.
84. Both, Dr Soad Ghafar and Dr Yousef prevented Mr Essam Atta's family and their appointed representative, Dr Seif Al-Dawla, from entering the morgue to observe the autopsy. Dr Seif Al-Dawla could only enter the morgue once the autopsy had concluded. The Forensic Medicine Authority's insistence on avoiding independent oversight of the autopsy procedure raises serious concerns regarding the objectivity of its findings.
85. Mr Malek Adly, a lawyer who followed events after Mr. Essam Atta's death waited outside the morgue on 28 October 2011 while the autopsy was underway. According to Mr. Adly, the two doctors from Al-Tahrir Doctors' Association<sup>93</sup> were not present during the entire autopsy as one of them arrived after the autopsy had started while the other kept going in and out of the room while the autopsy was on-going. The doctors themselves stated that they only observed the autopsy and could not confirm or deny the

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<sup>90</sup> Ibid.

<sup>91</sup> UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, principle 14.

<sup>92</sup> Ibid, principle 16; see also International Committee of the Red Cross, "Guidelines for Investigating Deaths in Custody", 2013, P. 14.

<sup>93</sup> Al-Tahrir Doctors' Association is a non-governmental medical organisation that was established by the doctors of "Al-Tahrir Square Field Hospital." The association aims to provide urgent medical assistance and raise medical, political and cultural awareness in collaboration with other organisations.

results. Mr Adly also said that one of the ‘Al-Tahrir’ doctors had admitted to him that as a radiologist, he was not qualified to observe the autopsy. In addition to the serious concerns about the independence of the other doctor who stated that he was an army officer, Mr Adly also saw a police officer enter the room where the autopsy was carried out.<sup>94</sup> The presence of a police officer during the autopsy aggravates concerns about the lack of the independence of the officials carrying out the autopsy, and the autopsy’s findings.

86. Dr Seif Al-Dawla testified to the prosecution that Mr. Essam Atta’s father was not allowed to attend the autopsy and that it was only once the autopsy was over that she, along with Mr. Essam Atta’s uncle were allowed into the morgue. According to Dr Seif Al-Dawla, Dr Amr Mahmoud from the Forensic Medicine Authority tried to prevent her from entering and shouted and cursed at her. Dr Seif Al-Dawla was eventually able to enter the morgue and the room where the autopsy had been carried out.<sup>95</sup>

87. Dr Souad Abdul-Ghaffar showed Dr Seif Al-Dawla a “roll” of about 5-6 cm, allegedly extracted from Mr Atta’s body. None of Mr. Essam Atta’s representatives or family members were in the autopsy room, when the roll was found.<sup>96</sup>

88. The conduct of the authorities at the autopsy illustrate that the procedure was riddled with shortcomings due to the lack of independence of the officials conducting it. This coupled with the authorities’ refusal to allow Dr. Seif Al-Dawla, the family representative and external party, to observe and follow the autopsy proceedings, are consistent with the Complainant’s contention that the authorities were preoccupied with reaching conclusions<sup>97</sup> that Mr. Atta had died as a result of drug ingestion.

#### *II.4. The independent forensic expert report prepared by Dr Ibrahim Mohamed Salim*

89. Dr Salim’s independent forensics expert report, which highlights the contradictions in the autopsy report, raises additional concerns as to the veracity of the official autopsy report.

90. Dr Salim earned a Bachelor degree of Medicine and Surgery at Cairo University. Dr Salim specialized in forensic medicine and worked in several governorates in both Upper and Lower Egypt where he worked as expert on many criminal cases. In the early 1980s, he worked as Chief Forensic Doctor, Undersecretary of the Ministry of Justice for Forensic Medicine Affairs, and head of the Department of Forensic Medicine. He retired

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<sup>94</sup> Testimony of Mr. Malek Adly in English and Arabic, Annex 16 and 16 a.

<sup>95</sup> Testimony of Dr. Aida Seif Al-Dawla, English Translation, Annex 6.

<sup>96</sup> See Dr. Aida Seif Al Dawla’s Testimony, Annex 6.

<sup>97</sup> Autopsy report, Annex 5/5a

in 1987 and worked as the forensic medicine expert in Bahrain for 10 consecutive years, where he was the only expert in this field.

91. Following Dr Salim's review of the forensic medical report of February 2012, he concluded that the cause of death could not have been drug intoxication as stated in the autopsy report because Mr Essam Atta's body could not have been affected by the ten undissolved pills found in the bag. The narcotic substances allegedly found in the body, approximately 0.37 milligrams of Tramadol and hashish, could not have resulted in such loss of blood pressure to cause death. Dr. Salim also concluded that the latex glove said to have been found in Mr. Essam Atta's body could not have decomposed in a period of approximately 34 hours, from 25 October when his mother visited him, and 26 October at approximately 11.30pm. when Mr Essam Atta called his parents saying that he thought he was dying. Dr. Salim concluded that the initial autopsy report was contradictory and that, based on that report's findings, Mr Essam Atta could not have died as a result of "a sharp drop in the blood circulation and breathing" caused by drug poisoning.<sup>98</sup>

#### *II.5. The Public Prosecutor's second investigation*

92. The Public Prosecutor re-activated the investigation in September 2012 on the basis of Dr Salim's report and established an official committee from the Forensic Medicine Authority to examine the new evidence. The committee included three doctors: Dr Emad El-Deeb, Dr Ayman Kamal El din and Dr Maged Hammam. As all three were colleagues of the first examiners, and were employed by the same government agency, there were serious concerns raised with the Prosecution services by the El-Nadim Centre and the Complainant about their independence and the impartiality of the committee. The prosecution services rejected the Complainant's objections to the composition of the Committee.
93. On 26 March 2013, the Committee issued a forensic report<sup>99</sup> in which it confirmed the findings reflected in the initial forensic report.<sup>100</sup> It did not comment on the findings of Dr Salim, notwithstanding the inconsistencies between his report and the autopsy report. The prosecution then again 'suspended' the case on 10 June 2013 in accordance with Article 61 of the Code of Criminal Procedures.<sup>101</sup> It did not investigate Mr Othman's allegations that the testimonies of inmates in Tora prison were made under duress.

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<sup>98</sup> Dr Ibrahim Mohamed Salim's independent forensic report, Annex 7 / 7a.

<sup>99</sup> Forensic Report No 108/2013, dated 26/3/2013 with its English translation, Annexes 4/4a.

<sup>100</sup> Ibid.

<sup>101</sup> Official certificate from the Public Prosecutor's Office Annex 15/ 15a.

94. Despite the contradictions between the conclusions of the autopsy report and the findings of the independent forensic expert, the authorities accepted the review of the autopsy report without seeking to clarify these inconsistencies. The authorities based their decision to terminate the investigation entirely on the opinion of the autopsy report that focused on Mr. Essam Atta's ingestion of drugs. As outlined above, the autopsy did not conform to international standards and was based on a questionable analysis as indicated by the independent forensic expert's report.
95. In light of the foregoing, the Organisations submit that the authorities failed in their obligation to identify the circumstances and causes of Mr. Essam Atta's death. The Organisations submit further that the second 'investigation' rubber stamped the findings of the first autopsy report even though the initial autopsy investigation was flawed. The authorities' constitution of a Committee to review the autopsy was a measure through which they affirmed their favoured narrative – that Mr. Essam Atta died as result of complications stemming from drugs ingestion. Once the Committee had confirmed that narrative, the investigation was terminated, without considering any of the issues raised in the independent expert's report.

*II.6. The authorities did not allow for public scrutiny, they failed to provide the Complainant and his family with information and prevented access to the investigation contrary to international standards*

96. The Prosecution services failed to provide the Complainant and his family with information about and access to the investigation contrary to international standards. Indeed, the Prosecution services actively sought to undermine the Complainant's efforts to obtain information.
97. International law recognises that investigations into allegations of torture and deaths in custody must include a certain level of public scrutiny, including through allowing victims and next-of kin access to the investigation. This is also reflected to some extent in Egyptian law.<sup>102</sup> Public scrutiny and the right of access to investigations is particularly important in the context of allegations of torture and death in custody, given the control that the State exercises over persons held and in light of the fact that a large extent of the information as to what happened often is in the possession of the State. Accordingly, the Luanda Guidelines for instance provide that as part of the obligation to investigate deaths in custody, "The detainee's next of kin shall be promptly informed of the death, be provided with regular updates by the authority investigating the death, and have access to information about the detainee and the investigative process in accordance with

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<sup>102</sup> See further below, regarding the obligation to inform complainants about the decision to suspend an investigation, Egyptian Code of Criminal Procedures, Article 62 and its translation, see Annex 12.

principles set out in the African Commission on Human and Peoples' Rights Model Law on Access to Information.”<sup>103</sup>

98. The African Commission has considered in a case concerning torture in custody that a failure to inform the Complainant about “the investigation and the decision to dismiss her case...in effect renders any available remedies ineffective.”<sup>104</sup>

99. It is furthermore considered a basic principle for investigating cases of death in custody that “The investigation should include some degree of public scrutiny. Its conclusions should be made public. In addition, the next of kin of the victim should be involved in the process. They should receive legal assistance, have access to the case file, and take part in the proceedings. They should also be permitted to have a medical or other qualified representative in attendance at the autopsy.”<sup>105</sup> Similarly, the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions “provide that the “families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence.”<sup>106</sup>

100. The Organisations submit that the authorities in the present case did not comply with any of those standards. As outlined above, the authorities undertook considerable efforts to prevent any public scrutiny of its investigation. It prevented the family and the family's representative, Dr Seif Al-Dawla, from being present during the autopsy. When the Complainant and his family requested information about the autopsy, their requests were ignored and they had to wait nearly four months to receive the autopsy report. The authorities failed to respond to the Complainant's third and fourth complaints, and the Complainant never received any official correspondence from the Prosecution's Office regarding whether an investigation had been opened or information about the progress of the investigation into the complaint. The failure to inform the Complainant about a suspension of an investigation was also in breach of Article 62 of the Code of Criminal Procedure, providing that “if the Public Prosecution orders the dismissal of a case, the dismissal shall be notified to the victim and to the civil rights plaintiff.”<sup>107</sup>

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<sup>103</sup> African Commission, Luanda Guidelines, Guideline 21a.

<sup>104</sup> African Commission, Communication 443/2013, *Safia Ishaq Mohammed Issa (represented by REDRESS and the African Centre for Justice and Peace Studies) v Sudan*, Decision admissibility (2014), para.58.

<sup>105</sup> International Committee of the Red Cross, ‘Guidelines for Investigating Deaths in Custody,’ October 2013, p.13.

<sup>106</sup> UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc E/1989/89, 24 May 1989, Principle 16, at <http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf>.

<sup>107</sup> Egyptian Code of Criminal Procedures, Article 62 and its translation, see Annex 12.

101. In light of the foregoing, the Organisations submit that the Prosecution Services' failure to allow for public scrutiny and to provide the Complainant with information and access to the investigation rendered the investigation ineffective.

#### *II.7. Conclusion regarding the autopsy and the prosecution services' investigations*

102. The Organisations therefore submit that rather than investigating the complaints submitted to it in an effort to establish the circumstances of Mr Essam Atta's death and identify the person responsible, the authorities' investigation and autopsy did not meet international standards, and did not remedy the violations. Instead, the investigation was, from the start to its end, characterised by efforts simply confirming the government's version of events that Mr Atta had died as a result of drug poisoning.

#### *II.8. There is no further remedy available to the Complainant*

103. The prosecution authorities' decisions not to continue the investigation into the circumstances of Mr Essam's death leaves the Complainant with no further remedy to exhaust. The Commission has considered in another case against the Respondent State, where the prosecution authorities similarly decided to order the stop of an investigation into allegations of torture and other violations, that "victims were left with no other remedy because the inquiry procedures have been stopped."<sup>108</sup>

104. Article 63 of the Egyptian Code of Criminal Procedures stipulates that... "no person other than the Attorney General, State Attorney or head of the Public Prosecution may file a criminal lawsuit against a civil servant, public employer and/or law enforcement officer for crimes or misdemeanours perpetrated thereby during the course of or as a result of performance of the duty thereof."<sup>109</sup> It follows that in cases where the suspect is a public official, a complainant does not have standing to file a direct lawsuit against the accused. Accordingly, the Complainant's only possible course of action was the submission of a complaint to the Public Prosecution for the latter to open an investigation into the incident. As outlined above the Complainant has submitted several complaints to the Public Prosecution, however, to no avail.

105. According to Article 197 of the Code of Criminal Procedures, if investigations have been suspended by the prosecution, there is no way to re-open them "unless new evidence appears prior to the elapse of the period of time specified for the abatement of a criminal lawsuit. Witness testimonies, reports and other documents not presented to the investigating magistrate or the accusation chamber and fostering the evidence found

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<sup>108</sup> African Commission, *Egyptian Initiative for Personal Rights & Interights v Egypt*, Communication 323/06, para.65.

<sup>109</sup> Egyptian Code of Criminal Procedures, Article 63 and its English translation. See Annex 12



insufficient or clarifying the matter for revelation of the truth shall be deemed new evidence.”<sup>110</sup> A return to the investigation has to be made through a request by the Public Prosecution.

106. The Organisations submit that the Complainant sought to, and did, submit new evidence to the Prosecution, which the Prosecution refused to investigate. Accordingly, there is no further remedy available to the Complainant.

### *III. Lack of accountability for deaths in custody in Egypt*

107. The organizations submit that the death of Mr. Essam Atta was not an isolated case, but rather part of a pattern in which Egyptian Public Prosecution investigations are conducted in ways to prevent accountability for the death of prisoners in custody.<sup>111</sup> Several cases that occurred during the same timeframe as Mr. Essam Atta’s death were documented by the Egyptian Initiative for Personal Rights.<sup>112</sup> In the case of Al Qatta Prison in 2011 for example, where forty-one prisoners were shot dead, dozens of complaints were filed naming specific officers implicated in the killings. None of them were summoned for questioning or charged. In addition, the only prisoners heard by the prosecution were those chosen by the prison authorities themselves. Later, three officials were summoned, yet they never appeared before the Prosecutor’s office. The Chief Prosecutor was then changed and until today, more than five years after the incident, no one has been referred to trial.<sup>113</sup>

108. Similarly, in another incident, fourteen prisoners at the appellate prison in Cairo were killed in January 2011. Evidence indicates that some of them were rope bound, beaten, and then shot at close range by prison officers.<sup>114</sup> After this incident, the Public Prosecution did not file charges against any prison officials despite numerous accusations by families of the intentional murder of their relatives by the prison administration. The case was officially closed in January 2012, citing investigations by the prison administration, which found that the prison officers had not used live ammunition in contradiction with the original investigation by the Public Prosecution.

109. The systemised impunity surrounding the mistreatment of prisoners in Egypt is also protected by a system that lacks judicial oversight of prisons, despite the availability of legal provisions offering protection to prisoners. Whereas the Ministry of Interior has

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<sup>110</sup> Egyptian Code of Criminal Procedures, Article 197 and its English translation. See Annex 12

<sup>111</sup> EIPR, “Contextual background information: Public Prosecution Investigation in Cases of Death of Prisoners”, See Annex 11

<sup>112</sup> Annex 11

<sup>113</sup> Annex 11

<sup>114</sup> Annex 11

constantly denied the occurrence of human rights violations in prisons, the Public Prosecution has barely made any statements on this issue. This is especially alarming, as the latter is bound by law to conduct monthly inspections of prisons and detention facilities.<sup>115</sup> This leaves the Organizations with the impression that the legislative framework for judicial oversight of prisons in Egypt is purely theoretical and not enforced by the authorities.

#### *IV. Conclusion regarding the exhaustion of domestic remedies*

110. The Complainant has, on several occasions, sought to exhaust domestic remedies in the Respondent State. However, the variety of remedies the Complainant sought with good faith to exhaust turned out to be partial, ineffective and inadequate. There is no further remedy available to him in the Respondent State. The Complainant therefore submits that he fully exhausted domestic remedies in the Respondent State.

#### **Article 56 (6)**

111. The Organisations submit that this complaint is brought within a reasonable time as stipulated in Article 56 (6) of the Charter and Rule 93 (2) (h). Since the Charter does not provide for what “constitutes a reasonable period of time”, the Commission “treats each case on its own merits”.<sup>116</sup>

112. The Organisations submit that the reasonable time requirement is satisfied in the present case as the alleged violations in the present case are of a continuing nature. The authorities have failed, and continue to fail, to provide the Complainant and his family with an access to the truth as to what happened to Mr Essam Atta in Tora prison. The African Commission, as well as other international human rights bodies, have considered that in such cases, the timeliness requirement must be held to be satisfied as to hold

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<sup>115</sup> Article 42 of the Code of Criminal Procedure states, “All members of the Public Prosecution and the heads and deputy heads of first-instance and appellate court may visit general and district prisons located within their jurisdictions and ensure that no person is detained unlawfully. They may view prison records and arrest and remand orders and take photographs of them. They may contact any detained person and hear any complaint he wishes to lodge with them.”

Article 85 of the prisons law gives the public prosecutor and his deputies the right to enter all places of imprisonment at any time, while Article 86 of the law allows heads and deputy heads of appellate and first-instance courts and investigating judges to enter at any times prisons located within the jurisdiction of their courts. The head and deputy head of the Court of Cassation have the right to enter all prisons. The prison administration must forward any observations they have to the director general.

Article 27 of the judiciary law states that the Public Prosecution shall assume oversight of prisons and other places in which criminal sentences are served, and the public prosecutor should notify the justice minister of any observations. He is also empowered to ensure compliance with laws and regulations, take necessary actions on violations, accept prisoners’ complaints, and examine private judicial records and documents to ensure their consistency with established templates.

Articles 1747 and 1750 of the General Directives for Prosecutions explain how the Public Prosecution is to conduct inspections of prisons and places of detention. These articles require public solicitors, heads of plenary prosecutions, or their surrogates to inspect general prisons in their respective jurisdictions and the heads or directors of summary prosecutions to inspect district prisons and detention facilities in their jurisdictions at least once a month.

<sup>116</sup> African Commission, *Darfur Relief and Documentation Centre v Sudan*, Communication 310/05, para.75.

otherwise would allow future violations to occur.<sup>117</sup> The Inter-American Commission on Human Rights has similarly considered that the failure to investigate, prosecute and punish constitutes an ongoing violation of the victim's family's right to a remedy and to the truth and that accordingly the 6-month time rule enshrined in the American Convention on Human Rights does not apply:

“a petition must be presented in a timely manner to be admitted, namely, within six months from the date on which the complaining party was notified of the final judgment at the domestic level. The six months rule ensures legal certainty and stability once a decision has been taken. The rule does not apply when it has been impossible to exhaust internal remedies due to a lack of due process, denial of access to remedies, or unwarranted delay in issuing a final decision... Nor does this rule apply where the allegations concern a continuing situation--where the rights of the victim are allegedly affected on an ongoing basis.”<sup>118</sup>

113. Furthermore, in the present case, the Complainant, with the support of human rights organisations in the Respondent State, has undertaken numerous attempts to exhaust domestic remedies before coming to the conclusion that domestic remedies are not available, effective or sufficient. The Organisations therefore submit that the Complainant's case must be distinguished from cases where no efforts were made to exhaust domestic remedies even though such remedies were available or from cases where a domestic court has made a final decision. The authorities in the present case at no point provided the Complainant or his lawyers with a written decision indicating that they would not carry out an investigation. Instead, investigations were 'suspended' and on each occasion the Complainant was not notified of these developments which only came to light when the lawyer contacted the Prosecution for an update on the status of the investigation.
114. The authorities failed to respond to the Complainant in regard to the complaint filed by ARPO in October 2013. In a final effort to exhaust domestic remedies, the Complainant submitted further evidence to the authorities in March 2015, only to be again informed orally in mid-April 2015 that the investigation was closed. The Complainant then decided that the African Commission was the only possible venue to obtain a remedy. Taking further into account the politically unstable and insecure situation in the Respondent State over the past three years in particular, as well as the complexity of the present case, including the consideration of a multitude of medical and forensic reports, the need for

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<sup>117</sup> Inter-American Commission on Human Rights, *Plan de Sanchez Massacre v. Guatemala*, Report No.31/99, Case 11.763, 11 March 1999, para. 29. See also African Commission, *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Eritrea & Ethiopia* Communications 233/99 & 234/99, (Nov. 24, 2003), para. 39; African Court, *In the Matter of Beneficiaries of Late Norbert Zongo et al. v. Burkina Faso*, App. No. 013/2011, Af. Ct. H.P.R. (Mar. 28, 2014) para 104-106.

translation, the Organisations submit that this complaint was submitted within a reasonable period of time in line with Article 56 (6) of the Charter.

### **Article 56 (7)**

115. The Organisations confirm that pursuant to Article 56 (7) of the Charter, they have not submitted this complaint to any other procedure of international investigation or settlement. On 30 January 2012, a request for urgent action in Mr Essam Atta's case was submitted to the United Nations (UN) Special Rapporteur on extrajudicial, summary or arbitrary executions and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment "concerning the extrajudicial execution of Mr Shalaby [Essam Atta] who died as a result of torture at the hands of the police at Tora prison, Cairo."<sup>119</sup> The Organisations submit that a request for an urgent action does not fall within the provisions of Article 56 (7) of the African Charter as the mandate holders on their own do not render complaints *res judicata* and are not mechanisms "capable of granting declaratory or compensatory relief to the victims."<sup>120</sup>

## **V. Conclusion**

116. The Organisations respectfully make this submission on admissibility, without prejudice to the later submission of additional facts, documents, and legal arguments, as set out under the Charter. The Organisations will detail their requested remedies once the Commission has rendered a decision on the admissibility of the case.

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<sup>119</sup> See Alkarama, 'Egypt: Gross negligence and inhumane treatment leads to the death of Essam Ali Atta Shalaby in Tora prison,' 3 November 2011, at <http://en.alkarama.org/egypt/press-releases/898-egypt-gross-negligence-and-inhumane-treatment-leads-to-the-death-of-essam-ali-atta-shalaby-in-tora-prison>; 'Egypt: Essam Atta- Symbol of Security Services' Impunity,' 14 June 2013, at <http://en.alkarama.org/egypt/press-releases/1114-egypt-essam-atta-symbol-of-security-services-impunity>.

<sup>120</sup> See for instance *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication 279/03-296/05, paras. 104-105.