



EuroMed Rights – Euro-Mediterranean Human Rights Network
EuroMed Droits – Réseau euro-méditerranéen des droits humains
الأورو-متوسطية للحقوق- الشبكة الأوروبية المتوسطية لحقوق الإنسان

TRIAL OBSERVATION REPORT

Public Prosecution

v.

Alaa Abd El-Fattah and Twenty-two others

The Special Chamber of the Criminal Court
Sitting at the Police Academy, Tora District Cairo, Egypt

April 2014 – February 2015

Written by

Lionel Blackman
Solicitors International Human Rights Group

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Executive Summary

Between 6 April 2014 and 23 February 2015, observers from the Solicitors' International Human Rights Group (SIHRG), commissioned by EuroMed Rights, monitored hearings held in a criminal case brought by the General-Prosecutor of Egypt against Alaa Abd El-Fattah. This report answers the question “Was the trial fair?”

Arising from a protest that took place outside the Shura Council in Cairo on the 26 November 2013, the first Defendant, Alaa Abd El-Fattah, was charged under Egypt's Law 107 of 2013 on the Right to Public Meetings, Processions and Peaceful Demonstrations (commonly referred to as the “Protest Law” or “Demonstration Law”) with organising a protest without prior notification. He was also charged under the 1914 Assembly Law with organising and participating in a “crowd of more than five people” and related disruption and assaults. Additionally, under the general Criminal Code, he was charged with the assault of two police officers and the theft of a police officer's radio. Liability by association with the acts of others for offences under the 1914 Assembly Law and a wide interpretation of article 7 of the 2013 Protest Law are a prominent feature in the final verdict of the Court.

24 other persons were prosecuted with similar offences, and two of the defendants did not seek a review of the initial 2014 judgment. The first Defendant is known to be an activist supporting reform and democracy. He was well known as such to the Egyptian police present at the scene. For these reasons, the observers focussed on the trial of the first Defendant Alaa Abd El-Fattah.

On 23 February 2015, the Court found Alaa Abd El-Fattah guilty of the offences aforementioned except the theft of the radio. He was sentenced to five years in prison, a fine of 100,000 Egyptian pounds (about 11,700 euros) and supervision for a period of five years after his release.

This report concludes that Alaa Abd El-Fattah's right to a fair trial was not observed by the Court.

Primarily, the Court did not show that it had proceeded on the basis of the internationally recognised presumption of innocence in criminal trials. In its published final judgement the Court was dismissive of the testimony of Defendants in these terms:

“And since the Court is reassured that the evidence in the case and the prosecution's witnesses' testimonies in the hearing are in fact true there's not need to consider the defendants' denial, yet it considers it sort of an escape from the penalty of accusation for which they were already found guilty by certain verbal and technical evidence.”

The opinion that the Court failed to proceed on the basis of the presumption of innocence is strengthened by the sudden and unreasoned Court decision on the 27 October 2014 to remand the Defendant into custody. This followed two periods when the Defendant had enjoyed the right to bail and had not breached his bail orders in any way.

The Court's failure to proceed on the basis of the presumption of innocence may explain other breaches of fair trial standards. For example, the Court, in our opinion, wrongly refused the Defendant's application to order the Prosecution to disclose to the defence in advance of the trial valuable evidence in the Prosecution's possession, namely closed circuit television (cctv) video film of the protest.

The rejection of the application deprived the Defendant of an opportunity to analyse this evidence before the trial. We cannot say that any analysis would have exonerated the Defendant. We have not analysed it and it is not our role to do so. However, a defence analysis of the video *may* have led to evidence persuasive of innocence. A tribunal of fact may be assisted by enlargements or enhancements of particular frames from video film. The Defendant was denied an opportunity to prepare a defence.

We observed other breaches of fair trial standards and shortcomings in the trial process which we detail in the report below.

1 June 2015

The Mission's Terms of Reference

The Mission reports on whether the trial of Alaa Abd El-Fattah complied with the standards set under the International Covenant on Civil and Political Rights 1966 which Egypt ratified in 1982. The Egyptian Constitution of 2014 came into effect on 18 January 2014 and the Report will mention whether the trial conformed with the Constitution and the Egyptian Criminal Procedure Code 1950 where appropriate to do so.

In particular the Mission will assess compliance with the standards of:

1. Right To Liberty
2. Right To Fair Treatment In Pre-Trial Detention
3. Right to a Fair Trial:

Impartial Tribunal

Public Hearing

Presumption Of Innocence

Right To Disclosure Of Case

Right To Be Present

Right To Call And Examine Witnesses

Right To Legal Assistance

Right To Prepare Defence

Right To Timely Trial

Right To Legal Certainty Of Criminal Charges

The Report complies with the following trial observation guidelines:

- Trial Observation Manual for Criminal Proceedings – Practitioners Guide of the International Commission of Jurists, 2009.
- The Guidelines contained in the Guidelines for Human Rights Fact Finding Missions - A joint publication of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law of the Lund University and International Bar Association, September 2009.
- Amnesty International's Fair Trial Manual, Second Edition, 2014.

Composition of the Delegation

EuroMed Rights invited experts from the Solicitors International Human Rights Group (SIHRG) to undertake this trial observation mission. SIHRG is a United Kingdom based non-governmental organisation with a membership drawn principally from the solicitors' profession of England and Wales. A solicitor is a qualified lawyer and there are 138,000 solicitors practising in the United Kingdom and overseas.

The objects of SIHRG include raising awareness of international human rights law within the solicitors' profession. It provides training in the UK and overseas on international human rights law.

The observers were all UK based members of SIHRG:

Lionel Blackman, solicitor-advocate, Chair of SIHRG and OSCE recognised trial expert.

Rosa Curling, international human rights solicitor. She observed the majority of the hearings.

Catherine Fischl, criminal law solicitor.

Ibrahim Al-Hamadi, Iraqi trained lawyer.

Anne-Marie Irwin, English solicitor.

The observers were greatly assisted by Manu Abdo, Nermin Serhan and Mohammed A. Gaafar, who provided Arabic-English interpretation at Court hearings and meetings. Additionally they provided written translations of some of the documents in the case.

There were 26 dates of hearings. On 20 December 2014, 12 and 16 February 2015, when the SIHRG observers were unable to visit Cairo, Manu Abdo attended the Court and reported.

The Mission's Meetings

The observers met in Cairo:

- Alaa Abd El-Fattah, several members of his family and a number of his lawyers.
- Various civil society representatives.
- Various European Embassy representatives and delegates from the European Union.
- Two members of the Egyptian judiciary, who have asked that their names not be printed.
- The first Presiding Judge determining Alaa Abd El-Fattah's case, Judge Mohamed El Fiky. Two meetings took place with the Judge. Both were short and took place at Tora police academy, in the Judge's room before the hearings on 10 and 15 September 2014.

The observers asked to meet with the second Presiding Judge, Judge Hassan Farid, but this invitation was not responded to. Despite several requests by observers the Prosecution did not meet with us.

The observers are not historians. However, the reader may benefit from a brief history of the recent political changes in Egypt to be found in appendix 1. This may help place the trial in a wider context. The general position of judges and prosecutors in the Egyptian criminal justice system is summarised in that appendix.

Alaa Abd El-Fattah

Alaa Abd El-Fattah was born on 18 November 1981. An open internet and political activist he has been at the forefront of the struggle for change in Egypt for many years. He has the distinction of having been arrested not only by Mubarak but also by the different regimes that have ruled Egypt since the 2011 revolution.

In 2006, under the Mubarak regime he was detained at a protest calling for the independence of the judiciary and was jailed for forty five days. In 2011, having emerged as a leading face of the revolution he was jailed under SCAF's rule for fifty six days. During the rule of Morsi, an arrest warrant was issued against him.



The Shura Council Protest of 26 November 2013

This section is intended to “set the scene” for the reader and is drawn from both Prosecution and Defence sources of evidence.

The protest was called for by an activist group called *No to Military Trials for Civilians*, founded by Alaa Abd El-Fattah’s sister, Mona Seif. The demonstration outside the Shura Council on 26 November 2013 was timed in the belief that the Constitutional Committee would vote that day on whether the draft constitution should allow for the military trial of civilians.

The police maintained that about 350 women and men gathered outside the Shura Council building at around 4pm. The police also maintained that the First Defendant had called for a protest there against the new Protest Law. The new Protest Law had been published on the 24 November 2013. It has the effect of rendering illegal any protest by more than five persons that has not been notified to the authorities. Notification of a protest must be given to the police by an organiser at least three days before the date of the intended protest. The law came into effect the day after its publication.

Banners calling for no military trials for civilians were held and chants were sung by those attending the protest. The police alleged insults were being directed at them. Security forces stood on the opposite side of the road to the protesters. After about thirty minutes the security forces moved closer to the protesters. They entered the road and issued a warning to the protesters that they must end the demonstration within five minutes. At this stage a small group of those attending the protest sat down in the road. The police used a water hose against those sitting down and those standing behind. Demonstrators dispersed in a variety of different directions.

Security forces, either in uniform or plain clothes, ran towards demonstrators. Scuffles between the protesters and security personnel broke out. Security forces arrested a number of those attending the demonstration and took them away. Alaa Abd El-Fattah was not one of those arrested at the scene. However, he subsequently admitted that he was present at the time.

On 28 November 2013, in pursuance of a warrant police arrested Alaa Abd El-Fattah at his home. There, the police seized two laptops and two mobile phones. He has complained that during his detention he was assaulted by police and deprived of his right to immediate access to a lawyer. He was transferred to Tora prison and denied bail when charged.

The Proceedings before The Tora Special Chamber

On 15 March 2014, the Public Prosecutor announced that the cases of Alaa Abd El-Fattah and the other twenty-two men would be referred to the Special Chamber of the Criminal Court (“the Court”) situated at the Tora Police Academy.

The Judge appointed to preside over Alaa Abd El-Fattah's case was Judge Mohamed El-Fiky. On 23 March 2014, Alaa Abd El-Fattah's application for bail was heard and having been held in prison for nearly four months the Court released him. A 10,000 EGP security was paid.

Subsequent hearings in Alaa Abd El-Fattah's case took place on 6 April 2014 and 25 May 2014.

On 11 June 2014 the Court sat earlier than previously notified and issued a judgement in absentia convicting and sentencing Alaa Abd El-Fattah. He was sentenced to fifteen years imprisonment, a 10,000 EGP fine and a five year supervision period. An English translation of this judgement can be found in Appendix Two. When Alaa Abd El-Fattah arrived at the Tora complex in time for the hearing as originally scheduled he was taken into custody by policemen.

Until re-bailed on 15 September 2014, he was held in custody. He and most of the other defendants lodged an objection to the 11 June *in absentia* judgement. The first hearing that took place in this review process was on 6 August 2014. The second was on 10 September 2014.

On 15 September 2014 Alaa Abd El-Fattah was granted bail upon receipt of a security of 5000 EGP. Judge El-Fiky and the other two judges then recused themselves from further hearings.

The case was referred to the Court of Appeal which appointed a new panel of three judges with Judge Hassan Farid presiding. On 27 October 2014, the first hearing before the new panel took place. The Court ordered that Alaa Abd El-Fattah be returned to custody. He and the majority of the other defendants remained in custody for the rest of the proceedings.

Subsequent hearings took place on 11, 17, 23, 26 November 2014, 4, 11, 14, 20, 27 December 2014, 15, 17 January 2015, 5, 9, 12 and 16 February 2015. The Court's verdict was handed down on 23 February 2015. A judgement setting out the reasons for the verdicts was published. EuroMed Rights arranged for Nermin Serhan to translate the judgement in to English. These two versions are available in Appendices 4 and 5 respectively.

Alaa Abd El-Fattah and other defendants held in custody all requested bail on several occasions following their return to custody on 27 October 2014. Each request was denied. The Judge stated that he was under no obligation to give reasons for the refusals and none were given.

The Court Room and Dynamics

All the hearings in Alaa Abd El-Fattah's case have taken place in a Special Chamber of the Criminal Court ("the Court") at the Tora Police Academy. Tora Police Academy is located in the heavily fortified Tora police compound. The jail in which Alaa Abd El-Fattah was detained is located in this compound.

Armed policemen control entrances into the section of the compound in which the Courtroom is located. Army tanks are stationed near the entrances. Armed policemen also guard an inner entrance where the Courtroom is located.

Policemen take visitors identity cards or passports before entry into the complex is allowed. Only visitors who have been granted permission to attend a hearing by the judges are allowed to enter and those with permission are granted a pass. The Courtroom is guarded by policemen who check each pass.

There is a tall wooden rail with a guarded door way between the gallery, dock and advocates' benches and the stage where the judges and prosecutors sit. The judges enter from a door on the stage and sit facing the tiered lecture seating. The Court clerks sit to their right.

The Prosecutors enter the Court from the same entrance as the judges. On several occasions the observers saw the Prosecutors emerge from the back room in which the judges appear to sit prior to the hearing. The Prosecutors' seats are on the stage positioned at an angle facing both the judges and everyone else.

A passage from the Qu'ran is hung above the judges. It includes the words: *"Justice must be the basis of any ruling. If you are in a position to judge, you must be fair and apply justice."*

During the course of the trial the Court never confirmed at what time the next hearing would start. However, the usual time was 10am. The date of the next Court session was announced at the end of each hearing. On 25 May 2014, 10 January 2015, 9 February 2015 the scheduled Court hearings were postponed without any forewarning. Visitors, lawyers, defendants and witnesses alike were all inconvenienced.

There is no waiting area for the defendants or their families in the Tora complex. The defendants, their relatives and lawyers habitually waited at a nearby coffee house.

The defendants' lawyers have a small waiting room immediately outside the lecture hall. When a hearing is due to start, the lawyers waiting in this area call the defendants and other lawyers waiting in the coffee house.

The Charges against Alaa Abd El-Fattah

A case summary was served on the Defence by the Prosecutor. The charges were as follows:

"Participated, along with other unknown individuals, in a gathering made up of more than five individuals, jeopardising public peace, in the aim of committing assault crimes against individuals, public and private properties, and influencing public authority figures as they performed their duties through the use of force and violence, as one of them carried a tool that is used in assaulting individuals. The intended aim of the gathering was achieved, and [protesters] were aware of the [commitment] of the following felonies:

- (a) They stole a radio device owned by the Ministry of Interior, which was carried by the victim Lieutenant Colonel Imad Tahoun. This was done through coercion as some [protesters] encircled him while others beat him, weakening his resistance. They were able, through this kind of coercion, to accomplish the theft. The coercion caused injuries to the victim as shown in the investigations.
- (b) They displayed, and other unknown individuals, force and threatened with violence, and proceeded first with using force and violence, in the aim of resisting police forces. The accused and other unknown individuals gathered at the incident scene and surprised police forces with the attack, putting their safety at risk, and disturbing security and public peace as shown in the investigations.
- (c) They took part in a protest, during which they disrupted security and public order, blocked the road, and disrupted traffic as shown in the investigations.
- (d) They attacked two policemen, Lieutenant Colonel Imad Tahoun and soldier Ahmad Mohammad Abdel Aal as they performed their duty, injuring them as described in the two annexed medical reports, as shown in the investigations.

The first accused [Alaa Abd El-Fattah] also:

- (a) Formed a gathering made up of more than five individuals, jeopardising public peace, in the aim of committing assault crimes against individuals, public and private properties, and influencing the figures of public authorities as they performed their duties through the use of force and violence as shown in the investigations.
- (b) Staged a protest without informing the competent police station about the location of the protest as shown in the investigations..."

Summary of the Evidence from the Prosecution

To permit the possibility of the observers having misunderstood any important prosecution evidence this section of the Report draws from the final Judgement of the Court. Given the guilty verdicts on all charges, except the theft of the radio, it is reasonable to suppose that the judgement does not understate the Prosecution's case. The full judgement is attached to this Report. In order to present the prosecution evidence in a readable and logical narrative this section paraphrases and re-orders the high points of the Prosecution's case as stated in the Judgement. Some of the grammar and wording has been altered for this purpose. Apparent inconsistencies have not been ironed out. "First Defendant" and "Alaa Abd El-Fattah" is one and the same person. At the end of this section are included some extracts from the Judgement concerning liability by association.

In this section comments made by the author appear in italics in square brackets.

The General Department of Information and Documentation of the Interior Ministry examined the contents of the two computers seized from the First Defendant's house. One of the computers stored a tweet that the First Defendant retweeted on 24 November 2013. It contained an invitation to the demonstration: "Go down and challenge the demonstration law and push for the prevention of ratification of military trials in the constitution".

A second invitation was blogged on the page called "Revolutionary Path Front – Thuwar" of which the First Defendant is considered a founding member. The invitation had the same content as the first invitation. Additionally, the First Defendant published other tweets on the same date that included "A demonstration to reject military trials in the constitution. Your attendance is important".

[The Judgement refers to both Facebook and Twitter accounts of the First defendant having 515779 followers. The Judgement is not clear if the impugned messages were sent on one or both of these social media outlets.]

The First Defendant stated in the investigations that he published two calls to demonstrate in front of the Shura Council because he does not recognise the Demonstration Law and admitted his presence in the demonstration and that he left it after the central security forces dispersed them using water and hit them with batons. The First Defendant admitted he is one of the founding members of Path of the Revolution which called for the demonstrations of the No to Military Trials Front and that he distributed the call to demonstrate against the demonstration law.

The protesters swayed away from non-violence by attacking policemen, as has been shown in the surveillance cameras of the Shura Council and other videos that the Prosecutor General has screened for the Court, seen and played according to the request of the defence.

Brigadier General Alaa Azmy testified that the demonstration was instigated by the First Defendant and that he saw the First Defendant at the scene. That the demonstrators sat in the middle of the street and assaulted the forces through insults and throwing rocks and that all the defendants were arrested at the scene of the crime.

Brigadier General Hani Girgis Naguib testified that the First Defendant is the one who called for the demonstration through social media networks and that they had gathered without prior notification and they did not abide by the instructions of security and disrupted public and private transportation and assaulted security forces by throwing rocks at them. He added that the forces warned the demonstrators and gave them a grace period to disperse but they did not abide by it and assaulted the police force by insulting and defaming them.

The chants against the state, the police, and the army and the blocking of the road to traffic and threats to public peace and serenity were clearly revealed by what the Court saw in the videos. *[The video film did not have an audio track. The Court observed that the cameras did not cover the entire incident but only recorded what was possible due to the angle of the camera.]* What the recordings do not show cannot be proven to not have happened in reality as long as it is proven in the papers. The evidence derived from the Court watching the videos on the CDs wasn't the only evidence used in the case for the Court to reach a verdict. If it didn't watch those videos, it wouldn't have made a difference. All that the videos did was prove the testimonies in the investigations that there was a grouping of a huge number of people in front of the Consultative Council's building. *[Emphasis supplied.]*

Lieutenant Colonel Emad Hamdy Tahoun testified that while water was pointed at demonstrators a number of them including Alaa Abd El-Fattah surrounded him, assaulted him and dragged him on the ground causing his injuries and stole his wireless after holding him down. He identified Alaa Abd El-Fattah because he is well known and has appeared in television several times.

Captain Abdel Aziz Mohamed Abdel Aziz and Captain Karim Mahmoud Ibrahim Mansour testified that they saw the accused Alaa Abd El-Fattah assaulting Lieutenant Colonel Emad Hamdy Tahoun and causing injuries to him.

Various police witnesses denied seeing the theft of the wireless from Lieutenant Colonel Emad Hamdy Tahoun but said they had heard of it. *[The Court found the First Defendant not guilty of the theft of the wireless.]*

The blade exhibit was found during the arrest of the Second Defendant who admitted its possession. He said that the blade was used to chop vegetables. It was presented to the Court during a hearing and the Second Defendant confirmed it to be the same one he was arrested with in his bag. *[Our notes show that the Second Defendant denied in Court that a particular knife produced by the Prosecution on 17 January 2015 was the knife that the police found in his bag at the protest. The Court may have been referring to an admission at an earlier hearing or answers during the investigation.]*

All the defendants were arrested at the crime scene except the First Defendant who was able to escape from the crime scene with the help of other defendants.

Two medical records attached to the papers report the injuries of Lieutenant Colonel Emad Hamdy Tahoun all over his body and the injury of recruit Ahmed Mohamed Abdel Aal to his left elbow.

The Court notes that the First Defendant is considered criminally responsible for any act committed by any of the attendees of the gathering for the purpose intended of it even if he was not present in the act or had walked away before the act is committed since he is one of the organizers of this gathering as is specified in Article 4 of the Law Number 10 for the Year 1914.

Second term of Article 3 of Crowd Control Law Number 10 for the Year 1914 states “If a crime is committed with the intention of fulfilling the group’s purpose then everyone in the crowd at the time of the crime is criminally responsible as partners in the crime as long as they are informed with the purpose”. [*Emphasis supplied.*] Article 4 of the same Law penalizes the planners of the grouping for each doing of everyone in the crowd even if not present at the time of the grouping. Everyone in the grouping knew that the purpose of it was to gather and try to have an impact on the committee working on the constitution. They tried to pressure it not to accept the call to have civilians in military trials as well as the demonstration law.

In accordance to the 7th Article of the Law Number 107 for the Year 2013 all participators are criminally responsible since it is proven that the Second Defendant had a weapon on him.

Summary of the Evidence from the Defence

The defence witnesses provided testimony to the Court on 11 and 14 December 2014. The witnesses were members of the Constitutional Committee, members of Alaa Abd El-Fattah's family, founders and members of the *No to Military Trials for Civilians*, several journalists from state owned and independent news outlets and the wife of one of the defendants. Two of the defendants, Ahmad Rahman and Alaa Abd El-Fattah, gave evidence to the Court on 17 January 2015 and 5 February 2015.

The thrust of the Defence testimony was that the Shura Council protest of 26th November 2013 was planned before the 2013 Protest Law came into effect. The intention was a peaceful protest. The police gave inadequate warnings to the protestors to disperse. The police used unlawful force on the protestors.

Alaa Abd El-Fattah gave evidence on the 5 February 2015 about technical matters relating to the recovery of evidence of tweets and so forth. He declined to answer whether he had sent the messages calling for the protest. During his brief testimony, he did not deny his presence at the protest.

The Trial Rights in Question

The applicable legal standards found in the International Covenant on Civil and Political Rights 1966 (ICCPR) are set out below.

1. RIGHT TO LIBERTY

Article 9 ICCPR

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

Pre-trial detention should not be the general rule: it should only be used in criminal proceedings as a last resort, and for the shortest possible time period, when required to meet the needs of justice, or of the investigation of the alleged offence or in order to protect society and the victim. Pre-trial detention should be the exception and bail should be granted, except in situations where it is likely that the accused would abscond, destroy evidence, influence witnesses or flee from the jurisdiction of the State. Anyone who is deprived of his liberty as a result of detention has the right to bring proceedings before a Court in order for that Court to decide, without delay, on the lawfulness of their detention and order his release if the detention is unlawful.

The Egyptian Constitution of 2014 provides in Article 71: *“Any person arrested or detained shall be informed forthwith of the reasons for his arrest or his detention. He shall have the right to communicate with whoever he sees fit and inform them of what has taken place and to ask for help in the way organized by law. He must be notified, as soon as possible, with the charges directed against him. Any person may lodge a complaint to the Courts against any measure taken to restrict his personal freedom. The Law shall regulate the right of complaint in a manner ensuring a decision regarding it within a definite period or else release shall be imperative.”*

FACTS

Alaa Abd El-Fattah was held in detention for the majority of his trial. He was initially held in detention from 28 November 2013 to 23 March 2014, a total of 115 days. No Court reviewed his application for bail during this time. Alaa Abd El-Fattah's lawyers made a number of applications seeking his release, both to the General-Prosecutor and to the main criminal Court in Cairo. Alaa Abd El-Fattah case was not allocated to a specific Court until 15 March 2014. Thus his lawyers were not able to make a bail application to a particular Court considering his case until then.

No replies and no decisions were received in response to any of the applications submitted by Alaa Abd El Fattah's lawyers. Alaa Abd El-Fattah's lawyers informed the observers they think his case was purposely not allocated to a Court for over three months specifically to keep Alaa Abd El-Fattah in detention. During this initial period of detention, Alaa Abd El-Fattah was held with the defendant Mr Rahman. All the other defendants were released on bail.

Alaa Abd El-Fattah and two other defendants were detained on 11 June 2014 until 15 September 2014, a total of 96 days.

On 6 August 2014, his application for bail was refused. No reasons were provided by the Court then or on 10 September 2014 when the Court extended his detention. The observers noted that Alaa Abd El-Fattah answered bail for every hearing held in his case between 23 March and 11 June 2014.

On 15 September 2014, Alaa Abd El-Fattah was released on bail by Judge El-Fiky who together with the other two judges then recused themselves from the case.

On 27 October 2014, Judge Hassan Farid, appointed to complete the review of the 11th June 2014 in absentia judgement, ordered that all defendants present in Court, including Alaa Abd El-Fattah, be detained. No reasons were given.

Alaa Abd El-Fattah and the others were held in detention for the remainder of the proceedings. An application for Alaa Abd El-Fattah's release was made at every subsequent. All the applications were refused. His detention was renewed at the end of each hearing with no reasons being provided.

FINDING

The observers find that Alaa Abd El-Fattah's rights under Article 9 ICCPR and Article 71 of the Constitution were breached.

The observers find that Alaa Abd El-Fattah's right not to be arbitrarily deprived of his liberty was breached as well as his right to challenge the lawfulness of his detention without delay.

The Judges ordering his detention did not provide reasons why the presumption of bail did not apply contrary to international norms.

2. RIGHT TO FAIR TREATMENT IN PRE-TRIAL DETENTION

Article 10 ICCPR

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

States must ensure that all persons deprived of their liberty are treated with humanity, with respect for the inherent dignity of the human person and are not subjected to cruel, inhuman or degrading treatment or punishment. Prolonged solitary confinement is prohibited under international law.

The Egyptian Constitution of 2014 provides in Article 42: *“Any citizen arrested, detained or whose freedom is restricted shall be treated in a manner concomitant with the preservation of his dignity. No physical or moral harm is to be inflicted upon him....”*

FACTS

Alaa Abd El-Fattah reported being beaten up by the police officers who arrested him. The Court accepted as part of the evidence before it a tissue on which, it was alleged, Alaa Abd El-Fattah's blood is to be found. The tissue was collected by Alaa Abd El-Fattah's wife following her husband's arrest and alleged beatings by the policemen.

Whilst detained at the Cairo Security Headquarters Alaa Abd El-Fattah reported being blindfolded, handcuffed and left on a cell floor for twelve hours. For six hours his hands were cuffed behind his back. For the other six hours they were cuffed in front of him. He reported being hit on the back of his head with a weapon and he suffered a blood clot in his left eye. His wife informed the observers that she suspects this clot was caused by the tightness of the dirty cloth that was used by the policemen to blindfold him.

Following Alaa Abd El-Fattah's arrest his family were not told of his whereabouts for some time. During his first detention, Alaa Abd El-Fattah reported being held in a cell for twenty hours a day. During his second detention, he reported being held in a cell for twenty two hours a day. Following a hunger strike of several detainees, this was reduced to eighteen hours a day.

FINDING

We cannot determine from our trial observations the truth of the allegations of ill-treatment. The observers recommend that the Prosecutor-General investigates Alaa Abd El-Fattah's complaints of police brutality upon his arrest and his mistreatment in detention. In respect of the impact of any mistreatment in detention the observers do not believe that Alaa Abd El-Fattah's capacity to defend the charges during his trial was diminished thereby.

Rights to a Fair Trial

3. IMPARTIAL TRIBUNAL

Article 14 (1) ICCPR

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The right to an independent, impartial and competent tribunal is an absolute right that may suffer no exception. All tribunals, Courts and judges must be independent from the executive and legislative branches of government as well as the parties to the proceedings. The independence of Courts and judicial officers must be guaranteed by the constitution, laws and policies of a country as well as being respected in practice by the government, its agencies and authorities and the legislature. The criteria for the appointment to judicial office should be transparent and subject to strict selection criteria.

The Egyptian Constitution of 2014 provides in Article 166: *“Judges shall be independent, subject to no other authority but the law. No authority may intervene in judiciary cases or in the affairs of justice.”*

FACTS

Judge El-Fiky was one of twenty two judges about whom Alaa Abd El-Fattah and others submitted a complaint, shortly after the 2011 revolution, accusing him and the others of allowing and permitting election fraud in 2005.

The evidence submitted in the complaint was compiled in 2005 by a fact finding committee of the Syndicate of Judges. While Mubarak remained in power, it was considered by the complainants to be pointless to submit a complaint about this issue. After 2011, the complainants had some hope that their evidence might be taken more seriously and treated more fairly. As far as the observers are aware, three years on, no finding or decision has been taken in regards to this complaint.

On 6 April 2014, Alaa Abd El-Fattah submitted an application to Judge El-Fiky that he recuse himself from the case. The observers understand that Egyptian law requires that there be no "rivalry" between judges and defendants. "Rivalry" may include previous complaints and legal disputes. Alaa Abd El-Fattah's lawyers argued that there was clear "rivalry" between the two men and that Judge El-Fiky lacked impartiality. In response to this application Judge El-Fiky adjourned the case pending a Cairo Appeals Court's decision about it.

On 17 May 2014, the Cairo Appeals Court ruled that Judge El-Fiky could continue to preside over Alaa Abd El-Fattah's trial. The observers have not been able to obtain a copy of the Appeals Court's decision but they are informed by Alaa Abd El-Fattah's lawyers that the application was refused because the Appeals Court held it had been submitted too late. The Appeals Court found that the application could not be granted because the Judge had already started to consider defence evidence in the case.

Alaa Abd El-Fattah's lawyers told the observers that this was not the case. They had not started to present their case to the Court at that stage. The Appeals Court's judgement apparently relies on the fact that at the hearing on 23 March 2014 Judge El-Fiky noted and confirmed four pieces of evidence from the defendants. Alaa Abd El-Fattah's lawyers agree that this is true. But, they informed the observers, they had specifically confirmed to the Judge that they did not wish to start to present their evidence at that point.

On 11 June 2014, the Court determined that as the Defendants had failed (in its view) to appear for the hearing the Code of Criminal Procedure permitted the Court to progress to judgement in their absence. The circumstances in which this situation arose are detailed in Section 7 below concerning the right of an accused to be present at his trial. We are of the view that the conduct of the judges on this date evidenced a lack of impartiality.

On 15 September 2014, Judge El-Fiky and the other judges considering Alaa Abd El-Fattah's case recused themselves from the proceedings. No reasons were provided for this decision.

On 26 October 2014, Judge Hassan Farid was appointed to try the Defendants.

FINDING

Without sight of the Court of Appeal's judgement we cannot reach a firm conclusion about the fairness of its reasoning. However, it is a well-established principle that justice must be seen to be done. The test is whether a reasonable and objective observer might think that the judge might be biased.

As it turned out, the trial judges decided on the 15 September to withdraw. This decision was neither reasoned nor expected. However, by this time (on 11 June 2014, to be precise) the Court had reached conclusions upholding the prosecution case and had announced lengthy sentences of imprisonment. The 11 June judgement may have influenced the judges that were subsequently appointed to the case.

If Judge El-Fiky and his panel withdrew in belated recognition of the "animosity" issue, notwithstanding the support for them to continue from the Appeals Court, we could conclude that the proceeding up to that withdrawal was tainted by partiality. What other reason might they have had to withdraw? The sentences handed down by the subsequent tribunal were more lenient than those imposed on 11 June. So it seems unlikely that some higher authority imposed their withdrawal on the ground that they had shown undue leniency. The reason for their withdrawal remains unknown.

The principle of tribunal impartiality sometimes overlaps with the principle of the presumption of innocence. See section 5 below. Of concern is the statement on page 30 of the final judgement:

“And since the Court is reassured that the proofing evidence in the case and the prosecution’s witnesses’ testimonies in the hearing are in fact true there’s not need to consider the defendants’ denial yet it considers it sort of an escape from the penalty of accusation for which they were already found guilty by certain verbal and technical evidence.”

This statement is dismissive of Defendants’ evidence. Defendants as witnesses should be subject to the same consideration and scrutiny as any witness. Any lesser consideration is not consistent with the presumption of innocence. It may show more than a lack of understanding of the presumption of innocence principle but may show a lack of impartiality in breach of Article 14 (1).

Another example of bias appeared on 11 December 2014 when defence witnesses were called. A number of the witnesses were members of the Constitutional Committee meeting on 26 November 2013 at the Shura Council. Though much of their testimony consisted of hearsay, some testimony was of direct bearing on issues in the case. The witnesses gave evidence of the signs they witnessed that protesters had been subject to violence at the hands of the police. In the middle of the testimony of one such witness, the presiding Judge interrupted with this comment directed at a defence lawyer: *“The Court is being presented with enough evidence. We don’t need any more witnesses. This case does not require more negative witnesses. The number you have offered is enough.”*

The events of 11 June 2014 detailed in section 7 below on the right to be present gave rise to the appearance of partiality on the part of the Judges.

4. PUBLIC HEARING

Article 14 (1) ICCPR

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

All trials in criminal matters must in principle be conducted orally and publicly. Having a public hearing ensures transparency of proceedings and thus provides an important safeguard for the interest of the individual and society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account the potential interest in the case and the duration of the oral hearing.

The Egyptian Constitution of 2014 provides in Article 169: *“The sessions of Courts shall be public, unless a Court decides to hold them in camera for considerations of public order or morality. In all cases, judgments shall be pronounced in public sessions.”*

FACTS

All the hearings in this case were held at Tora, a fortified police compound. Access to the compound at each of the hearings was controlled by armed policemen. Access to the Court within the compound was restricted to those granted permission by the judge. There is no public listing regarding the hearings that take place at the Special Chamber in Tora.

Only journalists, EU delegates and members of the defendants’ families were allowed into the Court to attend the hearings in Alaa Abd El-Fattah’s case. Whether permission would be granted was not a predictable matter. General members of the public were not allowed into the Court.

In relation to all hearings held in this case, save that of 11 June 2014 when the Court sat unexpectedly early, the observers were granted permission to enter the Court. On 6 April, 25 May and 6 August 2014 Alaa Abd El-Fattah’s family members were not granted access to the Tora police compound and thus could not get in the Court. From 10 September 2014 onwards, members of Alaa Abd El-Fattah's family were granted permission.

In relation to all attendees, however, access to the Courts was often a fraught affair. Entry was allowed at different stages of the proceedings on different Court dates. For example, on 11 November 2014, the observers were let in for the start of proceedings but, despite the judge ordering that the families be allowed in, they were barred from entering and the Court session had to be briefly adjourned to ensure that the families were present. On 11 November 2014, one of the defence lawyers was refused access to the Courtroom by security guards.

On 17 November 2014, the observer experienced difficulties gaining access to the Court despite the fact that the judge had specifically granted permission. The observer was only allowed access once the Court session had started. Family members were also initially obstructed. On 26 November 2014, family members were not allowed into the Courtroom. The judge asked two defence lawyers to leave the Court to ensure that the family would be allowed in.

No reasons were provided by any Judge for the exclusion of ordinary members of the public. The Court room is large enough to accommodate over two hundred people. The prosecutors and judges are seated some distance away from the public gallery which is behind a barrier and gate. Any concern that the judges may have had as to their safety would have been hard to sustain.

The media were usually well represented in the gallery.

The Court did not demonstrate effective management over the Court security officers. We cannot be certain whether the Judges were aware of the difficulties over access and tolerated the situation or whether security officers shoulder the full blame. However, the Judges clearly were controlling access as entry for observers was only permitted by prior judicial permission confirmed in writing.

FINDING

In relation to the principle that criminal trials should be in public we find that hearings were in the respects explained above in breach of Article 14 (1) ICCPR.

5. THE PRESUMPTION OF INNOCENCE

Article 14 (2) ICCPR

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The principle is enshrined in Article 67 of the 2014 Egyptian Constitution in the following terms:

“Any defendant is innocent until he is proved guilty before a legal Court....”

The arbitrary decisions to remand the Defendant in custody were contrary to the presumption of innocence that underscores the presumption of the right to bail of accused persons. See section 1 above on right to liberty.

The statement from the final judgement about the Defendant’s evidence, quoted in section 3 above (impartiality of tribunal), is indicative of a failure by the Court to apply the principle of the presumption of innocence.

The Court’s refusal of the Defence application for pre-trial disclosure of the cctv evidence was consistent with an assumption of guilt. See section 6 below for more detail on non-disclosure.

If the Court had proceeded on the basis of the presumption of innocence it would have recognised the right of the Defence to scrutinise readily available evidence that may have assisted the Court in reaching a reasonable doubt about the prosecution case. This analysis is generous to the judges. The denial of the application may have been motivated by a desire to prevent the defence from having an opportunity to challenge the oral testimony of police witnesses.

The haste with which the Court proceeded to convict and sentence the Defendants on 11 June 2014 was in our view a process inconsistent with the principle of the presumption of innocence. See section 7 below on the right to be present for full details.

For these reasons we find that the Court was in breach of this principle in Article 14 (2).

The breach is a central flaw to the trial. If other breaches we observed were refuted then the trial remains an unfair one on account of this breach of the overarching and fundamental principle of the presumption of innocence.

6. DISCLOSURE OF EVIDENCE

Article 14 (3) ICCPR

To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him

Article 14 (3) makes clear that a fair trial requires an accused person to be provided with certain procedural minimum guarantees. This includes the right of the accused to be informed promptly and in detail, in a language which he understands, the nature and cause of the charges against him. The right to be informed promptly requires that the information provided must give details on both the law and the alleged facts on which the charges are based.

FACTS

Alaa Abd El-Fattah's lawyers received a copy of the written evidence upon which the Prosecution sought to rely in April 2014.

The final judgement suggests that cctv video film of the Shura Council protest was sought to be relied on in the trial by the Defence rather than the Prosecution. It was the observers' understanding that the cctv evidence was produced during the Prosecution's case. However, that does not necessarily convert the item of evidence into part of the Prosecution's case if it is produced at the request of the Defence and the Prosecution has the means to produce and display it.

If the cctv evidence should be treated as part of the Prosecution case the failure to disclose a copy to the Defence before the trial must be treated in this section. If the cctv evidence should be treated as potentially part of a Defence case then the failure to disclose a copy to the Defence before the trial could be treated under section 8 on the right to call witnesses (the witness who formally produces the cctv exhibit and any potential defence expert analyst) and section 10 below on the right to prepare a defence. The effect of the failure to disclose the evidence before the trial amounted to a breach of the Defendant's right to a fair trial whether treated as a breach of the right to disclosure of the prosecution case or the right to call witnesses or the right to prepare a defence. For convenience we will deal with the issue of non-disclosure of the cctv evidence and its importance in this section and not repeat the detailed points in sections 8 and 10.

The defence team did not receive in advance a copy of the cctv evidence shown in the trial by the Prosecution. Alaa Abd El-Fattah's lawyers requested the cctv evidence from the Prosecution. On 25 May 2014 and 6 August 2014, the defence submitted applications to the Court for a copy of the evidence. On 25 May 2014, no comment was made by the judges about the application. On 6 August 2014, the Court refused the request.

A scheduled opportunity for its examination on 11 June 2014 was thwarted by the unexpected early sitting of the Court in the absence of the Defendants. See section 7 below on the right to be present for details of those events.

The first time the cctv evidence was shown to the Defendants and their lawyers was during hearings on 17 and 23 November 2014. The video film was projected onto a large screen. However, due to the metal caging of the dock we consider it unlikely that the defendants were able to properly view this evidence. Except for humans with exceptional photographic memories it is very difficult for anyone to assimilate from a single viewing of a film fast moving events and numerous simultaneous actions.

The Court denied the Defence an application made at the hearing on 14th December 2014 for an expert examination of the cctv evidence.

The cctv video footage could have been copied to compact disc (CD) or DVD or other electronic media in little time and with minimal cost. Video evidence can be most revealing and is objective. Images can be enlarged. Moving images can be frozen and viewed frame by frame. There was no opportunity for the Defence to undertake such analysis. The Defence had only one opportunity to absorb the video footage whilst it was shown in normal time in the Courtroom during the trial. This was completely unfair to the Defence. A close examination of the cctv evidence may have exonerated some or all of the accused in respect of some or all of the charges. The judges could not have been expected to truly absorb and fix in their minds the full and detailed picture available. The final judgement is rather inconsistent but at the least relies on the cctv for the basic facts of the prosecution case; namely, that a demonstration took place and other broader points.

FINDINGS

The failure to provide Alaa Abd El-Fattah with the cctv evidence before the trial was in breach of Article 14 (3) ICCPR.

7. RIGHT TO BE PRESENT

Article 14 (3) d ICCPR

To be tried in his presence...

Everyone charged with a criminal offence has the right to be tried in their presence so that they can hear and rebut the prosecution case and present a defence. In principle, the accused should not be tried *in absentia*. Defendants may be tried *in absentia* in certain exceptional circumstances in the interests of the proper administration of justice, for example, when defendants have been given sufficient advance notice of their trial and they decide to waive their right to attend or refuse to do so.

FACTS

Alaa Abd El-Fattah attended all the hearings held in his case save that of 11 June 2014 when unannounced the Court sat earlier than scheduled.

For all the hearings from 6 August 2014 onwards until 16 February 2015, Alaa Abd El-Fattah and all other defendants were held in glass cages which had been installed in the Court.

The cages prevent all noises in the cage being transmitted into the Court and vice versa. The observers understand that the judges have a button which controls whether noises are allowed in or out of the cages. Microphones are provided for all those who wish to speak in the Court. The observers understand that it is only when people speak into the microphones that the defendants can hear the words being spoken.

The use and quality of the audio equipment was not consistent during the hearings held from 6 August 2014 onwards. The observers found it was difficult to hear what was being said and by whom. Defendants caged in the dock would have been handicapped even more so. On several occasions the defendants made clear, through banging on the glass, that they were unable to hear the evidence being presented.

At two of the hearings, 26 November 2014 and 5 February 2015, following requests from the defendants, the judge ordered that the door of the cage should be opened and he acknowledged on 5 February 2015 that the audio system may be broken. However, even when the door was opened, it seems unlikely that the sound quality was adequate. On 26 November 2014 one of the defendants shouted that after the door had been opened still he could not hear and asked to be allowed out of the cage. The judge refused this request.

The glass of the cages is brown so it is not possible to see the defendants properly through it. The silhouettes of their bodies were visible from the observers' section of the Court but not much more. This would have caused particular difficulties in respect of the cctv evidence when shown to the Court. The observers believe that the defendants were not provided with an adequate arrangement for the viewing of the cctv evidence. Though it should be noted that the Defence lawyers were not in the cage and had a close view of the large screen upon which the video film was projected.

The final judgement rejected Defence submissions relating to the inadequacy of the facilities in the Courtroom for ensuring that Defendants could follow proceedings. The judges asserted that the technology in place was sufficient and that when Defendants wished to address the Court they were permitted to leave the cage for that purpose.

On 11 June 2014, a day listed for the trial, Judge El-Fiky handed down a judgment, in the absence of the accused, finding Alaa Abd El-Fattah guilty. Alaa Abd El-Fattah was sentenced to fifteen years imprisonment, a 10,000 EGP fine and a five years probation period following the service of his sentence.

On this day our observer arrived at 08.30am for an expected 10am start (the usual start time on all other days.) Alaa Abd El-Fattah was observed arriving with his lawyers at 09.30am and was promptly taken into custody by police officers.

The published version of the June 11 2014 judgement (see appendix 2) makes the following assertion: *“On the 11/6/2014 session, none of the accused showed up and the Court called on the head of the guards, and those in charge of the Courtroom and prison, it was noted that the witnesses decided not to attend and it was affirmed that all doors were open and that the accused were not inside or outside the Courtroom, the representative of the public prosecutor decided to issue a summons.”* The judgement states *“... the Court [had] postponed the case till 11/6/2014 to call for one of the technical help experts to review the CDs and to call on the witnesses...”*

FINDING

The observers find generally that hearings from 6 August 2014 probably fell short of the requirement to ensure *effective* presence of the Defendant during his trial. We observed many instances of behaviour by Defendants that indicated that the “cage” like dock was not sufficiently equipped to allow the Defendant to follow the proceedings at all times. We do note that the Defendant was represented by a lawyer and there was no barrier to his ability to follow proceedings.

From the evidence of our own observer on the spot and on the balance of probabilities we find that the Court deliberately failed to notify the Defence of the setting of an earlier time for the session of the 11 June 2014. We think it extraordinary that the Court should presume that suddenly on 11 June every one of 23 Defendants should have decided to abscond without a reasonable excuse. Especially when the hearing was to be of potential benefit to the Defence as it was anticipated that the cctv evidence would be analysed at that session.

Why did the Court not continue with the evidence? The *in absentia* judgement states that witnesses did not attend either – but that would not have been the fault of the defence and therefore an adjournment would have been appropriate. The Court should have adjourned to enquire not only about the reason for the absence of the witnesses but also 23 Defendants!

The reliance upon the alleged enquiries of Court security officers as to the whereabouts of all 23 defendants is doubtful. How difficult could it possibly have been to have made telephone calls to the defence lawyers’ mobile phones or their offices? We doubt very much indeed that the Court acted with integrity on this day.

The Defendant's right to be present was unfairly denied him and as a consequence the Court promptly and unfairly proceeded to conclude the case *in absentia* with guilty verdicts and sentences. The possible prejudicial effect of the *in absentia* judgement on the impartiality of the second judicial panel appointed to the case is analysed in section 3 above on impartial tribunal.

Thus we find breaches here under Article 14 (3) (d).

8. RIGHT TO CALL AND EXAMINE WITNESSES

Article 14 (3) e ICCPR

The accused has the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

The Prosecution should, within a reasonable time, provide the defence with the names of the witnesses that it intends to call at trial so as to allow the defence lawyer sufficient time to prepare his or her case. Everyone accused of a criminal offence has the right to obtain the attendance of witnesses and to examine witness of their behalf “under the same conditions as witnesses against them.”

FACTS

The Prosecution provided Alaa Abd El-Fattah's lawyers with a list of the witnesses on whose evidence it sought to rely in April 2014. On 10 September 2014, four of the Prosecution's witnesses provided oral evidence to the Court. Judge El-Fiky, the Prosecutor and Alaa Abd El-Fattah's lawyers were able to ask questions of them.

On 26 November 2014, 4 and 11 December 2014 further witnesses called by the Prosecution provided testimony to the Court. Judge Hassan Farid and Alaa Abd El-Fattah's lawyers were able to ask questions of them.

The defendants' witnesses provided testimony to the Court on 11 and 14 December 2014. Judge Hassan Farid, the Prosecutor and Alaa Abd El-Fattah's lawyers were allowed to ask questions of them. However, the cage in which Alaa Abd El-Fattah was held prevented his lawyers taking instructions from him about *any new evidence* given by witnesses.

The refusal of the Court to order the Prosecution to disclose the cctv evidence in advance of the trial arguably constitutes a denial of the right to call witnesses. Effectively, the defence were denied the right to call the witness who formally produced the cctv exhibit and the defence was prevented from instructing its own expert witness video analyst.

FINDING

Alaa Abd El-Fattah's lawyers were permitted to examine witnesses freely and therefore this part of the trial process was compliant with Article 14 (3) (e). The defence were allowed to call witnesses within their ordinary control but were prevented from calling witnesses in respect of the vital cctv evidence and in this latter respect there was a breach of Article 14 (3) (e). The physical arrangements of the Court diminished the ability of the Defence to examine witnesses on any evidence arising *de novo*.

9. RIGHT TO LEGAL ASSISTANCE

Article 14 (3) d ICCPR

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

FACTS

During all the hearings held in this case Alaa Abd El-Fattah has been adequately represented.

FINDING

The hearings complied with the right in Article 14 (3) (d) ICCPR in this regard.

10. RIGHT TO PREPARE DEFENCE

Article 14 (3) b ICCPR

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

The article has two limbs: “Time and facilities” and “communication with counsel”. The right requires that the accused and his or her lawyers are guaranteed access to all appropriate information, documents and other evidence that the prosecution plans to offer in Court against the accused. The accused should be able to communicate, consult with and receive visits from his lawyer without interference or censorship and in full confidentiality.

FACTS

Alaa Abd El-Fattah's lawyers received a copy of the written evidence upon which the Prosecution sought to rely. The defence did not receive the cctv evidence in advance of the trial. See section 6 on disclosure above for the detailed treatment of this issue.

We were informed that during Alaa Abd El-Fattah's first period in detention all requests submitted by his lawyers to visit him were refused. During his second period of detention all requests submitted by his lawyers to visit him were refused for the first forty days.

Alaa Abd El-Fattah's lawyers have informed the observers that during the meetings they did secure with Alaa Abd El-Fattah at Tora prison they have they been unable to speak to him in private. Police personnel were always present and in earshot.

FINDING

The refusal to order the Prosecution to serve a copy of cctv evidence prevented the Defence preparing a defence. (See section 6 for detailed analysis.) If the information provided to the observers concerning legal consultations is true then the relevant authorities were breach of Article 14 (3) (b) ICCPR.

11. RIGHT TO TIMELY TRIAL

Article 14 (3) c ICCPR

To be tried without undue delay:

The right of the accused to be tried without undue delay means that he or she must be tried within a reasonable time. The authorities must ensure that the entire criminal proceedings, from the pre-trial investigation stages until the final appeal, are completed within a reasonable time.

FACTS

The charges related to incidents on 26 November 2013 and the first trial did not start until 23 March 2014.

Since that date the hearings have been adjourned on numerous occasions. On 10 May 2014, the hearing was adjourned because Judge El-Fiky had the flu. The hearing scheduled for 22 July 2014 was cancelled on the evening of 21 July 2014 because of "maintenance work" at the Court. On 10 January 2015, the hearing was cancelled due to "logistical difficulties" transferring the defendants from the prison to the Court. Despite these difficulties the defendants were brought to the Court around 30 minutes after the hearing had been cancelled and were allowed a short meeting with their families. On 9 February 2015, the hearing was cancelled due to "security risks".

Proceedings conducted by the new panel of judges began on 27 October 2014. The numerous hearings in the second trial rarely lasted longer than three hours and were spaced irregularly over a period of six months.

FINDING

The observers believe the duration of these proceedings was unduly lengthy. Though the length of time between arrest and verdicts is not beyond international norms the hearings could have been better organised. The Court could have sat for longer. The delays between adjourned hearings could have been shorter. However, we are not apprised of the demands on judicial time that may explain the length of adjournments. The Defendant spent less than twelve but over six months in custody before a final guilty verdict was reached. Six months is a target maximum period of pre-trial custody detention in many jurisdictions. However, longer periods up to a year are not uncommon. Though we maintain that the decision to remand into custody before trial was arbitrary and contrary to the presumption in favour of bail we cannot find that the Court was in breach of Article 14 (3) (c).

12. LEGAL CERTAINTY OF CRIMINAL CHARGES

Article 15 ICCPR

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed...

We do not find that the criminal offences charged were applied retrospectively. We do however find that the ambit of liability by association in the Assembly Law of 1914 to have been interpreted too widely in this case. To quote from the final Judgement: *“Article 3 of the Assembly Law of 1914 ... “If a crime is committed with the intention of fulfilling the grouping’s purpose then everyone in the crowd at the time of the crime is criminally responsible as partners in the crime as long as they are informed with the purpose”* [emphasis supplied]. The Judgement ducks the issue whether the First Defendant was informed of the Second Defendant’s criminal purpose of possessing a knife. The Judgement also interprets Article 7 of the 2013 Protest Law more widely than its words appear to permit. *“In accordance to the 7th article of the law number 107 for the year 2014 then all participators are criminally responsible along with the first defendant since it is proven that the second defendant had a weapon on him”*.

Article 7’s terms are:

“Participants in public meetings or processions or protests are prohibited to disrupt public security or order or obstruct production, or call for it, or hamper citizens’ interests or harm them or subject them to danger or prevent them from exercising their rights and work, or affecting the course of justice, public utilities, or cutting roads or transportation, or road, water, or air transport, or obstructing road traffic or assaulting human life or public or private property or subjecting it to danger.”

It is quite extraordinary to find a person liable for various aggravating offences without his knowledge, belief or awareness of, for example, the possession of a knife by one other out of 349 demonstrators. The basis of liability constructed by the Judges in this case is contrary to the internationally accepted norm that criminal laws are construed restrictively and that penal responsibility is individual. There are exceptions to the restriction of liability to individual responsibility in respect of those who incite the criminal actions of others. In this case Alaa Abd El-Fattah was accused of planning a protest that was illegal because it was not authorised under the 2013 Protest Law. There was no evidence that he was aware that the Second Defendant had a knife in his bag let alone that the Second Defendant’s intention might have been to possess it to cause alarm or injury during the protest.

The legality of the 2013 Protest Law is outside our remit. Some may question its constitutionality and compatibility with both the ICCPR and the 2014 Egyptian Constitution guarantees of freedom of assembly. However, a requirement for prior notification to the authorities of protests is not *per se* illegal.

The Shura Council protest took place on 26 November 2013 one day after the 2013 Protest Law became effective, which was the day after publication in the Official Gazette of 24 November 2013. Thus the calling of the protest in impugned messages dated 24 November 2013 arose before the new law was effective.

The legal requirement is for a notification to be submitted three clear working days before the intended protest date (Article 8 of the 2013 Protest Law).

The 2013 Protest Law is silent on the question of the legality of protests taking place after 25th November 2013 where the planning took place before that date. We cannot say that the assumption by the Court that the 2013 Protest Law applied to the Shura Council protest of 26th November 2013 rendered the trial unfair.

Conclusion

For the reasons above the observers find that Alaa Abd El-Fattah did not have a trial in accordance with international fair trial standards. The standards are set by the International Covenant on Civil and Political Rights 1966 which Egypt ratified in 1982. Egypt ratified the African Charter on Human and Peoples' Rights in 1984 which includes in Article 7 rights to a fair trial. The 2014 Egyptian Constitution also enshrines the principle of the presumption of innocence. In particular:

We regard the manner of the judge's dismissal of defence evidence as contrary to the presumption of innocence. The evidence for the defence should have been placed into the balance and not treated as a mere "escape". Language which demonstrated a judicial mindset prejudiced against the Defendant.

We regard the decisions to remand the Defendant into custody at various stages during the proceedings as unreasoned and arbitrary. These decisions were contrary to the presumption of innocence.

We regard the refusal of the Court to order the Prosecution to provide to the Defence a copy of the cctv video film as a decision that may have deprived the defence of an opportunity to demonstrate the innocence of the Defendant in respect of the alleged assaults and other charges under the Assembly Law. Apart from the breach of the Defendant's right to prepare his defence that this refusal represented, the refusal further evidenced the bias of the Court against the Defendant and its failure to abide by the presumption of innocence.

We regard the behaviour of the Court on the 11 June 2014 as highly reprehensible. The bringing forward without notice to the accused of the time of the session, the failure to make proper enquiries as to the whereabouts of the accused and the bypassing of further trial evidence due to be heard, leads us to be confident in saying that the trial at that stage was a sham process.

Though a new judicial panel was appointed to the case the new panel also displayed prejudice against the accused as described in this report. For examples, the arbitrary remand into custody of the Defendant, the refusal to order disclosure of the cctv and the remarks about Defence evidence. The prejudicial conduct of the trial process by both panels allows us to conclude with a great deal of confidence that Alaa Abd El-Fattah did not have a fair trial by the standards set by the International Covenant on Civil and Political Rights, The African Charter of Human and Peoples Rights, the Egyptian Constitution of 2014 and the Egyptian Code of Criminal Procedure.

