



Study

Courts for Abuse

A case study of Yemen's Specialized
Criminal Courts
2015 - 2020



Mwatana
for Human Rights

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Introduction

1. Fair trial

Justice was, and remains, humans' first demand. It took centuries of struggle until governments and states acknowledged the right of every person to a fair trial, and until constitutions guaranteed this right. It is well-established by now that access to justice is the main criterion for evaluating the legitimacy of governments and regimes. When people cannot access justice, governments lose the trust of the people, and rule of law is undermined. It is within this context that this study examines the right of individuals to fair trials and the legal guarantees regarding states' obligation to respect this right, as well as judicial and executive authorities.

According to international standards, a fair trial is a trial that is conducted in a fair manner before a competent, independent, and impartial court established according to the law. Fair trials take place in the presence of the accused, in public, and begin and end within a reasonable period of time. In short, a fair trial is one in which all the guarantees and basic rights of the accused are respected. At the forefront of which is the right to mount a defense and the right to appeal. This study deals with the right to a fair trial, as a basic right established by international human rights law, and also as a constitutional right for every person according to the Yemeni legal system.

Since the armed conflict began in Yemen in September 2014, when the Ansar Allah group (Houthis) and forces loyal to former President Ali Abdullah Saleh took control of the capital, Sanaa, by force of arms. The conflict worsened in March 2015 when the Saudi-Emirati-led coalition began its military operations against Ansar Allah (Houthis) and Saleh forces in support of the internationally recognized government of President Abd Rabbu Mansour Hadi. Since then, all parties to the conflict and the various authorities in Yemen have committed serious violations of international humanitarian law and international human rights law, including arbitrary detention, enforced disappearances, torture, and unfair trials against civilian victims.

Accountability and redress for such serious abuses is a critical part of ending cycles of violence, ensuring justice for victims, and paving the way towards a peaceful Yemen. Although the revelations of many violations, including unfair trials, conducted by the warring parties across of Yemen, , impunity remains. All of Yemen's warring parties have shown themselves unwilling to take credible steps towards real accountability and redress.

2. Questions and aims

The main purposed of this study is to evaluate the degree to which trials at the Specialized Criminal Courts are considered fair, based on the concept and criteria of "fair trial" as specified under international human rights law and Yemeni law.

This report constitutes a specialized legal study that aims—from a theoretical lens—to clarify the concept of fair trial and its basic premissis, and legal guarantees, in accordance with international and national standards. It aims to clarify the role of the judiciary—represented by courts of all kinds and levels—in protecting human rights and fundamental freedoms from abuse by state authorities under normal and exceptional circumstances. Practically, the study aims to define the legal nature of the Specialized Criminal Courts in Yemen, and to explain how they were established and organized. The study also examines whether these courts would be considered a ordinary judiciary or whether they are extraordinary and illegal courts according to the Yemeni constitution . The study also aims to evaluate the performance of these courts and to verify the extent of their respect for the rights and guarantees of the accused through their practices (i.e.: through the cases that were considered before them and their rulings during the period from 2015 to 2020, which is the timeframe for the study).

3. Methodology

The study employs an **inductive approach**, along with a descriptive and analytical approach. These are the main methodological approaches in this study, especially with regard to assessing the availability of legal standards and guarantees for a fair trial in the practices of the Specialized Criminal Courts.

Within the broader framework of this approach, we have combined three tools and research methods, described below:

Direct observations, collected by Mwatana through the legal support team, by examining and studying the files of some cases that have been considered by the Specialized Criminal Courts and by taking notes regarding the cases, especially in the cities of Amanat Al Asimahand Hadramout. We also studied the rulings issued in these cases and the observations collected by Mwatana team members through direct follow-up of cases and by attending hearings in court.

Observations made by the defense attorneys for the defendants in some of the cases that were brought before the Specialized Criminal Court of First Instance and its appeals chamber in Amanat Al Asimahand Hadramout. Mwatana also obtained copies of written court rulings in which the defense pleadings that were presented to the court are documented.

A focused discussion group organized by Mwatana on October 22, 2020, under the title "Specialized Criminal Courts: The Legal Framework and Practices," in which a number of academics, legal experts and senior lawyers who had previously defended the accused before the Specialized Criminal Courts participated. The goal is to know the different opinions about all related to the procedures of trials before the specialized criminal courts, as the points of view presented at the meeting were used in addressing the issues included in the study after categorizing them according to the topics or points.

4. Literature review

To the best of our knowledge, there are no previous applied studies on the availability of legal guarantees for a fair trial by the Specialized Criminal Courts in Yemen, nor on the legal system of these courts (that is, studies other than those focused on of their establishment). Therefore, this study is foundational and pioneering, and we hope that it will form the basis for further studies in the future.

On the other hand, there are numerous studies related to the theoretical aspects of the guarantees and rights of the accused before the judiciary in general, the

most important of which is Ahmed Fathi Sorour's (1999) study on Constitutional Protection of Rights and Freedoms, which is a general and comprehensive study within the framework of constitutional criminal law. There are other studies that were presented as academic theses, including, for example: the study of Majdi Al-Jarhi (2008) on "guarantees of the accused before the extraordinary courts," and Abdullah Al-Dowah's study (2012) on "the special and extraordinary courts and their impact on the rights of the accused." There is also Naif Al-Ghamdi's study (2014) about "the Specialized Criminal Courts" in Saudi Arabia, which was devoted to justifying the establishment of this type of court. In Yemen, there are few studies and reports examining defendants' rights at the trial stage. Of those that exist, the most important are: the study conducted by Ahmad Muhammad al-Jundabi (undated) on "the basic principles of the defendant's rights at the trial phase," and the study conducted by Yemeni Observatory for Human Rights (2011) on "fair trial guarantees between reality and legislation.", and Amnesty International's report (2010) entitled "Yemen: Cracking Down Under Pressure" sheds light on the unfair trials and the Specialized Criminal Court in Yemen.

5. Study plan

The study is divided into two parts. The first part is devoted to the study of fair trial rights, and is entitled "**Fair trial and its guarantees before ordinary and extraordinary courts.**" This part includes all of the theoretical issues related to the subject of the study, such as the concept of fair trial and its basic requirements and legal framework (Section One) and trial procedures before the ordinary and extraordinary courts (Section Two).

The **second part** of the study represents the applied aspect of the study and is entitled "**Specialized Criminal Courts in Yemen.**" In this part, the legal system of Yemeni Specialized Criminal Courts is studied. Section One discusses their establishment, organization, and understand their legal nature and what may categorize them as ordinary or extraordinary courts. In Section Two examines the extent to which the basic rights and guarantees of the accused are respected throughout the practices of the Specialized Criminal Courts. We also study in this section the extent of respect for the institutional guarantees related to the administration of the judiciary and justice system. As for the results and

recommendations of the study, they were included in a final discussion in the last chapter within this second section.

Notably, the practices of the Specialized Criminal Courts in Yemen has always been subject to criticism and sometimes condemnation, but without reliable evidence based on examining and studying specific lawsuits, and without legal explanation or reasoning based on the international standards for fair trial. We sought in this study, as much as we could, to be objective, realistic, impartial and base our conclusions on indisputable legal benchmarks and criteria, at the national and international levels.

It should also be noted here that this study does not claim that the cases, observations and other information contained therein can provide a "representative sample of judicial practices" in Yemen in a statistically meaningful sense. However, from our point of view at least, it presents a real picture taken from the reality of the work of the Specialized Criminal Courts. Rather like a miniature image, honest and realistic and faithfully reflecting the dimensions of the large picture of the status of the judiciary in Yemen in general.

Part I:

Fair trial and its guarantees in ordinary and extraordinary courts

This part has two sections:

Section one: The concept of fair trial and its legal context

Section two: Trial procedures in ordinary and extraordinary courts

Section one:

The concept of fair trial and its legal context

This section has two chapters:

Chapter one: The concept of fair trial and its main premises

Chapter two: The legal framework for fair trial under international and Yemeni law

Chapter 1: The concept of fair trial and its main premises

First: The concept of fair trial

First and foremost, a fair trial is one that is conducted fairly before a competent, independent and impartial court that has been established in accordance with the law and is based on equality. The accused in a fair trial is not to be tried *in absentia*, and the hearings should be held in public. Defendants should be able to defend themselves in person or by proxy, and the trial should take place without undue delay. Moreover, a fair trial also requires the following: that a person should not be tried for an act that was not incriminated by law at the time of its commission; that the accused be considered innocent until proven guilty by a final court ruling; that the person against whom a conviction was issued has the right to appeal that judgment to a higher court; and finally, that no individual be tried twice for the same act.¹

Respecting the guarantees of a fair trial in practice requires that every step and procedure of the trial be governed by stringent controls and conditions, whether with regard to the validity of the measures taken against the accused both before and during the trial, or with regard to the powers of the authorities and persons undertaking those procedures, including their timing and timeliness. Where there is a failure to respect the rights and guarantees of the accused, the trial should be nullified or the proceedings generally should be considered invalid, with those who have been harmed by the failure provided with compensation and reparation.

Accordingly, fair trial—as a set of legal, substantive and procedural rules and principles—constitutes an integrated system aimed at preserving human dignity and providing a minimum level of protection for defendants' fundamental rights and freedoms. This system—whose rules and principles will be discussed in

¹ This concept is drawn from articles 14 and 15 of the ICCPR, issued 1966.

detail in this report—has become a critical component of international human rights law. No state can no longer deny its obligations to provide fair trial.

Second: Main premises for the administration of justice

It goes without saying that we cannot speak of fair trial in the absence of a state that observes **the rule of law** (meaning that state institutions fall under the law). A state that observes the rule of law is one in which the **principle of constitutional legitimacy** is observed (i.e., the constitution is the highest legal benchmark for state conduct and the conduct of its institutions). Another key principle stemming from this is that of the **legality of crimes and penalties** (i.e., there is no crime or punishment except on the basis of legal texts). A fair trial also requires that **all people be equal before the law, which entails equality before the judiciary and courts**. Moreover, guarantees of a fair trial cannot be achieved in a country unless **the judiciary is independent and impartial, with no authority over it except the law**, and unless everyone accepts the **principle of accountability and punishment where the law is violated**.

Combined, these principles constitute the basic pillars of the state of law, and thus represent the basic requirements necessary for the establishment and guarantee of justice in any society. Without respecting these principles in practice and in everyday life, discussions of law and justice are meaningless.

1. Respecting the principle of the rule of law

The principle of the rule of law means, in short, that the state—both the rulers and the ruled—are subject to the law. In other words, all of the state's actions are subject to the law. This is achieved by placing legal restrictions to prevent arbitrariness or deviation from the purposes and objectives of the law on the state authorities' exercise of their powers and responsibilities.

The principle of the rule of law requires that governmental authorities in any country respect the laws they have established, and that their application of the

law—under the supervision and protection of the judiciary—be fair and based on equality. Citizens will not obey the law if they have reason to believe that the authorities themselves do not respect the laws or that they apply double standards. In such cases, governmental authorities lose their credibility and the law loses respect.

As such, respect for the law is, in daily practice, the basis on which the state and its various agencies derive their legitimacy and credibility. It has become widely recognized today that the legitimacy of governments increases and decreases in tandem with the extent to which they respect and submit to the law.

2. Respecting the principle of constitutional legitimacy

As previously stated, the principle of rule of law requires that the state and all of its institutions and entities be established in accordance with and be subject to the law. This means that there is a higher legal reference to which the state must look to in its existence and in the exercise of its powers. This higher legal reference is embodied in the constitution, and the constitution is the highest and most supreme legal document in any country. The constitution contains all of the basic legal principles, provisions, and rules upon which the state is built and to which it must refer to in its exercise of power.

A state's constitution laws are supposed to be issued by a democratically elected legislative council (either a parliament or a house of representatives). This means that the association between the principle of the rule of law and democracy. As such, it is assumed that all laws issued by this Legislative Council represent popular will and reflect the values and principles of the Constitution. Hence, it is possible to judge the extent of the legitimacy or illegitimacy of the governing bodies—both in terms of their composition and their activity—according to the extent to which they comply with the provisions of the constitution and the law.

The principle of the legality of crimes and penalties branches out of the main principle of constitutional legitimacy: There is no crime, no punishment, and no criminal procedure except on the basis of the law. We will return to this principle

in more detail below, because it is one of the main principles governing the realm of legislation, penalization, and the administration of justice.

3. Respecting the principle of equality before the law

Equality before the law means that the same laws apply to everyone without exception, without discrimination, in a fair and impartial manner across the board.

This principle also implies that people should not be discriminated against because of their job, social status, political opinion, religion, color, ethnicity, gender, nationality, or for any other reason.

The principle of equality before the law extends equality before courts, and this includes the guarantee of a fair trial. We will return to this concept later on in the report, where this, and other, guarantees are described in detail.

4. Respecting the principle of an independent judiciary

An impartial judiciary and a fair trial are dependent upon respect for an independent judiciary. Respect for the principle an independent judiciary depends in turn on respecting the principle of separation of the state's powers—the executive, legislative and judicial branches—so that each authority monitors the work of the other authorities and observes checks and balances. These checks and balances among the three branches constitutes a restriction that limits the extent of each branch's powers—especially the executive branch—and limits one branch's capture of another branch's power. Hence, the primary consideration comes to the institutions not to the people who stand at the helm of those institutions or authorities.

Under the principle of separation of powers, judges and courts are supposed to operate without interference from officials in the executive and legislative branches. They should be able to operate independently from any interference from any party, so as to liberate the judiciary, as an organ entrusted with the

application of the law and the fulfillment of justice, from interference in its affairs and/or mandate.

Hence, the principle of an independent judiciary constitutes a very important guarantee for a fair trial, and it is one of the main principles established by all modern constitutions. On top of that, the principle of an independent judiciary has become today an international obligation on all states, by virtue of the rules of international human rights law.

5. Respecting the principle of accountability and penalization for violations of the law

For the rule of law to prevail and rights and freedoms to be safeguarded, law violators must be held accountable and punished. The penalty accompanying the legal provisions of criminalization would push those falling under the law's jurisdiction to respect the law. Here it is assumed that the penalty stipulated by law is applied consistently when the law is violated, that the penalty is based on a court ruling, and that it is carried out by a competent authority in the manner and conditions specified by the law.

Chapter two: Legal framework of fair trial under international and Yemeni law

Introduction: The legal framework for fair trial is provided both at the international level under international human rights law (IHRL), and domestically by individual countries' national legal frameworks. In the following chapter, we first describe the right to a fair trial under international law, including which aspects of the right are considered non-derogable (i.e., they must continue to be protected and respected in all circumstances, including exceptional circumstances such as during a conflict). We then present what we believe are the most important legal guarantees for a fair trial that are provided both under international and Yemeni law, starting with a brief description of the most important legal guarantees that exist in the pre-trial stage.

First: The Right to a Fair Trial Under International Law

The International Covenant for Civil and Political Rights (ICCPR) lays out the elements of the right to a fair trial under IHRL. Article 14 states:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.....
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;

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

(e) 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;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

...

Other ICCPR articles also lay out rights relating to a fair trial.²

With regards international humanitarian law (IHL), specific aspects of the right to a fair trial are discussed in Additional Protocol II (AP II) and Common Article 3 of the Geneva Conventions, both applicable to non-international armed conflicts (and therefore applicable to the war in Yemen). AP II, Article 6(2) states that, “No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality,” some of which “essential guarantees” Article 6 lists.³ Common Article 3 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court” that affords “all the judicial guarantees which are recognized as indispensable by civilized

² Additional articles in the ICCPR that lay out rights relating to a fair trial include Article 6 (the right to life), Article 7 (freedom from torture), Article 9 (the right to liberty and security), Article 15 (the right against being convicted of guilt for a criminal offense for an act that did not constitute a criminal offence), Article 16 (the right to recognition as a person before the law), and various elements of other articles contained within the Covenant.

³ Additional Protocol II, Article 6(2)

peoples.”⁴ Some elements of the right to a fair trial are non-derogable, even during war.⁵ As the Human Rights Committee has noted:⁶

*As **certain elements** of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that **fundamental requirements of fair trial must be respected during a state of emergency.***

The Committee goes on to list the following provisions of the right to fair trial as “fundamental requirements” that should not be derogated from, including, but not limited to, fair trial “guarantees” listed in AP II:

- 1) Only an independent, impartial, and regularly constituted court of law may try and convict a person for a criminal offence;⁷
- 2) The presumption of innocence must be respected;⁸
- 3) In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant;
- 4) The obligation to inform the accused of the nature and cause of the accusation;⁹

⁴ Common Article 3(1)(d) of the Geneva Conventions

⁵ Though the ICCPR has not specifically listed the right to a fair trial as a non-derogable right under Article 4.2, there are elements of the right to a fair trial that are considered non-derogable, including if they are intrinsically linked with other non-derogable rights listed in the ICCPR, or guaranteed under IHL. Rights listed as non-derogable under ICCPR Article 4(2) include:

- 1) The right to life under Article 6
- 2) The right to freedom from torture, cruel, inhumane and degrading treatment or punishment, and medical or scientific experimentation without one’s free consent under Article 7
- 3) The right to freedom from slavery, the slave trade and servitude under Article 8
- 4) The right not to be imprisoned on the ground of inability to fulfil a contractual obligation under Article 11
- 5) The right not to be subjected to retroactive legislation (ex post facto laws) under Article 15
- 6) The right to recognition as a person before the law under Article 16
- 7) The right to freedom of thought, conscience and religion under Article 18The right not to be subjected to the death penalty under Article 6 of the Second Optional Protocol.

⁶ UN Human Rights Committee, General Comment No. 29 (Article 4 of the International Covenant on Civil and Political Rights), <https://www.refworld.org/docid/453883fd1f.html>

⁷ Additional Protocol II, Article 6(2)

⁸ Additional Protocol II, Article 6(2)(d)

⁹ Additional Protocol II, Article 6(2)(a)

- 5) The requirement that an accused must have the necessary rights and means of defense;¹⁰
- 6) Accused persons have the right to be tried in their presence;¹¹
- 7) Convicted persons are to be advised of their judicial or other remedies and the time-limits within which they may be exercised.¹²

In Mwatana's view, the right to a fair trial, as described by Article 14 of the ICCPR, is fundamental, both in its own right and in relation to the protection of other rights.

Second : Legal guarantees in the pre-trial phase

1. Legal guarantees of the rights of the defendant

In order to assess whether the conditions for a fair trial are available or not, according to the rules and provisions of the international human rights law, we need first to go over the measures taken by the state authorities towards the person accused of violating the law. This starts from the moment the defendant was arrested and deprived of his freedom. The respect for international conditions and guarantees, or those stipulated by the constitution or national laws—both substantive and procedural—in force in a country, is a strong indicator of the nature and quality of the legal protection that people receive. The respect or disrespect of laws clearly reflects the image of the existing government in any country.

We will not discuss the rights and guarantees required by international human rights law at the pre-trial stage in detail, as they relate to the procedures prior to the referral of a case to the court. Rather, we simply refer to it to the extent necessary to reveal the extent of its connection to, or its impact on, the validity or unfairness of the trial, if the legitimacy of such rules is raised in court hearings. **This means that the judge must make sure—above all—that the facts of the case are correct. The judge shall ascertain the validity and legality of all measures**

¹⁰ Additional Protocol II, Article 6(2)(a)

¹¹ Additional Protocol II, Article 6(2)(e)

¹² Additional Protocol II, Article 6(3)

taken against the accused before his appearance before the court, and the validity of the procedures taken by officials or authorities towards the accused.

The most important basic rights and guarantees that a judge must ensure are observed in the pre-trial phase are as follows: The right of every person to personal freedom, and thus their right to know the reasons for their arrest and detention, and the right of the person, immediately upon his arrest, to be informed of the rights guaranteed by the law; the right to be brought promptly before a judicial authority; the right to challenge the lawfulness of one's arrest or detention; the right to seek the assistance of a lawyer; the right to a just investigation and interrogation; and the right to remain silent and not be coerced into a confession. Finally, individuals have rights related to the conditions of their detention, and the right to compensation for any pre-trial violations.¹³

Practice in the second section of this study has revealed that the right to personal freedom is the right that is most vulnerable to being violated by the authorities of parties to the conflict in Yemen in the pre-trial phase, described in more detail below.¹⁴

2. Guarantees of the right to personal freedom

The right to personal freedom is a fundamental human right, and is a natural right linked to the life and dignity of a person. No authority can take away or restrict the freedom of any person in the absence of relevant legal provisions. The law—pursuant to the principle of legitimacy—may restrict individual freedom where public interest requires it.

The right of a person to his or her personal freedom has become a legal principle established across national constitutions and stipulated in international instruments and treaties. Its basic premise is **that every person has the right to personal freedom, and that it is not permissible to arrest or detain a person except for reasons specified by law, and in accordance with the procedures and conditions specified by law.**

¹³ See "Rights and legal guarantees in the pre-trial phase," Yasmine Al-Shibany, Mwatana for Human Rights, Sanaa, 2019. pp. 17-48 [In Arabic].

International human rights law has affirmed the importance of ensuring the protection of the right to personal liberty, and this is linked to the right to life itself, as Article (3) of the Universal Declaration of Human Rights (UDHR) stipulates that “**everyone has the right to life, liberty, and the safety of his person.**” The ICCPR also stipulates in article 9.1, “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

In the Yemeni legal system, the right to personal freedom and its related basic rights have been legally protected. Article 48.A of the Yemeni constitution states that “The state shall guarantee to its citizens their personal freedom, preserve their dignity and their security. The law shall define the cases in which citizens freedom may be restricted. Personal freedom cannot be restricted without the decision of a competent court of law.” The Law on Criminal Procedures (Article 11) stipulates that “Personal freedom is guaranteed; no citizen may be accused of having committed a crime, nor may his freedom be restricted unless by orders from the concerned authorities in accordance with what is provided by this law.” Article 172 states that, “...no person may be arrested or detained except by a warrant from the General Prosecution or the Court.”

3. The principle of the assumption of innocence

The legal basis for protecting the rights and guarantees of the accused before the courts is based on a constitutional principle: that **the accused is innocent until proven guilty**. This is due to the fact that individuals have a default of freedom, and therefore innocence, and that criminalization and punishment are an exception to the rule. This exception is required by a balance, or a tradeoff, between the rights and freedoms of the individual, and the rights and interests of the community within the limits established by law.¹⁵

International human rights law, as well as the Yemeni legal system, establish many guarantees for every person who appears before the judiciary. These

¹⁵ See, Ahmed Fathi Sorour, “Constitutional Protection of Rights and Freedoms”, p. 591 and after, original in Arabic:

guarantees aim to protect human dignity and freedom and their related basic rights, on the one hand, and to guide and enlighten judges in getting to the truth, whether it is in the interest of the plaintiff or defendant, in order to reach justice. These guarantees are divided into objective guarantees related to legal rules and principles, and procedural guarantees related to how these rules and principles are applied in practice at every stage of criminal procedure. In addition, there are also institutional guarantees for a fair trial related to how courts are formed, their competencies and the independence of the judiciary, and their impartiality and integrity.

We noted above that the process of verifying the availability of guarantees of a fair trial—in accordance with international standards—does not start only from the moment a person appears before the judge or the court, but rather starts from the moment of the accused's arrest and/or the deprivation of their freedom. This also applies to the phase of pre-trial detention, which is a temporary detention pending investigation.

Respect for pre-trial rights and the presumption of innocence are necessary precursors to a fair trial. There are additional guarantees that also form the basis of a fair trial, and therefore justice, including:

The right to equality before the law, including the right to be brought before the judiciary; the right to be treated before the courts on an equal basis with others and without discrimination; the right to trial before an independent and impartial court formed according to the law; the right to have the case examined fairly; and the right to be tried in public. There is also the right to defend oneself and the right to the assistance of a lawyer; the right to remain silent; the right not to be compelled to confess guilt; and the right not to be convicted according to statements and evidence extracted from the defendant through the use of torture and other means of ill-treatment or coercion.

Moreover, no law should be applied to the defendant retroactively except if it is in their interest, and their trial should be carried out without undue delay. The defendant also has the right to attend all of their hearings, to summon and debate witnesses, and to have access to all of the documents in their case, and in

a language that he or she understands either in person or through an independent interpreter.

Scholars differ in arranging, framing and presenting the legal guarantees for a fair trial, each from the angle of his/her specialization, and according to their adopted methodology adopted or to the importance they've given to these guarantees or their priority and logical arrangement in the trial process. However, our approach in this report is one that combines brevity and clarity in presenting these guarantees, which requires that we address the content of each of the guarantees of a fair trial without delving into the historical or philosophical background, or the jurisprudential disagreements, behind each of them. This is consistent with the nature and purpose of this study, which focuses mainly on the availability of fair trial guarantees and the extent to which they are respected before the Specialized Criminal Courts in Yemen, based on the practices of these courts.¹⁶

Below we examine the most important rights and legal guarantees that must be upheld in a fair trial.

Thired: Fair trial guarantees at the trial phase

1. Right to equality before the law and before the judiciary

Equality before the law: We noted above that what is meant by equality before the law is that the same laws apply to everyone without exception and without discrimination, in a fair and impartial manner. Respect for this principle requires that people not be discriminated against because of their employment status, social status, or political opinions, or because of their religious believes, color, ethnicity, nationalities, or on any other basis for discrimination.

The right to equality before the law, and equality before the judiciary, is a fundamental guarantee of a fair trial. It is a right secured in most constitutions and legal systems. The UDHR stipulated established this right in its first article,

¹⁶ See regarding the historical and philosophical background for the protection of basic human rights and freedoms, in general, Ahmed Fathi Sorour, Ibid.

stating: "All human beings are born free and equal in dignity and rights." Article 7 of the UDHR further states that, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." The ICCPR decreed this right as an international obligation, stating in Article 26 that, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In the Yemeni Constitution, equality before the law is guaranteed through Article 41: "**Citizens are all equal in rights and duties.**" The same principle was stipulated in the Law on Criminal Procedures, in Article 5, "All the citizens are equal before the law; no person may be pursued, or subjected to any damages due to nationality, race, origin, language, religious belief, occupation, educational level or social standing."

Equality before the judiciary: The right to equality before the law entails another equally important right, which is the right to resort to the judiciary. i.e.: all people in any country have the right to resort to the judiciary, without any discrimination regarding social groups, gender, or citizenship.

The right to resort to the judiciary and equality before it requires that all people be treated equally before the courts. This means that there is a legal duty on judges, public prosecutors, judicial officers, and other law enforcement officials to respect the principle of equality and the prohibition against discrimination, as this forms a part of the guarantee of the integrity and impartiality of the judiciary.

The right to equality before the judiciary also requires that all defendants are subject to the same laws and procedures based on the circumstances of their case. It is prohibited to invent any procedures not provided for by the law or to form extraordinary courts to confront specific cases, unless this is based on

differences in legal positions or based on objective grounds approved and regulated by the law, and unless it does not involve any kind of discrimination.¹⁷

The **right to be brought to the judiciary and to be treated as equal before it**, as a basic guarantee of fair trial, is a right established under international human rights law. The UDHR (Article 8) stipulates that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Article 14.1 of the ICCPR also states that, “All persons shall be equal before the courts and tribunals.” Yemeni laws in turn guaranteed the right to resort to the judiciary and right to equality before it. Constitutional and legal provisions are in place. Article 51 of the Yemeni Constitution stipulates that, “Citizens have the right of recourse to the courts to protect their rights and lawful interests.”¹⁸ Article 2 of the Judicial Authority’s law states that, “Litigants are equal before the courts, regardless of their respective statuses and situations.”

2. Right to trial by a competent, independent and impartial tribunal established by law

One of the basic human rights is the right of a person to be tried before a competent, independent, and impartial court, formed according to the law. This right is an absolute right for which there are no exceptions, and has been a right established under the rules of customary international law that was then reinforced by international human rights law. Therefore, it is binding on all countries, at all times, including times of emergency and armed conflict. According to Article 14.1 of the ICCPR, “everyone shall be entitled to a fair and

¹⁷ Right to equality before the law requires that the law be the same whether when it protects or when it punishes. Since the judiciary is the entity that applies the protection of the law and applies the punishments, it was also necessary to have equality before the judiciary, and this in turn requires not only equality between people in resorting to the judiciary, but also equality between the prosecution and the accused, and giving them the same opportunity to prove or deny the case, which is known as the principle of “equality of arms” before the courts. This principle is based on the Declaration of the rights of Man and Citizens issued after the French Revolution in 1789. See Ahmed Fathi Sorour, *Op. Cit.*, p.704.

¹⁸ It is noticed here that the wording of Article 51 of the Constitution was clearly flawed, and inconsistent with Yemen’s international obligations, as it determined the right of a “citizen” to resort to the judiciary, while “the right to resort to justice” is one of the basic human rights of a citizen, non-citizen, or even stateless person.

public hearing by a competent, independent and impartial tribunal established by law."

In Yemen, the constitution guarantees the right of every person to be tried before a competent court, and A plea that the court lacks jurisdiction in terms of its formation is a plea of public order. The regulation of courts' jurisdiction is governed by the general principles contained in Article 150 of the constitution, which states that: "The judiciary is an integrated system. The law organizes this system in terms of ranks, responsibilities, the terms and procedures of appointment, transfer and promotion of judges, and their other privileges and guarantees. **Extraordinary courts may not be established under any conditions.**" The Judicial Authority's law and Yemeni criminal procedural law have organized the mandate of each court in detail.

The requirement that the **court be competent**¹⁹ means that the case before the court should be within its geographic jurisdiction (based on the geographic location of the crime), its topical jurisdiction (with regard to the type of crime), and personal (in view of the person who committed the crime), and that therefore the case should be subject to the jurisdiction of the ordinary judiciary and the guarantees stipulated in the constitution and the law.

As for what it means for the **court to be impartial**: the judges or public prosecutors, and everyone who has influence on the course of the trial, must not have any interest or involvement in the case before them, or any prejudice regarding it. They should not act in a way that serves one of the parties to the case. If this occurs, based on reasonable grounds of doubt, the judge must be removed from the case if they do not voluntarily withdraw.

As for the **independence of the court**: the judge(s) must be free to hear the case presented to them in an independent and impartial manner. The judge(s) has total freedom to extract the rule of law as dictated by their conscience, based on established and confirmed facts and in accordance with the law, without any direct or indirect interference from any parties or persons at any stage of the

¹⁹ See court mandates in Yemen, second chapter of the first section in the Law on Judicial Authority, number 1/1991; articles 231-237 of criminal procedures law.

trial. The independence of the judiciary also requires that the primary criterion in selecting judges is their personal competence and integrity.

Among the basic principles and standards required by international instruments and treaties to guarantee the integrity and independence of the judiciary is the **principle of separation of powers**, which provides constitutional protection for judges from the interference of the executive and legislative authorities. This principle has already been discussed above as one of the basic assumptions of a fair trial. The independence of the judiciary cannot be achieved without **judges feeling that their job security is not subject to their decisions as a judge**. Rather, it is critical that judges only be dismissed or held accountable based on strict criteria determined by the law. In addition to that, the independence of the judiciary requires a guarantee of a **dignified standard of living for the judges** (through the adequacy of their salaries and other benefits associated with their jobs, both while they remain in service or after they retire).

International standards relating to the independence and integrity of the judiciary, as already mentioned, require that persons appointed to the judiciary be selected based on their merits and personal competence, legal qualifications, experience and integrity. Decisions to promote judges must be based on objective considerations and reasons, including their competence, integrity and experience. Moreover, the appointment or promotion of judges shall not be discriminatory for any reason whatsoever, and women shall have full access to the judiciary.

Above all, international standards hold that in order for a judiciary to be independent and have integrity, the body responsible for appointing, promoting, transferring, and disciplining judges be independent of the executive authority, both in its composition and in its operation. It should be based on balance, so that judges form the majority of its members. The procedures for appointment, promotion, discipline and transfer shall be clear and transparent.²⁰

It should be noted here, that all of the above regarding the independence, integrity and impartiality of judges also applies to members of the Public

²⁰ See, regarding independence of the judiciary, Basic Principles of the Independence of the Judiciary, adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Prosecution Office, since the Public Prosecution is a body of the judicial authority in accordance with the Constitution.²¹

Finally, the trial of any person cannot be described as **fair** if the court before which he is being tried was not **formed according to the law**, whether by a general constitutional rule, or according to the provisions of the laws in force. The court should not be formed in response to a specific violation of law, so as to ensure that persons are not tried before special or extraordinary courts that are not subject to judicial oversight and that do not abide by the principles and standards required by law.

3. Right to have a fair and public trial in the presence of the defendant

Fair and impartial trial: the trial cannot be fair unless judges view the accused (or litigants in civil cases) and the facts, procedures and evidence with **fairness**, and unless they refrain from being influenced by emotions and whims or by political and social affiliations. They are required to have a spirit of integrity and impartiality. It is a basic premise and assumption of a fair trial that the judiciary and judges be fair.

Fairness requires that the defendant be **treated as innocent until proven guilty** by a final ruling. Fairness also requires that the rights of the accused to defend themselves and their right to a lawyer be respected, and that the trial takes place without undue delay. The guarantees relating to the right to the presumption of innocence, the right to defense, and the right to trial without delay will be described in more detail later in the study.

In order for the court to meet requirements of **integrity and impartiality**, it must separate, during the consideration of a single case, between the functions of the criminal justice system (that is, the separation between the judicial procedures and the judiciary) and between the functions of the Public Prosecution and the functions of judges (i.e., the Public Prosecution initiates the criminal case based on its investigations and evidence gathered against the defendant). Separately, the court must also search for the absolute truth and adjudicate the criminal

²¹ Article 149, Yemeni Constitution, and Article 1, Judicial Authority Law.

case in light of what it has found, so that it either reaches the decision of conviction if it has judicial certainty that the accused has committed the crime, or it rules innocence if there is any doubt as to the guilt of the defendant.²² The aim of all this is to ensure that the fate of the defendant is not entrusted to one party or to one person who becomes the opponent and the arbiter at the same time.

Public hearing: The right to a **public hearing** is a fundamental guarantee of justice and integral to the integrity of judges. In addition, public trials are an important way to inform the public about proceedings, which enhances people's confidence in the justice system and governance in general.

This right to a public hearing is established in international human rights law, in accordance with Article 14.1 of the ICCPR,²³ and is also established in the Yemeni Constitution under Article 154, which states that "Court sittings are open to the public unless a court determines, for reasons of security or general morals, to hold sessions behind closed doors. In all cases, verdicts are announced in an open session." This is also confirmed through Article 5.A of the Judicial Authority Law, which used the language from the constitution to establish the right to a public hearing. It is also repeated in the Criminal Procedures Law (Article 263) and the Court Procedures Law (Article 23.A).

The right to public hearings requires that the court hold all of its hearings—including the verdict—in public, except where the law permits for court hearings to be closed to the public in some exceptional cases, where required for specific circumstances that the law determines, or where a judge decides so as a matter of discretion that is permitted by the law. In other words, **the general rule is that hearings should be publicly**, but this rule is subject to important exceptions that are specified by the law, or by the discretion of the judge. If a public trial would be in conflict with considerations of public order, morals, national security,

²² See, regarding impartiality of the judiciary in general, Ahmed Fathi Sorour, *Op. Cit.*, p. 655 and after.

²³ ICCPR Article 14.1 states that, "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

protection of privacy, or protection of children or minors, etc., it may be closed to the public. However, sentencing sessions must always be public.

The Yemeni law on Criminal Procedures contains all provisions **related to the principle of public hearings** under Article 263, which states:

- 1- The sessions of the Court must be open to the public, unless the Court decides that some or all of the trial shall be closed, be attended only by those who are related to charges, for security and order, or for the maintenance of proper public conduct, or for fear of revealing confidential matters on the private lives of the Parties to charges, or in the case of widespread plagues and other communicable diseases. The Court can also prevent minors and people of improper appearance that undermines the prestige of the Court.
- 2- The public may be allowed to enter the Courtroom to the extent that the status permits accordingly.
- 3- Public Hearings are regarded as an important guaranty for insuring that justice proceeds properly.
- 4- In all cases the announcement of the verdict/ ruling must be made in a session open to the public.

Trial in the presence of the defendant: A fair trial requires that the hearings be held in the presence of the defendant, so that he can be fully aware of the charges against him, and all the legal measures being taken against him, by hearing the pleadings of the prosecution, the defense arguments, and the witness testimony and so that he can subsequently refute them. It also requires that the oral pleadings of the parties to the case take place in the presence of the public, including the press and the media, on issues that are of concern to the public. In order for the trial to be achieved in an optimal manner, the court must announce the date and place of the hearings to the parties to the case and to the public. This should be done taking into account the specific circumstances of each case, and done in a manner that ensures that the public trial does not obstruct the progress of the proceedings or harm the parties to the case. The right of the accused, or rather his duty, to attend their trial, is guaranteed by Yemeni law, under Article 315.1 of the Criminal Procedures Law, which requires that the accused attend the trial himself, though the court may accept the

presence of his representative on his behalf in crimes that are punishable by a fine only. Also, Article 349 of the Criminal Procedures Law prohibits the removal of the defendant from the courtroom unless they have “acted disorderly.”

4. Right of the presumption of innocence

The natural order of things is the rule of permissibility, and the natural assumption is that human beings should be void of responsibility towards other persons, and innocent of any and all guilt or crime against others. Those who claim the contrary—that one is guilty—have the responsibility to prove their claim, and to provide strong evidence that leave no doubt as to the accused’s guilt. Hence the saying, **“the defendant is innocent until proven guilty”**.

Over time, the principle of the “presumption of innocence” has transformed into a fundamental right established by many legal instruments. It is articulated as a human right under Article 11.1 of the UDHR (1948), which stated that, **“everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”** At a later stage, this right was established as a part of international law by the ICCPR (1966) under Article 14.2, **“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”**

The Yemeni Constitution guarantees this right in Article 47, which states “The accused is innocent until proven guilty by a final judicial sentence.” It is also guaranteed by the Criminal Procedures Law, in Article 4: “A suspect person is innocent until his indictment is proven; any doubts are to be interpreted in favor of the accused; no punishment may be ruled only after a trial executed in accordance with this law, where in the freedom [right] of defense shall be maintained.”

Accordingly, respect for this right requires that every accused person, both before and during the trial, be treated as innocent until the verdict is issued and becomes final in accordance with the law. This is one aspect of the right to a fair trial that is an absolute right with no exceptions, meaning that it must be

respected at all times, including at times of war and during other exceptional circumstances.

Respecting the right to the presumption of innocence also entails that the burden of proof—at all stages of a criminal trial—falls on the prosecutor. There should be no doubt that the accusation is proven against the accused if the court decides to convict him, and doubt must always interpreted in the interest of the accused.

5. Protecting the right of the defendant to remain silent and against self-incrimination

The right of the accused to remain silent and against self-incrimination: It is inconceivable for the accused to be coerced to confess guilt before the court. As such, the right to remain silent and not to be compelled to confess guilt are two of the basic rights and guarantees that must be respected in the pre-trial stage. This should be confirmed at the trial stage to free the defendant of fear that may have affected their statements at the pre-trial stage. **Consequently, the court must exclude any confession or admission of guilt, or any statements or evidence that incriminate the defendant, if it is proven to the judge that this was done through coercion. The form of coercion here is irrelevant, be it direct or indirect, physical or psychological, including subjection to torture or other forms of ill-treatment, inhuman or degrading treatment.**

Respect for this right also requires that in cases where the accused claims before the court that his admission of guilt was done under torture or other means of duress, the judge must verify the seriousness of this claim, and the prosecutor has the burden of proving that the accused made his statements voluntarily and without duress or coercion.

Moreover, it is the right of the accused to remain silent, and the court must not deduce from their silence any evidence of guilt. No judicial penalties shall be imposed on the defendant to compel him to speak, because this is a violation of his right to be presumed innocent, which includes the right to silence and the right against self-incrimination.

The right to remain silent and against self-incrimination as part of the guarantees of a fair trial is a right established in international human rights law, as stipulated in the ICCPR under Article 14.3, which states that “in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality [...] (g) Not to be compelled to testify against himself or to confess guilt.”

The Yemeni legislator has emphasized the right of the accused to remain silent, and against self-incrimination, through providing strict protection by means of a constitutional guarantee under Article 48.b: “The person whose freedom is restricted has the right not to answer any questions in the absence of his lawyer.” Article 6 of the Criminal Procedures Law provides the same protection: **“The torture of any person convicted or charged is prohibited, as well as inhumane treatment, or cause of bodily harm, or harm to morale, for the sake of obtaining an admission of guilt; any statement proven to have been committed by the accused, or any witnesses, under duress through any of these acts, shall be annulled and will not be relied upon accordingly.”** The right was further confirmed under articles 71 and 178 of the Criminal Procedures Law.

The **defendant's right to remain silent** is one of the rights of the accused **before the court**, emanating from his right to defend himself. This is established by Yemeni Criminal Procedures Law, indirectly under Article 361, which states, “If the defendant is prevented from answering, or if his testimony at the hearing conflicting with his testimony in the Minutes [Report] of testimonial evidence and the Minutes [Report] of the investigation, the Court can order the recital of his initial statements.” Further, Article 363 states that, “the defendant may not be subjected to torture, if he refuses to respond to any of the questions that are directed to him.” The Yemeni Criminal Procedures Law has also established the right of the accused to remain silent and against coercion to answer before the Public Prosecution under Article 178, which states that, “The suspect may not be sworn in the legal oath, nor may he be compelled to respond to a question, nor shall his refusal to answer be considered as evidence against him proving his indictment.” As such, the court should provide the defendant with these same rights.

Nulling evidence that has been extracted through coercion or torture: Where the accused's rights to remain silent and against self-incrimination has been violated, the court shall order any admission of guilt, or any statements, evidence or presumptions incriminating the accused, extracted through coercion to be null. It is irrelevant if the coercion was direct or indirect, physical or psychological, or through the use of torture or other forms of inhumane or degrading treatment. This means that the prosecutor must prove the accusation without resorting to means or methods that violate the rights of the accused and that are in accordance with international rules and standards for a fair trial.

All persons benefit from this legal guarantee, regardless of the type or gravity of the charges against which they are tried, and at all times, including times of war and emergency, and in all places under the control of the state inside and outside its national borders.

Moreover, if the defendant claims at any stage of the case before the court that the evidence or confessions were extracted from him under duress, the court must enable him to challenge that and examine the validity of his claim before proceeding with the trial. It should be noted here that torture and other means of coercion and cruel, inhumane or degrading treatment all constitute crimes that are not subject to the statute of limitations and are punishable by national and international laws.²⁴

The prohibition against coercion, physical and psychological torture, and all forms of ill-treatment as a means to coerce the accused into confessing is established in international human rights law and the Yemeni legal system. Both Article 5 of the UDHR and Article 7 of the ICCPR state that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The prohibition against torture and other forms of inhumane treatment as a means of obtaining confessions in front of official bodies was confirmed by CAT under Article 15, which states that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not

²⁴ See the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987; See also the Torture prohibition guidelines, Mwatana for Human Rights, Sanaa, 2019 [in Arabic].

be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”²⁵

The prohibition against torture and all that ensues from it is also stipulated in the Yemeni Constitution. Article 48.b states that “Any person whose freedom is restricted in any way must have his dignity protected. Physical and psychological torture is prohibited. Forcing confessions during investigations is forbidden.” Article 6 of the Law on Criminal Procedures also states that, “The torture of any person convicted or charged is prohibited, as well as inhumane treatment, or cause of bodily harm, or harm to morale, for the sake of obtaining an admission of guilt; any statement proven to have been committed by the accused, or any witnesses, under duress through any of these acts, shall be annulled and will not be relied upon accordingly.”

Above all, the prohibition of torture is a non-derogable human right, and is therefore not permissible under any circumstances.

Torture is also a serious crime that is not subject to a statute of limitations, meaning that its perpetrators remain vulnerable to punishment, even in the event of war or the threat of war, political instability, or internal armed conflicts. It is not acceptable to invoke defenses such as necessity, self-defense, protection, combating terrorism, fulfilling an order from a superior, or other defenses, to justify torture or ill-treatment.²⁶

Finally, it should be noted that the Yemeni Constitution, in addition to prohibiting torture under Article 48.b, also states under Article 48.E that, “The law shall determine the punishment for whosoever violates any of the stipulations of this Article and it shall also determine the appropriate compensation for any harm the person suffers as a result of such a violation. Physical or psychological torture at the time of arrest, detention or jail is a crime that cannot be prescribable. All those who practice, order, or participate in executing, physical or psychological torture shall be punished.” The Yemeni Penal Code, per Article 166, details the penalties imposed on those who commit the crime of torture, stating that, “Any public employee who tortures or uses force, by himself or

²⁵ the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (CAT, Article 1, Op. Cit.)

²⁶ See CAT, Articles 2 and 4.

through others while carrying out his job, with any suspect or witness or expert, in order to force him to confess to a crime or give testimony or relevant information thereof, without prejudice to the right of the victim thereof to the right of retribution [qisas] or Blood Money or Liable Injuries Compensation, shall be subject to a maximum imprisonment of ten years.”

6. Prohibition against ex post facto criminal law (i.e., the retroactive application of criminal law) and against double jeopardy (i.e., being tried more than once on the same charges)

The principle against ex post facto law: A crime is a person’s intentionally doing or abstaining from an act that is prohibited by law. This is what is known as the principle of “criminal legality,” meaning that there is neither crime nor punishment unless it is criminalized by a provision in the law. This principle is linked to the general principle that the nature of things is permissibility and that criminalization is an exception necessary to preserve the interests of individuals and society.

The principle of criminal legality requires that **criminal law not be applied to any act that at the time of its commission did not constitute a crime in accordance with national or international law, which is known as the principle of non-retroactivity of criminal law**, or the non-application of criminal law retroactively. This is one of the basic guarantees of a fair trial, guaranteed through most legal regime ; and is one of the basic principles of human rights. It is stated in the UDHR (Article 11.2), as well as in the ICCPR (Article 15). As such, it is a human right. The Yemeni Constitution also enshrines this right through Article 47, which states that “No crime or punishment shall be undertaken without a provision in the Shari’ah or the law. The accused is innocent until proven guilty by a final judicial sentence, and no law may be enacted to put a person to trial for acts committed retroactively.” The Yemeni Penal Code also states in Article 2, “Criminal Liability is personal and any crime and punishment must be defined by law as such.”

It should be noted here that the guarantee related to the human right not to apply law retroactively is an absolute legal right that must be respected at all times, including during times of war, emergency situations, and other exceptional circumstances.

Likewise, the right against ex post facto law, applies to both crimes and penalties. This means that if the law changes and the punishment for the crime committed in the new law becomes more severe than the punishment that was specified at the time the crime was committed, only the old penalty that was in force at the time of the crime is applied to the accused. The accused benefits from any new legal situation that is in their best interest, per the principle of applying the law in the best interest of the accused. If a new law removes the criminalization from the act and the act becomes permissible, or reduces the punishment imposed on it, then this applies in the case of the accused and he benefits from it.

The right against double jeopardy: The right of a person not to be tried or punished twice for the same crime or its component acts is established domestically and internationally. The ICCPR (Article 14.7) states “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” The Yemeni legislator did not see a need to expressly stipulate this right as it is contrary to justice and logic for a person to be tried or to be punished for the same acts more than once. This is assuming that the procedures for his original trial met all necessary legal standards and guarantees, were completed to their end, and a judgment of guilt or innocence was passed.

We must distinguish here between the right not to prosecute the person for the same crime twice (which is prohibited) and reopening the case file with the emergence of new facts or evidence, which were not under consideration by the court during the original proceedings, granted that this would affect the case or its judgment. This is permissible and even required and is required by a fair trial.

Finally, as an exception to the general principle, international rules stipulate that a retrial before an international criminal court is not considered a violation of the principle against double jeopardy in the following cases²⁷:

- If the act committed by the accused constitutes a serious crime within the jurisdiction of the International Criminal Court (genocide, crimes against humanity, war crimes), while the accused was tried before national courts on the basis that his act, even if it was criminal, does not constitute one of these crimes.

²⁷ See article 20 of the ICC statute.

- If standards for a fair trial before the national court are violated, or if the trial is mock trial and aims to protect the accused from international criminal accountability.
- If it is clear that the National Court did not give the case, given its seriousness, enough concern and due diligence.

We must stress here that the opposite is not permissible (i.e., it is not possible to bring any person who has been tried before the International Criminal Court in which a judgment has been passed against him in relation to certain acts, to national courts of his country to be tried on the same acts again.²⁸

7. Right to a trial without undue delay

An important safeguard of the right to a fair trial is that the accused be tried without undue delay after the case is transferred to the court. The trial procedures should begin and end within a reasonable period of time (taking into account all other rights of the accused, including their right to a sufficient amount of time to prepare their defense). This is because an extended period of time may negatively affect the position of the accused, as the details of the incident subject to trial may vanish from the memory of witnesses, or witnesses may become hard to find to be brought before the court, or other evidence may be destroyed or disappeared.

This right is guaranteed through Article 14.3 of the ICCPR, stating that, “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (c) To be tried without undue delay.” This is also explicitly stated in Yemeni law, under Article 268 of the Criminal Procedures Law, which states that “The review of the penal charges shall be done in continuous sequential sessions until the trial is completed unless the conditions of the case justify or necessitate the suspension or postponement thereof, in the conditions stipulated for in the Law.” The Yemeni Judiciary Law (Article 111.b and c) rendered that delay in deciding lawsuits, and the repeated failure of a judge to attend court sessions without an acceptable excuse, is a violation of the law that deserves disciplinary measures, as this constitutes a breach of the duties of the role of a judge.

The aim of the right to trial without undue delay is to shorten the period of anxiety that the accused endures, fearing for his fate and the suffering that he,

²⁸ See in general Amnesty International’s Guidelines to Fair Trial, 2nd Edition [Arabic], London: 2014.

his family and friends endure, as a result of being accused of a crime of which he may be innocent. Therefore, every delay in the trial procedures presumably causes harm to the defendant, and it is not his duty to prove this harm. Instead, the competent authorities must provide an acceptable explanation of the reasons for the failure to complete the trial procedures within a reasonable period.

The "reasonable period of time" is estimated according to the circumstances of each case separately. Among the elements that are to be taken into account are: the degree of complexity of the case; the behavior and health of the accused; the behavior of the authorities; and the seriousness of the charges and the possible penalties. Slowness resulting from the poor organization of the justice system, a lack of resources and capabilities, a lack of judges, and consequently an accumulation of cases, are considered an unjustified delay.

8. Right of the defendant to defend himself in person or through a legal counsel

Right to defense: The right of the accused to defend himself is a basic pillar of fair trial. The right to defense is the main means to guarantee and protect the other rights established by law for those accused in criminal cases, and therefore it cannot be said that justice is done under conditions that violate the right to defense.

The right of the accused to defend himself before the court, in person or by legal counsel is established by the UDHR, which states in Article 11.1 that, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." This right was also established as international law under ICCPR's article 14.3: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

In Yemen, the right to defense is a constitutional principle. Article 49 of the Yemeni Constitution states that, "The right to defend oneself in person or by representation is guaranteed during all periods of investigation and in front of all

courts, in accordance with the rules of the law. The state shall guarantee judicial assistance to those who cannot afford it, according to the law.” The right to defense is also one of the main guarantees of fair trial according to the Criminal Procedures Law, which states in Article 4, “a suspect person is innocent until his indictment is proven; any doubts are to be interpreted in favor of the accused; no punishment may be ruled only after a trial executed in accordance with this law, where in the freedom [right] of defense shall be maintained.”

Requirements of the right to defense:

The defendant's right to have access to the case file and his right to remain silent

Legal protection of the right to defense requires enabling the accused to be fully informed of the accusation or charges against him in the statement of the prosecution, and enabling him or his lawyer to have access to the investigation report and every paper or document in his case file, as the accused's knowledge of the accusations against him and all of the details are necessary for an effective defense. If the accused is not familiar with the language of the court or does not understand the language in which all or some of the case documents are written, he may seek the assistance of a certified translator, and the court's refusal to answer the accused or his lawyer regarding the right to view a case file and obtain a copy of it, or provide him with an interpreter, is a breach of the right to defense.²⁹

The accused, upon his appearance before the judge, has the right to remain silent without having his silence be considered evidence of his admission of the accusation(s) directed against him.³⁰ He has the right to discuss all of the

²⁹ This is based on Article 314 of the Criminal Procedures law, stating that, “The litigants have the right to review the papers of charges/charges by themselves, or through their attorneys, once they have been notified of the summons to be present in court”. Although the right of defense necessarily requires enabling the accused or his lawyer to have access to the case file in full, and this requires that the accused obtain a copy of the case file, the Yemeni Criminal Procedures Law is devoid of any provision on the right of the accused or his lawyer to obtain a complete copy of the case file, and this is a serious loophole that must be addressed in order for Yemeni procedural law to comply with Yemen's obligations under international human rights law. See: Ahmed Mohamed Al-Gandabi, Basic rights of the defendant during the trial phase, published on the Public Prosecution's office website, p. 29 [in Arabic].

³⁰ We stated above that the right of the accused to remain silent before the court branches out of his right to defense. This right is stated in the Constitution, in Article 48.B, stating that, “The person whose freedom is restricted has the right not to answer any questions in the absence of his lawyer”. Criminal Procedures law confirmed this through Article 6, “The torture of any person convicted or charged is prohibited, as well as inhumane treatment, or cause of bodily harm, or harm to morale, for the sake of obtaining an admission of guilt; any statement proven to have been committed by the accused, or any witnesses, under duress through any of these acts, shall be annulled and will not be relied upon accordingly.” Then again in Article 71 and 178, and indirectly in Article 361 stating that, “If the defendant is prevented from answering, or if his testimony at the hearing conflicting with his testimony in the Minutes [Report] of testimonial evidence and the Minutes [Report] of the investigation, the Court can order the recital of his initial statements.” And Article 363 states that, “The defendant may not be subjected to torture, if he refuses to respond to any of the questions that are directed to him, or if he responds to them incorrectly, as this is considered to be a denial, after which the truth is bound to be heard”. Article

contents of the accusation orally before the court, and to present any papers or documents to refute the accusation against him, but the court has no right to convert the discussion into a detailed questioning that may harm his position, unless he accepts this (Article 274.1 of the Criminal Procedures Law). It is the right of the accused to request the hearing be postponed to prepare his defense and to be given sufficient time to do so. The court has the right to answer him per his request as long as the request is legally justified, otherwise the refusal of this request will be considered, as previously mentioned, a breach of the right of defense.

Right to legal counsel: According to the right to defense, the accused can defend himself *pro se* (i.e. without an attorney) or through an efficient and specialized lawyer. This applies to all stages of the case, including during detention and preliminary investigation, and before and during the start of the trial, and at all stages of the appeal. Therefore, the right to seek the assistance of a lawyer is the first and most important of the rights that the accused should be informed of immediately upon arrest. This right is established by Article 48.b of the constitution, and its content is detailed according to Article 9.1 of the Criminal Procedures Law, which states that, “The right of defense is guaranteed and the accused is entitled to carry on his own defense, as well as he is entitled to be assisted by a representative to defend him, in any of the stages of the procedures of handling criminal cases, including the investigation period. The government must provide for the poor and hard pressed a defense lawyer from the accredited lawyers. The Council of Ministers, based on the recommendations of the Minister of Justice shall issue procedural rules for the regulation of the provision of defense lawyers for the poor and misfortunate”.

Given that the defendant’s relationship with his lawyer must be based on trust and credibility, the accused has the right, as a general rule, to choose the lawyer who will defend him, noting that this does not nullify his inherent right to defend himself on his own. However, the right of the accused to seek the assistance of a lawyer is not absolute, and it may be restricted if he is not in the interest of justice, and for example the right of the accused to choose his lawyer may be restricted, and another lawyer appointed by the court may be assigned to him, if

178 is also relevant, “The suspect may not be sworn in the legal oath, nor may he be compelled to respond to a question, nor shall his refusal to answer be considered as evidence against him proving his indictment”. As such, these rights should be guaranteed before the court. Review what we stated above concerning the right to remain silent and not to be coerced to confession.

the chosen lawyer does not abide by the ethics of the profession, or he refuses to comply with court procedures.³¹

If the accused does not choose a lawyer to defend him, the court may, depending on the circumstances of each case separately, assign him a lawyer to defend him at the expense of the state. The assignment of a lawyer may become obligatory in some cases if the interests of justice so require, depending on the seriousness of the crime, the potential penalty, the complexity of the procedures, or due to other reasons. The right for the accused to be represented by a lawyer remains valid whether the accused appears in person before the court or not.

Right to have contact with legal counsel: The defendant's right to choose a lawyer whom he trusts to defend him includes the right to meet or contact this lawyer in privacy. This right is guaranteed in the Yemeni Criminal Procedures Law, albeit indirectly, according to Article 180 which states, "The defense attorney may be allowed to look at the investigation the day before the interrogation or the confrontation, unless the investigator decides otherwise. In all cases the defendant and his lawyer attending with him during the investigation may not be separated." **However, the Yemeni legislator is criticized for not explicitly stipulating the right of the accused to contact a lawyer with confidentiality and privacy.** The absence of such a provision causes many practical problems where lawyers are forcibly prevented from contacting their clients, whether in police departments or before the prosecution and the court. The legislator should amend this to achieve compatibility between Yemeni law and international law with regards to fair trial guarantees.³²

If the accused was interviewed with his lawyer in front of the authorities, but without hearing their voices, does not contradict the defendant's right to meet his lawyer in a privacy context. This means that everything that violates privacy, such as wiretapping or otherwise intercepting the accused's interviews, calls, or other correspondence with their lawyer is considered unlawful and therefore is not suitable evidence against the accused. The same applies to the use of documents or secrets that the accused delivered to their lawyer or to a technical expert, which may not be seized, which is provided under Article 154 of the Yemeni Criminal Procedures Law.

³¹ For more on the guarantees of the right to defense and how it plays out in the Egyptian judicial system, see: Ahmed Fathi Sorour, *Op. Cit.*, p.739.

³²See: Ahmed Mohamed Al-Gandabi, *Op. Cit.* p.34.

It should be noted that if the use of a lawyer is one of the rights established by national and international law for criminal suspects, then it is the right of such lawyers—whether chosen by the accused or appointed by the court—to have all of their rights respected by the relevant authorities at every stage of procedures. It is the responsibility of the state, as a positive obligation, to protect lawyers from acts of threats or intimidation to which they may be exposed as a result of carrying out their duties as a lawyer.

Right of the defendant to call negation witnesses and discuss proof witnesses: In criminal cases, witness testimony is of great importance due to its crucial role in proving or denying the charges at hand. Therefore, one of the guarantees of a fair trial is that every defendant has the right to summon witnesses for their defense before the court, and the right to discuss the proof witnesses himself or through his lawyer. The defendant is given the opportunity and sufficient time that was granted to the prosecution representative in order to achieve balance and equal opportunities between the prosecution and the defense in order to reach the disclosure of the truth, whether it is in the interest of the accused or against him.

The defendant's right to call and debate witnesses is part of their right to defense. The discussion with and questioning of witnesses (which should, as a rule, take place in a public session attended by the accused) provides the court with the opportunity to hear the evidence and any arguments against it, and to test the credibility of the witnesses, all of which serves the court's purpose in reaching the truth and achieving justice.

This right is guaranteed under international human rights law, through Article 14.3 of the ICCPR, which states: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) 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". This is also guaranteed in Yemeni law through the Criminal Procedures Law, albeit indirectly, through Articles 165, 166, 170. Hearing the defendant's and the prosecution's witnesses is a necessity for the court. Article 264 of the Criminal Procedures Law states that, "The trial proceedings in Court shall be oral and the Court, in reviewing the case, shall look by itself directly for the evidence; it can question the suspect, the victim, [and] the witnesses."

The aim of the right of the accused to speak with and question witnesses, either themselves or through others, is to reach the truth and to achieve justice. The

court may restrict this right if it is in the interest of justice or if it ensures that the proceedings of the case are not obstructed, or when required to protect the witnesses themselves from retaliation. However, the court should not impose such restrictions except as necessary and to the extent required by each case separately, and they must not conflict with the accused's other rights that are required by a fair trial.

We conclude that protecting the right of the accused to defend themselves is a basic guarantee of a fair trial, and a breach of this right will result in the nullity of the trial.

Section two

Trial before ordinary and extraordinary courts

This section has two chapters:

Chapter 1: Ordinary and extraordinary courts

Chapter 2: Guarantees of fair trial in extraordinary conditions

Section Two: Trial before ordinary and extraordinary courts

First word:

As stated above, when talking about the basic requirements for the establishment of justice, the principle of the independence of the judiciary is a prerequisite for the application of the rule of law. It is not possible to talk about an honest judiciary and a fair trial without respecting the independence of the judiciary.

We also stated above that the administration of justice in any society requires that all people be equal before the law, which entails equality before the judiciary and the courts. Additionally, the guarantees of a fair trial cannot be achieved in a country where the judiciary is not an independent, impartial authority that is only subject to the higher authority of the law, and in which citizens don't accept the principle of accountability and punishment for violating the law. Hence, the independence of the judiciary is an effective guarantee for putting the principle of the rule of law into practice.

In the first section, we dealt with the basic guarantees for a fair trial in international human rights law and Yemeni law, and in this next section we describe how these guarantees are applied before ordinary and extraordinary courts, describing the judiciary, in all cases, as the natural guardian of rights and freedoms.

We will deal with the content of both the ordinary judiciary and the extraordinary judiciary in the first chapter, and then explain the legal guarantees for a fair trial in exceptional circumstances in the second chapter.

Chapter 1: Ordinary and Extraordinary Courts

First: Ordinary courts

1. The concept of ordinary courts

The principle of equality before the law implies that all people—under the jurisdiction of the state—are equal in their right to access the judiciary and have equality before it. The principle of equality before the law also means that all persons must be represented and tried without discrimination before the judiciary, and are subject to the same substantive and procedural laws. To affirm the judiciary's independence and impartiality, the judge's jurisdiction over the case should not be subject to any authority other than the authority of the law. The judiciary, in this sense, is what is known procedurally as an ordinary court.³³

An ordinary judiciary is described by Article 5 of the United Nations Basic Principles on the Independence of the Judiciary, which stipulates that “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

2. Characteristics of ordinary courts

The ordinary or ordinary judiciary is one under which basic guarantees of rights to a fair trial are available to protect the rights of the accused during their appearance before the court. In order for there to be a fair trial at a ordinary court, five conditions must be met:

a. The establishment of the court and its jurisdiction shall be defined by law:

³³ Compare to Ahmed Fathi Sorour, Op. Cit. p. 675. Some define the judiciary as, “the judiciary with general jurisdiction, who is appointed by law in advance, and whose judges are chosen according to the judicial system and in a permanent way, and it has all the constitutional and legal guarantees.” See Mamoun Mohamed Salama, Criminal Procedures in Egyptian Legislation, Vol. 2, 2nd Edition, Dar Al-Nahda AL-Arabia: Cairo, 1996, p. 7 [in Arabic].

We have previously shown that the state's respect for the law is a fundamental assumption is foundational to achieving a fair trial. Therefore, the court before which the accused is tried must be established in accordance with the law. This will be the case if its establishment is based on the constitution directly, or if its basis is founded in a law issued by the legislative authority. As the legislative authority is the only body empowered to define the legal framework that regulates the work of the courts, their jurisdiction, their degrees, and everything related to the performance of their functions.

It follows that the executive authority may not establish any extraordinary court—unless in a state of emergency—or any court having parallel jurisdiction to the court of original jurisdiction.³⁴

International human rights law obliges states to establish courts according to the law. Article 14.1 of the ICCPR states that, "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." This right is also guaranteed through the Yemeni Constitution, in Article 150, "The judiciary is an integrated system. The law organizes this system in terms of ranks, responsibilities, the terms and procedures of appointment, transfer and promotion of judges, and their other privileges and guarantees. Extraordinary courts may not be established under any conditions." The Judiciary's law confirmed this in Article 1, which repeated the text from the Constitution Verbatim. Also Article 9 confirmed the principle of the unity of the judiciary, and its general jurisdiction/mandate, as it states that, "Courts are judicial bodies concerned with all disputes and crimes, and the law specifies the subject and territorial jurisdiction of the courts."

b. The court must be permanent, not temporary, and should not be restricted by special rules

The court shall be permanent, if established according to the law, so that its existence and jurisdiction are known to all before referring the accused to trial. Its existence shouldn't be linked to any specific temporal restriction, whether

³⁴ See Ahmed Fathi Sorour, Op. Cit, p. 679 and after it .

related to a specific period or related to temporary circumstances such as war, or other states of emergencies or internal crises.

c. The court must be subject to normal litigation procedures

The court cannot be considered an ordinary court if the litigation procedures before it differ from the general procedures for litigation specified under the general law for criminal procedures at any stage of the proceedings. Therefore, every court with special procedures, such as emergency courts and state security courts, are excluded from consideration as an ordinary judiciary.

d. Judges on the court shall be appointed from the judiciary members and not from outside it

An ordinary judge is a judge who is qualified, trained, and appointed to the position of the judiciary in accordance with the law of the judicial authority, and who enjoys the guarantee of non-dismissal. In other words, it would not be an ordinary court unless the court is composed, in its entirety, of qualified judges specializing in judicial work and devoted to it, and they provide guarantees of independence, impartiality and impossibility of dismissal except in cases specified in the law..

e. The court respects the basic rights and guarantees of the defendant and the right to appeal decisions

To be facing a court within the ordinary judicial system, litigants before this court must have the right to enjoy basic guarantees of a fair trial, foremost of which is the right to defend oneself in an effective manner, and to be able to appeal to higher courts. This is in order to monitor the extent to which the accused's rights are respected and to ascertain the correctness in the application of the law to the facts of the case.³⁵ Based on this, it is not considered an ordinary judiciary when the court issues final rulings in the absence of multiple degrees of litigation, so that its rulings cannot be appealed through the ordinary and extraordinary methods of appeal.

³⁵ Compare with Fathi Wali, *The Waseet in the Judicial law*, Dar Al-Nahda Al-Arabia: Cairo, 1993, p. 658.

Based on all of this, the ordinary judiciary is a basic guarantee of justice, in that it provides reassurances to individuals by providing an established set of rules and laws that regulate their relations with other individuals and with official authorities and bodies, and ensures that these laws will be applied equally to the opposing side, even where it is the state.

It should be noted here that some types of courts raise controversies as to whether they are considered a form of ordinary judiciary, or whether they are courts of a special nature and do not fall within its framework. We will present two of these to demonstrate their nature.

3. Specialized courts

Specialized courts are courts that specialize in a specific type of case, or specialize in trying people who may have a particular legal status. Some call these courts "courts of special jurisdiction" because their jurisdiction is restricted only certain crimes or categories of defendants.³⁶

International instruments and treaties do not explicitly prohibit the establishment of this type of court. Rather, these courts may be required in certain instances in view of the advantages that may be achieved by specialization, such as with juvenile courts, commercial courts, administrative courts and others.

According to international standards, these courts must be established in accordance with the law, be independent and impartial, and not be based in any kind of discrimination. They must also respect the principle of equality before the law, equality before the courts, and all other rights and guarantees required by a fair trial.³⁷

Specialized courts, in the sense that we have referred to, are part of the ordinary judiciary. They are not considered a parallel judiciary, as is the case in the special and extraordinary courts, which are similar to the specialized courts in that they

³⁶ According to this viewpoint, the courts with special jurisdiction are considered a kind of ordinary judiciary in relation to the accused or to crimes within their jurisdiction other than the state of emergency. Military tribunals are better able to consider military crimes, and juveniles requires a court with a special composition that understands the nature of the child. See: Ahmed Fathi Sorour, *Op. Cit.* p. 681.

³⁷ See generally Al, *Guidelines to fair trial*, *Op. Cit.*

are both established to try a certain class of people for a specific type of crime that the legislator appreciates its seriousness, but which are subject to laws and procedures of their own. On the other hand, it is assumed that specialized courts are subject to the same substantive and procedural rules to which the courts are subject to in general, and that their rulings are subject to appeal in the same ways as judgments issued by the ordinary courts, and their penalties are also subject to the general rules specified by the Law of Crimes and Penalties.³⁸

It should be noted here that it is not sufficient to describe the court as a "specialized court" just because it is designated as such. Rather, it is necessary to look at its content and practices, so that it can be classified and precisely defined as specialized by the parameters described above, or not. This impacts whether it is part of the ordinary judiciary, or whether it may be a special or extraordinary court if, in practice, it differs from the courts of the general judiciary, either in formation or procedures.

4. Special courts

There is a common misunderstanding that conflates special and specialized courts. However, as described above, specialized courts are part of the ordinary judiciary, because they are subject to the same substantive and procedural rules to which the ordinary judiciary is subject. It is assumed that all guarantees and rights related to a fair trial are guaranteed before them. However, special courts are organized differently, both in terms of their establishment and formation and also in the procedures they follow, which makes them a system of courts that is parallel to the ordinary judiciary. This does not undermine their legitimacy if the constitution, in the country within which they exist, allows for their establishment for specific considerations stated in the constitution. In order to eliminate the confusion between special and specialized courts on the one hand, and between these two courts and the extraordinary courts on the other hand, we explain

³⁸ See Abdullah Sai'd Fahid Al-Dawah, *Specialized and extraordinary courts and their influence on the rights of the defendants* [in Arabic], p.90 and after:

below the legal meaning of the term “special courts,” and the extent to which their establishment is permitted under international and national law.

Special courts are defined as the courts established by the state to try special cases or specific crimes, such as crimes of terrorism or crimes related to state security. Many regimes, especially in unstable countries, have been creating this type of court as a means to implement exceptional procedures that may sometimes conflict with fair trial procedures and guarantees.

International rules do not expressly prohibit the establishment of special courts, provided that there is no contradiction between the establishment of this type of court and the right to equality before the law, which in turn entails equality before the courts, which are two basic guarantees of a fair trial. This requires that similar cases be heard according to similar procedures, and it also requires that there be an acceptable objective basis that justifies the establishment of the special courts. Of course, these courts must be established in accordance with the law, prior to referring an individual to them, and they must be independent and impartial. They must not be a mere means of stripping the ordinary courts of their jurisdiction, or a means to implementing exceptional procedures that do not comply with the conditions and standards of a fair trial. The conditions and standards of a fair trial must be guaranteed before the special courts, including rights to a defense. Finally, there must be ways to challenge their rulings before higher courts or tribunals.

Second: Extraordinary judiciary

1. The concept of extraordinary judiciary or extraordinary courts

Extraordinary judiciary or courts are courts established to look into a specific type of crime, or to try a specific class of defendants. In that, they are similar to specialized courts, but they differ from them in that extraordinary courts are temporary courts. They are not usually established by legislative instruments (i.e. the law) by which common law courts are established. They are not subject to the same trial procedures to which the rest of the courts are subject, but rather are subject to exceptional procedures in the various stages of the trial.

Extraordinary courts' judicial bodies are often formed without judges, or non-

judicial elements are included in its composition. Moreover, the crimes and punishments that extraordinary courts handle do not necessarily abide by the rule of legality of crimes and penalties, and their rulings are not subject to ordinary appeal procedures.³⁹

In view of all this, ordinary courts ultimately lead to the denial of the basic guarantees of a fair trial for the accused. Extraordinary courts are thus not considered a kind of ordinary judiciary, rather they are in fact a violation of it, and are a violation of basic human rights, which includes the right to equality before the judiciary and the rights and guarantees associated with it, the most important of which is the right to defense and the right to appeal judgments. This means that every court before which the accused does not enjoy all or some of the legal rights and guarantees encompassed by the ordinary judiciary is by default an extraordinary court.

However, the establishment of extraordinary courts is not expressly prohibited in international law, given that this relates to the sovereignty of each state over its territory and its nationals. But international standards related to fair trial and its guarantees make this type of court unacceptable because it contradicts the requirements of justice as determined by international standards and principles. This is what prompted many countries to prohibit in their constitutions the establishment of extraordinary courts under any circumstance. This is the case in Yemen, in which the Yemeni constitution categorically and explicitly prohibits the establishment of extraordinary courts under Article 150, stating that, "Extraordinary courts may not be established under any conditions".⁴⁰

2. Characteristics of Extraordinary courts

³⁹ Ahmed Fathi Sorour, *Op. Cit.*, p.682.

⁴⁰ Many countries around the world prohibited extraordinary courts in their constitutions, including Egypt (1971 Constitution) in Article 68, stating that, "Each citizen has the right to resort to his ordinary judge". The new Egyptian Constitution (2014) also states in Article 97 that, "litigation is a guaranteed right to all... No one shall be tried except in front of their ordinary judge. Extraordinary courts are prohibited". These courts are also prohibited in the Constitutions of: Belgium, Italy, Germany, and Finland. See Al-Duwah, *Op. Cit.*, p.117.

The exclusion of extraordinary courts from the concept of the ordinary judiciary is justified in most modern constitutions , as they differ from the ordinary courts in several ways, the most important of which are:

A- These courts are temporary and are not established, in most cases, by a law, but rather by resolutions issued by the executive authority or based on its suggestions and in response to its desires.

B - The judges of extraordinary courts—all or some of them—are not appointed by the judiciary and are not qualified in the field of law and judicial work, and do not enjoy—in most cases—the guarantee of job security, which raises doubts regarding their impartiality due to either their subordination to or their connection with the body that appointed them.

C- These courts do not apply the normal procedures followed before the courts of the ordinary judiciary. This means that the defendants before these courts are deprived of basic guarantees to protect their rights, the most important of which is the protection of the right to defense, whether at the stage of arrest, investigation or trial.

D- These courts do not accept civil claims for damages resulting from the crime.

E- The judgments of these courts—or rather their resolutions—are final, meaning that they are not subject to appeal or challenge to their validity by means of an appeals process, which deprives the accused of the guarantee of reviewing his case before a higher judicial body. In other words, the extraordinary judiciary is a non-multi-level judiciary, unlike the ordinary judiciary.

In fact, the authorities or governments have drawn up lists of justification for the establishment of extraordinary courts. To sum up these justifications:

- Confronting exceptional circumstances requires the use of exceptional authorities to preserve the integrity of the state and the safety of society.
- The judicial procedures before the extraordinary courts are characterized by speed and flexibility .
- it is more effective in confronting the threats to the state. The authorities believe it is a way to cope with dangers.

However, everything that was said in justifying the establishment of extraordinary courts does not stand up to sound legal logic, for the following reasons:⁴¹

1- If the theory of necessity lends itself to being the basis for exceptional powers in exceptional times, then this basis must not contradict constitutional legality. The establishment of extraordinary courts violates the first and most important constitutional principle, which is the principle of equality before the law and the consequent equality before the courts. The existence of extraordinary courts creates two sets of laws and two judicial systems, contrary to the judicial system that is laid out in the constitution. This paves the way for the state to implement whichever mechanism it wants on a case-by-case basis, which goes against the principle of equality before the law and what it requires of the unity of the judiciary.

2- It is not true that extraordinary courts are always characterized by the flexibility of procedures and speed in issuing resolutions and judgments. Rather, litigation before them—at least in practice in many countries—takes longer as a result of intentional delays in resolutions in order to keep the accused in detention or pretrial detention for as long as possible.

However, even if we accept that the procedures used by extraordinary courts are characterized by speed and flexibility, hasty trials will not give the accused and their defense counsel sufficient time to prepare their defense. This necessarily leads to a breach of the right of defense, which is essential to a fair trial.

3- If we accept that exceptional circumstances require taking exceptional measures that are faster and argued to be more effective in order to face dangers posed to state security in times of emergencies and crises, then facing these dangers must not take place at the expense of the principle of the rule of law and obligations to respect human rights and fundamental freedoms. This includes absolute rights which may not lose protection under any circumstances,

⁴¹ See in that, Abdullah Saeed Fahd Al-Dawa, *Special and Extraordinary Courts and their Impact on the Rights of the Accused*, previous reference, pp. 118 to 178.

including under circumstances of war, crises and other exceptional circumstances.⁴²

4- Finally, it is not true that establishing extraordinary courts is the only possible way to confront exceptional circumstances. Exceptional and emergency circumstances can be dealt with by establishing special departments within the framework of ordinary courts rather than creating a parallel judiciary. This is what some countries have done in cooperation with the United Nations.⁴³

⁴² See problems of non- extraordinary courts and arguments of their opponents, Magdy Al-Garhi, Guarantees of the defendant at extraordinary courts [in Arabic] p. 122:

⁴³ E.g.: what Cambodia did in cooperation with the UN to try criminals of the civil war. A law was issued for extraordinary courts within the framework of the ordinary judiciary, to look these crimes (2009). Article 33 of the law states that, "The Extraordinary Chambers of the Court ensure that trials are fair and prompt, and that they take place in accordance with established procedures, with full respect for the rights of the accused and the protection of victims and witnesses. If necessary, and if there are gaps in these existing procedures, guidance can be sought in the procedural rules established at the international level.". See: Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia, <https://dspace2.creighton.edu/xmlui/bitstream/handle/10504/46787/4CICLJ25.pdf?sequence=1> Accessed 15 October 2020.

Chapter 2: Fair trial guarantees in exceptional circumstances

First word:

Chapter 1 did show that exceptional circumstances may require taking exceptional measures out of necessity to confront the dangers surrounding the state and society in times of emergency and crisis. Yet, facing these dangers must not take place at the expense of constitutional legitimacy and the rule of law. Compliance with the law requires that states protect human rights and fundamental freedoms even in exceptional circumstances. Under international human rights law, some of these rights are absolute rights that may not be violated under any circumstances, including during war and other emergency situations.

In this chapter, we describe the nature and scope of exceptional circumstances that may change states' obligations, and the minimum legal rights and guarantees for a fair trial that may not be violated under these exceptional circumstances.

First: The nature and scope of exceptional circumstances.

Second: Rights and guarantees that may not be violated or restricted during exceptional circumstance.

First: The nature of exceptional circumstances and their scope

Exceptional circumstances are those that cannot be faced with normal state procedures, due to the development of a state of necessity—that is, the emergence of a sudden danger threatening the integrity, security and stability of the state that require resorting to exceptional measures.

A state of necessity, then, is the legal basis that justifies the state resorting to extraordinary measures to confront exceptional dangers or threats to its existence and security. In order for a state to be considered in a state of necessity, two conditions must be met: first, that there is an immediate or imminent danger that is real and not imagined, and is not only a potential danger that may occur in the future; second, exceptional measures must be the only

means to address this danger. Accordingly, the state of necessity that allows for states to deviate from ordinary legal principles does not arise if the danger can be confronted by resorting to ordinary laws. The validity of the exceptional measures also depends on their proportionality to the degree of danger at hand—the measures taken must not exceed what is necessary, which is known as the condition of proportionality between the danger and the action taken. These conditions are based on two legally recognized principles: that necessity permits prohibitions, and that necessity is assessed in proportion to risk.⁴⁴

In international human rights law, Article 4.1 of the ICCPR provides the conditions for for states to be able to derogate from certain obligations under the Covenant during times of “public emergency,” stating that, “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

This provision sets seven strict threshold conditions, all of which are necessary, under which the state may restrict some of the basic rights and guarantees of individuals that they are obligated to protect under the ICCPR. First, the threat must be exceptional and it is only so if it is involving a grave danger that constitutes a threat to the life of the nation; that the state officially announce it; that the restriction or suspension must not include certain rights; that it be carried out in accordance with the principle of absolute necessity and to the extent necessary and proportionate to meet that necessity; that it is not inconsistent with the state’s obligations under international law; that the exceptional measures are not based on any discrimination; and that the state informs other countries of these measures.

Article 4.2 adds onto Article 4.1 that, “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.” The

⁴⁴ See Ahmed Fathi Sorour, *Op. Cit.*, p. 817.

articles stated relate to absolute rights and guarantees that may not be infringed upon at any time, including during times of war and other exceptional circumstances. We will return to the clarification of these rights when discussing the scope of exceptional circumstances.⁴⁵

The exceptional measures taken by states usually to confront exceptional circumstances have common characteristics, the most important of which are:

- Strengthening and expanding the powers of the police and security services.
- Granting additional powers to the military judiciary.
- Reducing or restricting some rights and freedoms that are protected under normal circumstances.
- Limiting the scope of the rights to fair trial.

Exceptional measures are not to be used only in times of wars and emergency crises, but may also be deployed in times of peace to confront serious threats to internal security such as terrorism, organized crime, drug trafficking, and illicit financial transactions.⁴⁶

Scope of procedures in exceptional circumstances

The existence of the state of necessity and the justifications for resorting to exceptional measures do not imply that the authorities and agencies of the state may not comply with legal restrictions and controls. Rather, the state of necessity and the consequent exceptional circumstances allows for the authorities to expand the range of procedures that they may resort to to face the circumstances at hand. That is, it allows them to shift from ordinary legitimacy to an exceptional and temporary legitimacy. The constitution and the law define the authorities' scope of control, and the judiciary's role is to monitor the extent of the validity of exceptional measures and their impact on public rights and freedoms, that should not be violated under any circumstances.

⁴⁵ The Human Rights Committee stated the minimum standards applicable in times of emergency in detail. No person may be tried and convicted of a criminal offense except before a court of law, and the principle of presumption of innocence must always be respected. The provisions of the Covenant must not, as an exception, derogate from the right to initiate proceedings before a court to decide without delay on the lawfulness of that person's detention. (General Comment 29, CCPR/C/21/Rev.1/Add.11 para. 16; General Comment 32, CCPR/C/GC/32 paras 6 and 59).

⁴⁶ Ahmed Fathi Sorour, Op. Cit. p.815.

The guarantees of the accused in a fair trial are affected, of course, by the exceptional measures taken by the state in emergency circumstances. The judiciary has a role in extending its protection and monitoring the validity of the exceptional procedures taken in light of the extraordinary circumstances as the natural guardian of rights and freedoms in the state. As such, the judiciary acts to balance the requirements of protecting the public interest and maintaining the security of the state and society, and protecting the personal rights and freedoms of its citizens. It is this balance that determines the extent to which rights and freedoms may be infringed upon in emergency situations without overstepping that which is necessary.⁴⁷ For example, if exceptional circumstances (such as in situations of war and other emergency crises) justify the restriction of personal freedom, judicial enforcement agencies are given broader powers to arrest, detain and interrogate the accused, but this must not amount to a total violation of the rights to freedom that the constitution establishes and protects, and the desire to speed up the trial of the accused and issue sentences to punish them under exceptional circumstances. The broader powers granted should also not violate the right to defense, which is a basic right protected by the constitution. This leads us to a discussion of the basic rights and guarantees that may not be circumvented under any circumstances.

Second: Rights and freedoms that should not be violated or restricted under any circumstances

1. Minimum rights of the accused in extraordinary circumstances

According to international human rights law, there are a number of fundamental rights and guarantees established for every person. The state is prohibited from violating these rights and guarantees at all times, including times of wars and crises, which are known as non-derogable rights. These rights constitute an international standard for balancing the public interest and individual rights and freedoms in extraordinary or exceptional circumstances.

⁴⁷ Ibid, p. 821.

Before referring to these rights, it must be pointed out that some principles of the right to a **fair and just trial** are, in and of themselves, rights that may not be violated at any time and under any justification, as described in the legal introduction. This makes these aspects of a fair trial a matter of application as an international obligation, even under exceptional circumstances.

As briefly described in the legal introduction, according to the ICCPR, the basic rights that may not be violated under any circumstances, and violations of which are not subject to a statute of limitations, are:

1. Right to life: All states have a duty to protect the right to life in all circumstances, and under no circumstances should anyone be subjected to arbitrary or extrajudicial execution. States must not condone any such practices and investigate any violations of the human right to life and punish the perpetrators, even in exceptional circumstances and emergency situations that threaten the life of the nation (Article 6).

2. It is impermissible to subject anyone to torture or to cruel, inhuman or degrading treatment or punishment. This prohibition applies at all times, even in cases of emergency threatening the life of the nation, and it constitutes a crime that is not subject to the statute of limitations (Article 7).

The prohibition against torture is one of the requirements of the right to be treated humanely at all times, and it is a right that cannot be suspended or diminished during detention or imprisonment in both ordinary and exceptional circumstances.

3. The prohibition against slavery, human trafficking, and forced labor. This prohibition applies at all times, and states, even in armed conflict and exceptional circumstances, have a legal duty to take all necessary measures to prevent the violation of these rights. States have the duty to investigate the violation, prosecute and punish those found to have committed or participated in them, and to compensate their victims (Article 8).

4. The prohibition against imprisoning anyone merely because of his inability to fulfill a contractual obligation. This is a firm principle in all legal systems, and it applies at all times, including during exceptional circumstances (Article 11).

5. The prohibition against retroactive application of the penal code. This prohibition is linked to the principle of "legality of crimes and punishments," which is the cornerstone of punitive legislation. Exceptional circumstances do not justify a departure from this principle (see in the content of this right what was previously explained in detail above about legal guarantees during trial) (Article 15).

6. The right of every person to have a legal personality at all times and places (Article 16).

7. The right of every person to freedom of thought, conscience and religion (Article 18).

Unfortunately, though these rights are non-derogable under international law, they are often more susceptible to violations than others during exceptional circumstances, which requires the bolstering of their protection and creating provisions for reporting, investigation, and redress—including compensation—where violations of these rights occur. This is done to ensure that exceptional circumstances do not justify violations of these rights.

2. Protection of constitutional guarantees and principles under exceptional circumstances

a. Protection of the guarantee of the presumption of innocence

In addition to the rights that may not be restricted in exceptional circumstances, according to Article 4.2 of the ICCPR, there are rights that cannot be violated because they represent legal principles or are governing constitutional principles, and thus remain in effect at all times. Whatever exceptional circumstances may exist—whether they be a war, a state of emergency, or a national crisis of any kind—this does not entitle the state to entirely violate the rights of the accused, which are guaranteed by legal and/or constitutional principles. First and foremost of these guarantees is the presumption of innocence and the associated procedural rights. This represents a foundational legal principle, and is a constitutional principle that may not be violated under

any circumstances. If the exceptional circumstances sometimes call for infringement of personal freedoms, expanding the scope of suspicion of persons and restrictions on movement, it is not permissible for these restrictions to reach the point of presuming guilt, as this would infringe upon the rights of the accused, making them a prisoner to the accusations against them and incapable of defending themselves against the evidence.⁴⁸

b. Protection of the right to access to judiciary

Another basic guarantee that should continue to be protected during exceptional circumstances is the principle of the right to access judiciary and seek its protection and fairness. This requires that the guarantee of judicial oversight over the validity of exceptional measures not to be restricted, and that these measures are evaluated within the framework of necessity and proportionality required when in exceptional circumstances. The judiciary is the natural guardian of rights and freedoms, and when the constitution permits the state to take exceptional measures, this does not include the freedom for the state to dispose of the rights and freedoms of individuals without restrictions. Rather, it only expands the scope of the state's powers and mandate, but within the necessary limits required by the preservation of the integrity of the state and society. Within this context, every measure that the state takes that deviates from those prescribed by these limitations, by its nature, is able to be nullified by the judiciary. To say otherwise would be to free the state of any restrictions over its powers, where it is assumed that the state remains committed to the principle of legality and the rule of law even in exceptional circumstances.

c. Protection of basic guarantees of fair trial

As described above, the International Covenant on Civil and Political Rights has permitted states, under strict conditions, to resort to taking exceptional measures to preserve the existence and the safety of society where necessary. The Covenant explicitly states under Article 4.2 the basic rights that cannot be violated even under these exceptional circumstances. The fundamental

⁴⁸ See, Ahmed Fathi Sorour, Constitutional legitimacy in the laws of procedures and penalties, Dar Al-Shorouk, Cairo, 2002, pg. 570

requirements of a fair trial, laid out in the legal section above, also cannot be violated at any time.

This study considers the right to personal freedom, the presumption of innocence, and not to be convicted except by a judgment issued by a competent legal court and after a fair trial in which he is guaranteed his rights to defense and to appeal judgments before a higher judicial body as some of the basic elements of a fair trial.

Accordingly, the protection of the right to a fair trial, including the protection of the right to personal freedom, the protection of the right to defense, the right to appeal and the rights and guarantees associated with them, as previously explained in detail, are should be protected even during exceptional circumstances as well. To establish justice in all circumstances and at all times, authorities should not violate these rights under exceptional circumstances, because exceptional circumstances do not allow for the rule of law to be undermined and do not nullify constitutional legitimacy.

Based on all of the above, it is assumed that the judiciary, represented by the courts, as well as the General Prosecutor as a body of the judiciary, will play an important role in protecting the basic rights and guarantees associated with fair trial, regardless of whether those rights are derogable in a state of necessity according to Article 4 of the ICCPR or to the guarantees and rights recognized by the constitution or by other laws. Every trial in which all or some of these rights and guarantees are violated should be considered null and void.

Part II

Specialized Criminal Courts in Yemen

This part has two sections:

Section one: Legal system of the Specialized Criminal Courts

Section two: Trial at Specialized Criminal Courts

Section one: Legal system of the Specialized Criminal Courts

First word

The implementation of the principle of equality before the law requires that all people within the jurisdiction of the state be equal in their right to resort to the judiciary and to stand equal before it. This means that everyone should be represented or tried without discrimination before a single judiciary and be subject to the same substantive and procedural laws. In light of this unified judiciary, and to affirm its independence and impartiality, the judge should not be subject to any authority other than the authority of the law that determines his jurisdiction over the case before the emergence of the dispute or the occurrence of the crime. It was already indicated that the judiciary, in this sense, is what is known as the ordinary judiciary.

It has also been mentioned previously that the ordinary judiciary, as part of the international and constitutional guarantee of a fair trial, is the judiciary under which the accused's rights are protected during his appearance before the courts. There are five guarantees associated with the ordinary judiciary: that the establishment of the court and its jurisdiction be defined by law; that the court be permanent, not temporary or restricted by special rules; that regular litigation procedures are applied before it; that the court's judges be appointed by the judiciary itself rather than by an external source; and that the court respect the basic guarantees of the defendant's right to fair trial, foremost of which is the right to defense and the right to appeal judgments by ordinary means before a higher judicial body.

In light of this, and given that the intention of this study is to verify the fairness of the trials that take place before the Specialized Criminal Courts in Yemen, this section addresses the study of the legal system that governs Specialized Criminal Courts in Yemen, in order to understand their legal status, before moving on to an assessment of their practices. This section will first describe the circumstances and justifications for these courts' establishment, how they are organized, and the types of crimes that fall within their jurisdiction. It will then move on to explain their legal nature and whether they are considered part of the ordinary judiciary or whether they may be considered extraordinary courts.

Chapter 1: Establishment of the Specialized Criminal Courts and their organization

First: Establishment of the Specialized Criminal Courts

Second: Organization of the Specialized Criminal Courts

Chapter 2: Legal nature of the Specialized Criminal Courts

First: Legal basis of the Specialized Criminal Courts

Second: Constitutionality of the Specialized Criminal Courts

Chapter 1: Establishment of the criminal courts and their organization

First: Establishment of Specialized Criminal Courts and prosecutors

1. Historical background

The Specialized Criminal Court and Public Prosecution Office were established in Yemen for the first time in 1999, in accordance with Republican Decree No. (391) for the year 1999. The stated goal for their establishment was to confront crimes of kidnapping and highway banditry that were common at that time.⁴⁹ Some believed that the establishment of these courts was not necessary, and believed that the real motives behind their establishment were political, not legal or judicial. Those felt that the Yemeni government was mainly motivated by a desire to prove its seriousness combating terrorism and building international partnerships on this front on the one hand, and targeting its political opponents on the other hand.⁵⁰

Even before the outbreak of the armed conflict in Yemen, the various authorities have been prosecuting their political opponents, many journalists, opinion makers, and followers of religious minorities before the Specialized Criminal Court instead of the Ordinary Criminal Courts, with the aim of subjugating and harassing them in most cases. In various incidents, many of the accused, before their lawsuits moved to court, were subjected to serious violations, including arbitrary detention, enforced disappearance, torture, and other forms of

⁴⁹ Prior to that, the Republican Decree was issued by Law No. (24) of 1998, on confronting the crimes of kidnapping and highway banditry, which some view as a prelude or a main justification for the establishment of Specialized Criminal Courts and prosecution offices.

⁵⁰ See Abdulaziz Al-Bughdadi, also Saqr Al-Samawi, in their introductions to the focus group discussion organized by Mwatana for Human Rights in Sanaa, under the title "Specialized Criminal Courts: legal framework and practices" on 22 October 2020. See also Nabila Al-Mufti, in her oral intervention in the same session. Abdul Majeed Sabra believes, as in his oral intervention in the same panel discussion, that even with the admission that the Specialized Criminal Courts were established for the purpose of confronting the crimes of kidnapping and highway banditry, these courts have deviated from the objectives of their establishment and turned into political courts, and therefore they are now extraordinary courts because of the politicization prevailing over their performance.

inhumane abuses, often for the purpose of extracting “confessions” from them that would later be used as evidence against them.⁵¹

2. Crimes within the jurisdiction of the court

The specific jurisdiction of the Specialized Criminal Court, in accordance with Article 3 of Republican Decree No. (391) of 1999, is limited to the following crimes: Hiraba [Highway robbery] Crimes; kidnapping of foreigners; sea and air piracy; crimes of damage, destruction, arson and explosion to oil pipeline installations and facilities of oil; economic crimes against public interests; crimes of theft of public and private means of transport carried out by armed or organized gangs or by one or more individuals by force; as well as crimes of joining a bandit to attack the lands and property of the state and private citizens. It also include crimes of assault against or kidnapping members of the judiciary or kidnapping any of their family members. According to its establishment resolution, the Specialized Criminal Court has jurisdiction to try the perpetrators, their partners and/or contributors of any of the aforementioned crimes in accordance with the law.

Initially, crimes related to state security were not within the jurisdiction of the Specialized Criminal Court, but they became so after Republican Decree No. (391) was amended by Presidential Decree No. (8) of 2004, which added “crimes against state security and very grave crimes against social and economic assets” to the jurisdiction of the court. The inclusion of crimes related to state security to the court’s jurisdiction sparked widespread opposition from local human rights organizations, because this moved these courts outside of the scope of the ordinary judiciary and transformed them into state security courts, which had larger implications in terms of the risk of transforming the judiciary and courts into a political tool for the government to suppress and punish political opponents. We will return to this issue later in this study.

As for the territorial jurisdiction, Article 4 of Republican Decree No. (391) established that the Specialized Criminal Court had jurisdiction over crimes that

⁵¹ For more on the practices of the Specialized Criminal Court prior to the outbreak of the conflict see: Amnesty International Report (Yemen: Cracking Down Under Pressure), 2010. Available at this link: <https://www.amnesty.org/en/wp-content/uploads/sites/9/2021/06/mde310102010ar.pdf>

occurred anywhere within the territory of the Republic of Yemen, including its airspace or territorial waters.

3. Shortfalls in the legal organization of the Specialized Criminal Court in its original establishment

Republican Decree No. (391), according to which the Specialized Criminal Court and Prosecution Office was established in Sanaa, was characterized by a number of deficiencies from a legal point of view, both in terms of form and subject matter. First, the resolution violated the constitution—namely Article 150—which states that “the judiciary is an integrated system. The law arranges this system in terms of ranks, responsibilities [...] extraordinary courts may not be established under any conditions.” It is well known that republican decrees do not replace the law as a legislative tool, because only the House of Representatives, as a legislative authority, possesses this power under normal circumstances. Additionally, the decree violated the principle of the unity and integrity of the judiciary, which is a constitutional principle, by virtue of establishing a new type of criminal court besides the regular first instance courts that are supposed to have sole jurisdiction over all crimes. We will return to a detailed explanation of this when we examine the constitutionality of the Specialized Criminal Courts.

In terms of the subject matter, the resolution to establish the Specialized Criminal Court violated the constitutional principle related to equality before the law and the right of citizens to resort to their ordinary judge. This right is guaranteed by Article 41 of the constitution, which states that “Citizens are all equal in rights and duties.” It violates this principle firstly by making a distinction between crimes against foreigners and Yemeni citizens in that the Specialized Criminal Court only criminalizes the abduction of foreigners under the second paragraph of Article 3. Second, it violated this principle where it differentiated between the crime of assault against members of the judiciary and the crime of kidnapping them or one of their family members, and crimes that occur against other citizens. In other words, these legal articles are contrary to the generality and abstraction that should characterize legal rules.

This organization of the Specialized Criminal Court and Public Prosecution Office was canceled after ten years, and these courts were re-established and reorganized according to the Supreme Judicial Council Resolution No. (131) of 2009, which is the resolution from which the Specialized Criminal Courts currently derive their legitimacy and their legal organization. We will deal with this new system in the following section.

Second: Current legal organization of the Specialized Criminal Courts

The Specialized Criminal Courts and Public Prosecution Office, as they are currently organized, are subject to Supreme Judicial Council Resolution No. (131) of 2009. According to this resolution, Republican Decree No. (391) of 1999 was, implicitly, revoked and replaced, which as described above was beset with legal shortcomings.⁵² The new 2009 Resolution was characterized in turn by some shortcomings of its own, the most important of which was that it repeated the same mistake that marred the old decree when it re-established and organized the Specialized Criminal Courts according to an administrative resolution and not according to a law issued by the legislative body as required by the Constitution. This point specifically will be discussed in detail when talking about the constitutionality of the Specialized Criminal Courts in the next chapter.

What matters to us, in this regard, is how the Supreme Judicial Council re-established and organized the Specialized Criminal Courts, which we present as follows:

1. The number of courts, their establishment, and litigation rules

The new resolution established four Specialized Criminal Courts of first instance, with four chambers of appeals. It also established four primary criminal

⁵² Some believe that the Supreme Judicial Council Resolution No. (131) of 2009 has not canceled Republican Decision No. (391) of 1999 and its amendments, (Al-Samawi Saqr, in his oral intervention in the focused discussion session organized by Mwatana, Op. Cit.). This opinion indicates that the Council's decision has established three new Specialized Criminal Courts and prosecution offices in addition to the Specialized Criminal Court in Amanat Al-Asimah (Sanaa). It did not cancel the previous decision but rather added to it. However, this opinion is not consistent with the fact that the new decision has introduced fundamental amendments to the previous decision, whether in terms of the qualitative or territorial jurisdiction of the courts. And also in terms of the legal reformulation of the articles, as the wording has become more accurate in terms of legal precision. The new decision has introduced new crimes that were not included in the previous decision, and thus the content of the two decisions contradicts so that they cannot be combined, which means that the new decision has canceled the previous decision, implicitly, even if this is not explicitly indicated, since the two decisions cannot be implemented at the same time, just as it is impossible to say that they are complementary due to the difference in their qualitative and territorial scope.

prosecution offices, along with four specialized appellate prosecution offices. In addition to the Specialized Criminal Court in the capital Sanaa(Amanat Al Asimah), a Specialized Criminal Court was also established in three different governorates: Aden, Hodeidah and Hadramout. These courts are affiliated, organizationally, with the Provincial Appeals Courts in the governorates. It should be noted here that the Specialized First Instance Criminal Court and its appeals chambers, as well as the court for Criminal Prosecution in the capital Sana'a were previously present, and their territorial jurisdiction includes the entire region of the Republic of Yemen. But according to the new resolution, their territorial jurisdiction became limited to the Capital Secretariat Sana'a (Amanat Al Asimahjurisdiction) and eight other governorates, which means that the new resolution re-established and re-organized the Specialized Criminal Court and the Public Prosecution Office in Sanaa.

Each of the Specialized Criminal Courts consist of a president and a number of judges. In the court of first instance, the ruling body consists of one judge, and in the specialized criminal appeals chamber there are three judges. The president of each of the Specialized Criminal Courts exercises his jurisdiction in tandem with the administrative supervision of the court in accordance with the provisions of the law.

Judges of the Specialized Criminal Courts are appointed from amongst the judges who were previously appointed to the judiciary in accordance with the terms and conditions stipulated in the Judicial Authority Law. Members, assistants and heads of the specialized criminal prosecution offices established within the framework of the Specialized Criminal Courts are also appointed from among those appointed to the Public Prosecution, according to the Judicial Authority Law.

As for the way in which cases are filed, the Attorney General assigns the Specialized Criminal Prosecution to file cases before the Specialized First Instance Criminal Court, and the specialized criminal chambers in each court are competent to adjudicate appeals by way of judgments and resolutions issued by the Specialized Criminal Courts of first instance. The resolution did not indicate how to appeal the judgments issued by the appellate chambers, but it is

understood *a priori*, and through established practices, that it is done before the Criminal Chamber of the Supreme Court.⁵³

With regard to laws, the general rules stipulated in the Specialized Criminal Courts shall be applied, objectively, to the Law of Crimes and Punishments (Law No. 12 of 1994) and other relevant laws, the most important of which is Law No. (24) of 1998, on combating the crimes of kidnapping and highway banditry, and Law No. (3) of 1993 on combating drug crimes.

Procedurally, the Criminal Procedure Rules (Law No. 13 of 1994), the Law of Civil Pleadings and Execution of judgements (Law No. 40 of 2002 and its amendments), and the Evidence Law (Law No. 21 of 1992 and its amendments), are to be observed by the Specialized Criminal Courts.

What is worth noting here is that the organization of Specialized Criminal Courts does not differ, from a theoretical legal point of view, from the organization of ordinary courts, whether with regard to how the courts are formed, in the appointment of judges and members of the Public Prosecution Office, in the methods of appeals, or regarding the applicable substantive and procedural laws. In this way these courts do not differ from the ordinary courts, in theory, except in terms of their subject and territorial jurisdiction.

2. Subject jurisdiction of the Specialized Criminal Courts

According to the current organization, a number of serious crimes fall within the jurisdiction of the Specialized Criminal Courts, and for the sake of brevity and non-repetition, we will list these crimes here with a brief reference, whenever necessary, to their status under the previous organization of the courts under Decree No. (391) and to the legal rules that govern them in the law of crimes and penalties or other relevant laws. The specific jurisdiction of the Specialized Criminal Courts includes totally , the following crimes:

⁵³ Article 8 of Decision 391/1999 stated that, "Appeals are submitted against the provisions of the Specialized Criminal Appeals Chamber before the Criminal Chamber of the Supreme Court". But Decision 131/2009 re-established and organized the Specialized Criminal Courts without specifying how to appeal the judgements from specialized appellate chambers.

Hiraba [Highway robbery] Crimes: Follow the provisions of Articles 306-309 of the Crimes and Punishments Law (the Penal Code).

Kidnapping crimes: Follow the provision of law No. 24/1998 related to crimes of highway banditry and kidnapping, as well as Articles 249 and 250 and other relevant articles from the Penal Code.

It should be noted here, that the legal text on kidnapping crimes in the current regulation came in a separate clause, after these crimes were in the old legal regulation within a legal text that combined "the crimes of kidnapping foreigners and sea or air piracy." The latter resolution is worthy of praise as it added to the court's jurisdiction for kidnapping crimes in general, and no distinction was made between the abduction of foreigners and Yemenis, as is the case in the previous resolution, which was a fundamental flaw, as already mentioned. The reasoning behind the change was that it involved unjustified discrimination, and the old text was contrary to the most important characteristics of the legal rule, which is namely to be characterized, as a legal text, with generality and abstraction.

Sea and air piracy crimes: Subject to article 4 of law No. 24/1998 related to crimes of highway banditry and kidnapping. These crimes are also addressed by the articles criminalizing Hiraba in the general sense, and are also included in the crimes of general danger according to Articles 137 - 146 of the penal code.

Crimes of drug trafficking: These crimes were included in the jurisdiction of the Specialized Criminal Courts for the first time in accordance with the 2009 resolution, and are governed by Law No. (3) of 1993 regarding combating drug crimes.

Crimes of damage, destruction, arson, and explosions that occur on oil pipelines, installations and oil and economic facilities of public benefit: These crimes are governed by articles 137 - 146 of the penal code.

Crimes of theft of public and private means of transport that are carried out by armed or organized gangs or that are carried out by one or more individuals by force: These crimes are subject to the general provisions of the penal code, in addition to law No. 24/1998 related to crimes of highway banditry and kidnapping.

The crimes of participating in a gang to attack the lands and property of the state and private citizens: These crimes are subject to the general rules of the penal code, in addition to the provisions of the Crimes of Kidnapping and Highway banditry).

Crimes related to state security and crimes posing general risks: Crimes against the external and internal security of the state are subject to Articles 125 to 136 of the penal code, while general risk crimes are subject to Articles 137 to 146 of the same law.

It has already been pointed out that these crimes were added to the jurisdiction of the Specialized Criminal Court five years after its establishment, according to the amendment included in Republican Resolution No. (8) of 2004, although there was widespread objection to this by lawyers, human rights activists and local and international organizations working in the field of human rights. This is because it was known that this Resolution would transform the Specialized Criminal Courts into state security courts (as will be explained below in detail). Yet, the Supreme Judicial Council reaffirmed the jurisdiction of the Specialized Criminal Courts vis-à-vis these crimes according to Resolution (391) of 2009.

Assault crimes against members of the judiciary during or because of the performance of their duties: These crimes are subject to Articles 171, 172, and 185 of the penal code that criminalize assault on members of the public authority, including judges and prosecutors.

It should be noted here, that the new text did not include the rest of the paragraph that criminalized the kidnapping of members of the judiciary or one of their family members, which was stipulated in the previous regulation of the courts. The new resolution did well because the criminalization of kidnapping, in general, was mentioned in Article 3.2, without differentiating between Yemenis and foreigners, or between members of the judiciary and others.

Crimes of assaulting witnesses: These crimes were not within the jurisdiction of the Specialized Criminal Courts under the 1999 Resolution, and so there was a positive shift made by the resolution to criminalized assault on witnesses in the new resolution.

3. Territorial jurisdiction of the Specialized Criminal Courts

We stated above that the territorial jurisdiction of the Specialized Criminal Court, in the capital city of Sanaa, was extended under the previous organization to every area of Yemen, meaning that it includes crimes that fall within the jurisdiction of the court, regardless of where they occurred, as long as they occurred within the territories of the Republic of Yemen.

As for the new resolution, it reorganized the territorial jurisdiction of the Specialized Criminal Courts, after becoming four courts, as follows:

The Specialized Criminal Court in the capital, Sanaa has jurisdiction over crimes that occur in the capital and the governorates of Sanaa, Dhamar, Al-Bayda, Ibb, Amran, Al-Jawf, Saada and Marib.

The Specialized Criminal Court in Aden has jurisdiction over crimes that occur in the governorates of Aden, Taiz, Lahj, Al Dhale'e and Abyan.

The Specialized Criminal Court in Al Hudaydah has jurisdiction over crimes that occur in the governorates of Al Hudaydah, Raymah, Hajjah and Al Mahwit.

The Specialized Criminal Court in Hadramout has jurisdiction over crimes that occur in the governorates of Hadramout, Shabwa and Al-Mahrah.

Chapter 2: Legal character of the Specialized Criminal Courts

First word

In Chapter 1, we presented the ways in which the Specialized Criminal Courts were established and organized and described their jurisdiction. We now turn to the legal nature of the Specialized Criminal Courts, i.e. determining whether these courts are ordinary or extraordinary—a distinction that can only be made through studying their legal grounding.

Accordingly, we first deal with the legal basis that governs the work of the Specialized Criminal Courts, and then we address - secondly - the legal basis for the legality of the Specialized Criminal Courts and the extent of their constitutionality.

First: Legal basis of the Specialized Criminal Courts

1. General legal framework

By the general legal framework, we mean the international legal basis governing the basic issues related to the establishment and management of justice agencies. This includes the courts, Public Prosecution Offices, and other relevant bodies, as well as the persons associated with them such as the police and security personnel as judicial officers. It also includes penal institutions such as prisons, the legal rules that determine the formation of courts and their regulations, as well as crimes within the courts' jurisdiction, laws and procedures applied before the court, and the rules of appeal.

The general legal framework that governs the work of courts in general, including the Specialized Criminal Courts, is represented in the legal rules and principles related to fair trial guarantees under international human rights law. This is a framework to which justice systems in all countries are subject, in addition to the special legal framework applicable through the legal rules and principles contained in the legal system in each country separately.

On this basis, the general legal framework that governs the work of courts, and justice agencies in general, including the Specialized Criminal Courts, consists of the legal rules and related principles that are stipulated in the following international instruments and agreements.

a. Universal Declaration of Human Rights

Yemen is obligated to abide by the principles and provisions of the UDHR under Article 6 of the Yemeni Constitution. Also, the principles and rules contained in the UDHR have binding force derived from being customary legal rules in accordance with the provisions of international law.

b. International rules and criteria related to fair trial guarantees in extraordinary circumstances, according to international human rights law

In particular, the International Covenant on Civil and Political Rights (ICCPR), ratified by Yemen in 1987, provides fair trial guarantees that Yemen is obliged to protect.

c. Fair trial-related conventions and treaties

Most important of which are the **United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (which Yemen ratified on November 5, 1995) as well as the **United Nations Convention for the Protection of All Persons from Enforced Disappearance**.

d. Other international principles related to justice

Including the Basic Principles on the Independence of the Judiciary, Principles Concerning the Independence and Responsibility of Judges, Lawyers and Public Prosecution Representatives, Basic Principles Concerning the Rights of Victims, Guidelines on the Role of Public Prosecutors, Code of Conduct for Law Enforcement Officials, Principles Governing Prisons or Punitive Facilities and Places of Detention, etc. Although these principles were issued in the form of declarations that are not legally binding, their wide acceptance at the international level and their promulgation by the United Nations makes respect for them a duty of every state that claims to be based on the rule of law.

2. National legal framework

By the national legal framework, we mean the legal rules and principles related to the establishment of justice in the Yemeni legal system. Specifically, we are focused here on the legal framework that is applicable to the work of the Specialized Criminal Courts. This includes the following:

- a. Yemeni Constitution*
- b. Judicial Authority Law and amendments (Law no. 1/1991 and amendments)*
- c. Resolution on establishing the Specialized Criminal Courts (Higher Judicial Council's resolution 131/2009)*
- d. Penal Code (Law no. 12/1994 regarding Crimes and Penalties)*
- e. Criminal Procedures law (no. 13/1994)*
- f. Other applicable law, including: Law on Combatting Kidnapping and Highway Banditry (no. 24/1998) and Drug Trafficking law (no. 3/1993)*

Accordingly, it is assumed that the Specialized Criminal Courts, whether with regard to the legality of their establishment or in the performance of their mandate, shall be subject to this legal framework. In light of this framework, the courts' legality and constitutionality will be evaluated in the following section.

Second: Grounds for the legality and constitutionality of the Specialized Criminal Courts

1. Legal basis for the establishment of the Specialized Criminal Courts

It was previously mentioned that the Specialized Criminal Court and Public Prosecution Office were established, for the first time, in accordance with Republican Decree No. (391) for the year 1999, before it was then reorganized and its powers expanded by Supreme Judicial Council Resolution No. (131) for the year 2009, which is the resolution from which the courts currently derive their legal basis.

The Supreme Judicial Council's resolution to establish these courts is based on the Judicial Authority Law (Law No. 1 of 1991), which stipulates in Article 8 that, "a. It is not permissible to establish extraordinary courts; b. It is permissible, by a resolution of the Supreme Judicial Council, based on a proposal from the Minister of Justice, to establish specialized courts of first instance in the governorates whenever the need arises in accordance with the laws in force."

In turn, the Judicial Authority Law is based on Articles 150 and 152 of the Constitution, as Article 150 states that "The judiciary is an integrated system. The law organizes this system in terms of ranks, responsibilities, the terms and procedures of appointment, transfer and promotion of judges, and their other privileges and guarantees. extraordinary courts may not be established under any conditions."

Article 152 of the Constitution states that, "The judiciary shall set up the supreme judicial council. The law shall organize it, stipulate its jurisdiction and system of nominating and appointing its members. The supreme judiciary council shall execute these guarantees for the judiciary in the fields of appointment, promotion, discharge and dismissal according to the law."

Based on this last article, the Yemeni legislator established, according to the Judicial Authority Law, the Supreme Judicial Council and made among its competencies to establish specialized courts of first instance in accordance with Article 8.b, stated above: "It is permissible, by a resolution of the Supreme Judicial Council, based on a proposal from the Minister of Justice, to establish specialized courts of first instance in the governorates whenever the need arises in accordance with the laws in force."

Based on these constitutional and legal provisions, or rather based on a broad interpretation of them, the Supreme Judicial Council issued Resolution No. (131) of 2009, according to which it re-established and re-organized the Specialized Criminal Courts to create what we know them as today.

This legal organization of the Specialized Criminal Courts by an administrative resolution raises the following legal problem:

Are the Specialized Criminal Courts ordinary courts that therefore fall within the scope of an ordinary judiciary? Are they specialized courts? Or are they extraordinary courts?

What raises this issue is that ordinary courts of justice, in order to be considered independent and impartial in accordance with international standards, must be established by a law issued by the legislative authority. However, the Specialized Criminal Courts were established by an administrative resolution issued by the Supreme Judicial Council. This is a professional administrative council, deriving its legal powers from Article 8.b of the Judicial Authority Law, which in turn is based on Article 152 of the Constitution, as stated above. But the text of Article 152 does not include any indication that among the powers of the Supreme Judicial Council is the power to establish courts of any kind. All that the constitution refers to is that the judiciary shall set up the Supreme Judicial Council. The law shall organize it, stipulate its jurisdiction and system of nominating and appointing its members. The Supreme Judicial Council shall execute judicial guarantees with respect to appointments, promotions, discharge and dismissals according to the law.

Moreover, Article 109 of the Judicial Authority Law, which defines the powers of the Supreme Judicial Council, does not mention the authority of the Council to issue resolutions establishing or organizing courts. Article 109 states the following: "The Supreme Judicial Council exercises the following powers:

- a. Laying down the general policy for developing judiciary affairs.
- b. Consider all issues presented to the Council regarding appointment, promotion, dismissal, accountability, retirement, transfer and resignations of judges in light of the articles stipulated in this law.
- c. Disciplining judges.
- d. Study draft laws related to the judiciary.
- e. Consider the results of the periodic inspection of the work of the presidents and judges of the courts of appeal and the courts of first instance to assess the degree of their competencies, investigate the complaints lodged against them,

consider the applications submitted by them in accordance with the provisions of the Judicial Inspection Regulations.

f. Express opinion on the judiciary's budget projects."

According to Article 109(d), the parliament "studies draft laws related to the judiciary," which is clearly understood to mean that the authority of the Supreme Judicial Council is limited to studying draft laws before they are presented to the House of Representatives as the only authority constitutionally empowered to issue laws.

From our point of view, the Yemeni legislator went beyond the content of the text of the constitution when it granted the Supreme Judicial Council the power to establish Specialized Criminal Courts by administrative resolution. If the legislator had wanted to establish this type of court, it should have regulated them directly through the law, as done in the case of juvenile courts and military courts, for example, in order for people's representatives to approve them according to the mechanism followed in issuing laws. It should not have referred to a professional technical council that was established to protect the rights and guarantees given to judges, which has cast doubts as to the legality of the Specialized Criminal Courts and the extent of its constitutionality.

2. Constitutionality of the Specialized Criminal Courts

Above, we stated that the establishment of the Specialized Criminal Courts by an administrative resolution has cast doubt on the nature of these courts and their legitimacy, and this situation has created the following legal problem:

Are the Specialized Criminal Courts a form of ordinary court that therefore fall within the concept of the ordinary judiciary? Or are they an exception to it, making them unconstitutional and falling within the scope of the prohibition stipulated by Article 150 of the Constitution?⁵⁴

⁵⁴ Article 150 states that, "The judiciary is an integrated system. The law organizes this system in terms of ranks, responsibilities, the terms and procedures of appointment, transfer and promotion of judges, and their other privileges and guarantees. extraordinary courts may not be established under any conditions."

There are two main opinions regarding the answer to this question:

First opinion: Arguably, the Specialized Criminal Courts, despite the existing gap between the legal framework that governs them and their practices, are ordinary courts, like other specialized courts. They fall within the scope of an ordinary judiciary, and therefore they are not considered extraordinary courts, because the resolution to establish them was issued by a legal body authorized to do so. Therefore, they do not fall within the scope of the constitutional prohibition contained in Article 150 of the Constitution.⁵⁵

Some add, in support of this opinion, that criminal courts, as well as commercial courts, administrative courts, public funds courts, press courts, and others are similarly situated, all of which were established by resolutions of the Supreme Judicial Council with no controversy over their being extraordinary and unconstitutional courts. As for the controversy surrounding the Specialized Criminal Courts, according to this opinion it is due to several reasons, the most important of which are:

First, the establishment of these courts was not a response to real circumstances that imposed a criminal policy that necessitated their establishment in order to achieve a public interest. They were created for political reasons and motives, and in response to foreign pressures to demonstrate the seriousness of Yemen's desire to partner with other countries in combating terrorism.

Second, most of the crimes that fall within the jurisdiction of the Specialized Criminal Courts and prosecution offices are among the crimes affecting the security of the state according to the Law of Crimes and Penalties. This has resulted these courts falling under the influence of the security and political agencies, and thus being used as a means of targeting and settling scores with political opponents with, and suppressing and narrowing the margin of freedom of opinion and expression as a constitutional right.

⁵⁵ Those who follow this opinion include Dr. Abdulmomen Shuja' Al-Din and Saqr Abdulaziz Al-Samai, in their oral intervention (and written) presented to the focused discussion organized by Mwatana for Human Rights, "Specialized Criminal Courts: legal framework and practices" 22 October 2020. Proponents also say that these courts are not extraordinary despite of their shortfalls in practice. See Fayrouz Al-Garadi, in her oral intervention during the same event.

Third, the appointment of members, agents, heads of the specialized criminal prosecution and judges in the criminal courts and the specialized appellate chambers is based on the fact that they represent a state security Prosecution and court. that means, this authorizes judges and prosecutors in these courts to make exceptions to free themselves of accountability for violating guaranteed legal procedures and safeguards. This in turn violates the rights and guarantees of the accused in a fair trial in accordance with the law and the constitution.

Fourth, the Supreme Court, represented by the Criminal Department, in many of its rulings overlooks the nullifications that characterize many of the judgments of the Specialized Criminal Courts and divisions for reasons that seem to be political. In particular, there are the appeals related to the negation of defendants' right to defense, and how these courts and prosecutors overlooked many grave errors in some rulings.⁵⁶

Despite all these shortcomings, the Specialized Criminal Courts, according to this view, remain part of the ordinary judiciary. This view finds that they cannot be considered extraordinary courts because: they are established as permanent courts; regular substantive and procedural laws are applied; and the judges appointed to them are ordinary judges who were chosen from amongst those who have been appointed in accordance with the law of the judicial authority. Also, rulings issued by the Specialized Criminal Courts are subject to appeal by ordinary and extraordinary methods. All of these factors differentiate these courts from the extraordinary courts, which are often established by resolutions or temporary laws, their judicial bodies are often composed of non-judges or include non-judicial elements, and they do not take ordinary procedures into account. Also, such rulings from such extraordinary courts are not subject to appeal by ordinary means.

With regards to the establishment of the Specialized Criminal Courts by a resolution of the Supreme Judicial Council, according to this opinion, this does not undermine the extent of their legitimacy, as they were mainly established by a presidential resolution. All that the Supreme Judicial Council did was to

⁵⁶ Saqr Al-Samawi, *ibid.*

reorganize them and establish Specialized Criminal Courts in a number of governorates as well as the Criminal Court in the capital, Sanaa.⁵⁷

Second opinion: This opinion holds that the Specialized Criminal Courts are extraordinary courts established in contravention of the explicit text of Article 150 of the Constitution, which prohibits the establishment of extraordinary courts in all cases. The resolution to establish them was issued by a party that does not have the constitutional and legal mandate to establish courts. Moreover, these courts are in violation of a number of basic constitutional and legal principles, foremost of which are: the principle of equality before the law (Article 41 of the Constitution); the principle of separation of powers (Articles 62, 79, 80, 81, 82 and 105 of the Constitution); the principle of the independence of the judiciary (Article 149 of the Constitution); and the principle of the unity of the judiciary (Article 150 of the Constitution). As such, these courts are unconstitutional.⁵⁸

This opinion relies on the following arguments:

First, the establishment of the Specialized Criminal Courts is inconsistent with the principle of equality before the law and the consequent equality before the judiciary, which is based on respect for the unity of the judiciary. Also, since the criminal judiciary represents a single specific competency, its unity and indivisibility should be preserved, and this is what is required by the proper application of constitutional and legal principles related to a fair trial. This, in turn, means respecting the accused's right to defense and their related fair trial guarantees, and applying those guarantees to all accused in general and abstractly.

Second, the description of this type of courts as "specialized," according to this opinion, is a "linguistic trick whose aim is, as is clear, to legitimize their establishment in contravention of the explicit text of Article 150 of the Constitution, while also manipulating the text of Article 8.b of the Judicial Authority Law. Loading the meaning of "specialization" with more than it connotes is impossible, because specialization refers to a judiciary whose mandate is focused on a specific topic, such as the commercial and military

⁵⁷ Ibid.

⁵⁸ Abdulaziz Al-Bughdadi in his oral intervention and written as well, at the focused discussion organized by Mwatana, Op. Cit.

judiciary. The criminal judiciary is indivisible in its specialization, and trying to divide it is like dividing the indivisible, and this brings us into a mess of terminology.”⁵⁹

Third, there is a clear contradiction between the text of Article 8.b of the Judicial Authority Law, which gives the Supreme Judicial Council the power to establish specialized primary courts, and Article 109.d of the same law, which limits the authority of the Supreme Judicial Council to "study draft laws related to the judiciary" before it makes its way to the House of Representatives for discussion and promulgation.

Fourth, giving the Supreme Judicial Council the power to establish extraordinary courts, contrary to the general meaning of the constitutional text that affirmed the inadmissibility of establishing extraordinary courts under Article 150 of the Constitution (which includes the phrase "in any case") clearly means that paragraph (b) of Article 8 of the Judicial Authority Law violates a constitutional principle. Accordingly, the Specialized Criminal Courts are extraordinary and unconstitutional courts.⁶⁰

In our opinion, it was the establishment of the Specialized Criminal Courts by an administrative resolution from the Supreme Judicial Council that sparked all the complications regarding the legitimacy and constitutionality of these courts. If these courts had been established by a law issued by a legislative body,⁶¹ controversy would not have arisen over the extent of their constitutionality. However, it was not solely the resolution of the Supreme Judicial Council. The resolution was also granted or authorized by the legislators, according to the Judicial Authority Law. This means that the Yemeni legislator, represented by the House of Representatives, overstepped its legislative powers when it approved the text of Paragraph (b) of Article 8 of the Judicial Authority Law,

⁵⁹ Abdulaziz Al-Bughdadi in his oral intervention and written as well, at the focused discussion organized by Mwatana, Op. Cit.

⁶⁰ Al-Bughdadi, op. cit. This opinion is also supported by lawyer and legal counsel Nadya Al-Khalifi. She considers these courts contradictory to Article 150. Moreover, she sees that the establishment of this type of courts is an attempt by the executive authority to control the legislative and judicial powers, contrary to the principle of separation of powers stipulated in the constitution, which is a violation of the independence of the judiciary and judges.

⁶¹ Most important examples here are: Law on establishment of juvenile court. (Issued by Republican Decree of Law No. (28) of 2003); the Military Criminal Procedures Law. (Issued by Republican Decree of Law No. (7) of 1996); Law of Military Crimes and Punishment (issued by the Republican Decree of Law No. (21) of 1998). In these laws the jurisdiction of the military courts and the procedures followed before them were determined and delimited clearly.

including those that violate Articles 149 and 150 of the Constitution.⁶² According to these two articles, courts can only be established and organized according to law issued by the legislative body, as the legislator represents popular will, and this power may not be delegated to any judicial or executive authority. Accordingly, it is said that paragraph (b) of Article 8 of the Judicial Authority Law is unconstitutional. It is the legal provision on which the resolution of the Supreme Judicial Council to establish the Specialized Criminal Courts is based.

However, on February 24, 2008, the Constitutional Chamber of the Supreme Court rejected a challenge to the constitutionality of the Specialized Criminal Courts, finding that the courts and prosecution offices were constitutional⁶³ in that their organization, the appointment of judges, the laws they apply, and their appeals procedures do not differ, at least in terms of form, from other specialized courts. Therefore, there is nothing left for those working in the field of law, including lawyers, academics and activists, to do except to work to spread awareness of the need to correct and legitimize the legal status of these courts. Those in the field of law should demand that the House of Representatives issues a new law in which that would establish a comprehensive process of organizing and reforming the justice and justice system in accordance with constitutional principles, and in a manner that respects guarantees of the right to a fair trial in accordance with the requirements of Yemen's obligations under international human rights law.⁶⁴ Until that happens, we must also strive to bridge the gap existing between the legal framework and the performance of the Specialized Criminal Courts and prosecution, which is widening day by day, especially in light of the exceptional circumstances that Yemen is going through. Until this happens,

⁶² The Yemeni Ministry of Justice has explicitly acknowledged that Law No. (1) of 1991 regarding the judiciary is tainted with unconstitutionality. The draft: Strategy for the Modernization and Development of the Judicial Authority for the years 2006-2015 states that "the necessity to amend the provisions of the Judicial Authority Law No. (1) for the year 1991, in accordance with the constitutional provisions in force in articles: from 149 to 153, (of the constitution) to lift the unconstitutionality of it, and in a way that embodies the existence of a financially, administratively and judicial independent judicial authority, in addition to the executive and legislative powers. See استراتيجية تحديث وتطوير السلطة القضائية (2015-2006) , وزارة العدل اليمنية , صنعاء , ص. 13. <http://www.yemen.gov.ye/portal/justic>.

⁶³ See the ruling by the Constitutional Chamber of the Supreme Court. 24 February 2008. In case No. 32730 of 2007.

⁶⁴ We stated earlier that the international human rights law considers the establishment, organization and determination of the courts as an internal sovereign matter. But it is required that these courts be independent, impartial and established in accordance with the law, and that they guarantee before them - at all times and circumstances - all the guarantees related to the right of the human being to a fair trial, and at the forefront of these rights is his right to defense and what is related to it. It includes fair trial guarantees and the right to appeal judgments at a higher judicial authority through regular appeal methods, as previously explained in detail.

we must also strive to bridge the gap between the legal framework and the practices in the performance of the Specialized Criminal Courts and prosecutions, which is widening day by day, especially in light of the exceptional circumstances that Yemen is going through.

Section two: Specialized Criminal Courts and prosecution offices in practice

Chapter 1: The degree of respect for the basic rights and guarantees of defendants in the Specialized Criminal Courts

Chapter 2: The degree of respect for institutional guarantees related to the administration of justice

Chapter 1: The degree of respect for the basic rights and guarantees of defendants in the Specialized Criminal Courts

First word

We stated above that a fair trial is a trial in which all the legal guarantees established to protect the fundamental rights and freedoms of the accused, as stipulated by international human rights law and Yemeni law, are respected. The most important of these guarantees are as follows: That the trial takes place before a competent, independent and impartial court, established by rule of law and based on equality; that the accused is tried in public and not tried *in absentia*; not to be tried for an act that was not incriminated by law at the time it was committed; that the accused is considered innocent until proven guilty by a final court ruling; that they be able to defend themselves genuinely or through legal aid; and that they be tried without undue delay. A fair trial also requires that the person against whom an indictment was issued has the right to appeal that judgment to a higher court, and not to be tried twice for the same act.

Respecting these guarantees in practice requires that every step and procedure of the trial be governed by precise controls and conditions, whether with regard to the validity of the measures taken against the accused, before and during the trial, or the powers of the authorities and persons undertaking those procedures, or their timing and the timeline of the procedures. The penalty that the law invokes for not respecting the rights and guarantees of the accused is the nullification of the trial or invalidation of the proceedings, and the right to compensation and reparation for those harmed.⁶⁵

⁶⁵ According to article 396 of the Criminal Procedures law, "All measures that are in violation of this Law are null, if the Law clearly specifies its nullification as such or if the procedure that is violated or ignored essentially".

Article 397 stated the particular cases of nullification related to the general procedures, as follows:

If the nullification is due to the lack of consideration to the provisions of the Law related to the method for presentation of the penal indictment to the Court, the formation of the Court, the competence to make a ruling thereon, whether the hearings shall be opened or closed to the public, or the reasoning behind the rulings, the procedures of appealing the rulings and decisions, major procedural faults that cause the loss of any of the rights of any of the litigants, or any other reasons

related to the general order, the Parties have a right to uphold it in any condition that charges have come to reach; the court can thus rule as such by its own choice. Also, giving the person who a ruling is against a choice between the punishment of imprisonment or paying a fine is a nullity related to the general order.

In this chapter, we will examine the extent to which these guarantees are respected before the Specialized Criminal Courts, based on the practices of these courts during the period from 2015 to 2020. In particular, we will examine the extent to which the following basic rights are respected-

First: The right of the accused to be tried before a competent, independent and impartial court, established by the rule of law.

Second: The right to defense and the guarantees associated with it.

Third: The right of the accused to be tried without undue delay.

Fourth: The right of the accused to a public trial that takes place in his presence.

Fifth: The right of those convicted to appeal judgments.

Sixth: The right of those convicted to guarantees relating to the death penalty.

First: The right of the accused to be tried before a competent, independent and impartial court, established by the rule of law

1. This right and its significance

The trial of any person cannot be described as fair if the court before which he is being tried is not a competent court formed according to the law, whether according to the constitution or according to the provisions of the laws in force and in a manner that does not contradict the constitution, and that was established prior to committing the acts alleged to be in violation. The purpose of this is to ensure that people are not tried before special or extraordinary courts that are not subject to judicial oversight and that do not give weight to the foundations and standards required by law.

All this has already been mentioned, and it has already been noted that the right of a person to be tried before a competent, independent, impartial court established by law is a fundamental human right that does not have any exceptions. It is a right established under the rules of customary international law. It is also established by international human rights law, and therefore respect for this right is binding on all states according to the Universal Declaration of Human Rights's Article 10 and Article 14.1 of the International Covenant on Civil and Political Rights.⁶⁶

The requirement that the trial take place before a competent court, as a guarantee for a fair trial, means that the case before the court should be within its territorial jurisdiction (in view of the location of the crime) and its subject jurisdiction (in view of the type of crime). Thus, the case is subject to the jurisdiction of the ordinary judiciary and the guarantees stipulated in the constitution and the law.

In Yemen, the organization of the courts is subject to the general provisions of Article 150 of the constitution, which states that, "The judiciary is an integrated system. The law organizes this system in terms of ranks, responsibilities, the terms and procedures of appointment, transfer and promotion of judges, and their other privileges and guarantees. extraordinary courts may not be

⁶⁶ See above in detail about trial in front of ordinary and extraordinary courts, in Part I, Section two.

established under any conditions.” The Judicial Authority Law, as well as the Criminal Procedure Law, have regulated the jurisdiction of each court in detail.⁶⁷

As for what it means for the **court to be impartial**: the judges and prosecutors, and everyone who has influence over the course of the trial, must not have any interest or involvement in the case before them, or any prejudice regarding it. They should not act in a way that serves one of the parties to the case. If any of this is found based on reasonable grounds, the judge must be removed from the case if he does not voluntarily withdraw.

As for the **independence of the court**: it means, as stated above, that the judges are free to hear the case presented in an independent and impartial manner. Judges must have total freedom to extract the rule of law as dictated by their conscience, based on established and confirmed facts and in accordance with the law, without any direct or indirect interference from any parties or persons at any stage of the trial. The independence of the judiciary also requires that the primary criterion in selecting judges is their personal competence and integrity.

We will discuss here the extent of respect for the **right of the accused to be tried before a competent court**, *in the practice* of the Specialized Criminal Courts. As for the extent of the court’s independence and impartiality, it falls within the institutional guarantees related to the administration of the justice system, and we will address this in its appropriate place.

2. Right to trial at a competent court in practice

We said above that the legal basis upon which the Specialized Criminal Courts are based, at the theoretical level, was the subject of jurisprudential debate where opinions differed based on whether these courts are considered specialized legal courts established according to the law and fall within the ordinary judiciary, or are they a kind of extraordinary judiciary prohibited by the constitution. This issue was discussed in detail in the previous chapter.

In practice, it has rarely been argued that these courts lack jurisdiction in most of the cases brought before them. This is mainly because the Supreme Court

⁶⁷ See the organization of courts in Yemen: Part 1, Chapter 2 of the Judicial Authority Law, no. 1/1991. See also articles 231-237 of the Criminal Procedures law.

rejected the argument that the Specialized Criminal Court is unconstitutional, and so many of the accused and their lawyers believe that it would be futile to argue that the court doesn't have jurisdiction over their case. These courts, and the ruling affirming their constitutionality, have cemented the belief that the court's jurisdiction is a fixed and recognized matter.⁶⁸

However, there are some cases in which it has been argued that the Specialized Criminal Court does not have jurisdiction to hear a case. In these cases, the court refused to heed the argument and decided to proceed forward with the case, and then confirmed its rejection of the argument based on lack of jurisdiction in its final judgment.⁶⁹ Among the cases in which the Specialized First Instance Criminal Court in Sanaa refused to heed the defense based on lack of jurisdiction, for example, is the lawsuit related to the trial of journalists, as the court continued to hear the case and issued a ruling to execute four journalists for having committed publication crimes that the court has designated as falling within the state security-related crimes.⁷⁰

The use of the death sentence against journalists, in spite of the argument that the court does not have jurisdiction to decide this, has been widely criticized by local and international human rights organizations. These groups strongly oppose the inclusion of press crimes amongst crimes against state security, as logic requires that crimes related to the press and publications be subject to the jurisdiction of the court specialized in press cases, unless it constitutes another crime. They argued that publication crimes are supposed to be subject to the provisions of the Press and Publications Law, under which the maximum penalty

⁶⁸ See the ruling by the Constitutional Chamber of the Supreme Court. 24 February 2008.

⁶⁹ See, for example, the ruling of the Specialized First Instance Criminal Court No. (101) for the year 2017 issued on 7/7/2019, in the case submitted by the Specialized Criminal Prosecution Office No. (131) for the year 2017.

⁷⁰ See the details of this case, the judgment issued by the Specialized First Instance Criminal Court, No. (107) for the year 2020, issued on April 11, 2020, in the Criminal Case No. (176) for the year 2020, filed by the Public Prosecution No. (258) for the year 2017. The court imposed the death penalty on four journalists (out of ten), on the charge of "broadcasting false news, statements, and tendentious rumors and propaganda with the intent to weaken the strength of the defense of the homeland, weaken the morale of the people, disturb public security, and throw terror among people and harm the public interest... They created several websites and pages across the internet and social networking sites... This had the effect of harming the war preparations to defend the country and the war operations of the armed forces, as indicated in the leaflets off their computers and phones seized in their possession during the commission of the crime."

prescribed for press crimes is a fine or imprisonment for a period not exceeding one year.⁷¹

Second: How far the right to defense and the guarantees associated with it are respected

1. Significance of the defendant's right to defense

International human rights law imposes a legal obligation on all states and governments to respect the freedom and dignity of humans and to treat individuals humanely at all times and circumstances. International human rights law also protects the right to a fair trial for every person who appears before the judiciary at all stages of a criminal case, and before all types of courts, including extraordinary courts.

The right to defense acquires special importance because the person accused of committing a criminal offense is before the overwhelming power of the state and its authorities. Meanwhile, a fair trial requires that the defendant be given a fair opportunity to present his defense in order to confront this imbalance between his position and that of the state represented by the Public Prosecution, which is known as the principle of "equality of arms" in defense.

Therefore, the right of the accused to defend himself, in person or through an agent (i.e., legal counsel), is a basic right at the trial stage. It is a right that emanates from the principle of the presumption of innocence, because the accused is considered innocent until proven guilty by a final court ruling, which is a right established by the constitution. We have seen above in detail the content of this right and the associated rights and guarantees in international law and the Yemeni legal system.⁷² As for our discussion here, it is limited to examining the

⁷¹ It is assumed that the Press Court is the court specifically specialized in press crimes, and the Specialized Court for Press and Publications was established pursuant to Supreme Judicial Council Decision No. (130) of 2009. Press and publishing crimes are subject to Law No. 25 of 1990, which stipulates in its third article: "The Press and Publications Court shall be competent to consider and adjudicate crimes of publication stipulated in the law and all cases related to issues of the press and publications stipulated in the Press and Publications Law and related laws." With regard to the maximum penalty for publishing offenses, Article 104 of the Press Law states: "Without prejudice to any more severe penalty in any other law, anyone who violates this law shall be punished with a fine not exceeding (10) thousand riyals or with imprisonment for a period not exceeding (1) one year".

⁷² See Part I, Section one, Chapter 2.

extent to which Specialized Criminal Courts respect for the right of the accused to defense in practice.

2. Right to defense in practice

It was remarkable and unfortunate, the defendant's right to defend themselves was found to be the most violated right within the study, especially in the two stages of arrest and arbitrary detention by the security authorities of the parties to the conflict in Yemen. In all the cases that Mwatana reviewed, serious and substantial investigation was not carried out by the criminal prosecution nor by the Specialized Criminal Courts in relation to the accuseds' defense or their claims related to the violation of their constitutional and legal rights.⁷³ This includes defendants who were arrested unlawfully or without an official arrest warrant, or by persons who did not disclose their legal capacity to arrest. It also includes cases in which defendants were not informed of the charges against them immediately after their arrest. Defendants were denied defense rights fully in the investigations stages, whether before the security authorities or before the criminal prosecution office.⁷⁴

Also, the specialized criminal prosecution, in the cases that Mwatana studied, did not heed the defenses of the defendants denying all the confessions attributed to them, didn't view them as submissions stripped of evidence, in records most of them unofficial, this includes their defense based on the fact that they provided

⁷³ This undermines the obligation under Article 8 of the Criminal Procedures law:

1. The judicial enforcement officers, the general prosecution and the Court are compelled to be fully assured/confident of the occurrence of the crime, its reasons, circumstances and of the identity of the accused.

2. The accused has the right to participate in the confirmation of the truth; he is entitled to present requests to prove his innocence in all the stages of the investigation and the trial; in all cases, they must be proven and investigated.

⁷⁴ The claim or allegation of violating the rights related to the illegality of arrest, search and detention in the prisons of the security authorities, and exposure to coercion and torture by these authorities, is almost a common argument presented by the defense in all cases that have been managed by the Specialized Criminal Courts. This claim, however, has been ignored in practice in many cases. Some rulings have been issued in some cases though, the most important of which is Judgment No. (101) of 2019, issued by the Specialized First Instance Court in Sanaa on 7/9/2019, in Case No. (141) filed by the Specialized Criminal Prosecution under No. (131) For the year 2017. The court has decided on all the claims raised by the defendants regarding the violation of their rights, and the court decided in this regard, "that the defense's arguments for the defense (the invalidity of the arrest and search procedures and the consequences thereof, as well as the defense to invalidate the defendants' confessions being made under duress and torture), amount to nothing more than allegations submitted without evidence and contrary to the reality proven in the case file, which confirms the invalidity of the said claims, which must be rejected." This has been repeated in other rulings where the defendants' defense were viewed as "statements made without evidence or proof". See, for example, the judgment issued by the Specialized First Instance Criminal Court in Sanaa, No. (16) of 2018, in the criminal case No. (232) For the year 2014, as well as the judgment issued by the Appeals Chamber, Sanaa, No. (78) for the year 2020, in the Criminal Case No. (25) for the year 2019.

the information contained in those records due to the physical and psychological torture they were subjected to as a result of their lengthy detention in the security authorities' prisons in harsh and inhuman conditions. They also often denied the accused's legitimate right to seek the assistance of a lawyer or the right to contact their families and relatives (even though most of them were the sole breadwinners for their families). Where the accused was held in incommunicado detention and was forcibly disappeared for months or often years, the criminal prosecutors often did not investigate the reasons for this, before referring them to the prosecution office or the judiciary, and mostly after referred them to the prosecution and the judiciary.⁷⁵

And worst of all,, the indictment decisions submitted by the Criminal Prosecution to the Specialized Criminal Court in the cases were based on police records, and were almost an exact copy of them in legal form. **All of the judgments were issued based on the evidence contained in those reports. That evidence is often confined to the confessions of the defendants before the security authorities and before the criminal prosecution, without serious investigation into their truth or without establishing the truth of facts that defendants denied in court. Some defendants, for example, reported that these confessions were made under duress or physical and psychological torture during the long period of detention,** which calls into question their legal value as evidence in accordance with Article 6 of the Criminal Procedure law, which states that, "The torture of any person convicted or charged is prohibited, as well as inhumane treatment, or cause of bodily harm, or harm to morale, for the sake of obtaining an admission of guilt; any statement proven to have been committed by the accused, or any witnesses,

⁷⁵ E.g.: In Case No. (56 of 2018), the Specialized Criminal Court in Hadramout, represented by the Appeals Chamber, did not pay attention in its judgment issued on (February 26, 2019) to what the accused raised before it of being subjected to torture at the hands of the security authorities and being denied health care (he was suffering from a kidney disease proven by a medical report), and from contacting his family. It didn't address his request for compensation for the damages he suffered and depriving him of his freedom from the date of his arrest on (July 22, 2016) until his release on (February 26, 2019), according to the aforementioned verdict, which ruled that he was found guilty of the charges against him and released, and that his previous imprisonment period was sufficient. Nevertheless, The Specialized Criminal Court, in some cases asked the Public Prosecution to address the prison administration of Political Security Agency, regarding the need to respect the rights of the defendants related to visits, meeting lawyers, and providing them with proper health care, which has not been implemented in practice. See, for example: the judgment of the Specialized First Instance Court in Sanaa, No. (101) for the year 2019, issued on 7/9/2019 in the case filed by the Criminal Prosecution No. (131) for the year 2017.

under duress through any of these acts, shall be annulled and will not be relied upon accordingly.”⁷⁶

On the other hand, Mwatana was informed of few cases in which the Specialized Criminal Prosecution notified the security authorities about the situation of some of the defendants in their custody, sent a request to refer them to the prosecution, or summoned them to the criminal court (mostly after the case had been pending before the prosecution or the criminal court). But the security authorities in some of these cases did not respond to the Specialized Criminal Prosecution’s orders, and sometimes also did not respond to the court’s orders.⁷⁷ This suggests that these authorities consider themselves to be above the authority of the judiciary, even though legally it is assumed that judicial agencies, including the security services, operate under the orders of the Public Prosecution Office and under the supervision of the Public Prosecutor.

Access to lawyer

Access to lawyers is a vital component of the right to defense. The accused’s right to a lawyer starts from the moment of their arrest, and continues through investigations, trial and judgment. This is because every accused individual needs be able to obtain legal advice in order to be able to fully understand the case being brought against them, and thus to be able to prepare an informed defense. The accused must be able to freely choose a lawyer, and if they are unable to pay their lawyer’s fees, the state must, in accordance with international and national law, provide them with free legal aid in the interest of justice.

Although the right to a lawyer is established under international human rights law, and is guaranteed by the Constitution and Yemeni Criminal Procedure law (which makes it mandatory in serious criminal cases, and at the expense of the

⁷⁶ This comment is confirmed by Abdulmagid Al-Sabra (a prominent lawyer who defended many defendants at the Specialized Criminal Court of Sanaa). He repeated the same argument at the court in more than a case. He also raised this question in his oral intervention at the focused discussion panel organized by Mwatana for Human Rights, Op. Cit.

⁷⁷ E.g. In Case No. (214 of 2017), which was heard before the Specialized Criminal Court in Sanaa, the accused was arrested on August 11, 2016, and his case was not transferred to the Criminal Prosecution until May 17, 2017. That is 8 months after his arrest. He did not appear for investigation before the Criminal Prosecution until January 23, 2018 (that is, seven months after the date of referral). The reason for the defendant not appearing before the Criminal Prosecution is the security authorities’ procrastination, even though it had previously referred his case to prosecution by virtue of an official memorandum, and despite the Specialized Criminal Prosecution’s communication with the security authorities (8 times).

state if necessary), this right, in practice, has often not been made available to the accused in the arrest and investigation stages, or in most cases pending before the Specialized Criminal Courts. Often the first time this right was made available was before the court, usually in the first session of the trial. In most cases where a lawyer was made available, they were often assigned by the court, and defendants were not given the opportunity to choose their lawyer.⁷⁸

Access to case files

The accused cannot prepare their defense without having access to the files related to the case and the details contained within them. This right is to be guaranteed to the accused at all stages of the case. It includes access to all documents and information related to the case for which the accused is being tried.

In practice, defendants and their lawyers were not allowed to obtain a copy of the case files at the evidence collection stage, and in the investigation stage as well. The courts responded, partially, to lawyers' requests to review some of the documents contained in the case files. In a few cases, the court enabled the lawyers to obtain a copy of the files, or the lawyers were able to obtain it by their own means, while Some lawyers were able to take a copy of the case file after the judgment was issued.⁷⁹ In cases where the lawyers were allowed to view the case file, they often were not given sufficient time to study the files and prepare the defense. Additionally, they often were either not allowed to contact their clients or to meet with them outside of court hearings.⁸⁰

⁷⁸ It should be noted here that all cases reviewed by the Specialized Criminal Courts bring the accused into custody. The lawyer is assigned, in most cases, by the court in the first court session, as the law requires the assistance of a lawyer in grave criminal cases.

⁷⁹ Some lawyers have explicitly said that they did not obtain the right to view the case files before the court based on court orders alone in each case, but in some cases they had to obtain this through their own methods, and among those methods was the payment of a fee to obtain a complete copy of the files.

⁸⁰ In one of the cases, the court allowed the defense lawyer, assigned by it, to obtain a copy of the case file, but it gave the accused only one day to prepare his defense, and required him to present the defense petition in the next hearing that was held the next morning. This leads to believe that the court hiring of the lawyer, and enabling him to see the case file, was merely to fulfill the formal aspects of looking into the case and not to enable the accused to seriously defend himself. The trial resumed the next day, and after hearing the defendant's defense, the First Instance Specialized Criminal Court in Hadramout (Case No. 56 of 2018) convicted the accused and did not pay attention to his essential defense. (It is noticeable here, that the verdict was issued in the second hearing, after the trial was postponed in the first one, which means that the trial of the accused in a serious crime, and the issuance of the judgment in it, took place in one hearing).

Witnesses

In all cases, there were no witnesses to prove the incident or the facts for which the accused was being tried. Rather, the Specialized Criminal Courts relied on the accused's own confessions that were stated in the evidentiary records and the prosecution's investigation in order to convict the accused, although the defendants denied—including before the court—having confessed in the first place, or argued that the confession was extracted under physical and psychological torture and in some cases under duress. The court, however, did not pay attention to these essential elements of the accused's defense, nor did it investigate them or take them seriously.⁸¹

Third: The extent to which the accused's right to be tried without undue delay is respected

1. Definition of the right to be tried without undue delay and its importance

One of the basic guarantees stipulated in the ICCPR, under Article 14(3)(c), is the right of the accused to be tried before a court without undue delay. This is so that trial procedures begin and end within a reasonable period of time, as lengthy litigation may negatively affect the position of the accused, including because: details of the facts may fade from the memory of witnesses; witnesses may not be found to appear before the court; other evidence may be destroyed or disappeared.

⁸¹ For example, in Case No. (56 of 2018), a serious criminal case, the Specialized Criminal Court in Hadramout, represented by the Appeals Chamber, did not pay attention to the judgment issued on February 26, 2019, to the defendant's claims that he was subjected to torture by the security authorities and deprived of his health care (he was suffering from a kidney disease confirmed by a medical report), from contacting his family. Nor did it pay attention to his request for compensation for the damages he suffered due to this case and depriving him of his freedom from the date of his arrest on (22 July 2016) until his release on (26 February) 2019). He was found guilty on the charges against him and released, and that his previous imprisonment period was sufficient. However, in other cases, the courts investigated the validity of the defendants' claims of being subjected to coercion or torture, and tasked the prosecution of sending these claims on to the forensic medicine office, which stated that there were no signs of torture on the accused. See for example: the judgment issued by the Specialized Criminal Court No. (101) on 7/7/2019, in the case filed by the Specialized Criminal Prosecution No. (131) for the year 2017.

Additionally, this right aims to shorten the period of anxiety that the accused endures as they await their fate, and to minimize the suffering that they and their family and friends endure as a result of being accused of a crime of which they may be innocent. Therefore, every delay in the trial procedures may potentially cause harm to the accused, and it is not their duty to prove this harm, but rather the competent authorities must provide an acceptable explanation of the reasons for their failure to complete the trial procedures within a reasonable period of time.

The accused has the right to be brought to trial as soon as possible, regardless of the type of crime they are accused of committing.⁸² This is because the accused may be innocent, and thus the restriction of their freedom or the use of pretrial detention would be against the general rights to freedom that individuals have.

Therefore, the constitution prohibits the arrest of any person except in accordance with the law, through an order from the Public Prosecution or the court. It is required that the accused appear within 24 hours before the prosecution or that they otherwise be released. The law also requires that the period of pretrial detention, based on the prosecution's decision, does not exceed seven days (though this is extension by a decision of a competent judge if it is required in order to complete the investigation for a period not exceeding 45 days). In all cases, the law requires that the period of pretrial detention does not exceed six months and that this should be decided issued by the competent judge upon the request of the Public Prosecutor.⁸³

2. Right to trial without undue delay in practice

⁸² The "reasonable period of time" is estimated according to the circumstances of each case separately. Among the basic elements that are to be taken into account: the degree of complexity of the case, the behavior and health of the accused, the behavior of the authorities, the seriousness of the charges and the possible penalties, bearing in mind that the slow procedures resulting from the poor organization of the justice system or arguing based on the lack of resources and capabilities, the lack of judges, and consequently the accumulation of cases, is considered an unjustified delay. See Yassin Al-Shaibani, *Fair Trial*, published by Mwatana for Human Rights, Sanaa, 2019, p.72.

⁸³ See articles 190-191, Criminal Procedures law.

In practice, the respect for the right to trial in a reasonable amount of time differs in each of the stages in which cases go through before the Specialized Criminal Courts, as follows:

Arrest and detention stages at security departments

A common factor that existed across all cases in the study was that the period between the arrest of the accused and their referral to the Specialized Criminal Prosecution (which is the stage in which many legal rights and guarantees are violated, primarily the right to personal freedom and the right to be presumed innocent) exceeded the period specified by the law. The period during which the accused was detained by the security authorities had reached more than two years in many cases.⁸⁴ Moreover, the authorities often denied the presence of the accused in their custody, meaning that the accused were in a state of "enforced disappearance." When such issues were raised before some prosecution offices and the Specialized Criminal Courts, they claims were not given any attention, nor were they seriously investigated, in some cases, there was no investigation at all.⁸⁵

⁸⁴ For example, in case No. (417) of 2017, and according to what was stated in the opinion memorandum issued on 5-7-2018 by a member of the appeals in the Specialized Criminal Prosecution, the accused was arrested on December 9, 2016 under an arrest warrant issued by the Criminal Prosecution, on 6/6/2016, and his statements were taken by the arresting authority and the records of evidence collection were released on 01/26/2017. The defendant's file was not referred to the prosecution after arrest, not until 3-10-2017. In other words, the stage of collecting evidence lasted for nearly 7 months. The accusation decision was issued by the Specialized Criminal Prosecution in July 2018, meaning that the accused has been detained pending investigation for more than a year and a half. This represents a violation of a constitutional right, and also violates the text of Article (191) of the law of Criminal Procedures, even on the assumption that the criminal prosecution order, according to which the arrest was made, is considered to be in the custody of the criminal prosecution from the moment of his arrest, and the prosecution is considered responsible for any violations that the accused is exposed to from that moment.

⁸⁵ It had been argued repeatedly, before the Specialized Criminal Courts, that the accused has been detained by the security authorities for a long time, and has been prevented from contacting his family and relatives, and has been denied health care in more than one case. Among those cases, for example: Criminal Case No. (56 of 2018), which were considered, in both first instance and appeals stages, before the Specialized Criminal Court in Hadramout, where the accused was held for nearly two years before he was referred to the prosecution and then for trial. There is also Case No. (214 of 2017), which was considered before the Specialized Criminal Court in Sanaa, where the accused was arrested on August 11, 2016, and his case was not referred to the Criminal Prosecution until May 17, 2017 (i.e. 8 months after the arrest). Therefore, he did not appear for investigation before the Criminal Prosecution until January 23, 2018 (that is, 7 months after the date of the referral). The reason for the defendant not appearing before the Criminal Prosecution is the security authorities' procrastination in bringing the accused, even though he had his case was referred to it by an official memorandum, despite the Specialized Criminal Prosecution's order to the security authorities (8 times) on the necessity of brining the accused to appear before the prosecution.

Case waiting times at the criminal prosecution office

In some of the cases, the Specialized Criminal Prosecution offices began taking legal measures within the legally prescribed periods. The periods between these two stages generally ranged from two weeks in some cases to five months in other cases. The extension of pretrial detention periods for the accused, weekly or every 45 days, were carried out in terms of form in accordance to the law, in many of the cases that Mwatana was able to access.⁸⁶ Nevertheless, and as stated above, the responsibility of the criminal prosecution remains in place regarding its failure to investigate claims and defendants' relating to violations of their rights while they were in the custody of the security authorities.⁸⁷

Trial time at the Specialized Criminal Courts

We stated above that filing cases before the Specialized Criminal Courts is subject to the general rules in the Criminal Procedures Law, and we add here that hearing cases is also subject to the general rule established in Article 268 of the Criminal Procedures Law, which states that "the review of the penal charges shall be done in continuous sequential sessions until the trial is completed unless the conditions of the case justify or necessitate the suspension or postponement thereof, in the conditions stipulated for in the Law."

Expedited trial procedures according to Articles 296 and 299 of the Criminal Procedures Law are also applicable to the cases in which the accused is brought

⁸⁶ For example, in Case No. (417 of 2017), which was considered before the Specialized Criminal Court in Sanaa, the case was referred from the security authorities to the Prosecution on October 3, 2017, and the procedures began by the Specialized Criminal Prosecution on October 7, 2017. That is, only three days after the case was referred to the prosecution. In Case No. 249 of 2016, the Specialized Criminal Prosecution began its procedures on December 17, 2016, two weeks after the case was referred to it by the Security and investigative Prosecution of Sanaa on December 3, 2016.

⁸⁷ Violations of the rights of the defendants during their detention by the security authorities are not limited to their fair trial rights, which were previously mentioned in detail, but also to the violation of their human rights of personal dignity, health, nutritional and psychological conditions. Among the most important violations that the legal support team monitored was the rights of the defendants during detention by the security authorities. They are forcibly disappeared for long periods of up to six months, not being allowed to communicate with family members at all during this period. They were held in detention facilities that are not subject to the prisons law or inspection and supervision of the Public Prosecution, and in narrow and dark rooms that the sun does not enter. Also, the food in terms of its quantity and content was very poor, and fruits are not allowed at all, in addition to not allowing the introduction of medicines and limiting them to sedatives (such as Panadol and Despan). The prison doctor turned out to be a person who graduated from high school then took training courses in first aid.

to trial in custody due to the seriousness of the crimes he is alleged to have committed. In accordance with the provisions of these articles, the trial of the accused must begin within one week from the date of the case's referral to the court, and the case is considered in successive hearings, whenever possible, until the court decides on and issues a final judgment for the case.

It is important to remember here that Article 111.1.D of the Judicial Authority Law makes it a breach of the judge's duties to delay deciding the cases pending before him, requiring disciplinary accountability before the Supreme Judicial Council.

In practice, There were several cases in which the trial took an unreasonable period of time to adjudicate. According to international standards, these cases may be considered unfair trials due to how long they took. In one particular case that was before the Specialized Criminal Court in Sanaa, there were 33 hearings prior to adjudication, and the verdict was not issued until three full years after the start of the trial. In the same case, there were 20 hearings that occurred before the Appeal Chamber of the Specialized Criminal Court in Sanaa, and the final judgment was not issued until one year and three months after the start of the proceedings. The hearings before the Appeals Chamber in this case had not begun until one year after the registration of the appeal petition against the judgment issued by the court of first instance.⁸⁸

Fourth: The extent to which the right to a public trial in the presence of the defendant was respected

1. Definition of the right to public trial in the presence of the defendant and its significance

⁸⁸ See the judgment of the First Instance Criminal Court in Sanaa, No. (16) of 2018, in the Criminal Case No. (232) of 2014, as well as the judgment issued by the Appeal Chamber of Sanaa No. (78) of 2020, in the Criminal Case No. (25) of 2019 known as the Baha'i case. There are also trials that continued (from the first hearing to the date of the verdict) for more than two years and three months, in addition to the period the defendants spent in the custody of the security authorities before the trial. See Case No. (131) for the year 2017, that was considered by the Specialized First Instance Court in Sanaa.

It is stated above that the right to a public trial is a fundamental guarantee of achieving justice and in safeguarding judicial integrity. In addition, a public trial is an important way to inform the public about proceedings, which enhances people's confidence in the justice system and the system of governance in general.

This right is established under international human rights law, in accordance with Article 14.1 of the ICCPR, and is also established in the Yemeni Constitution in accordance with Article 154, which states that, "Court sittings are open to the public unless a court determines, for reasons of security or general morals, to hold sessions behind closed doors. In all cases, verdicts are announced in an open session." This is also confirmed in Article 5.A of the Judicial Authority Law, which presents the principle of public trial using the same language from the Constitution. The Yemeni Criminal Procedures Law has combined everything related to the principle of the open trials under Article 263, which states that:

1. The sessions of the Court must be open to the public, unless the Court decides that some or all of the trial shall be closed, be attended only by those who are related to charges, for security and order, or for the maintenance of proper public conduct, or for fear of revealing confidential matters on the private lives of the Parties to charges, or in the case of widespread plagues and other communicable diseases. The Court can also prevent minors and people of improper appearance that undermines the prestige of the Court.
2. The public may be allowed to enter the Courtroom to the extent that the status permits accordingly.
3. Public Hearings are regarded as an important guaranty for insuring that justice proceeds properly.

Presence of the defendant

A fair trial requires that the trial sessions be held in the presence of the accused, in order for him to be fully aware of the charges and legal measures against him by hearing the prosecution's pleadings, defense arguments, and witness testimony and having the chance to refute them.

The right of the accused to attend the trial is also guaranteed in Yemeni law according to Article 315.1 of the Criminal Procedures Law, which obliges the accused to attend the trial himself, provided that the court may accept the presence of a representative of the defendant for crimes punishable by a fine. Article 349 has also prohibited removing the accused from the courtroom unless he violates the order of the session.

2. Right to public trial in practice

Although all trial sessions before the Specialized Criminal Courts, in cases which Mwatana reviewed, were public sessions, the public aspect was subject to some restrictions, as attendance in many trials was restricted to relatives or friends of the accused. Sometimes, some members of the legal support team (Mwatana) were able to attend sessions. The reason given for the restrictions were the strict security procedures accompanying the appearance of the accused before the Specialized Criminal Courts.⁸⁹

Allowing public access to rulings and the rationale

Right to public access to court rulings

A judicial ruling is every decision issued by the court in which it decides on the outcome of a lawsuit or dispute under its consideration. It is assumed that each judgment is an expression of the will of the law and therefore is binding on all parties to the lawsuit. Hence, it is obligatory to implement voluntarily or involuntarily.

A fair sentence can only result from a fair trial. International standards require that court rulings be rendered publicly. The aim of public access to judgments is

⁸⁹ Some believe that "there is a severe exaggeration in the security procedures that are followed, whether in the headquarters of the Specialized Criminal Courts or in the hearings, which creates an atmosphere of terror and fear, instead of the atmosphere of trust and security that must prevail in the courts as bodies for the administration of justice", Ahmed Al-Abyadh, in his oral intervention In the "Focused Discussion Seminar" organized by Mwatana under the title "Specialized Criminal Courts: The Legal Framework and Practices", Op. Cit.

to ensure that justice is administered publicly and that it is subject to the scrutiny and oversight of public opinion.

The principle of public access to judgments is related to the right to a public trial. The judgment must be issued orally in a public hearing and in a language that the accused understands (alternatively, the judgment must be translated into a language that they understand). If the judgment is issued in writing, it must be presented to all parties to the case at the same time, and access to it must be made available to others through a record with the court.

The general rule, then, is that there must be public access to judgments and public issuance of judgments. This is guaranteed under international and Yemeni law, and the only exception to this is when publicity may affect the privacy or interests of minors or when it comes to marital disputes or the guardianship of children.

In practice, the principle of the publicity of judgments was respected in all judgments issued by the Specialized Criminal Courts, as the verdicts were all read in an open hearing, and judgments were subsequently issued accompanied by the verdict's reasoning in written form.

Right to know the reasons and rationale of rulings

The right to make rulings public requires that the parties to the lawsuit, and the public as well, know the reasons and rationale on which the court relied on in issuing the ruling. It is irrelevant if the ruling found the defendant innocent or guilty. In general, the ruling must include the basic facts and every issue upon which the case was decided, as well as the legal basis on which the judgment is based for each element of the case. The ruling must also include the reasons on which the ruling is based in each of its parts and in necessary detail to allow for clarification of the reasoning.

The Yemeni Criminal Procedures Law guarantees the right of the defendant to know the reasons and rationale for the judgment. It stipulates in Article 372 that, **"The ruling shall include all the reasons on which the ruling is based upon. Every conviction verdict must include the reasons that prove the occurrence of the**

punishable crime and the charges against the defendant thereof. The Court shall also include meting out the sentence for the crime and the conviction thereof; the justifications upon which the determination of the sentence are based upon, otherwise the violation thereof shall render the ruling null and void.”

The purpose of guaranteeing the right of the parties to the lawsuit and the public to know the reasons and rationale of the ruling is to enhance the credibility of the judiciary and the justice system more generally. Most importantly, it is also to ensure the right of the affected parties to challenge these rulings and appeal if they choose to do so.

In practice, the rulings issued by the Specialized Criminal Courts—whether issued by the court of first instance or the appellate chambers—often fulfilled these obligations of the reasons and rationale -in terms of form-. However, many of the rulings were based exclusively on the confessions of the defendants as proof of the crime, according to what was stated in police investigation records and on the prosecution's investigations and the list of evidence attached to the indictment sheet. In some cases, those who were convicted denied these confessions altogether at their hearings. However, these denials were not taken into consideration, as previously mentioned.

Some rulings were deficient in determining the exact legal basis upon which the judgment was based, and there was insufficient explanation for the reasoning on which the alleged facts were attributed to the accused. Some rulings relied mainly on references to Qur'anic verses of general and unspecified significance in addition to some legal articles contained in the indictment sheet, instead of relying on legal articles governing the facts of the case.⁹⁰

Judgments were sometimes not properly drafted, as they should be done in a neutral legal language. Instead, some rulings were drafted in rhetorical language that clearly reflected the judge's point of view, including his political views, which was inconsistent with the legal basis for the rulings. Moreover, some of the rulings dealt with parties and persons who have not been charged in the Criminal Prosecution allegations.⁹¹

⁹⁰ See, for example, the ruling issued by the First Instance Criminal Court in Hadramout, in Case No. (56 of 2018).

⁹¹ See, for example, the judgment issued by the Specialized First Instance Court in Sanaa in Case No. 249 of 2016.

Fifth: The degree to which the defendant's right to appeal is respected

1. Definition and significance of the right to appeal rulings

The right to appeal is one of the most important guarantees of a fair trial according to international and national standards. It is a right established for all parties to the case, provided that they have an interest in annulling or amending the judgment. The parties may exercise their right to an appeal in both civil and criminal cases within the conditions, procedures and dates specified in the law. Criminal appeals are more important in view of the serious consequences that may ensue from their judgments, including the death penalty.

International human rights law guarantees the right to appeal rulings under Article 14.5 of the ICCPR, which states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

Yemeni law also guarantees this right under Article 411 of the Criminal Procedure Law, which states:

1. Every ruling or decision can be appealed unless the Law specifically stipulates that it may not be appealed.
2. The right to appeal is decreed for all Parties, unless the Law restricts it to only one Party and no other Party.
3. Only those concerned or who have a stake in the appeal may present an appeal.

Additionally, Article 373 of the Criminal Procedures Law states, "If the ruling is subject to appeal, the Judge must notify the defendant that he has the right to appeal the ruling and the period in which he can do so accordingly." Article 413(1) adds to this, stating that, "The General Prosecution may appeal a ruling or

decision in favor of or against the defendant whenever it deems that the law requires accordingly.”⁹²

In conclusion, with regard to the right to appeal rulings, in order for the trial to be fair, it trial must take place before a court within the scope of the normal or ordinary judiciary, and litigants before the court must have the right to appeal their rulings to a higher court of a judicial body. This is known as the multiplicity of degrees of litigation, or the right to appeal rulings.

2. Right to appeal in practice

The right to appeal was respected in all rullings issued by the Specialized Criminal Courts, though the rullings issued by the appeals chambers were in support of the initial decisions convicting the accused in almost all cases and on the same basis. In none of the cases studied did the appeals chamber rule contrary to the Court of First Instance's rulling, except in a few cases in which the death penalty was replaced by imprisonment.⁹³ Many of the cases in which judgments were issued by the Appeals Chamber are still in the process of appeals or cassation appeals before the Supreme Court.

Sixth: The degree to which guarantees in cases of death penalty are respected

The death penalty - given its seriousness and the inability to avoid its effects in the event of its execution - is subject to additional conditions and controls above those prescribed for other penalties. It should be noted that there is a general trend among non-governmental organizations, of an international character (among them Amnesty International and Human Rights Watch) that they oppose in principle the imposition of the death penalty on the grounds that it is inconsistent with the basic principles established in international human rights

⁹² Given the importance of the right to appeal rulings in criminal cases, the Criminal Procedure Law has regulated this topic in Section Four of the Law, in 58 articles, which are Articles 411 to 468. The regulation of appeals in civil aspects is mentioned in the Yemeni Procedures Law, Section 10, in 42 articles, which are Articles 272 to 313.

⁹³ See, for example, the judgment of the Specialized Appeals Division in Sanaa, dated July 9, 2019, in Case No. 249 of 2016.

law, especially the right to life. According to this trend, the death penalty is a form of punishment that is unique in its cruelty and finality as it is irreversible, and there is no way to correct its consequences in the event of a mistake in its application

1. International standards regarding capital punishment

For countries that have not abolished the death penalty It has become well-established today that the death penalty is subject to the following international guarantees and standards:⁹⁴

1. Where the death penalty is not abolished complete, international standards require that it only be imposed for the most serious of crimes, and that it should not be obligatory for any specific crime, as it limits the discretion of the courts to assess the degree of criminal and moral responsibility of the perpetrators in each case separately.
2. The death penalty may only be imposed when the crime of the defendant is based on clear and convincing evidence that leaves no room for any alternative interpretation of the facts.
3. The death penalty may only be carried out according to a final judgment issued by a competent and independent court formed according to the law. All rights and guarantees related to a fair trial are taken into account in the trial of the

⁹⁴ See article 6 of the ICCPR, which includes the following important guarantees:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

accused, and in particular the guarantee of the defendant's right to defense in all stages of the case and trial.

4. Everyone sentenced to death has the right to appeal to a higher court, and every state must take measures to make this appeal compulsory.

5- The death penalty may not be carried out except after ratification by the head of state or by the authority authorized to do so in accordance with the constitutional conditions of the relevant country.

Article 123 of the Yemeni Constitution confirms this last point, stating that, "A death sentence shall not be executed unless endorsed by the President of the Republic." The Criminal Procedures Law also guarantees a set of safeguards regarding the death penalty and includes how it should be implemented. The most important of these guarantees are what the law has stated in the following articles:

1. Article 478: "If the Supreme Court rules on rulings for the death sentence, religiously stipulated punishments; retribution in-kind sentences, it shall send copies of such rulings to the General Prosecutor, in order for the latter to present it to the President of the Republic with a comprehensive report on the case, within ten days after receiving the ruling of the Supreme Court, in order to issue the Decree for the approval of the ruling accordingly."

2. Article 479: "Sentences of death, religiously stipulated punishments or retribution– in-kind shall only be implemented after the approval of the President of the Republic for the sentence accordingly."

3. Article 480: "The President of the Republic shall issue a decree to execute, religiously stipulated punishments or retribution – in-kind sentences. However, for death sentences, he may issue a decree for the execution of such sentence, for an alternative punishment or for exempting the sentenced defendant. When a decree is issued accordingly, the General Prosecutor shall issue an order, which entails that the President of the Republic has issued a decree and that the required legal procedures thereof have been fulfilled accordingly [...]."

2. Capital punishment in practice

The Specialized Criminal Courts has issued many death sentences,⁹⁵ mainly due to the fact that the Law on Crimes and Penalties has perscribed the death penalty in cases where crimes affecting the security of the state from abroad have been committed. Most of the cases considered by the Specialized Criminal Courts during the period studied have been adapted by the prosecution offices and the Specialized Criminal Courts as affecting the security of the state. This is due to the fact that the provisions of incrimination and punishment in relation to crimes of state security have been formulated in such a vague manner as to allow many acts to be introduced within this framework. This signals a serious loophole that has resulted in the expansion of criminalization acts affecting state security. Moreover, the politicization of the judiciary by the conflict parties is another main factor contributing to the issuance of a great number of death sentences, some of which have been issued *in absentia* and against defendants who are supposed to enjoy judicial immunity, including heads of state and government and members of Parliament.⁹⁶

The politicization of the judiciary, the consequent violation of the defendants' right to a fair trial, and the degree to which the Specialized Criminal Courts have issued death sentences, drew the attention of the United Nations Group of Eminent Experts. In 2019, the Group of Eminent Experts said, "The group found reasonable grounds to believe that Parties to the armed conflict in Yemen are

⁹⁵ The issuance of many death sentences by the Specialized Criminal Courts has raised the concern of international organizations. In a statement issued by Amnesty International on March 25, 2020 (Document No. MDE 31/1990/2020), it was stated that:

Amnesty International is concerned that some of the charges - most of which are related to espionage - in all documented cases are punishable by death under Yemeni law, and in 2018, 22 people were sentenced to death... In 2019, the number of those sentenced to death doubled... and the organization's concerns (Amnesty International) intensified regarding this point as a result of violations of the right to a fair trial... On March 6, 2020, the Specialized Criminal Court sentenced 35 parliamentarians to death - in absentia - on charges of treason. According to the cases documented by the "Saba News Agency, Sanaa" website, 146 people were sentenced to death in the year 2020 alone, and those rulings were issued by the Specialized Criminal Courts in the capital Sana'a, Hodeidah, and Saada (note that the Criminal Court The specialist in Saada, not covered by Resolution No. (131) of 2009 regarding the re-establishment and organization of the Specialized Criminal Courts).

⁹⁶ See, for example, the ruling of the Specialized Criminal Court, in Hudaydah Governorate, in Case No. (24) of 1440 AH, filed by the Specialized Criminal Prosecution and the Specialized Criminal Appeals Prosecution in Hudaydah Governorate No. (12) of 2019. Where this ruling convicted 16 defendants in the case with crimes of murder and espionage, and handed down against eleven defendants, the death penalty within Qisas crimes while five defendants were issued the death penalty on basis of Hudood and Ta'zir. Source: <https://www.saba.ye/ar/news3106781.htm>
Also review what has been mentioned previously, that on March 6, 2020, the Specialized Criminal Court in Sanaa sentenced 35 parliamentarians to death - in absentia - for "treason and aiding aggression."

responsible for arbitrary deprivation of the right to life, arbitrary detention, enforced disappearance, sexual violence, torture, ill-treatment, child recruitment, violation of fundamental freedoms, and violations of economic, social and cultural rights. They amount to violations of international human rights law and international humanitarian law. Many of these violations may lead to the individuals concerned being held accountable for war crimes, if they are referred to an independent and competent court.”⁹⁷

⁹⁷ See the full text of the statement by the Group of Experts on Yemen, dated 3 September 2019, Geneva: <https://www.ohchr.org/EN/HRBodies/HRC/YemenGEE/Pages/Index.aspx>

Chapter 2: The degree of respect for institutional guarantees related to the administration of justice

First word: In Chapter 1, we discussed the extent to which basic guarantees are respected regarding the rights of the accused to a fair trial before the Specialized Criminal Courts and its prosecutions—both substantively and procedurally—in accordance with international human rights law and Yemeni law. The study revealed a clear gap between the legal framework that governs the work of these courts and their practices. In this chapter, we try to determine the extent to which institutional guarantees are respected in the administration of the justice system, as defined in international and national legal frameworks, through the performance of Specialized Criminal Courts and prosecutions. We then try, in a final discussion, to explain the most important reasons for the existing gap between the legal framework and practices of these courts, and provide suggestions for how to bridge this gap. We finally recommend some urgent solutions and remedies as necessary next steps on the road toward comprehensive reform of the judiciary and justice system in Yemen.

First: How far guarantees related to the administration of justice are respected

1. Independence of the judiciary

At the beginning of this study, we stated that the independence of the judiciary, as a basic pillar of the rule of law, constitutes a basic requirement for the establishment and administration of justice. Therefore, it is a basic assumption that the judiciary must be independent in order to respect the rights and guarantees related to a fair trial.

When talking about the international and national legal frameworks for a fair trial, we indicated that the independence of the judiciary is considered a human right in accordance with Article 10 of the Universal Declaration of Human Rights (UDHR), which states that, “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his

rights and obligations and of any criminal charge against him.” The principle was also established as international humanitarian law by Article 14 of the ICCPR, as previously explained, and this principle was the first among the basic principles related to the independence of the judiciary issued by the United Nations. Article 14 states that “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”

The Yemeni Constitution, under Article 149, also guarantees the independence of the judiciary, stating that: “The Judiciary authority is an autonomous authority in its judicial, financial and administrative aspects and the General Prosecution is one of its subbodies. The courts shall judge all disputes and crimes. The judges are independent and not subject to any authority, except the law. No other body may interfere in any way in the affairs and procedures of justice. Such interference shall be considered a crime that must be punished by law. A charge regarding such interference cannot be nullified with the passing of time.” Article 1 of the Judicial Authority Law also includes the same language from Article 149 of the constitution.

In fact, the principle of the independence of the judiciary is one of the requirements for the application of the principle of **separation of powers**,⁹⁸ and without respecting this principle, judges cannot be afforded constitutional protection from the interference of the executive and legislative branches.

We have dealt with the principle of the independence of the judiciary extensively in the first section of this study. In order to avoid repetition, suffice here to say that the independence of the judiciary means that the judge is free to consider

⁹⁸ The principle of separation of powers is of great importance, considering that it defines the area of competence of each authority, and prevents it from being overridden. However, this principle does not mean the strict and absolute separation between the three powers (the legislative authority; the executive authority; the judicial authority) because the judge still needs an executive authority that allows to implement the rulings and decisions. Judicial authority also remains in need of appropriate laws promulgated by the legislative authority. The legislator, in turn, still needs the executive and the judiciary. The legislative authority needs the judicial and executive powers. From this standpoint, the relationship is supposed to be within the framework of legal controls without overriding or confiscation. The constitutional judiciary is the one that decides on the constitutionality of laws. With regard to the administrative judiciary, it examines the legitimacy of the administration's actions and the possibility of revoking its decisions in the event of an abuse of power. See about the principle of the independence of the judiciary in general, Idris Lekerini, the dialectical relationship between the independence of the judiciary and democracy, on: [// studies.aljazeera.net/ar/issues/2010/2011722101150375746.html](http://studies.aljazeera.net/ar/issues/2010/2011722101150375746.html) Accessed November 11, 2020

the case presented in an independent and impartial manner, based on established and confirmed facts and in accordance with the law, without any direct or indirect interference from any parties or persons at any stage of the trial.⁹⁹

Therefore, the discussion here will be limited to the extent to which the principle of judicial independence is respected in the practices of the Specialized Criminal Courts and prosecution offices.

The work of the Specialized Criminal Courts, in the early years, was progressing well in the face of the crimes of highjacking, terrorism, highway robbery, and armed assault on private and public property, with little interference from the executive authority through its security services. But from the moment the crimes affecting state security were included within the jurisdiction of these courts (according to Republican Decree No. 8 of 2004), some lawyers, as well as some national and international human rights organizations, have observed in previous studies and reports¹⁰⁰ that the Specialized Criminal Courts' method of dealing with urgent cases related to state security is different from the way it considers the rest of the cases within its jurisdiction. This has also been confirmed by some of the case files considered before the criminal courts during the period under study. Moreover, cases of state security are often subject to the influence of the political and security authorities. This explains what we have already discussed—that these courts do not respond to defendants' claims regarding violations of their rights while they remain in the custody of the security authorities in pretrial detention, and that there is a failure to seriously investigate these claims. This includes cases in which the defendant has claimed that they were subject torture, detention, or enforced disappearance in areas that are not subject to the supervision of the judiciary or the Public Prosecution, that they were prevented from contacting their families, and even in some cases that they were denied medical care. There is also the problem of the Specialized

⁹⁹ See the international and national legal provisions related to the principle of the independence of the judiciary as one of the most important guarantees of a fair trial, and indeed one of the assumptions for the establishment of justice in general, what was previously explained in detail in the first chapter of the first section of this study. In particular, see Principles 1, 2 and 10 of the United Nations Principles on the Independence of the Judiciary.

¹⁰⁰ See, for example, the statement issued by Amnesty International (one of the most credible organizations) on 25 March 2020 (Document MDE 31/1990/2020), which documented the violation of many guarantees of the right to a fair trial, especially in the pretrial stage, in more than one of the cases that have been heard before the Specialized Criminal Courts in the last three years.

Criminal Courts' reliance, in almost all cases, on relying on records from the evidence collection stage of the trial, without making any modifications, in convicting the accused. All of this is a strong indication that these courts are under the influence of the executive authorities in relation to state security cases, and that their mission is often to complete formalities in order to complete convictions that may have already been decided in advance.¹⁰¹

It should be noted here, that the September 2020 report of the Group of Eminent Experts monitored a steady increase in the reliance of the parties to the conflict on the judiciary, represented by the Specialized Criminal Courts, as a tool for managing political conflict. This is summarized in the report under the heading "Violations Related to the Administration of Justice," wherein the Group concluded that violations of fair trial rights have occurred within the framework of the administration of justice in Yemen, particularly with respect to "the operation of specialized criminal courts, violations of fair trial rights, and attacks on the judiciary." According to the same report, predominant violations include: the right to a fair trial, the use of torture to force people to make confessions, denying access to suspects and/or confidential and secure communications with their legal agents (lawyers). In addition, due to political interference and corruption, "the right to appear before an impartial and independent court in Yemen cannot be guaranteed," and some members of the judiciary "face violent attacks, arrests, threats and intimidation motivated by political and/or security reasons and personal interests."¹⁰²

2. Independence of judges and prosecution on the individual level

¹⁰¹ Some believe that many of the appointments of judges in the first instance criminal courts and the specialized appellate chambers, as well as the appointments of members, deputies, and heads of specialized criminal prosecution offices, were based on the fact that these courts and prosecution offices are state security courts and prosecution offices, and that this authorizes those appointed in them to make exceptions that frees them from following the legal procedures and guarantees that preserve the rights and guarantees of the accused in a fair trial. Saqr Abdulaziz Al-Samawi, in his written intervention in the "focused discussion session" organized by (Mwatana) on (Specialized Criminal Courts - The Legal Framework and Practical Practice), Op. Cit. p. 1.

¹⁰² See, the full version of the summary of the international experts' report on the situation in Yemen, which came under the title: "Impunity," issued on September 9, 2020, on the website of the Human Rights Council, accessed on December 26, 2020: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/GEE-Yemen/2020-09-09-09-report-summary-ar.pdf>

We have previously stated that the independence of the judiciary, represented by the courts, includes the freedom of the judge to hear the case presented in an independent and impartial manner, based on established and confirmed facts and in accordance with the law, without any direct or indirect interference from any parties or persons at any stage of the trial.

International standards regarding the independence and integrity of the judiciary, as previously described, stipulate that persons appointed to the judiciary are to be selected on the basis of their individual merits and based on their personal competence, legal qualifications, experience and integrity. Decisions to promote judges must be based on objective considerations, particularly their competence, integrity, and experience. Additionally, the appointment or promotion of judges should not be subject to any discrimination for any reason whatsoever, and women should have full access to the judiciary.

International standards also require that the body responsible for appointing, promoting, transferring, and disciplining judges should be an independent body not related to the executive authority, whether in its composition or in its mode of operation. Judges should form the majority of the members of this body, and decisions should be balanced. The procedures for appointment, promotion, and disciplinary action disciplining and transfers are clear and transparent.

The independence of the judiciary as an institution, and the judges and members of the Public Prosecution Office as individuals, is not complete without the protection of judges and their enjoyment of job security, so that they can only be dismissed or held accountable based on strict criteria determined by law. Additionally, they should be ensured a decent standard of living, through adequate salaries and other job benefits, both during their term in service and after they are retired.

The Yemeni Constitution, in theory, provides all guarantees related to the independence of the judiciary in accordance with Article 149 (as previously described), and the Constitution also provides all guarantees related to the protection of the job security of judges in accordance with Article 151, which states that "Members of the judiciary and Public Prosecution Office shall not be dismissed except under the conditions stipulated by the law. They may not be

transferred to non-judicial posts except with their own consent, the approval of the relevant judicial council, unless that was taken as a disciplinary measure.”¹⁰³

However, the power of these guarantees is diminished by the Judicial Authority Law, which granted the Minister of Justice (who is part of the executive authority) significant power in the appointment, transfer and promotion of judges and members of the Public Prosecution. The Judicial Authority Law also established the Judicial Inspection Authority to be subordinate to the Ministry of Justice, which allows the Minister of Justice to have the final word regarding the career of judges. This negatively affects the independence and impartiality of judges and members of the Public Prosecution Office, and has made them—in practice—subordinate to the executive authorities, which contradicts with the principle of the independence of the judiciary in accordance with Article 149 of the constitution.

It has already been pointed out that the Specialized Criminal Courts’ judges, as well as the members, prosecutors and heads of the criminal Public Prosecution Offices, are appointed from among the judges and prosecutors who were previously appointed in accordance with the conditions and qualifications stipulated in the Judicial Authority Law. Matters related to their promotion, transfer, accountability and removal are subject to the guarantees specified by this law under Articles 57 and 62. They also enjoy the same guarantees enjoyed by judges of other courts, while some believe that additional guarantees should be established for judges working in the Specialized Criminal Courts, given the seriousness of the penalties imposed by these courts.¹⁰⁴

This would be sufficient for the independence and impartiality of judges and prosecutors in the Specialized Criminal Courts, but, in practice, and as indicated in the previous section, there are some indications (especially with regard to the lack of serious investigation of the cases of the accused or those convicted of violating their legal rights by security) that leads to the belief that some judges

¹⁰³ Nevertheless, despite this constitutional provision, the Ministry of Justice, which is part of the executive authority, continues to exercise influence over the judiciary and members of the Public Prosecution through its supervision over the Judicial Inspection Authority, which, according to the Judicial Authority Law, is entrusted with a major role in matters related to the promotion of judges, their transfers and accountability. This requires correcting the status of the Judicial Inspection Authority to operate under the supervision of the Supreme Judicial Council.

¹⁰⁴ Abd al-Mumin Shuja al-Din, in his written answer to the questions raised in the background paper of the “Focused Discussion Seminar” organized by (Mwatana), Op. Cit.

and members of the criminal prosecution offices are under the influence of the security authorities, especially when it comes to hearing cases affecting the security of the state. What reinforces this belief is that the specialized appellate chambers, and indeed the Supreme Court, have ignored defenses relating to the violation of the defendants legal rights and guarantees, and have not paid attention to the submission of public order that marred some of the judgments issued by the Specialized Criminal Courts.¹⁰⁵

[name of person quoted], a [position/why their relevant], stated in relation to the issue of judicial impartiality and independence, that “there are many reasons for the phenomenon of the questioned impartiality of some judges and prosecutors in cases before the Specialized Criminal Courts. Among these reasons are personal considerations, meaning the personality of the judge or the prosecutor appointed in those courts and prosecution offices, which may include those who do not believe in the right of defense and who do not care about the necessity to respect it, nor believe in the importance and necessity of following the legal procedures related to a fair trial. Among the reasons for the impartiality of some judges and prosecutors, too, is what has become known as a culture within the circles of the prosecution offices and the Specialized Criminal Courts and the security services wherein the success of a security personnel, a member of the Public Prosecution, or a judge, in cases related to state security, can only be achieved through the conviction and punishment of the accused, and that this result must be achieved even if based on evidence obtained through unlawful practices, and that the acquittal of the accused or failure to bring the accused to trial (in the case of excluding any unlawful evidence) represents—according to the prevailing culture among these circles—a failure of the prosecution member. This failure is then counted against him upon his performance evaluation, and the more cases he completes and the more accused are brought to trial, the more his career progresses.”¹⁰⁶

A lack of concern for the independence and prestige of the judiciary has manifested itself in many ways in the Specialized Criminal Court, including through the conduct of some judges wherein the judge appeared to be

¹⁰⁵ Saqr Abdul Aziz Al-Samawi, and also Abdul Majeed Sabra, in their separate interventions at the “Focused Discussion” organized by (Mwatana) on October 22, 2020, *ibid*.

¹⁰⁶ *Ibid*.

subordinate to the prosecutor in the consideration of a case. In these cases, the prosecutor appeared to be the head of the hearing rather than the judge. The prosecutor sometimes sat with the judge on the same stage without regard for formal considerations.¹⁰⁷

It was also found through some rulings that some hearings have been postponed, either as a result of the prosecution's absence, or as a result of the defendants not being brought before the court because they were being held by the security authorities, who court orders and the prosecution's requests to bring them before the court.¹⁰⁸

Second: Conclusions and recommendations on bridging the gap between legal frameworks and practice

1. Reasons behind the shortfalls in the Specialized Criminal Courts' performance

This study revealed that most of the reasons behind the Specialized Criminal Courts' and the General Prosecutor's failure to respect guarantees of a fair trial are due to one main reason: the lack of respect for the principle of judicial independence, including the lack of respect for the rule of law, in practice. This lack of respect for the rule of law forms the basis for the judiciary, as an institution and as individuals, to fall under the influence of the executive authority and its attempts to use the judiciary as a tool to impose its policies and punish its adversaries.¹⁰⁹ This is reflected in the performance of the Specialized Criminal

¹⁰⁷ This observation was made by some members of the Legal Support Unit at Mwatana, who attended some hearings of the Specialized First Instance Criminal Court in Sanaa.

¹⁰⁸ See for example ruling by the first instance Specialized Criminal Court, case no. 176/2020. Op. Cit.

¹⁰⁹ Some believe that the judiciary, under the current conditions of war, has also been divided, like the rest of the state's authorities, and there are two judicial systems, the first of which operates under the authority of the de facto context in Sanaa, and the second is subject to the authority of the (internationally recognized government) in Aden. Two ministries of justice, two public prosecutors, two councils for the Supreme Judiciary, a supreme court in Sanaa and another in Aden, as well as two institutes of the higher judiciary, and Specialized Criminal Courts and prosecutions that follow the controlling party in this or that governorate. Moreover, the judiciary has become a political tool in the hands of this or that party, and some even believe that "the judiciary has become used as a means of political propaganda. For example, the Specialized Criminal Court in Sanaa issued a judicial declaration ordering 52 persons to appear before the court, for their participation in the assassination of Saleh al-Samad, including US President Donald Trump, former British Prime Minister Theresa May, Israeli Prime Minister Benjamin Netanyahu, President Hadi and other Yemeni and international officials." See the paper prepared for Deep Root by Muhammad Al Shuwaiter and Amelie Kozak, "Judicial Authority in Yemen, Current Situation, Current Challenges and Post-Conflict Considerations", accessed on November 20, 2020: <https://www.deeproot.consulting/single-post/2020/02/05>

Courts, whether in the areas controlled by the internationally recognized government or in the areas controlled by the de facto authorities (the Houthis), where the right to a fair trial has been violated, in different proportions and forms. These violations took on the following negative aspects:

a. The Specialized Criminal Courts and General Prosecutor overlook the claims and pleadings of the accused before them that describe violations of their rights and guarantees established under the Constitution and violations of the law by the investigation and arresting authorities. In particular, this includes the illegality of arrest procedures, long periods of detention in security authorities' prisons, exposure to torture, denial of medical care, and the prevention of detainees from contacting their families or their lawyers. The failure of the courts to seriously investigate these pleadings—on which the validity or invalidity of the procedures and evidence depend—consequently impact the validity or invalidity of the court rulings. This constitutes a fundamental violation of the guarantees and rights of the accused to a fair trial in accordance with international and national standards.¹¹⁰

b. **Violation of the right to defense**, as previously discussed in detail, evident through:

- Not allowing defendants in state security cases a free choice of lawyer whom they trust to defend them, and assigning lawyers by the court to simply fulfill the legal form of the trial, except in rare cases.

- Not allowing the lawyers appointed by the courts, often in the first hearing of the trial, to view the entire case file or to obtain a copy of it. In cases where they were allowed to do so, they were not given sufficient time to prepare their defense, nor to freely communicate with their clients outside of trial sessions, and were even prevented from pleading before the court in some cases.

c. The judicial inspection's (which is affiliated with the Ministry of Justice, an executive body) overlooking of violations and abuses of individuals' rights to

¹¹⁰ It goes without saying that the legally considered evidence in the conviction of the accused must be the result of legitimate procedures, in implementation of Article (322) of the Criminal Procedures Law, which states that, "No occurrence that results in any penal accountability on any person except by means of lawfully admissible evidence and only through measures set by Law accordingly."

defense, and not respecting fair trial guarantees by some judges of the Specialized Criminal Courts and prosecutors.¹¹¹

It is noteworthy that some of the reasons for the widening gap between the legal framework and the application of the framework in practice by courts and prosecution offices is not mainly due to reasons of organization (i.e., they do not relate to poor or inefficient legal organization), but rather to reasons related to court practices. Indeed, the most important of them, in addition to the aforementioned, are:

- Insufficient legal qualification and training for some judges, members of the Public Prosecution Office, and judicial control officers, or poor decisions in selecting such cadres.
- Failure to respect legal procedures strictly and failure to hold violators according to the law.
- The professional culture of some judges and members of the Public Prosecution that brings them to work in the service and fulfillment of the demands of the executive authorities, even at the expense of legal considerations and the requirements of justice.¹¹²

2. Bridging the gap between legal standards and practices on the ground

Legal texts aim to protect the general social interest without sacrificing the rights and freedoms of individuals through a careful balance the two. In order to achieve the best possible protection for both sets of interests, legal texts

¹¹¹ Saq Samawi, Op. Cit.

¹¹² These reasons, with a difference in their order of importance, were mentioned in the direct notes of the legal support team, and the remarks of experts and lawyers participating in the "focused discussion session" organized by Mwatana on "Specialized Criminal Courts: Legal Framework and Practices" on October 22, 2020, Op. Cit. It should be noted here that these reasons are not related to the performance of the Specialized Criminal Courts and prosecutions alone, but rather to the performance of courts and prosecutions in general, with the exception of the last reason.

In a report prepared by the Yemeni Network for Human Rights, it was noted that, the Specialized Criminal Prosecution has a predetermined pattern of crimes that are attributed to the accused before it, and these crimes are mainly represented by "forming an armed gang, communicating with a foreign country, violating unity, Participation in unauthorized demonstrations, incitement, and spreading news and lies that disturb public tranquility and harm the public interest". See: Report on "Fair Trial Guarantees between Reality and Legislation", Yemeni Observatory for Human Rights, Sana'a, 2011, p. 32.

envisage the optimal situation through which individual justice and social security can be achieved together.

Because reality is usually messy and complicated, and conflicts of interest can arise in real situations, there is often a gap that exists between legal texts and reality in almost every country. But this gap narrows the more the rule of law prevails and the more community organization there is, while it widens when situation is otherwise.

From here, we can imagine that there is a certain degree of difference between the text of the law and the application of law in reality, but that difference should not, in any way, reach the point of undermining the rule of law and sacrificing the interests that it protects, be they public or private.

Given this, however, the existence of a gap between the legal text and their application in practice with respect to the protection of the right to a fair trial (all of which are closely related to the fundamental rights and freedoms of individuals) necessarily entails a total or partial undermining of those rights and freedoms. When all or most of these rights are indivisible (you cannot be held illegally and still enjoy your freedom at the same time), there is an international legal obligation that governments, agencies and law enforcement personnel respect basic guarantees and rights to a fair trial in various circumstances and times, including times of war and armed conflict.

3. Urgent steps must be taken to guarantee fair trial rights

The existence of a clear gap between the legal framework that governs the work of the Specialized Criminal Courts and their practices is one of the most significant results of this study. Bridging the gap between the legal text and its application on the ground requires that the relevant authorities take urgent practical steps to respect the guarantees of a fair trial. The most important of these steps is to avoid deficiencies in the work of these courts and to address their root causes. This includes the following procedures:

- Putting an end to the interference of the executive authority and its security agencies in the affairs of the judiciary and criminalizing this in accordance with explicit provisions in the Law of Crimes and Punishments. These texts should define the elements of the crime of interfering in the affairs of the judiciary or

obstructing the course of justice, with its various forms laid out and penalties prescribed for each of them in accordance with Article 149 the Constitution.¹¹³

- Restructuring the status of the Judicial Inspection Authority and legally attaching it to the Supreme Judicial Council, after reconfiguring the Council, so that the Judicial Inspection Organization can play its role in monitoring the performance of judges and members of the Public Prosecution Office regarding their duties, and hold them accountable for any breach thereof, as defined by law.
- Establishing practical training programs to impart skills and establish respect for the law, especially with regards to respecting the guarantees and legal rights of individuals at all stages, in order to avoid deficiencies and correct the practices of judges, members of the General Prosecution, and judicial control officers.
- All security bodies, especially the Security and Intelligence body, the National Security body, and the Political Security body, should be under -with all their facilities, buildings, prisons, officers, officials, and records- the authority of the judiciary, the prosecution, and the inspection agencies, making them subject to permanent legal supervision with effective and enforceable mechanisms, in accordance with the requirements of the law..

4. Comprehensive reformation of the justice sector

The Specialized Criminal Courts and prosecution offices are just one of the components of the judicial system in Yemen, and the deficiencies revealed by this study are not limited to them alone. Rather, the entire judicial system needs comprehensive reform, and this process will only take place through a government that has the desire and ability to impose the rule of law. Such a

¹¹³ Although the Yemeni legislator has criminalized some forms of individual interference in the affairs of the judiciary according to Articles 187 and 188 of the Crimes and Penalties Law. Whereas Article (187) punishes the person who interferes with judges with the intention of influencing justice to issue judgments in favor of one of the parties with a penalty of imprisonment for a period not exceeding three years, and Article (188) relates to the crime of "judges bias", which is punishable by imprisonment for a period not exceeding seven years, against judges who are proven to favor one of the litigants in response to the intervention of some party.

However, the Yemeni legislator is criticized for not setting a general definition for the crime of "interference in the affairs of the judiciary" in the Crimes and Penalties Law, nor for specifying the forms or types of crimes of interference in the affairs of the judiciary, with the exception of the two examples referred to. Also, the most dangerous forms of interference in the affairs of the judiciary, which are often carried out by official executive bodies, have not been implemented and there are no specific punitive texts to deal with this. And this deficiency in the Law of Crimes and Penalties constitutes a serious gap that should be quickly filled.

government should possess the political will to subject itself and its bodies, including its executive powers, to the rule of law and should immediately punish any action that violates the dignity and rights of people. This is particularly critical where such action is issued by the agencies and persons entrusted with upholding the rule of the law and the maintenance of order and security in society.

A detailed discussion regarding comprehensive judicial reform is outside the scope of this study,¹¹⁴ but any judicial reform process should not overlook any of the following considerations:

- Reconsidering the existing constitutional and legal framework with regard to the fundamental rights and freedoms of individuals. Reformulating the constitutional and legal rules to ensure they are fully compatible with international principles and standards, and in a manner that upholds the dignity of people and their fair trial rights in all circumstances and times in accordance with international human rights law.
- Emphasizing the principle of independence and unity of the judiciary. Reorganizing the judiciary and justice system in line with constitutional principles. Correcting faulty conditions and deficiencies in the current organization of courts. Putting an end to the influence and interference of the executive authority on the performance of the judiciary, institutions and individuals, and filling all existing legal loopholes. Specifically, this should include ending the influence and interference of the Ministry of Justice, as an executive body, and limiting its role in matters related to the appointment, transfer and promotion of judges and members of the Public Prosecution Office. Also in relation to its role in determining salary scales,

¹¹⁴ See regarding previous attempts to reform the judiciary from the official point of view: The Judicial Authority Modernization and Development Strategy (2006-2015), Ministry of Justice, Sanaa, 2006. It is noticeable on this strategy that it depended on the views of the Ministry of Justice alone! It would have been better if any vision or strategy for reforming the judiciary was presented by an independent committee formed by the House of Representatives, which includes a number of judges and members of the Public Prosecution Office nominated by the Supreme Judicial Council, in addition to lawyers nominated by the Bar Association and the participation of civil society organizations working in the field of human rights in Yemen. Also with the help of the advice and expertise of law professors in Yemeni universities, and credible international organizations such as Amnesty International. This proposal is required by logic, as the reform process cannot be entrusted to the same party that is targeted for reform!! Reform of the judiciary and justice system cannot be based on a vision presented by the Ministry of Justice, an executive body. Notwithstanding, this does not prevent the ministry being represented within a committee entrusted with the task of preparing a project to reform the judiciary, and this committee must be formed and its powers determined by the House of Representatives as a representative of the popular will.

incentives and allowances, in order to achieve full financial and administrative independence of the judicial authority represented by the Supreme Judicial Council.¹¹⁵

- Reorganizing and restructuring the Supreme Judicial Council, constitutionally and legally, to ensure that the Council is the supreme legal body responsible for setting judicial policy and protecting the judiciary and justice affairs from interference by or influence from the executive authority.¹¹⁶
- Reorganizing the Public Prosecution Office, as part of the judiciary.¹¹⁷ This should be effectuated in a manner that achieves independence and

¹¹⁵ Article (67) of the Judicial Authority Law states: "The salaries and allowances of the members of the judiciary are determined in accordance with the schedule attached to this law, and it is permissible by another decision of the Prime Minister based on the proposal of the Minister of Justice to grant other allowances to members of the judicial authority other than what is stated in this law. It is also allowed to deploy a decision from the Council of Ministers to amend this schedule according to what is necessary to improve the livelihood of public employees." There is a broad objection to the content of the provision of this article from judges. As claimed, it opens the door wide for the interference of the executive authority in the financial and administrative independence of the judicial authority, contrary to the provisions of the Constitution in Articles: 149, 150, 151 and 152, which establish the independence of the judiciary, judicially, financially and administratively. The judicial authorities entrusted with the disposition of judicial affairs are stated in these articles of the Constitution, and they do not include the Ministry of Justice.

The Constitutional Chamber of the Supreme Court had ruled that the aforementioned Article (67) of the Judicial Authority Law is tainted by unconstitutionality, and that it is impossible to reconcile with the constitutional texts related to the independence of the judiciary. The court decided that, "... considering what was decided in Article 149 of the Constitution that The judiciary - as an authority within the state's authorities - enjoys financial, administrative and judicial independence, through Article (152) thereof, which mandated the Supreme Judicial Council to implement the guarantees granted to judges in terms of appointment, promotion, and dismissal. These administrative powers were mentioned exclusively as entrusted to the Supreme Judicial Council, thus cutting the way to granting them legislatively by law or otherwise to a body other than the aforementioned Judicial Council as a constitutional institution mentioned in two constitutional articles (151 and 152). The Constitution entrusted them with what was intended to achieve financial and administrative independence for the judicial authority. ... it becomes unquestionably clear that the authorization granted to the government and its head in Article (67) of the Judicial Authority Law No. (1) of 1991 regarding the determination of additional allowances, violates a constitutional rule, which is impossible to reconcile with the aforementioned constitutional texts. "Verdict of the Supreme Court, Constitutional Chamber No. (25) of 2013.

And see, also, the legal controversy regarding the interference of the executive authority in the affairs of the judiciary, Majed Al-Madahji, in his report entitled "Two Projects to Amend the Judicial Authority Law and a Constitutional Ruling in One Year: The Independence of the Yemeni Judiciary in an Open Battle", Legal Agenda, at this link: <https://legal-agenda.com> Accessed November 22, 2020.

¹¹⁶ The process of reforming the Supreme Judicial Council requires that two important matters be taken into consideration:

First: Expanding the Supreme Judicial Council, to be able to formulate judicial policies, to include a number of legal experts, either from university law professors or from lawyers experienced in the profession from among the lawyers licensed to plead before the Supreme Court.

Second: That the council's role be limited to discussing the general principles that govern judicial policy, without entering into discussing administrative details and procedures, or engaging with them on a daily basis, as they can be assigned to lower bodies, because administrative cases and their details - from de facto experience - take up most of the time and energy of the Council. See: Dr. Abdel Moumen Shuja Al-Din, in his oral intervention in the advisory seminar organized by Mwatana on March 18, 2021.

¹¹⁷ Regarding the Public Prosecution as part of the judicial authority, candidates for the Public Prosecution career must submit to all the provisions related to the appointment of judges without exception, and this requires, in our belief, to annul paragraph (f) of Article (57) of the Judicial Authority Law which states: "An exception applies from the requirement

impartiality in the performance of its functions, and that activates its role as a representative of society to: monitor police stations and places of security services detention; verify that legal guarantees of human rights are respected; take measures for ensuring the commitment of the executive authority to implement the judgments and decisions of the courts; and hold accountable anyone who refuses to comply with or obstructs their implementation of these decisions, or who interferes in any way in the affairs of the judiciary and justice.

- Reconsidering all rulings issued by the Specialized Criminal Courts during the armed conflict period, in accordance with the terms and principles of a fair trial, and investigating all violations took place throughout these trials.
- Stopping the death sentences which have been imposed during the conflict period.
- Opening an extensive discussion between the Supreme Judicial Council, expert lawyers, and NGOs on the problem of Specialized Criminal Courts and possible ways to address it.
- Reconsidering the organization of the Higher Judicial Institute, as the gateway to the judiciary, in terms of the content of its curricula and requirements for joining it, with the aim of raising the standards of preparation and qualification, expanding legal training programs and skills acquisition,¹¹⁸ and prioritizing preparing more women to be judges.
- Carry on with the institution-building efforts for the judiciary, and equip it with the necessary means to keep updated with technical developments in matters of archiving, issuing and documenting judicial rulings and

to obtain the Higher Judicial Institute's Diploma, and the minimum age limit, for those who join the Public Prosecution positions". This is because this constitutes a serious gap for those who are not legally qualified enough to join in the positions of the Public Prosecution. In addition, this provision was made thirty years ago when the necessity related to the scarcity of qualified cadres required the exemption. This necessity no longer exists.

¹¹⁸ According to Article 57 of the Judicial Authority Law, which defines the conditions and qualifications of judges: whoever is appointed to the positions of the judiciary and Public Prosecution, in addition to having obtained a university degree in law or Sharia, must obtain a diploma (a period of study is 3 years) from the higher institute for the judiciary, and also a two-year legal training by working in the courts prior to their appointment as judges. It is our belief that the reform and organization of the Higher Judicial Institute (being according to the current law, the only gateway to join the judiciary) constitutes a necessary entry point to avoid many of the current deficiencies in the performance of some judges, as well as the importance of this in reforming the judiciary and justice in general.

decisions, and reporting judicial orders and announcements through modern electronic means.

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Annexes

Annex 1:

Chapter III (of Part III of the Yemeni Constitution), on the Organization of Judicial Authority

Annex 2:

Presidential Decree no. 24/1998 issuing the Law Criminalizing Kidnapping and Highway Banditery

Annex 3:

Presidential Decree 391/1999 Establishing the Specialized First Instance Criminal Court and a Specialized Criminal Appellate Chamber, amended by decree no. 8/2004.

Annex 4:

Law under decree no. 15/2006 concerning the Establishment of the Supreme Judicial Council, amending some provisions of law no. 1/1991 Organizing the Judicial Authority.

Annex 5:

Decree by the Supreme Judicial Council no. 131/2009 Establishing and Organizing the Specialized Criminal Courts.

Annex 6:

Crimes against State Security (external and internal) according to the Yemeni Penal Code (which are crimes tried at the Specialized Criminal Courts).

Annex 1: Chapter III (of Part III of the Yemeni Constitution), on the Organization of Judicial Authority

Chapter III: The Judicial Authority

Article (149): The Judiciary authority is an autonomous authority in its judicial, financial and administrative aspects and the General Prosecution is one of its subbodies. The courts shall judge all disputes and crimes. The judges are independent and not subject to any authority, except the law. No other body may interfere in any way in the affairs and procedures of justice. Such interference shall be considered a crime that must be punished by law. A charge regarding such interference cannot be nullified with the passing of time.

Article (150): The judiciary is an integrated system. The law organizes this system in terms of ranks, responsibilities, the terms and procedures of appointment, transfer and promotion of judges, and their other privileges and guarantees. extraordinary courts may not be established under any conditions.

Article (151): Members of the judiciary and Public Prosecution Office shall Not be dismissed except under the conditions stipulated by the law. They may not be transferred to non-judicial posts except with their own consent, the approval of the relevant judicial council, unless that was taken as a disciplinary measure. The law shall regulate the disciplinary trial of the judiciary and it organizes the legal profession.

Article (152): The judiciary shall set up the supreme judicial council. The law shall organize it, stipulate its jurisdiction and system of nominating and appointing its members. The supreme judiciary council shall execute these guarantees for the judiciary in the fields of appointment, promotion, discharge and dismissal according to the law. The council shall study and approve the judicial budget in preparation for inserting it as one item within the overall budget of the State.

Article (153): The Supreme Court of the Republic is the highest judicial authority. The law shall specify how it can be formed, clarify its functions and the procedures to be followed before it. It shall undertake to do the following:

- a. Judge on cases and pleas that laws, regulations, by-laws and decisions are not constitutional.
- b. Judge disputes over conflict of jurisdiction.
- c. Investigate and give opinions regarding appeals referred by the House of Representatives which relate to its membership.
- d. Rule on appeals of final judgments in civilian, commercial, criminal, personal and administrative disputes and disciplinary cases according to the law.
- e. To try the President of the Republic, the Vice President, the Prime Minister, his deputies, the ministers and their deputies according to the law.

Article (154): Court sittings are open to the public unless a court determines, for reasons of security or general morals, to hold sessions behind closed doors. In all cases, verdicts are announced in an open session.

Annex 2

Presidential Decree Law no. 24/1998 Concerning Crimes of Kidnapping and Highway Banditery

The President of the Republic,

- After reviewing the Constitution of the Republic of Yemen
- And Presidential decree no. 20/1991 Concerning the Cabinet Law.
- And Presidential decree no. 12/1994 On Crimes and Punishments
- And Presidential decree no. 72/1998 Organizing the Government and its Members
- And in accordance with deliberations from the Prime Minister
- And after acceptance of the Cabinet

Decided:

Article (1): The capital punishment shall be the penalty inflicted on whoever leads a gang to kidnap, loot, or rob public or private property by force, and the partner in crime shall be punished with the same punishment.

Article (2): Whoever abducts a person is punished with imprisonment for a period of no less than twelve years and not exceeding fifteen years. If the crime is against a female, then punishment shall be imprisonment for twenty years. It becomes a maximum of twenty-five years if the crime is accompanied with abuse or assault. All of this without prejudice to retribution, blood money, or libel, according to the circumstances, if the harm results in something that so requires, and if the person who is kidnapped was then murdered or raped or assaulted through an act of sodomy, the penalty shall be death.

Article (3): Imprisonment for a period of not less than ten years and not exceeding fifteen years is every person who seeks through the help of a foreign country or a bandit to carry out any act of kidnapping, highway banditery, or plundering of public and private property.

Article (4): Whoever hijacks a means of air, land or sea transportation, is punished with imprisonment for a period of no less than ten years and not exceeding twelve years, and the penalty is imprisonment for a period of fifteen years is due if the kidnapping results in wounding any person, whether inside or outside the means of transportation, or if the perpetrator resists, by force or violence, the public authorities while performing their duty to wrestle the means of transportation from his control. The penalty shall be death if the kidnapping results in the death of a person inside or outside the means of transportation.

Article (5): A penalty of imprisonment for a period of not less than ten years and not exceeding twelve years shall be inflicted on whoever holds any person as a hostage, with the aim of influencing the public authorities in their performance of their work or obtaining from them a benefit or advantage of any kind for him or for others. The punishment shall be imprisonment for

a period of no less than fifteen years if the perpetrator uses or threatens to use force or violence, or if he impersonates a civil or military government employee, or shows a forged order claiming it was issued by the public authorities. The same penalty shall be imposed if he resists the public authorities while performing their duties to release the hostage. The penalty shall be death if the act results in the death of a person.

Article (6): Without prejudice to any harsher punishment stipulated in other laws, a penalty of imprisonment for a period of not less than seven years and not exceeding ten years shall be inflicted on whoever assaulted a person in charge of combating the crimes of kidnapping, highway banditry, or plundering, while performing his job or because of it. The penalty becomes imprisonment for a period of no less than fifteen years if the infringement results in bodily wounds or injuries.

Article (7): Punishment with imprisonment for a period of not less than fifteen years and not exceeding twenty years shall be inflicted on whoever kidnaps any of the individuals charged with combating the crimes of kidnapping, highway banditry, or plunder, or his wife, or one of his relatives. The penalty shall be death if the act results in the death of the kidnapped.

Article (8): The penalty mentioned in the articles above is doubled if the perpetrator is a member of the armed and security forces or a public employee.

Article (9): Any person who incites or participates in a criminal conspiracy to commit one of the crimes stipulated in this law is punished with the same penalty prescribed for the crime, and whoever initiates the same crime prescribed for the crime even if such initiation of the crime had no consequences.

Article (10): Anyone who provides assistance to the kidnapper in any way or hides the kidnapped person after his kidnapping or hides the plundered money or possessions, if he knows the circumstances in which the kidnapping took place and the actions that accompanied or consequent events related to the act.

Article (11): Whoever among the perpetrators hastens to notify the administrative or judicial authorities before the commencement of the crime, shall be exempted from the penalties prescribed for the crimes stipulated in this law.

The court may exempt the person who reports the crime from the penalty if the report is made after the completion of the crime, if this enables the authorities during the preliminary investigation to arrest the other perpetrators of the crime.

Article (12): This decree shall be enforced as law from the date of its issuance and it will be published in the official gazette.

Issued by the President of the Republic, at Sanaa

11 Rabi' al-Thani, 1419 H

3 August 1998

Dr. Abdulkarim Al-Ariyani, Prime Minister

Ali Abdullah Salih, President of the Republic

(Published in the Official Gazette, vol. 15, 1998)

Annex 3:

Presidential Decree 391/1999 Establishing the Specialized First Instance Criminal Court and a Specialized Criminal Appellate Chamber, amended by decree no. 8/2004.

Presidential Decree no. 391/1999
Establishing the Specialized First Instance Criminal Court
And a Specialized Criminal Appellate Chamber

The President of the Republic ,

- After reviewing the Constitution of the Republic of Yemen.
- And Law no. 1/1991 Concerning the Judicial Authority.
- And Presidential decree no. 12/1994 On Crimes and Punishments
- And Presidential decree no. 24/1998 Concerning Crimes of Kidnapping and Highway Banditery.
- And Law 13/1994 Concerning Criminal Procedures.
- And in accordance with deliberations from the Prime Minister.
- And after acceptance of the Supreme Judicial Council.
- And in the Public Interest.

Decreed:

Article (1): A specialized first instance criminal court and a specialized criminal appellate chamber shall be established in the Capital Sanaa. Both shall be located in the Capital, and they shall be affiliated with the Organization of the Capital' Court of Appeal.

Article (2): The Specialized First Instance Criminal Court consists of a president of the court and a number of judges. The ruling body in it is composed of a single judge, and the president of the court exercises his judicial competence in addition to the administrative supervision of the court in accordance with the provisions of the law.

Article (3): The specific jurisdiction of the First Instance Criminal Court specialized in looking and adjudicating in the first instance shall be determined for any of the following crimes:

First: Hiraba crimes.

Second: Crimes of kidnapping foreigners and sea or air piracy.

Third: Crimes of damage, destruction, arson, and sabotage by explosives that occur on oil pipelines and oil and economic installations and facilities of public benefit.

Fourth: Crimes of theft of public and private means of transport by armed or organized bandits or by force.

Fifth: Crimes of participating in a bandit to attack the lands and property of the state and citizens.

Sixth: Crimes of assault against members of the judicial authority and crimes of kidnapping for any of them or any of their family members. This court has jurisdiction to prosecute the original perpetrators, accomplices, and contributors to any of the aforementioned crimes, in accordance with general rules.

Article (4): The spatial jurisdiction of the Specialized First Instance Criminal Court includes crimes that occur within the territory of the Republic of Yemen, its airspace, or its territorial waters.

Article (5): The court shall hold its sessions in the Capital Secretariat or in any other suitable venue within the Republic of Yemen.

Article (6): The rules and procedures related to the expedited trial stipulated in Articles (296) and those following, of the Code of Criminal Procedure, shall be observed in the trial procedures. The provisions of substantive laws are also applied in the matter of crimes mentioned in Article (3) of this decision.

Article (7): The Specialized Criminal Appeals Chamber shall have jurisdiction over appeals by way of appeal in rulings and decisions issued by the Specialized First Instance Criminal Court in accordance with the law.

Article (8): Appeals for cassation against the rulings of the Specialized Criminal Appeals Chambers shall be at the Criminal Chamber of the Supreme Court, the provisions of articles 3, 4, 5, and 6 shall apply in related deliberations at the said Chamber.

Article (9): The Specialized First Instance Criminal Court and the Specialized Criminal Appeals Chamber shall have independent financial allocations to meet their needs within the courts' budget, and within the framework of the general budget of the judicial authority.

Article (10): A specialized first instance criminal prosecution and a specialized criminal appeals prosecution offices shall be established and assume the duties of the Public Prosecution in the crimes specified in this decree, in accordance with the law, and a decision to regulate it is to be issued by the Minister of Justice, based on a suggested draft from the Attorney General.

Article (11): The Minister of Justice shall issue the necessary decisions to implement this decree.

Article (12): This decree shall be enforced as law from the date of its issuance and it will be published in the official gazette.

Issued by the President of the Republic, at Sanaa

9 Sha'ban, 1420 H

17 November 1999

Ismail Ahmed Al-Wazir (Minister of Justice)

Dr. Abdulkarim Al-Ariyani (Prime Minister)

Ali Abdullah Salih (President of the Republic)

(Published in the Official Gazette, vol. 22, 1999)

Decree of the President of the Republic - No. (8) of 2004, adding a new paragraph to Article (3) of Republican Decree No. 391/1999, Concerning Establishing a Specialized Criminal Court and a specialized criminal appeals chamber.

The President of the Republic ,

- After reviewing the Constitution of the Republic of Yemen.
- And Law no. 1/1991 Concerning the Judicial Authority.
- And Presidential decree no. 12/1994 On Crimes and Punishments
- And Presidential decree no. 24/1998 Concerning Crimes of Kidnapping and Highway Banditery.
- And Law 13/1994 Concerning Criminal Procedures.
- And in accordance with suggestions from the Minister of Justice in deliberation with the Head of the Supreme Court.
- And after acceptance of the Supreme Judicial Council.
- And in the Public Interest.

Decreed:

Article (1): A new paragraph is added to Article 3 of Republican Decree No. 391/1999 related to the establishment of a Specialized Criminal Court and a specialized criminal appeals chamber, so that the text of the paragraph becomes as follows:

- A- Sixth: (Crimes affecting state security and grave social and economic crimes).
- B- The aforementioned paragraph replaces the sixth paragraph and the sixth paragraph becomes the seventh paragraph in the aforementioned article of the aforementioned decree.

Article (2): This decision is effective from the date of its issuance and will be published in the Official Gazette.

Issued by the President of the Republic, Sanaa

1 Rabi'e Awal 1425 H

20 April 2004

Ali Abdullah Salih (President of the Republic)

Head of the Supreme Judicial Council

Annex 4:

Law under decree no. 15/2006 concerning the Establishment of the Supreme Judicial Council, amending some provisions of law no. 1/1991 Organizing the Judicial Authority.

Law no. 15/2006

Amending some articles of law no. 1/1991 concerning the Judicial Authority.

In the Name of the People.

The President of the Republic,

- After reviewing the Constitution of the Republic of Yemen.
- And Law no. 1/1991 concerning the Judicial Authority.
- And after the acceptance of the Parliament.

Issues the following law:

Article (1): Articles 104 and 105 of Law No. 1/1991 regarding the judicial authority are amended as follows:

Article (104): The Supreme Judicial Council shall be formed as follows:

1. The President of the Supreme Court.
2. The Minister of Justice.
3. The Attorney General.
4. The Secretary General of the Council.
5. The Head of the Judicial Inspection Authority.
6. Three members appointed by a decision of the President of the Republic, provided that the rank of each of them is not less than a judge of the Court of Appeal.

Article (105): The president of the Supreme Judicial Council shall preside over the sessions of the Council, and in the event of his absence, the sessions shall be chaired by whomever he selects from among the members of the Council.

Article (2): An Article numbered (104 bis) shall be added, stating as follows:

Article (104 bis): The President of the Supreme Court shall be the President of the Supreme Judicial Council and a decision to appoint him shall be issued by the President of the Republic.

Article (3): This decision is effective from the date of its issuance and will be published in the Official Gazette.

Issued by the President of the Republic, Sanaa

3 Jumadah Awal, 1427 H

30 May 2006

Ali Abdullah Salih
The President of the Republic

Annex 5: Decree by the Supreme Judicial Council no. 131/2009 Establishing and Organizing the Specialized Criminal Courts

The Supreme Judicial Council.

- After reviewing the Supreme Judicial Council in its meeting held on 16 Jumadah Al-Awal 1430 H, corresponding to May 11, 2009 AD, as recorded in the memorandum from the Minister of Justice regarding the proposal to establish and organize Specialized Criminal Courts in the governorates of Aden, Hodeidah and Hadramout.
- And the Republican Decree Law no. 12/1994 regarding crimes and penalties.
- And the Republican Decree no. 13/1994 regarding criminal procedures.
- And based on Law no. 1/1991 regarding the judicial authority and its amendments, and the Regulations of the Supreme Judicial Council.

Decreed the following:

1.A. In the governorates of Aden, Al-Hudaydah, and Hadramout, a specialized primary criminal court and a specialized criminal appeals Chamber shall be established, in addition to the Specialized Criminal Court currently established in the Capital Sanaa, and the organization of these courts shall be in accordance with this decision.

B. These courts are affiliated with the governorate's courts of appeal.

2. The thematic jurisdiction of the specialized first instance criminal courts and the appellate criminal chambers is in considering and adjudicating the following crimes:

First: Hiraba crimes.

Second: the crimes of kidnapping.

Third: Crimes of sea or air piracy.

Fourth: Crimes of drug trafficking or promotion.

Fifth: Crimes of damage, destruction, arson, and sabotage by explosives, that occur on oil and gas pipelines, and oil and economic installations and facilities of public benefit.

Sixth: Crimes of theft of public and private means of transport that are carried out by armed or organized bandits or by force.

Seventh: Crimes of participating in a bandit to attack the lands and property of the state and citizens.

Eighth: Crimes against state security and crimes of general danger.

Ninth: Assault crimes against members of the judiciary while performing their duties or because of it.

Tenth: Crimes of assaulting witnesses.

3. The spatial jurisdiction of the specialized first instance criminal courts is determined according to the following:

A- The jurisdiction of the First Instance Criminal Court in the Capital Municipality includes crimes that occur in the Capital Municipality and the governorates of Sanaa, Dhamar, Al-Bayda, Ibb, Amran, Al-Jawf, Saada and Marib.

B - The jurisdiction of the Specialized First Instance Criminal Court in Aden Governorate includes crimes that occur in the governorates of Aden, Taiz, Lahj, Al Dhale and Abyan.

C - The jurisdiction of the Specialized First Instance Criminal Court in Al Hudaydah Governorate includes crimes that occur in the governorates of Al Hudaydah, Raymah, Hajjah and Al Mahwit.

D- The jurisdiction of the Specialized First Instance Criminal Court in Hadramout governorate includes crimes that occur in the governorates of Hadramout, Al-Mahra and Shabwah.

4. The Specialized Criminal Appellate Chamber shall have jurisdiction over appeals by way of appeal in rulings and decisions issued by the specialized first instance criminal courts.

5. The headquarters of the courts and the chambers mentioned in this decree shall be in the capitals of the governorates they are established in, and their sessions shall be held in their headquarters or in any other suitable venue within the framework of their spatial jurisdiction.

6. The criminal procedures law, the penal code and the related laws shall be applied before the courts and the chambers mentioned in this decree.

7. Within the framework of the courts and the chambers mentioned in this decree, specialized first-instance criminal prosecutions and specialized criminal appeals prosecutions shall be established to assume the functions of the Public Prosecution in the crimes specified in this decree and in accordance with the law.

8.A. The cases currently filed before the Specialized First Instance Criminal Court in the Capital Sanaa and the Specialized Criminal Appeals Chamber in the Capital Sanaa will continue to be heard even if they become, according to this decree, under the jurisdiction of other courts.

B. The cases currently being filed before the general courts of first instance and the criminal divisions shall continue to be heard in the governorates' appeals courts, even if according to this decree they become under the jurisdiction of other courts.

9. This decree becomes effective starting 1 Sha'baan 1430 H, 23 July 2009

Issued by the Supreme Judicial Council

16 Jumadah Awal, 1430 H

11 May 2009

Annex 6: Crimes against State Security (external and internal) according to the Yemeni Penal Code (which are crimes tried at the Specialized Criminal Courts).

Chapter One

The Crimes Related to the Security of the State

Section One: Special Definitions

Defense Secrets

Article 121: The following shall be regarded as defense secrets:

1. Defense, political, diplomatic, economic and industrial information which by their nature require that only persons concerned with such information and for the interest of the country such information shall remain secret to anyone else other than such persons accordingly.
2. Letters, correspondences, documents, drawings, maps, designs, photographs, etc., which for the sake of the defense of the country, shall only be known to those who are designated to keep or use such documents, which otherwise shall remain secret to any other people, for fear that that could lead to exposing such information as indicated in the previous article.
3. News and information related to the armed forces; the formations, movements, military equipment, supplies and personnel thereof; in general all information touching upon military affairs and strategic plans; for which a written order for publication or broadcasting thereof has been issued by the delegated authority in the armed forces accordingly.
4. News and information related to the arrangements and procedures, which are taken to discover, investigate and try the perpetrators of the crimes, herein stipulated in this chapter. Notwithstanding this; however, the Court, which is in charge of the trial thereof, may authorize the broadcast of any such information it deems appropriate.

Yemenis

Article (122): Yemenis are those who enjoy the citizenship of the Republic of Yemen by virtue of their origin or by acquiring such citizenship in accordance with the Yemeni laws.

Enemies

Article (123): An enemy is every state, which is in a state of animosity with the Republic of Yemen. Included as enemies are political groups, which are not recognized by the Republic, in the form of the State; which was dealt with as warring factions.

Article (124): Transgression is the rebellion against the state outrageously based on its forbiddance. People who carry out transgressions are punished, in accordance with the sentences meted out against crimes that touch upon the security of the state, which are stipulated in this Law.

Section Two: Crimes Involving the Security of the State

Offences Against the Independence of the Republic

Article (125): Anyone who undertakes an act with the intent of violating the independence, unity or territorial integrity of the Republic shall be punished by the death penalty. A sentence for the confiscation of all or some of the perpetrator's assets may be issued accordingly.

Weakening the Strength of Defense

Article (126): Anyone who intentionally undertakes an act, with the aim of weakening the armed forces shall be sentenced to the death penalty by:

1. Destroying, spoiling, distorting or impairing any military site, base or facility or any factory, boat, aircraft, transportation road, transport vehicle, Facilities, ammunition, supplies, medicine or any other items that were prepared for the defense of the country, or which are used accordingly, or manufactured, repaired or rendered unfit for use for the purpose it was so prepared-even temporarily-or made to cause damage or become hazardous.
2. Broadcasting false biased news, data or rumors or willfully disseminating inciting propaganda that lead to causing damage to the military preparedness for the defense of the country or the war operations of the armed forces in order to incite fear and weaken morale among the people.
3. Revealing a defense secret of the country.

A sentence for the confiscation of all or some of the perpetrator's assets may be issued accordingly.

Assisting the Enemy

Article (127): The death penalty shall be meted out to any:

1. Yemenis who, in any way, enlist with the armed forces of a state that is at war with the Republic.
2. Whoever surrenders any personnel of the armed forces to the enemy, or whoever assists any prisoners to return to their ranks.
3. Whoever supports the enemy with troops, personnel, funds or whoever act as a guide to the enemies.

A sentence for the confiscation of all or some of the perpetrator's assets may be issued accordingly.

Article (128): The death penalty shall be meted out to any:

1. Anyone who works for a foreign state, or with anyone who works in the interest thereof, or exchanged information with either of them, thus leading to damages to the military, political, diplomatic or economic position of the Republic.
2. Anyone who provides a foreign government or anyone working for the interest thereof, in any form and by any means, any news, information, objects, correspondences, documents, drawings, photographs or any other material that is related to the government authorities, public authorities, corporations that work for the benefit of the public while there was an order by the relevant concerned entity to bar the dissemination or broadcast thereof accordingly.

3. Anyone who submits to a foreign government or anyone working for its interests, or exposed to the former or the latter, by any means, a defense secret, or who was able to have access by any means to any such secrets, with a view to submitting or exposing such secrets to a foreign government or anyone who is working for its interests. [The same also applies to] anyone who destroys, for the interest of any other state, anything, which is deemed to be a defense secret or made such thing unfit for use.

Provocation, Criminal Collaborations and Criminal Attempts

Article (129): Anyone who provokes or participates in a Criminal Collaboration to commit any of the crimes stipulated in this Section or attempted to commit any such crimes shall be punished by the very punishment set thereof, even if such action did not lead to any consequential impact.

Waiver of Punishment

Article (130): The punishments set forth for the crimes stipulated in this section shall be waived for any of the criminals who informs the administrative and judicial authorities, before beginning to commit the crime. The Court may also mitigate the sentence of imprisonment for less than two years; the Court may also waive the penalty of the sentence, if such information was given after the crime has been committed if the Perpetrator enabled the apprehension of the other culprits during the primary investigation of the crime.

Section Three

Crimes Involving the Internal Security of the State

Violations of the Constitutions and the Constitutional Authorities

Article (131): The punishment of imprisonment for a term of a minimum of three years up to a maximum of ten years shall be meted out to anyone who, was able to, or attempted to, violently or threateningly, or by any other means:

1. Cancel, amend, or suspend the Constitution or some of its stipulations.
2. Change or amend the formation of the legislative, executive and judicial branches of authority, prevent such authorities from exercising their constitutional authorities or compel such authorities to make a certain decision.

Armed Disobedience

Article (132): The punishment of imprisonment for a minimum of one year up to a maximum of ten years to:

1. Anyone who takes charge of a military command, whatever forms it takes, without any designation thereof by the concerned relevant authority or without any legitimate reason. Similarly, anyone who continues in a military command after an order has been issued by the relevant concerned authority for such a person to step down, or whoever maintains his troops under arms or together after the order of the relevant concerned authority to release or break them up.
2. Anyone who commands the armed forces or police personnel, and who requests them or assigns them to work towards frustrate the orders of the existing authorities under the Constitution, if this was for an illegitimate purpose.
3. Anyone who occupies or attempts to occupy a military command, position, aircraft or ship, or any thing such as public buildings or those which are geared for government authorities or public utilities or corporations or wire and wireless communication

Facilities that are allocated for public use or audio or visual broadcasting stations without being assigned to do so by the relevant concerned authority.

4. Whoever publicly incites troops to disobedience or to divert them from their military duties.
5. Anyone who incites or attempts to incite armed disobedience among the people against the existing authority under the Constitution.
6. Anyone who incites or attempts to incite a civil war, distributing arms to a multitude of the population, or who calls them to take to arms against another multitude of the population.
7. Anyone who incites for committing murder or looting or arson.

Joining an Armed Bandit

Article (133): Imprisonment for up to a maximum of ten years to

1. Takes part in an armed gang with the intention of taking over land or looting property owned by the Government or to a group of people, or in order to resist a military force that is assigned to chase perpetrators of such crimes
2. Anyone who takes part in an armed group, which attacks a group of people or undertake armed resistance against people in public authorities who are charged with upholding the Law.

If death to a human being arises out of the acts of the perpetrators of the crimes cited in the previous two articles, the punishment shall be the death penalty as a religiously ordained punishment, without prejudice to the blood heirs for blood money, if the victim was not the intended target of the crime.

Provocation, Collaboration, Attempted Crimes and Pardoning

Article (134): With respect to provocation, criminal consort, attempted crime and Pardoning of punishment, Articles (129 and 130)) of this Law for the crimes shown in Articles (132 and 133) shall be applied accordingly.

Provocation to Break the Law

Article (135): Anyone who incites people to disobey or not to adhere to the effective laws shall be punished by imprisonment for up to three years.

Spreading News for the Purpose of Disrupting General Security

Article (136): Anyone who broadcasts false or biased news, declarations or rumors or statements, or any other publicity that is provocative, with the intention of disrupting general security or raise fear among the people or to cause damage to public interest shall be punished by imprisonment for a maximum of three years.

Chapter Two: Crimes that Pose Danger to the Public

Fires and Arsons

Article (137): Any perpetrator who causes a fire or an explosion to fixed or movable assets, even if it is his own property shall be punished by imprisonment for a maximum of 10 years, whenever such actions that put the lives or property of people to risks. If the fire or explosion occurs in a

place in which people are residing or occupied by a group of people or in a public building or one that caters to public interests, a three year

Exposing Transport Vehicles and Communication Facilities to Danger

Article (138): Anyone who carries out the following shall be subject to imprisonment for a maximum of 10 years: Anyone who intentionally exposes any land, sea or air transport vehicle to danger or who impairs its function by any means. Anyone who impairs any form of communications equipment or telecommunications facility that is catered for public use.

Causing Floods

Article (139): Anyone who causes flooding leading to drowning intentionally, thus endangering the life or property of people shall be subject to imprisonment for a maximum of 10 years.

Pollution

Article (140): Anyone who exposes the lives and safety of people by the placement of poisonous or damaging material in the territorial waters and the ports of Yemen or in a water well or water tank, or another similar object that is set up for public use, which causes the death or severe damages to the public health, shall be subject to a maximum of ten years imprisonment.

The Occurrence of a Catastrophe, Death or Human Injury

Article (141): If any of the crimes cited in Articles (137-140) lead to the malfunction of any public facility or severe property damages, or lead to severe injuries of a number of people, the punishment shall be a minimum three years to a maximum fifteen years imprisonment. If they lead to the death of a human being the punishment shall be the death penalty without prejudice to the entitlement of the blood owners to the full compensation accordingly.

If they lead to the injury of a person the punishment shall be added to the punishment set for the crime the retribution [qisas] of the injury or the Blood Money or Liable Injuries Compensation as the case may be.

Damage to Public Roads

Article (142): Anyone who intentionally damages or disrupts the conditions of a public road by any means leading to a threat to the safety of the movement of traffic in it, shall be subject to a maximum of five years imprisonment.

Damages Caused By Negligence

Article (143): Anyone who negligently causes a fire or an explosion or flooding or impairment of any transport vehicles, or pollution, shall be subject to a maximum of three years imprisonment. If any such negligent acts lead to a disaster, the perpetrator shall be subject to a maximum of five years imprisonment.

Possession and Trading of Firecrackers

Article (144): Anyone who possesses, or brings in or makes or imports firecrackers, or engages in trading them without the permit thereof shall be subject to a maximum of five years imprisonment.

All substances that are of the composition of firecrackers and a decree so identifying them as such is issued by the concerned entity shall be subject to the provisions herein provided, including the tools and equipment used in their manufacture.

The Misuse of Permits

Article (145): Anyone who violates the terms and conditions applicable to the permit cited in the previous article shall be subject to a maximum imprisonment of one year and a maximum fine of YR Two Thousand.

Transport of Firecrackers

Article (146): Anyone who transports explosions or any inflammable materials in public transport vehicle, or through the postal service in violation of the applicable laws and regulations in effect shall be subject to a maximum imprisonment of one year and a maximum fine of YR Two Thousand.

Chapter Three

Crimes that threaten the National Economy

The Destruction of National Economic Assets

Article (147): Anyone who intentionally destroys a structure that leads to the collapse of the national economy, such as a factory or any of its annexes or facilities, a bridge or, water channel, dam, or high voltage electricity line, transport vehicles or communication facilities, grain silos or customs warehouse, or a building or warehouse storing primary basic goods, consumer products or any other materials such as fixed and movable assets that are publicly owned; which are set up to carry out the government's economic plans which have vital importance to the national economy, shall be subject to a minimum of one year to a maximum ten years of imprisonment.

Treason by a Public Employee

Article (148): The punishment cited in the previous article shall be applicable to the responsible public employee if he violates his duties or is slack in carrying them out with the intention of causing the collapse of the national economy , thus leading to the destruction of property cited in the previous article.

Incitement and Consort Beginning and Pardoner

Article (149): With regards to criminal incitement and Collaboration and the initiation of and the Pardoner from punishment, Article (129 & 130) of this Law shall be applicable for the crimes cited in the previous two articles.

Waste Not Intended to Cause Damage

Article (150): Anyone who intentionally causes the impairment of any of the tools of production or raw materials or manufactured or agricultural products that lead to severe damage to production or noticeable shortage of consumer goods, or if waste arises due to negligence the punishment shall be a maximum imprisonment of one year and a maximum fine of YR Two Thousand.



The painting on the
cover page was
painted by the artist:

Ryan Alshibany

