



### **A review of the judges' explanation of the verdict: The verdict in “the trial of the century” on the gas case: impunity in corruption cases continues**

*A wasted golden opportunity to achieve justice in cases involving the squandering of public funds*

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The case of the export of underpriced gas is perhaps one of the key corruption cases in the modern history of Egypt due to its magnitude and impact on the lives of millions of Egyptians, the involvement of top state officials, public interest in it, and its historic and political significance. Many analysts and followers of the trial maintained that it was impossible that former President Mubarak had no knowledge of or involvement in the deal, if only because the issue is a matter of “sovereignty” concerning one of Egypt’s most strategic natural resources. The terms for gas export are also part of the mandate of the General Intelligence Directorate (GID) and an obligation provided for in the Camp David Accords. More importantly, Mubarak is an old friend of the former intelligence agent and the current fugitive businessman, Hussein Salem—a friendship attested to by General Omar Suliman, Egypt’s vice president during the 25 January Revolution, in his testimony for the trial. Moreover, Suliman stated in his testimony that this was a non-tender commission of gas export to Salem.

On 29 November 2014, the North Cairo Criminal Court acquitted Mubarak of charges related to the murder of protestors during the 25 January uprising, financial corruption, and the squandering of public funds, following the so-called “trial of the century,” in which Mubarak, his two sons, Minister of Interior Habib Al-Adli and his six aides, and Hussein Salem faced several charges. The verdict created much debate concerning the diligence of the trial, the impartiality of the panel of judges, and the verdict. Many questions were posed about the independence of the judiciary, the efficiency of legal procedures, and deficiencies in legal statutes. The verdict, ultimately, unleashed wide controversy about the political and historic dimensions of the case, which is far from being an ordinary criminal case. In contrast, supporters of the decision claimed that the judge could only issue a verdict based on the evidence at hand and that the verdict should

not be influenced by political or historical considerations, but rather be impartial. Yet, the court exercised undue discretion in evaluating evidence, contrary to precedents established by rulings of the Court of Cassation. The court also failed to explain to the general public why it utterly disregarded most prosecution testimonies, while at the same time it was “satisfied” with most—if not all—defense testimonies, although most of these were not in any way impartial about the case.

The court dismissed all prosecution testimonies, including the investigations of the Public Funds Investigations Department (PFID), top officials in the oil sector, and the Administrative Control Authority. All prosecution testimonies were refuted and dismissed on the grounds that “they failed to offer any material, tangible evidence that could guide the court ‘in this dark tunnel’”.

Prosecution testimonies included the investigations by Colonel Tarek Marzouk Abdul Mughni, the director of financial fraud in the PFID, which proved the involvement of Mubarak in the conclusion of the contract of the Mediterranean Gas Co., the majority of whose shares are owned by Hussein Salem jointly with the Egyptian General Petroleum Corporation (EGPC). Under the contract Egyptian natural gas was exported to Israel at very low prices and under unfair conditions, only to the profit of Hussein Salem, evaluated at around USD 2 billion, and to the detriment of public funds. The court dismissed the colonel’s testimony arguing that “investigations alone cannot stand as sufficient proof or independent evidence proving charges. Moreover, they are but an opinion of the person that could prove wrong, be truthful, or falsified.” This argument was supported by the judgments of the Court of Cassation concerning investigations as an expression of the opinion of the speaker. Nonetheless, the dismissal of certain investigations, and the admission of others, raises concerns around the selective application of the principle established by the Court of Cassation.

Among the core prosecution testimonies ignored was that of Muhammad Kamel el-Essawi, the former first undersecretary of the Minister of Petroleum for Gas Affairs, given in another case on the sale of natural gas to Salem’s company at marked-down prices, which was used in the trial of the century. El-Essawi affirmed that he was tasked with preparing a pricing study to estimate the value of the production of natural gas and to establish contractual conditions with Salem’s company. The study maintained that the cost of producing MBTU (the British thermal unit used to measure gas) at the time was USD 1.5. Moreover, it recommended a condition stipulating periodic review of the price of gas in any contracts for the sale of gas. The results of the study were presented to the Supreme Committee for Gas, chaired by Sameh Fahmy, who tasked Hassan Muhammad Akl, the former deputy of the EGPC, and Ismail Karrarah, the deputy of the EGPC, to prepare another memorandum in which the price was calculated after excluding charges and taxes paid by EGPC, as well as the cost of extracting gas from the deep Western

Delta field, which is very high. As such, production cost was lowered to USD 0.68 per BTU, as Essawi testified. The price proposed by the Essawi report was completely dismissed, and based on the second study, the Cabinet approved the lower price, only to serve the profiteering of Hussein Salem. If the testimony is true, this action had a serious impact, not only in the form of profits lost from selling gas at such low prices, but also as a direct loss due to the sale of gas at a price lower than the cost of extracting it.

Defense testimonies came from individuals who occupied top positions in the state at the time of the crime, such as that of former Prime Minister Atef Ebeid, who himself approved the pricing decision and contractual conditions with Hussein Salem's company in 2000. The very same ex-prime minister approved the establishment of the East Mediterranean Gas Company to operate as a free zone company. The case files from the trial of top officials of petroleum sector include much correspondence between Atef Ebeid, Hussein Salem's company, and the petroleum sector concerning the contract. This is in addition to the testimony of former Prime Minister Ahmad Nazif, under whose term the contract to sell gas to the government of Israel was concluded in 2005. The court was persuaded by all the defense testimonies, despite the partiality of the witnesses and even their possible involvement, at least by facilitating, as top officials of the state, the approval of the sale of gas in this manner. Moreover, many of the defense witnesses were convicted or tried in other cases of corruption and the squandering of public funds (Atef Ebeid in connection with the al-Bayyada land case and Ahmad Nazif in the case of vehicle license plates).

### **Is the verdict based purely on legal, rather than political considerations?**

Despite the claim that the judge relied solely on the case files, proof, and evidence and was not influenced by any political consideration, the explanation of the verdict was laden with political and rhetorical phrases that are not of a legal nature. One example is this paragraph taken directly from the verdict's explanatory document:

This is indeed proven by the establishment of the international American Hebraic scheme, according to which the political order known as the Greater Middle East Project is established, which, in brief, relies on the division of the larger Arab countries into a number of smaller states, in order to achieve their goal of preserving the Zionist entity's position to exercise hegemony over the Middle East. [This support comes to enable the Zionist entity] to achieve its numerous dreams and to loot the natural resources bestowed by God, through instigating fear of al-Qaeda and of some groups disguised in the robes of religion, both of whom are thirsty for power and rule. Some of these groups were able to build financial empires, whose origin is only known by the Almighty. The axis of evil, formed by America, Israel, Iran, Turkey, and Qatar followed two paths to connive

in the Arab world: first, the military invasion under the lie of the existence of nuclear weapons, as was the case in Iraq in 2003, and second, in order to avoid this military cost and the human toll it claimed—which could turn their people against them—they entered through the door and hid behind what they have ostensibly called the US program of “democracy and good governance.” They described this as fourth-generation war, claiming the non-violent change of authoritarian ruling regimes by provoking religious, sectarian, ethnic, or tribal differences.

- It was important that political youth movements or human rights organizations appear to achieve the desired goal, through supporting them with funds from foreign countries, even if these groups were opponents, and even if at the expense of deducting such funds from aid dedicated to their countries. This is indeed what was implemented on the ground with some organizations hiding behind the guise of religion and their supporters, leading to the division of Lebanon, the split of the Sudan to North and South in the 1990s, the severing of Yemen into two parts, the inflaming of Tunisia, and the sowing of the seeds of strife in Libya as of February 2011.

The court concluded that the 25 January Revolution was motivated by a conspiracy that sought to compromise the country and divide Egypt by exploiting public anger against the regime. The court used rhetorical statements utterly unrelated to the law, insinuating that the case itself and the accusations against the former president were all but fabrications. This was a clear attempt to slander youth and everything related to the revolution. The statement conformed to the predominant trend and discourse circulated by the executive authority and the media that supports it. This stood in clear contrast to the first verdict, which confirmed that the court was influenced by the prevalent political conditions. All of this allows us to safely conclude that political considerations influenced the court.

### **Statute of limitation as a tool of impunity**

One of the issues that has been overlooked is the long friendship between Hussein Salem and the Mubarak family. This was proven by the testimony of the former GID director and vice president, Omar Suliman. This relationship is further confirmed by another part of the case linked to the acceptance of gifts in the form of five villas in Sharm el-Sheikh, given by Salem to Mubarak and his two sons, Gamal and Alaa. This gift was accepted with the full knowledge of the recipients that it was meant to exploit the power of the president in the governorate of South Sinai. The court ruled to dismiss that case due to the statute of limitation. The decision was predicated on the fact that the crime was time-

bound and effective on demand, acceptance, or receipt. The court reasoned that the time-bound crime is “the crime that is committed and concluded immediately upon committing the act.” If this criminal status persists, however, the crime is continuous, according to the explanatory note of the verdict.

The court reasoned that since the acceptance of the gift (i.e., since the commission of the crime), Hussein Salem’s company, the owner of the villas, had not itself undertaken any construction, expansions, modifications, additions, finishing, or refurbishing, and that the Mubarak family authorized the Arab Contractors to do so. This fact in itself, in the court’s view, was sufficient evidence to negate the nature of persistence, as if the offender, the party offering the gift, was the company as a legal person and not its owner, Hussein Salem, who owns several other companies and has various interests in many fields.

The court could have considered the gas export deal and its non-tender commission as one of the outcomes of the acceptance of the gift. This would have sufficed to revive two parts of the case, first by establishing Mubarak’s liability for authorizing the sale of gas to Hussein Salem’s company without offering the contract for tender, which would have been enough to delay the start of the statutes of limitations due to the persistence of the criminal conditions for a period of time.

However, a positive consequence of the case is the recommendation of the legislator to start counting the statutes of limitations in cases of abuse of power at the moment the bribe receiver is stripped of his powers, not at the moment of the acceptance of the gift. This is in line with the recommendations of Transparency International, which describes the statute of limitations in corruption crimes as the “countdown towards impunity.” TI proposes several procedures, including flexibility in starting the statutes of limitations in cases of public servants that enjoy some form of immunity at the time of committing the crime. The question posed would be: would it have been possible to disclose this incident and open investigations before the end of the period of the statute of limitations, when Mubarak was still in power?

Flexibility in determining the statute of limitations would have enabled counting the start of the statutes of limitations from the day of Mubarak’s formal ousting on 11 February 2011, given the possibility of the persistent abuse of power by the bribe recipient, in this case the president, to the benefit of the bribe giver, the businessman, as well as the persistence of immunity.

### **What was seen by all, except the court!**

One of the testimonies admitted by the court was that delivered by former Prime Minister Ahmad Nazif, who confirmed that the price of the gas was adequate and approved by “experts,” and that export did not harm the national economy. This flagrantly

contradicted the opinions of independent experts and courts. The Administrative Court, following petition hearings on 18 November 2008 and 6 January 2009, ordered the discontinuation of gas export to Israel at prices below international market rates. In addition, the criminal court convicted Sameh Fahmy and Hussein Salem in the case involving the export of gas to Israel. It was reported that Fahmy's defense confirmed that orders to export gas to Israel were given based on instructions issued by former President Mubarak, which is only logical given the manner in which the state was run when it came to such serious, "sovereign" issues. The Israeli side itself has admitted that the prices were indeed very low.

Despite the fact that, unlike oil, there is no standard price for natural gas, many economists tried to calculate the losses accrued by comparing the price to the lowest international price at the time. EIPR published a report on gas transactions under the Mubarak regime<sup>1</sup> that stated that the losses arising from the export of gas to Jordan, Spain, and Israel cost the state treasury around USD 10 billion during the period 2005–2010. The report relied on precise calculations, based on the prices as stated in the case documents.

The price discrepancy is apparent not only upon comparing the sale price of Egyptian gas to that produced by other countries, but also upon comparing the sale price of Egyptian gas to various countries. Egypt sold its gas to Israel, Jordan, Syria, and Lebanon for USD 1.25, USD 1.0, USD 5.00, and USD 5.5 per BTU respectively. This was confirmed by the two court orders to discontinue gas exports to Israel in 2008 and 2009, issued by the Administrative Court and the Supreme Administrative Court. Both courts relied for their orders on the fact that gas was exported to Israel at prices much lower than international prices. Essawi's aforementioned testimony confirms that gas was sold at a price less than the cost of extraction, not only less than international prices or even comparable to Russian gas, which is the cheapest on the international market.

Israeli experts confirm these views as well. Ramez Halabi, an economist at Tel Aviv University, stated in an interview with the channel Russia Today on 26 February 2011 that Israel "imports approximately USD 4 billion of Egyptian gas annually... There is a negative impact resulting from failing to pump Egyptian gas to Israel... There are alternatives from several countries with respect to liquid gas in general. However, we need to know that over the past ten years, importing from Egypt has saved Israel USD 10 billion. First, the prices at which Israel buys from Egypt are very low; and second, this forces other companies to lower their prices to compete."

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<sup>1</sup> See EIPR report on the issue:  
<http://eipr.org/en/pressrelease/2014/03/13/1999>

Finally, the court's verdict in the case raises two key legal points. First, the court having absolute discretionary power to evaluate evidence, admitting what it deems appropriate, especially in the case of the testimonies. In exercising this discretion, the court is not subject to the oversight of a higher court or obliged to explain why it admitted the testimony of a given witness and not another. The court need only maintain that it is satisfied without any need for further explanation of the grounds for its satisfaction.

Second, legal action in criminal courts in Egypt is conducted on one tier only. The Court of Cassation is not deemed part of the tiers of litigation, since it is not a subject-matter court, except in particular cases. Article 96 of the Egyptian constitution of 2014 provides that the law shall regulate the appeal of felony sentences. Although almost one year has passed since the issuance of the constitution, the question of amendments to the Criminal Procedure Code concerning appeals of judgments issued by criminal courts has not been raised, despite multiple amendments and legislation appearing since the constitution was issued.

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1. A lawsuit examined by the Cairo Criminal Court, where former Minister of Petroleum Sameh Fahmi and fugitive businessman Hussein Salem, as well as four top officials from the oil sector, faced charges for exporting gas to Israel at low prices through a company owned by Hussein Salem, which led to the loss of large sums of public money. Similar to many post-revolution cases of corruption during the Mubarak regime, the Court of Cassation ordered a retrial after the first-instance criminal court sentenced the defendants to up to 15 years of imprisonment. The trial continues, with 21 February 2015 set as a date for the final judgment.
  2. Transparency International. 2010. Timed out: statutes of limitations and prosecuting corruption in EU countries.  
[http://www.transparency.ee/cm/files/statutes\\_of\\_limitation\\_web\\_0.pdf](http://www.transparency.ee/cm/files/statutes_of_limitation_web_0.pdf) .
  3. See the EIPR report issued in January 2013, "Corruption of Gas Contracts."
  4. Sobhi, Mahmoud. 2014. "The Defense of Sameh Fahmi: Mubarak issued orders of exporting gas to Israel."  
<http://dotmsr.com/ar/501/1/133714/>.
  5. Russia Today. 2011. Impact of the change of the Egyptian regime on Israeli economy. <http://tinyurl.com/odgr4ku>.