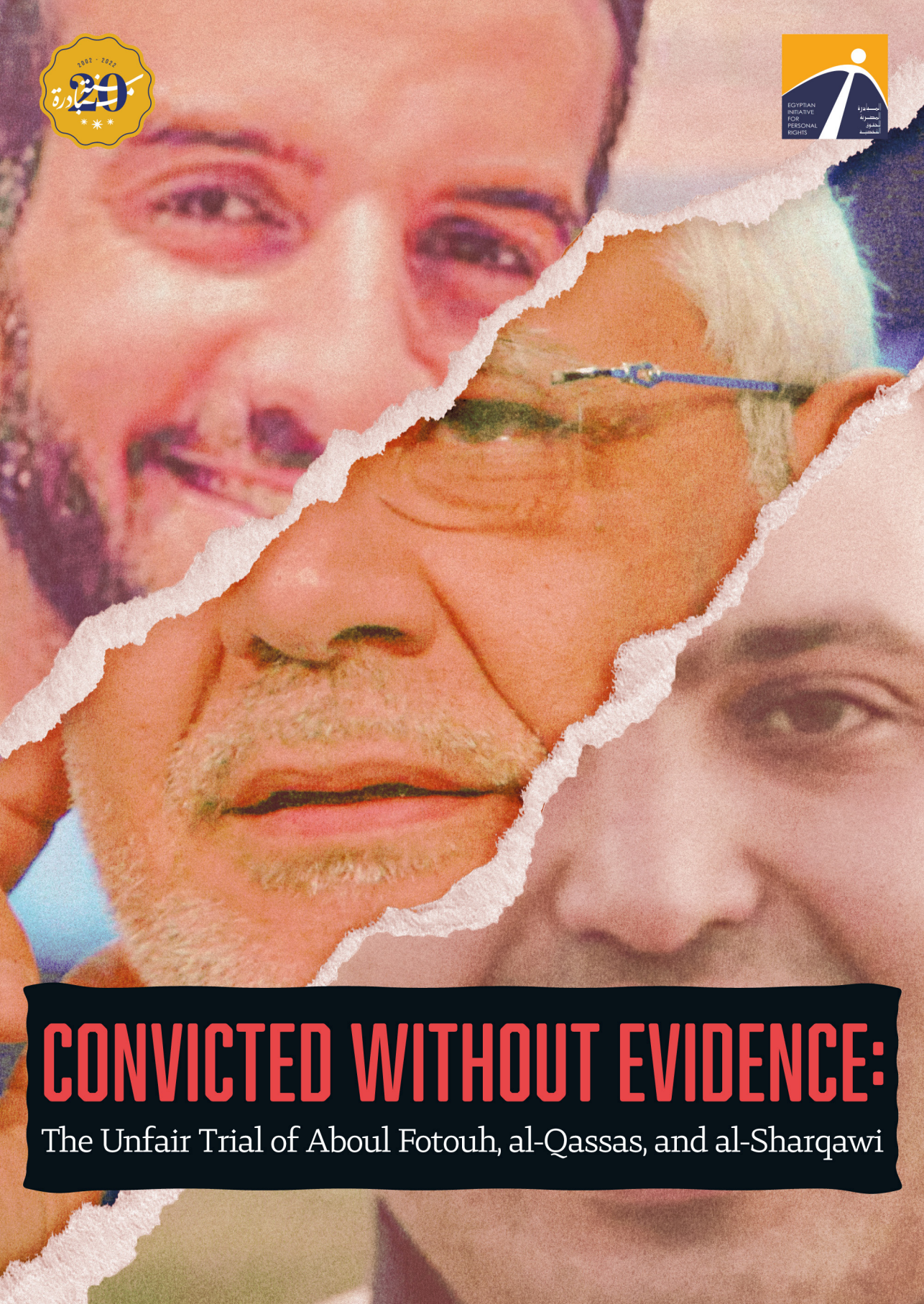

CONVICTED WITHOUT EVIDENCE:

The Unfair Trial of Aboul Fotouh, al-Qassas, and al-Sharqawi

Convicted Without Evidence:

The Unfair Trial of Aboul Fotouh, al-Qassas, and al-Sharqawi

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I. Introduction

On May 29, 2022, the Emergency State Security Felony Court issued a judgment not subject to appeal, convicting 25 defendants in case no. 1059/2021/Emergency State Security and handing down sentences ranging ten years aggravated prison sentences to life in prison. The court sentenced Abdel Moneim Aboul Fotouh, former presidential candidate and the head of the Strong Egypt Party, and Mahmoud Ezzat, the acting general guide of the Muslim Brotherhood, to 15 years of imprisonment; Mohammed al-Qassas, the vice-president of Strong Egypt, and Moaz al-Sharqawi, the former vice-president of the Tanta Student Union and a member of the Egyptian Student Union, were each sentenced to 10 years in prison. The case was opened in 2018 and was referred to trial in 2021. The judgment was issued after a handful of hearings in the Emergency State Security Court, all of which took place after the state of emergency was lifted in October 2021.

The Egyptian Initiative for Personal Rights was part of the defense team of the accused, representing al-Sharqawi, the former student leader, who was tried while free on his own recognizance following his release from Tora Prison in March 2020 after a year and a half in pretrial custody.

Let's take a step back. On August 25, 2021, the Supreme State Security Prosecution referred 25 defendants to trial before the Emergency State Security Criminal Court in the Fifth Settlement in case no. 1059/2021 (docketed as case no. 440/2018/ Emergency Supreme State Security), alleging that "on or about 1992 until August 21, 2018, inside and outside the republic," they committed eight terrorism-related crimes, including assuming the leadership of, joining and financing a terrorist group, possessing weapons and ammunition, and promoting ideas advocating violence.

The case was opened in early 2018 during the campaign to reelect President Abdel Fattah El-Sisi for a second term in office. The year began with an official statement by the armed forces on January 23 that Sami Anan, the former army chief of staff and a potential presidential candidate, had been summoned for questioning on charges of falsely claiming his service in the armed forces was terminated, announcing his candidacy for the presidency without the approval of the armed forces, and explicitly inciting against the armed forces and "driving a wedge between the army

and the Egyptian people" with his declaration of candidacy.[1] After Anan's arrest and the suspension of his campaign, another potential candidate, lawyer Khaled Ali, announced that his campaign was being harassed, prompting him to withdraw from the race.

The Military Prosecution released Sami Anan after nearly two years in custody,[2] while Colonel Ahmed Qunsuwa is still serving a six-year prison sentence with labor, upheld by the Northern Appellate Misdemeanor Circuit of the military justice system, after announcing his intention to run for the presidency. Qunsuwa was convicted on charges of "conduct detrimental to the requirements of the military order" and the expression of political opinions.[3]

In a related context, a coalition of several parties, including Strong Egypt and various independent figures, called for a boycott of the presidential elections on January 30, 2018. Ultimately, only two candidates competed in the presidential election of March 2018: President Abdel Fattah El-Sisi and Moussa Mustafa Moussa, the founder of "Mou'ayedoun" –a campaign that aimed to mobilise support for El-Sisi's presidential bid.

Case no. 1059/2021 was initiated in February 2018. At that time, a state of emergency was in effect, imposed for the second time after a lapse,[4] and under the constitution, it would last for a period of three months, extendable only once.[5] Under the state of emergency, the security forces arrested several people in connection with case no. 440/2018/Emergency State Security Investigations. On February 11, Abdel Moneim Aboul Fotouh returned from London after appearing in several televised interviews, during which he had spoken of the upcoming presidential elections and the fate of a number of potential rivals to President El-Sisi. On the

1 Statement from the General Command of the Armed Forces, January 23, 2018, https://www.youtube.com/watch?v=OF33DDr1oqc.

2 Al-Masry Al-Youm, "Sami Anan Released; The General Is Home Now, Say His Lawyers" (Arabic), December 22, 2019, https://www.almasryalyoum.com/news/details/1454605.

3 He was convicted under Articles 153 and 166 of the code of military justice.

4 Pursuant to Presidential Decree 510/2017, issued on October 13, 2017; the emergency was in effect until January 13, 2018.

5 On January 2, 2018, the Official Gazette published Presidential Decree 647/2018 extending the state of emergency starting on January 13, 2018.

morning of February 13, a National Security Investigations (State Security) officer filed his investigation report on the allegations in case no. 440, meaning that less than 24 hours separated the first investigative report in the case and the issuance of an arrest warrant for 16 suspects, including a former presidential candidate and the head of an officially recognised political party. The following day Aboul Fotouh was arrested with six members of the political bureau of the Strong Egypt Party. All of them were released some two hours later without being officially questioned—with the exception of Aboul Fotouh, who became the subject of an investigation launched by the prosecution the following day.

Drawing on the official public narrative, the defendants' version of events, and the violations documented by the defendants' legal counsel, this report reviews a long list of irregularities and legal grounds that require the judgment issued in case no. 1059/2021/Emergency State Security Felonies to be repealed. The EIPR offers here a reading of the official case documents, defense arguments, and the court's judgment, coupled with a discussion of the general context and pretrial detention, which in this case lasted for more than three years before a trial of concluded in a few months that took place in an exceptional legal framework which violates many fair trial guarantees.

II. Investigation and arrest

On February 13, 2018, the officer in the National Security division of the Interior Ministry finished writing the first investigation report on 16 defendants. The same day, the first public prosecutor authorized the Supreme State Security Prosecutions to arrest those defendants and search their places of residence, after which the number of persons wanted in connection with the case would increase to 25.

This part of the report reviews the way the case was constructed and publicized, including the contents of investigative reports prepared by State Security (National Security Agency) division, and how the defendants were arrested and the physical evidence seized. This section juxtaposes the official account reported continually in the media, official state social media accounts, and in the police reports with the de-

fendants' version of events, which they provided during the Supreme State Security Prosecution in the pre-trial phase.

1. Investigations and testimony

The case is based largely on two preliminary investigation reports (police reports), written by the investigating National Security officer. The first report consists of six pages and was completed on February 13, 2018, and the second is a supplement of less than two pages dated February 20. The officer did not specify the period in which he conducted his investigations, nor did he give his personal testimony on any of the relevant events. The first preliminary investigation report is based entirely and exclusively on "information obtained from confidential, reliable sources." (that are not named). This has become routine in investigations in State Security cases, such that investigation reports contain no real evidence of the charges that will be filed against the accused.

According to the first preliminary investigation report, the facts are based on Information that was received from "confidential sources" and confirmed by the National Securityofficer in charge through his investigations, though the nature of these investigations is not specified. The facts in brief are as follows:, the officer learned that there was "a general scheme aimed at fomenting chaos in the country (...) in order to overthrow the state and its institutions››; the people responsible for this plot were six people he described as "the leaders of the Brotherhood organization based investigation in the country of Britain." This scheme was two-pronged: the escalation of terrorist operations against the state and the use of the media "to broadcast false news to stir up public opinion."

According to the report, the six leaders agreed with Mahmoud Ezzat to task Abdel Moneim Aboul Fotouh with the plan's implementation, so that he could exploit "his legitimate cover as the head of the Strong Egypt Party to step up action against the state." The officer added that his investigations confirmed that Aboul Fotouh had relied on Mohammad al-Qassas for help in "executing the plan" and that Aboul Fotouh communicated with "officials in the organization's administrative offices and tasked them with providing the weapons necessary to implement the plan." He also estab-

lished groups of "Strong Egypt students" to bring them into the armed wing. The officer's investigations concluded that among those who joined were four defendants, among them defendant Moaz al-Sharqawi. Here it should be noted that a number of those "students" had graduated at least a year prior to the time of the writing of the investigation report. The officer states in his report that when Aboul Fotouh travelled to London, he held meetings with several leaders, in addition to a media interview with another defendant in the case. Nowhere in the report are the dates of the alleged meetings and encounters mentioned, and there is no mention as to whether the officer was actually aware of the details of what happened during these meetings.

Initially, investigations focused on potential crimes that had not actually occurred and do not fulfill the elements of attempt or even incitement to a crime. The confidential sources referred to undisclosed plans and attributed responsibility for the implementation of them to the accused, they also mentioned attempts to attract young people or students, with no indication of whether these attempts were successful. The alleged violations of the law on which the case is built center on intent and the convening of organizational meetings that were not conclusively determined to have actually taken place. The investigation report cites no physical or material evidence, but simply refers to information from anonymous sources about meetings with people in places at which the defense denies those people were even present. During the prosecutorial process, the defense asked for evidence of any kind indicating that they had been present in the country where the meetings were alleged to have taken place, but the prosecution provided none. The preliminary investigation report just referred to Abdel Moneim Aboul Fotouh's televised interview on Al Jazeera,[6] attaching a copy of the footage as an exhibit.

The investigating officer did not indicate what Aboul Fotouh said in the televised interview that could amount to incitement to violence, nor did he establish with evidence that Aboul Fotouh had repeated any false news. He simply referred to the interview as part of the general scheme aimed at "stepping up the organization's terrorist and subversive activities against the state and fomenting chaos, for the purpose of striking the authorities." The defense thus argued at trial that the investigations were invalid.

6 Al Jazeera interview with Dr. Abdel Moneim Aboul Fotouh, February 11, 2018, https://www.youtube.com/watch?v=ag7QbqQ5pVM&t=255s.

The second, complementary investigation report was no better than the first in terms of containing evidence or providing any precision or detail.

In addition to writing the report a full week after Aboul Fotouh's arrest, the officer affirmed his confidence in the information of his confidential and anonymous sources, which indicated that Abdel Moneim Aboul Fotouh had used his private farm to commit a number of his alleged crimes, including holding organizational meetings and providing weapons training for members of the organization, absent any specifics about when this took place or other legal or administrative or logistical details. Aboul Fotouh's family and defense counsel provided official documents showing that he has no connection to the operation of the farm, which has been in the possession of a tenant for years; this casts immediate doubt on the soundness of the investigations. Moreover, this is only one officer's affirmation of his investigations, which rely on undisclosed sources for the allegation that such meetings and training exercises took place. There is no mention or reference to any evidence whatsoever to support this allegation, and the report did not even specify particular dates on which certain meetings were allegedly held in the presence of particular people with the aim of training for any of the things that the investigation report claims they did. The entire investigation file contains nothing that could be described as anything more than hearsay.

It should be noted that all the preliminary investigation reports in the case are based on the word of the officer, who relied in his investigation on "confidential sources." Accordingly, all the prosecution witnesses in the trial would be National Security officers testifying on behalf of their sources, with no one else except the investigating officers themselves to corroborate their findings. This is common in cases prosecuted by the Supreme State Security Prosecution and has become such a well-established practice that it is not questioned or challenged at all by the courts.

To prove the charge of joining a terrorist group, the prosecution attached to the referral order a list of witness statements and corroborating evidence, including the defendants' statements during questioning. While these were considered incriminating evidence, the State Security Prosecution, and the court after it, did not pay attention to the actual content of those statements, relying on some parts while ignoring others. Abdel Moneim Aboul Fotouh, for example, acknowledged joining the

Muslim Brotherhood, but also said that he was a member only until 2000 and that he had made his departure from the group public in 2009. Mahmoud Ezzat's statement to the State Security Prosecution confirmed that the Brotherhood's relationship with Aboul Fotouh was severed after he was ejected from the group following his decision to run in the presidential elections in 2012. It is a different matter for Mohammad al-Qassas. His lawyer argued the absence of both the moral and material elements of the crime of joining a terrorist group, as the case file contained no indication that al-Qassas carried out any act that entailed or resulted in the crime of joining. The State Security Prosecution found nothing in al-Qassas's statements that could be construed as an admission of joining the group that could be added to the prosecution's evidence, and there was no evidence to support this charge.[7]

When the judgment was issued, the Emergency State Security Court explained that it had dismissed the defense argument for the invalidity of the National Security officer's investigations, saying it was satisfied that the inquiries were diligent because they seemed to be clear and "included the names and addresses of the defendants," as if this were sufficient evidence in itself! The court noted that it was satisfied given its confidence in the statements of the investigating officer (the first prosecution witness), even if he did not personally conduct the investigations.

***Testimony of officers*:** While there were no defense witnesses called in the case, the prosecution called four witnesses, including three officers and a voice expert with the National Media Authority, who stated that the voice and image of Aboul Fotouh matched those which appeared in the recording of the television interview attached as an exhibit. The first witness, the National Security officer who conducted the investigation, testified that he received his information from "confidential sources." The second witness was another officer who testified about items seized during the search of what he claimed was Aboul Fotouh's residence (although Aboul Fotouh denied this, saying that this was the address of his office, not his residence) during his arrest. The third witness was the police colonel who arrested six farmers at the farm purportedly owned and run by Aboul Fotouh.

The police investigator provided no evidence to support the sole charge against

7 Khaled Ali, defense brief filed on behalf of Mohammed al-Qassas in case no. 1051/2021, Fifth Settlement, March 2022.

Moaz al-Sharqawi, who was sentenced to ten years imprisonment for one count of joining a terrorist group based solely on the testimony of the investigating officer with no corroborating evidence.

During the trial, a hearing was scheduled to cross-examine the first prosecution witness, the investigating officer. A lawyer with EIPR defending al-Sharqawi asked the officer if he himself had observed al-Sharqawi participating in the activities attributed to him. He responded, "This is what the investigations concluded." When asked if he had observed al-Sharqawi attending meetings with any of the other defendants, which could prove the act of joining and his activity, the officer then responded with, "I don't remember."[8] Although Article 290 of the code of criminal procedure allows a witness who no longer remembers a specific fact to read from his statement given during questioning or his statements contained in the evidence report, the investigating officer did not refer to his report to answer the defense's question, most likely because his report did not refer to attending any meetings or directly observing any of the defendant's alleged activities.

In the case of al-Sharqawi, the prosecution attached a statement he made during questioning about his participation in peaceful demonstrations wholly unrelated to what the investigation report alleges he did. The prosecution took this part of al-Sharqawi's statement at face value, but paid no attention to his persistent denial throughout the case of having joined any group or political party. Moreover, there was no evidence in the investigation report supporting this accusation or proving he had any connection with the Muslim Brotherhood or the Strong Egypt Party. The prosecution also questioned al-Sharqawi without his attorney present, while disregarding his statements about being forcibly disappeared and tortured and without attempting to verify his claims.[9] The prosecution considered al-Sharqawi's admission that he participated in peaceful demonstrations, years before the case in question, to be sufficient to try him.

In its written judgment, the emergency court responded to this argument by saying, "It is established that in criminal matters, a confession is one of the elements whose

8 Hoda Nasrallah, defense brief filed on behalf of Moaz al-Sharqawi in case no. 1051/2021, Fifth Settlement, February 26, 2022.

9 Ibid.

veracity and probative value the trial court has full discretion to assess." Thus, the court did not directly respond to the argument of al-Sharqawi's counsel that a person's confession should not incriminate him if it is contrary to the truth.[10] Implicitly, the court decided that the defendant's confession, twisted out of its intended meaning, was sufficient to convict him, making the investigations of the Interior Ministry or prosecution unnecessary.

The judgment against al-Sharqawi was based on the personal opinion of the police investigator and the prosecutor who questioned him, although neither of them provided a single piece of material evidence to implicate him in case no. 1059. Meanwhile, the investigating officer himself, on the witness stand, did not remember if al-Sharqawi had committed any act that could be deemed a crime punishable by law.

On another occasion, the investigating officer (the first witness) provided confirmation that his investigation report was not consistent and that his testimony was not supported by dispositive evidence. When Aboul Fotouh's defense counsel cross-examined him about the alleged meetings in London between Aboul Fotouh and a number of "leaders," the defense asked him whether he himself was in London or had obtained his information from a source, but no response was forthcoming. The defense explained that one of the leaders referred to had not been in England for several years and moved to contact the British government to confirm his entry to the UK. The court did not grant this request, instead relying on the hearsay account submitted by the investigating officer.

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The natural course of this case—the course it should have taken—would have ended with the closure of the investigations or the acquittal of the defendants due to the lack and insufficiency of evidence. The same is true of many other cases that have been built entirely on confidential investigations based on secret sources that neither the court nor the defense were allowed to hear or examine, even in closed or confidential hearings or in any framework that would ensure their protection, and without any other information to complement those confidential statements.

10 Appeal no. 1203/54JY, hearing of February 14, 2016.

That is, the judgment handed down in this case—and similar State Security cases in recent years—is not based on real evidence, but only the opinions of the officer who conducted the inquiries. This is not our description; it is the judgment and characterization of the Court of Cassation, which has recognized that police (preliminary) investigations in all cases are presumptive rather than dispositive evidence. This means that the inquiries, the personal opinion of the officer who conducted them, must be supported by other evidence before they are presented to the judge and cannot in themselves amount to proof.[11]

Because a casual, unqualified account from confidential sources is not alone reliable evidence on which to build a case involving charges of this gravity, the police would later present as exhibits items allegedly seized during the arrest of some of the defendants. At the same time, the prosecution would take a selective approach to the defendants' statements during questioning, relying on some of them as confessions while ignoring many of the defendants' statements of having been subjected to various abuses.

2. Arrest and torture

***Convicted before investigation*:** Between 2018 and 2020, security forces arrested 10 of the 25 defendants in the case, in the following order: Mohammad al-Qassas, Aboul Fotouh, six farmers, and Moaz al-Sharqawi, all in 2018, and then Mahmud Ezzat in August 2020.[12]

Before the first investigation report was written, Mohammed al-Qassas, vice president of the Strong Egypt Party, was already in custody following his arrest on February 8, 2018. On the day of his arrest, one security detail arrested him as he was returning from the wedding of a friend, while another security force raided his house, all in connection with charges of belonging to the Brotherhood and promoting terrorist ideas in another case that has still not been referred to trial at the time

11 Appeal no. 15321/85JY, hearing of February 3, 2016.

12 Statement from the Interior Ministry, August 28, 2020, https://www.facebook.com/MoiEgy/photos/a.181676241876047/3308437495866557/.

of this writing.[13] About a week later, on February 14, security forces arrested Abdel Moneim Aboul Fotouh. The next day, the Interior Ministry declared him guilty in a statement containing many accusations, ignoring the prosecution's mandate to investigate and indict. In its official statement, the Interior Ministry announced that it had carried out what it called "successful security strikes directed at the extremist activist factions and the cadres of the armed wing of the terrorist Brotherhood group," although Aboul Fotouh had never been convicted of any of these things. Indeed, until his arrest, he was engaged in legitimate, public political activity as the head of an official party recognized by the authorities and was a former presidential candidate.[14]

A week after Aboul Fotouh's arrest, specifically on February 21, the Interior Ministry followed up with another statement[15] and a video clip titled "Arrest of six Brotherhood operatives at a farm owned by Brotherhood leader Abdel Moneim Aboul Fotouh in Wadi al-Natron."[16] Aboul Fotouh's family denied any connection to the farm and farmers the same day, announcing that they were prepared to provide proof of this.[17]

The six farmers were named in the case, and for the second time, the Interior Ministry publicly declared them guilty before they were even questioned, although the farmers were not caught red-handed committing the crimes described in the ministry's statement. The Interior Ministry acted outside its authority in several respects, levelling charges and issuing judgments in its statement like a judicial authority, paying no heed to the basic, undisputed legal precept of presumption of innocence. It also published photos of the accused without regard for the constitutional guarantee in Article 51 that obligates the state to respect and protect the dignity of every human being.

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13 Case no. 977/2017, known familiarly as the Mukammilin 2 case.

14 Interior Ministry statement, February 15, 2018, https://www.facebook.com/MoiEgy/photos/a.181676241876047/1670508679659455.

15 Interior Ministry statement, February 21, 2018, https://www.facebook.com/MoiEgy/posts/pfbid02Zihc8egLrYhyptUAapPdkm7UH7zd9XSCpaU4VQ1XHVnxfD5TijHRHbwTcyXes7shl.

16 Official YouTube page of the Interior Ministry, February 21, 2018, https://www.youtube.com/watch?v=upMGU7Hbhls.

17 Abdullah Salem, "Aboul Fotouh's Family Respond to Interior Ministry's Statement" (Arabic), Al-Masry Al-Youm, February 22, 2018, https://www.almasryalyoum.com/news/details/1262226.

***Two arrest dates*:** The arrest dates listed in official reports differ from those given by seven defendants when they appeared before the prosecution (the six farmers and Moaz al-Sharqawi). The official arrest reports for the six farmers give the date as February 21, 2018 at 4 pm, as declared by the Interior Ministry hours after their arrest in various media outlets, while the farmers unanimously said during questioning by the prosecution that they had been arrested on Tuesday, February 20, 2018.

In their statements, the six farmers concurred that a security force had come to where they were working on the farm and that after everyone's ID was checked against their database, the six of them were arrested. It appears that the arresting force decided to arrest anyone with a previous arrest record, regardless of the relevance of their previous cases to the crime under investigation and although one farmer attempted to tell them that he had been acquitted at trial.

According to the official account, the six farmers were arrested and photographed the same day the statement about their arrest was issued, on February 21; they were then taken before the prosecutor the next day, in compliance with the law. The prosecution did not investigate the farmers' claims, made during questioning, that they had been arrested on February 20 and had been treated in a degrading manner and beaten. They also stated that they were detained in the Noubariya police station before being taken back to the farm the next day to be photographed and to give their coerced statements without a lawyer present. They were then detained again before being brought before the prosecution.

Former student leader Moaz al-Sharqawi stated that he had been subjected to more and more violent abuses in the period before he was brought before the State Security Prosecution. "I slept in handcuffs until they brought me here today"[18]—this sentence concludes al-Sharqawi's statement about his arrest to the State Security Prosecution. The official case file shows that al-Sharqawi's arrest report was written at 3:20 am on Saturday, October 13, 2018. The National Security officer wrote in the arrest report that he had arrested al-Sharqawi after going with a force to his home in a village in the district of Tanta. After knocking on the door, al-Sharqawi

18 Minutes of the first session of the first interrogation of Moaz al-Sharqawi at the Supreme State Security Prosecution in the Fifth Settlement, October 13, 2018.

answered, whereupon he was informed of the nature of the call and searched; no items were taken from him. He was accordingly brought before the State Security Prosecution in New Cairo the same day at 3:30 pm.

But al-Sharqawi told the prosecutor an entirely different story. He said he was arrested 24 days before the date recorded in the report, specifically at 10 am on Wednesday, September 19, 2018, after being stopped at a police checkpoint on the Sharm el-Sheikh Road while going about his business as a tour organizer. Al-Sharqawi said that he was arrested without being shown a warrant and that after being cuffed and taken to a State Security facility in Sharm el-Sheikh, he was moved to the State Security headquarters in Tanta, where he was detained for 23 days.

> *"I was questioned under torture, electroshocks to my two thighs, my penis, and the fingers of my left hand. I was beaten on my face with hands and slippers, cursed, and stripped naked, all to make me confess. The torture happened twice, the first day I was there and then two days later."*[19]

Al-Sharqawi related to the State Security Prosecution the details of his physical torture and the unofficial interrogations with him to compel him to confess to charges against him before appearing before the prosecution. He went on at length about his unofficial, nearly month-long confinement. At the end of the first questioning session—conducted without the presence of al-Sharqawi's attorney—the prosecutor remanded him to custody for 15 days and scheduled the rest of the interrogation for three days later. The State Security Prosecution ignored complaints and reports made by al-Sharqawi in his statement and consequently no order was issued to investigate the veracity of his purported arrest date, or the torture and detention in an illegal facility, which is tantamount to enforced disappearance and raises the possibility that the arrest report submitted to the prosecutor was falsified - a crime in itself. Nor was al-Sharqawi referred to the forensic medical examiner to ascertain the truth of his claims, as the prosecutor should have automatically done.

The first public solicitor of the Supreme State Security Prosecution issued a warrant for the arrest of al-Sharqawi and the search of his residence on February 13, 2018, based on the first investigation report from National Security, which included his

19 Ibid.

name among the 16 suspects. Although an arrest warrant is valid for one month only, the Emergency State Security Felony Court disregarded the argument made by al-Sharqawi's defense attorney that the warrant was no longer valid under Article 139 of the code of criminal procedure, having been issued in February while the arrest was made in September. According to the court's written judgment, the prosecution issued more than one arrest warrant. To be precise, however, only two new warrants were issued. One month after the first warrant, a new one was issued in March 2018, then another in April. The prosecution then did not issue a new warrant for five full months, issuing a new one only on September 20, 2018—one day after al-Sharqawi was actually arrested according to his own statements, supported by telegrams sent by his family to the public prosecutor following his arrest.

The court similarly dismissed the argument that the arrest report for al-Sharqawi had been falsified. Both the prosecution and the court accepted the story of the National Security officers, although the Interior Ministry submitted no documentation showing that any attempt had been made to execute the warrant against al-Sharqawi, nor had officers gone to his home, in the period between February, when the first warrant was issued, and October 2018.

The court ruled that al-Sharqawi's arrest and presentation to the prosecution had been correct and declared that it was not persuaded of the truth of his statement that he had been held in unofficial detention facilities, nor of the telegrams submitted by his lawyer that were sent to the public prosecutor to report his enforced disappearance and demand knowledge of his whereabouts nearly one month before the date of his arrest as recorded in the official documents.

After al-Sharqawi was arrested on September 19, 2018, two of his brothers sent several telegrams to the public prosecutor, the first public solicitor of the State Security Prosecution, and the interior minister, petitioning for an investigation of the arrest and his release and asking that they be informed if he was wanted in connection with any case to enable his lawyer to be present during questioning. The prosecution did not conduct an investigation into the incident or, later, into al-Sharqawi's statements regarding his own torture and enforced disappearance or the falsification of the arrest report. This was plainly an act of dereliction: the prosecution, as the examining body even before being the charging body, must treat

the statements of both parties to a dispute with the same degree of seriousness and impartiality. The prosecution did not undertake even minimal effort, deciding to disregard al-Sharqawi's statements about his detention, which were consistent with the telegrams sent by his family on the date of his actual arrest. Indeed, the prosecution did not include the testimony of the officer who ostensibly arrested al-Sharqawi in the case file as a corroborating witness, as was the case with the officers who arrested Aboul Fotouh and the six farmers.

In explaining why it automatically accepted the correctness of the procedures despite numerous grounds for doubt, the court said, "Any person may easily resort to such means when sensing that he is the object of a security pursuit, in order to make the court doubt the validity of his arrest procedures." The Emergency court—without examination or inquiry—ruled that the telegrams sent by al-Sharqawi's family were not genuine, although the Court of Cassation had previously issued a ruling that cited telegrams as evidence of a date of arrest contrary to that to which the prosecution witnesses had testified. The Cassation Court additionally ruled that it is a violation of the accused's right of defense for a judgment to be issued "without examining the telegrams sent as evidence that the arrest took place…before the warrant [was issued]."[20]

In fact, the court accepted any narrative offered by the arresting and investigating bodies no matter how tenuous or non-existent the evidence. In contrast, it adopted a selective approach with the defendants' statements, relying on their statements when it might incriminate them and disregarding other statements in which they denied the charges against them or alleged a violation. It was as if the trial proceedings, the mounting of a defense, and the attempt to present or demand evidence of the charges were immaterial and pointless.

The Court of Cassation has established in similar cases that a court may disregard as evidence official complaints of a disappearance when they are inconsistent with the truth as proven to the court's satisfaction. But this should not apply to Sharqawi's case. It should be noted that in the period between the issuance of the first arrest warrant in February and his disappearance and unlawful detention

20 Appeal no. 25402/77JY, hearing of April 1, 2009.

in September, Sharqawi was included on the designated terrorist lists, an action he actively appealed before the Cassation Court during that time. He moreover submitted his conscription papers to the army. All of this is confirmed by date in official documentation available to the court. Despite those official engagements, he was not informed of any arrest warrant, and no security detail was dispatched to his residence in that period. As such, there is nothing to suggest that he felt himself to be "the object of a security pursuit," as the court claimed—indeed, these official dealings and proceedings that he himself initiated indicate the exact opposite.

There is much evidence in similar State Security cases that this practice—disappearing defendants for a period before presenting them to the prosecution and then writing an arrest report backdated one day prior to the appearance before the prosecution—is a recurrent one in the State Security sector. It is possible that courts' persistent acceptance of the account of the arresting and investigating bodies has served to entrench the practice. In many if not all documented cases of individuals being prosecuted by State Security Prosecution, the family or lawyers of the disappeared person file telegrams with the Public Prosecutor's Office in an attempt to determine where the detainees are being held and to simply prove that they have been detained, since police typically deny holding people in official custody. It is difficult to accept that all these incidents are attempts by defendants or their families to fake a disappearance.[21] However, we have no examples in any of the dozens of cases in recent years in which we have represented defendants or which we have documented or studied of a single instance in which the court has shown due regard for such flawed arrest procedures or considered them a breach meriting attention or inquiry - not even once.

3. Search and seizure

Under Article 51 of the code of criminal procedure, an arresting force may search the property or residence of the wanted person named in the judicial warrant. By law, the search must take place in the presence of the accused or his representative,

21 See EIPR's second annual report on the death penalty in Egypt in 2018 (Arabic), March 2019, https://eipr.org/publications/%D9%90%D8%A8%D8%A7%D8%B3%D9%92%D9%85%D9%90-%D8%A7%D9%84%D8%B4%D9%8E%D8%B9%D8%A8%D8%B9%D9%86-%D8%B9%D9%82%D9%88%D8%A8%D8%A9-%D8%A7%D9%84%D8%A5%D8%B9%D8%AF%D8%A7%D9%85-%D9%81%D9%8A-%D9%85%D8%B5%D8%B1-2018.

or witnesses, preferably relatives or neighbors of the accused, and this should be established in an official report. According to the case file, the Interior Ministry searched two locations during the arrests carried out in February 2018: first, what was purportedly Abdel Moneim Aboul Fotouh's home when he was arrested and second, a farm in Wadi al-Natron in the governorate of Beheira, which the investigating National Security officer alleged was owned by Aboul Fotouh.

***The first search*:** In the arrest report for Aboul Fotouh, the Interior Ministry notes its compliance with lawful search procedures. But Aboul Fotouh said during questioning by the prosecution that he was arrested at his office, not his place of residence, which are two different places as a matter of fact. He told the prosecutor that he was informed that an arrest warrant had been issued, but was not shown the text of the warrant; no one informed him in advance that a search warrant had been issued.

According to the case file, the prosecution did not view the seized items or record its observations about them in the presence of the defendant, as Article 206 of the code of criminal procedure permits. In his first interrogation, Aboul Fotouh's counsel asked to see the arrest procedure report and the report of the relevant investigation, but the request was denied on the grounds that it conflicted with the inquiry. This contravenes Article 84 of the code of criminal procedure, which provides for the defendant's right to not only read, but also request a copy of the case documents, whatever they may be, at his own expense. Aboul Fotouh insisted that the physical items mentioned during questioning were not seized in his presence, and he denied any connection to them.

The forensic report confirmed that Aboul Fotouh did not write any of the documents seized as evidence, which came down to 21 titles consisting of 145 pages. The documents were referred to as printed matter that included the promotion and spread of false news and information promoting ideas advocating violence. Despite Aboul Fotouh's assertion that the material was not his and was not found with him, and despite the lack of witnesses to the seizure of the documents, as required by the code of criminal procedure, the court dismissed Aboul Fotouh's argument that the material should be excluded as evidence. In explaining its decision, the court simply stated that such a defense "is a dispute about the evidentiary weight of the

statements of the prosecution witness," a characterization typically applied to an attempt to rebut a prosecution witness's testimony. We do not understand how that diminishes the weight of the argument or how to explain the court's refusal to consider all the procedural irregularities that led to the inclusion of this material in the case from the outset.

While the investigating officer (first witness) was the only person who testified about the investigation on the pretext of protecting confidential sources, there was no such justification to suffice solely with the testimony of the officer who arrested Aboul Fotouh. That officer (the second witness) said that he arrested Aboul Fotouh and searched his home, where he found "organizational documents belonging to the Brotherhood." Aboul Fotouh's counsel pointed to the shortcomings of the prosecution's investigations—which did not seek clarification of the names of the members of the detail who accompanied the officer on the arrest and in fact blocked them from testifying—while also noting that the search was conducted in the absence of Aboul Fotouh or any other witnesses.[22]

***The second search*:** evidence in the case included the testimony of a National Security colonel (the third witness) who stated that he had gone to a farm in Wadi al-Natron in the Beheira governorate, which he alleged was Aboul Fotouh's, a week after the latter's arrest and arrested six farmers. He stated that after a search, during which neither Aboul Fotouh nor the other arrestees nor any other witnesses were present—in violation of the code of criminal procedure—he found a pickup truck and three rifles and ammunition.

The State Security Prosecution charged Aboul Fotouh with the possession of weapons and the provision of a site for the commission of a terrorist crime, which is tantamount to financing terrorism. But the investigations of the National Security officer contained no evidence of any genuine connection between Aboul Fotouh and the farm, whether ownership, possession, or management. Nor did the prosecution pay heed to the unanimous statements of the six arrested farmers that they had no employment relationship with Aboul Fotouh and indeed did not even personally know him.[23]

22 Ahmed Abu al-Ela Madi, defense brief filed on behalf of in case no. 1051/2021, Fifth Settlement, March 12, 2022.

23 Khaled Ali, defense brief filed on behalf of Abdel Moneim Aboul Fotouh in case no. 1051/2021, Fifth Settlement, March 2022.

Similar to the lone witness testimony about the arrest of Aboul Fotouh, the prosecution neglected to call any other witnesses to confirm the third witness's story. The prosecution did not call any of the other members of the search detail to give their testimony, nor did it even call any other individuals working on the farm or present at the nearby factory as witnesses to confirm or deny the truth of the meetings or training alleged in the charges.

It should be noted that the case file includes notarized statements from four farmers other than the defendants that were disregarded by the State Security Prosecution. The four farmers' testimony contradicted that of the National Security officer and were consistent with those of the six arrested farmers: they stated that the arrest took place on February 20, 2018 and that after a search, the police force found nothing.

III. Before the State Security Prosecution

In the trial before the Emergency State Security Court, defendants' counsel argued that there were multiple flaws in the investigation procedures, including the inadequacy of the investigations, the invalidity of the interrogation, and the failure to investigate the violations suffered by the defendants. During questioning by the prosecution, the defendants and their attorneys made several requests and filed a number of complaints, some of which were considered while others were completely ignored. In this section we review the propriety of the investigation and the major problems in the interrogation of the accused.

1. Questioning without counsel present

The code of criminal procedure specifies several rules governing the interrogation of suspects. The first and most obvious is in Article 124, which prohibits questioning a suspect or confronting him with another suspect or witnesses in the absence of his attorney. Although the article guarantees the accused the right of defense and the right to a lawyer, it does provide for two cases in which the accused may be questioned without an attorney: first, if apprehended in the act, which does not

apply to any of the defendants in this case, and second, if speed is warranted "in fear of the loss of evidence, as established by the interrogator in the minutes."

The State Security Prosecution questioned some of the defendants in the presence of their lawyers (Abdel Moneim Aboul Fotouh, Mohammed al-Qassas, Mahmoud Ezzat), but it initially questioned Moaz al-Sharqawi and the six farmers in the absence of their attorneys and without appointing a lawyer to represent them, and this on the grounds of "fear of the loss of evidence."

Official documents show that six farmers at the Wadi al-Natron farm were arrested at 4 pm on Wednesday, February 21, 2018, and that they appeared before the prosecution for questioning between 3 and 4:30 pm on Thursday, February 22, 2018, meaning that they were brought before the prosecution within the timeframe defined by the code of criminal procedure.

Article 36 of the code of criminal procedure requires the juridical police officer to bring the accused before the Public Prosecution within 24 hours; the prosecution then must question him within the next 24 hours. Each of the six farmers was questioned by a different prosecutor, in the absence of legal counsel. The reason for the lack of counsel recorded in the minutes of the interrogation is "a state of exigency, namely the fear that the legal deadline will elapse, especially since tomorrow is Friday, an official holiday."

This is insufficient cause to question the accused without a lawyer, as it is customary for the prosecution to work evenings before Fridays to ensure that suspects are questioned by the legally prescribed deadline - so that excuse was actually invalid. This exception, which undermines the integrity of interrogation proceedings, should not be a recurrent practice—and yet it is in many if not most State Security cases.[24]

The six interrogators established that they had contacted the local branch of the Bar Association, located in the New Cairo Court (where the Supreme State Security Prosecution is housed) seeking the assignment of a lawyer to attend the interrogation. Nevertheless, none of the defendants was attended by a lawyer during questioning, for

24 See EIPR, "World Day Against the Death Penalty: 10 October 2020—Focusing on the Necessity for Effective Communication for Lawyers and Defendants Facing the Death Penalty," October 10, 2020, https://eipr.org/en/publications/world-day-against-death-penalty-10-october-2020.

various reasons provided by the prosecution in the interrogation minutes, although all of them were questioned at the same time. Some of the prosecutors said there was no lawyer present because the Bar Association was closed, on an official work day; other prosecutors said that attorneys were available but occupied. According to official documents, in a little more than 24 hours the six farmers were arrested and taken before the prosecution, during which time the Interior Ministry was able to photograph them and publish written statements and video footage related to them and the charges against them. Yet, the prosecution found it difficult to enable them to contact their lawyers or procure a lawyer for them from the Bar Association.

It should be noted that according to the six farmers' statements before the prosecution, they had actually been arrested on February 20, not February 21, meaning that they were brought before the prosecution after the legal deadline had elapsed. None of the six State Security prosecutors took heed of these statements, which in the context are tantamount to reports of a violation.

The case of Moaz al-Sharqawi is different: he was questioned without a lawyer and without any real official justification. If we take the arrest report at face value, he was arrested and questioned on the same day. The official story is that he was arrested in Tanta, at dawn on Saturday, October 13, 2018, after which he was moved from the Gharbiya governorate to New Cairo for questioning, some 12 hours after his arrest. According to the interrogation minutes, the State Security Prosecution affirmed that at 3 pm there was not one lawyer present in the prosecution office or the branch office in the New Cairo courthouse[25] . Accordingly, al-Sharqawi was questioned without a lawyer present "in fear that the legal deadline would elapse and due to a state of necessity"; the examiner did not specify the nature of the necessity. In the case of the six farmers, the justification was the impossibility of postponing the questioning to the next day, because it would be an official holiday. In the case of al-Sharqawi, however, 12 full hours remained before the deadline, during which he could have been permitted to contact his family or lawyer, which he had not been permitted, even if simply to ensure that legal formalities were followed. Similarly, his interrogation

25 It is worth mentioning that on most working days, because of the excessive restrictions placed on defendants in State Security Prosecution cases curtailing their ability to contact family or lawyers; defence lawyers go to the prosecution HQ and try to find defendants needing legal representation.

could have been delayed for a few hours pending the arrival of his legal counsel and still remain within the deadline. But this did not happen.

In regard to the defendants questioned by the State Security Prosecution in the presence of counsel, such as Aboul Fotouh, the prosecution did not comply with Article 125 of the code of criminal procedure, which allows defense counsel to view the investigation file a day prior to the interrogation. The lawyers thus attended the interrogations without having seen the case file, which would have enabled them to specify their legal motions and build an appropriate defense. But this flagrant legal breach occurs systematically at the Supreme State Security Prosecution, having become so routine that it goes unquestioned.

2. Confessions under duress

According to Moaz al-Sharqawi, his interrogation before the State Security Prosecution lasted for more than ten hours, until 3 am. The prosecution notes in the official record that the interrogation clerk was exhausted and replaced by another, but does not note the time of the replacement. Al-Sharqawi then made statements that the court deemed incriminating.

It merits a mention that on August 9, 2022, a number of UN special rapporteurs sent a letter to the Egyptian authorities regarding the sentencing of Moaz al-Sharqawi. In the letter, the special rapporteur on the situation of human rights defenders, the Working Group on Enforced or Involuntary Disappearance, and the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed their concern. The letter condemned the judgment as having been issued in a framework that undermined fair trial guarantees and demanded that the Egyptian authorities clarify the information about al-Sharqawi's allegations of enforced disappearance and torture, asserting the need for an urgent investigation into the matter. At the time of this writing, the Egyptian authorities had not responded to any of the questions and demands contained in the letter.[26]

26 Egyptian Front for Human Rights, "UN Experts Condemn Violation of Student Rights' Defender Moaz al-Sharqawi's Right to a Fair Trial after Emergency State Security Court Sentences Him to Ten Years in Prison" (Arabic), October 11, 2022, https://egyptianfront.org/ar/2022/10/mooaz/.

IV. Three years without trial

Many significant legislative, judicial, and political events occurred from 2018 to 2021; the state of emergency in Egypt was successively renewed; parliament approved a bill to create a supreme council to combat terrorism and extremism, although it has not yet begun operating; several new laws were enacted and other existing laws were amended; there were presidential elections and the 2014 constitution was amended to extend presidential terms from four to six years and to allow an exceptional third term for the current president; the Covid-19 pandemic swept the world, posing unprecedented political and social challenges.

It is normal for a span of three years to see many important events, but it is not normal for pretrial detention in case no. 1059/2021 to persist without a referral to trial, leaving the defendants in limbo for years without a clear idea of their fate. In the same period, several measures were taken against them that could be considered preemptive punishment and legal abuse. This section discusses the most prominent developments in the lives of Mohammad al-Qassas, Moaz al-Sharqawi and Abdel Moneim Aboul Fotouh over the three years from arrest to referral to trial and then the swift issuance of the judgment against them.

1. Inclusion on the terrorist lists

On February 17, 2018, the prosecution filed a report on a letter from the head of the Technical Office of the Public Prosecutor's Office asking the prosecution to include the 16 defendants in case no. 440/2018 on the list of designated terrorists based on investigations conducted by the National Security division of the Interior Ministry. On February 19, the request was put before the 25th Circuit of Appeals, which ruled the same day to proscribeall the names submitted on the terrorist lists for a period of five years.

Under Article 3 of Law 8/2015 regulating the lists of terrorist entities and terrorists, an order for inclusion on the list requires only an application from the public prosecutor to the competent circuit court, submitted with documentation, investigations, interrogations, or any information supporting the request. The court then

issues its judgment based solely on its assessment of the seriousness of the documents before it, without allowing the persons to be included on the list to give a statement or mount a defense against the allegations; the person to be designated is not a party in any way to the process of inclusion on the terrorist lists. And because the law does not require notification of inclusion, al-Sharqawi discovered, while reading the news in March 2018, that he himself had been included on the list of terrorists, pursuant to an order by the South Cairo Felony Court![27] He was one of 16 names, among them Abdel Moneim Aboul Fotouh and Mohammed al-Qassas, whom the State Security Prosecution had already charged in a case that al-Sharqawi did not yet know he was wanted in connection with.

Al-Sharqawi did not understand the reason for his inclusion since he had never been arrested for any reason or charged with any crime. His and the other defendants' legal counsel were unable to view the evidence submitted and accepted for their inclusion and thus could not ascertain its validity. When they appealed the judgment, they were not permitted to present substantive defenses. Although the Cassation Court accepted the appeal on February 1, 2020 and ruled to overturn the order, a new order to include their names on the lists was issued on January 25, 2021 in case no. 1/2020/designation of terrorists. They appealed the new order, but this time the Cassation Court upheld the designation in a ruling issued in November 2021. The defendants were thus subject to various legal consequences under Article 7 of the law on terrorist lists, among them travel bans, the loss of the condition of good conduct, the freezing of money and assets, and the suspension of membership in syndicates and unions. This is tantamount to preemptive punishment without conviction.

Article 95 of the constitution states that no penalty may be imposed without a judicial ruling. A judicial ruling can only be rendered through a criminal proceeding in which the requirement of public contestation between the adversarial parties is met, which is not the case with inclusion on the terrorist lists. The law on terrorist entities was enacted one year after the election of President El-Sisi with statutes that clearly contradict the constitution and the most basic precepts of the right to litiga-

27 The order was issued on February 19, 2018 pursuant to a brief filed by the public prosecutor; the order was published in the Official Gazette on February 22.

tion and self-defense before the judiciary. The law did not provide for a method and time to notify persons to be designated of a hearing to consider the prosecution's application. In the absence of such a provision, the criminal courts instituted a new custom in which they allowed themselves to issue orders of inclusion in the absence of the person designated and without even notifying him. The consequences of inclusion on the lists are in effect for five years and are renewable, which precludes treating them as solely a precautionary measure. Proscription or inclusion on the terrorist lists is similar to criminal penalties because it infringes on a number of constitutionally guaranteed freedoms, such as freedom of movement and property.[28]

2. "Recycling"

The code of criminal procedure sets the absolute maximum limit of pretrial detention at eighteen months in criminal cases (or two years in crimes punishable by life imprisonment or death). In recent years, however, a new practice has emerged to circumvent the letter of the law, which has come to be known as "recycling." The same charges are filed against the same defendants in new cases. Accordingly, a new investigation begins and the period of pretrial detention is reset to zero, without regard for a defendant's previous time in pretrial custody in what is now a separate case. Defendants may be "recycled" while being held in pretrial custody as a preventive measure, thereby precluding the execution of any release order; after they are released in connection with the first case; after they have served the maximum legal duration of pretrial detention; or even after they are acquitted by a court in the first case. The practice lends a sheen of legality of what is essentially open-ended imprisonment without trial.

When this case was referred to trial in August 2021, Abdel Moneim Aboul Fotouh and Mohammed al-Qassas had been in pretrial detention for more than three and a half years. According to official documents, however, no defendants were in custody

28 Ahmed Hossam, "Inclusion on Terrorism Lists in Egypt: Vague Statutes, Confused Interpretations, Lost Justice" (Arabic), Legal Agenda, April 12, 2018, https://legal-agenda.com/%D8%A7%D9%84%D8%A5%D8%AF%D8%B1%D8%A7%D8%AC-%D8%B9%D9%84%D9%89-%D9%82%D9%88%D8%A7%D8%A6%D9%85-%D8%A7%D9%84%D8%A5%D8%B1%D9%87%D8%A7%D8%A8-%D9%81%D9%8A-%D9%85%D8%B5%D8%B1-%D9%86%D8%B5%D9%88%D8%B5/.

in connection with the case when it was referred to the Emergency State Security Court except Mohammad al-Qassas. Of the ten defendants arrested in the case, release orders had been issued for several of them, some of them actually implemented. Moaz al-Sharqawi, for example, spent a year and a half in pretrial detention before being released with precautionary measures; the six farmers were released as well. As for Aboul Fotouh, he continued to be imprisoned after a release order was issued on June 15, 2021 because he was re-detained in connection with a new case on similar or identical charges. Mahmoud Ezzat was still in custody because he was serving sentences handed down in other cases.

Although Mohammad al-Qassas was detained nearly a week before the issuance of the first preliminary investigation report in case no. 440/2018 (docketed as no. 1059/2021), he was first questioned in the case on June 27, 2021—that is, three years and five months after he was taken into custody. Al-Qassas continued to be detained pretrial for a period of four and a half years, during which he was investigated in connection with four separate cases.[29] Each time a release order was issued in one case, it was mooted by the launch of an investigation into a new, similar case, meaning he was never actually released from pretrial custody.

In Aboul Fotouh's case, he was detained in pretrial custody in connection with the same case for three years and three months, a breach of any possible interpretation of the code of criminal procedure. On June 30, 2020, his defense counsel submitted a request to the public prosecutor (no. 26489/2020/Public Prosecutor petitions) for his release on the grounds that the detention order had expired by exceeding the maximum allowable duration of pretrial detention; the prosecution did not respond to the petition. A full year later, the Public Prosecution issued an order releasing him with guarantees for his place of residence, unless he was wanted for another reason. Because Aboul Fotouh was wanted in another matter—as is often the case when defendants in State Security cases are recycled—the release order was not implemented. The Supreme State Security Prosecution had named him as a defendant in a new case, no. 1781/2019, on February 2, 2020, 14 days before he

29 Al-Qassas was arrested in 2018 and remanded to pretrial custody in case no. 977/2018/State Security. Two years later, in 2020, he began his pretrial detention in case no. 1781/2019/Supreme State Security. Seven months later, he was also detained in pretrial custody in case no. 786/2020. Finally, he was questioned and referred to pretrial detention in case no. 440/2018/State Security in June 2021.

had served the maximum period of pretrial detention in the first case. In the new case, it again charged him with leading a terrorist group and committing a terrorist financing offense.

3. Conditions of detention

Aboul Fotouh's detention began when he was 67 years old. At the time, he suffered from diabetes and hypertension, and since 2006 had been diagnosed with a condition that resulted in sleep apnea, necessitating the use of a respirator. Aboul Fotouh was allowed to have the device inside his cell after his arrest, but the device is no longer operational due to the conditions in his cell and the high temperature. Over the past four years, Aboul Fotouh has had repeated heart attacks, and all his requests for transfer to a private hospital for prostate surgery at his own expense have been denied.[30]

Solitary confinement is an additional penalty within prison, which under Article 43 of the prisons law, should not exceed 30 days. Prolonged or open-ended solitary confinement is prohibited as tantamount to torture or other cruel, inhuman or degrading treatment or punishment, as defined by the UN Standard Minimum Rules for the Treatment of Prisoners.

Abdel Moneim Aboul Fotouh and Mohammed al-Qassas spent more than four years in a solitary cell, during which they were denied their rights to exercise and appropriate communication with their families. This situation was exacerbated with the spread of Covid-19, when no word was heard from them for five months after the Interior Ministry suspended prison visits from March to August 2020, without providing alternative accommodations, such as phone calls. Apart from the fact that years-long solitary confinement is illegal, inhuman and tantamount to torture, even solitary confinement of limited duration as regulated by the prisons law is a used to punish infractions inside the prison. In the case of Aboul Fotouh and al-Qassas, however, it is a form of abuse, as they were held in solitary confinement since their very first day in Tora Prison.

30 Mostafa Mohie, "Abdel Moneim Abouel Fotouh: A Man Apart," Mada Masr, August 18, 2020, https://www.madamasr.com/en/2020/08/18/feature/politics/abdel-moneim-abouel-fotouh-a-man-apart/.

On April 23, 2022, the Administrative Court denied case no. 60756/74JY, filed by Aboul Fotouh in pursuit of his legally and constitutionally guaranteed rights as a pretrial detainee to be allowed books, enter the prison library, subscribe to newspapers, and exercise in the sun, as well the right to telephone communication and correspondence; none of this exceeds the minimum rights of prisoners affirmed by Egyptian laws and international conventions.

Currently, more than two months after the judgment in case no. 1059/2021, Aboul Fotouh is 71 years old. In July 2022, his family made a direct request to the warden of Mazra'a Prison in Tora to move him to the hospital, but the prison administration refused to receive the request. His family then submitted ten requests via telegram to the public prosecutor, a number of officials in the Ministry of Interior, and the National Council for Human Rights, to temporarily transfer him to any hospital, whether inside or outside the prison, at his own expense, until his health status is accurately diagnosed and in order to determine the appropriate treatment for his condition. They have received no response to this date.

In August 2022, Aboul Fotouh's family announced that he had his fourth heart attack in two months, without access to minimal health care, at the Mazraa Prison in Tora. In the wake of this, a request was submitted to the president to intervene for his release on health grounds, but Aboul Fotouh's status remains unchanged.[31]

In October 2022, a few days before the release of this report, Aboul Fotouh, Mohammad al-Qassas and a large number of detainees at Tora Prison were transferred to the Badr prison complex. Although al-Qassas was finally able to avail himself of his right to exercise, guaranteed by Egyptian law, enabling him to see the sun outside his cell for the first time since his detention more than four years earlier, and now shares a cell with a number of other political prisoners, Aboul Fotouh's situation has deteriorated. Aboul Fotouh declined a visit, which allowed him to leave his cell for the first time after eight days, because the visit was to be from behind a glass barrier absent any justification for it. According to his family, he remains in solitary confinement, denied exercise and deprived of personal belongings, sleeping on the floor in a cell that is always lit and under security camera surveillance around the clock.

31 Aboul Fotouh's official Facebook page, August 28, 2022, https://www.facebook.com/photo/?fbid=623039139180574&set=a.399909664826857.

V. Under emergency law

Although exceptional courts are prohibited by Article 97 of the 2014 constitution, the emergency law (Law 162/1958) remains on the books and, when a state of emergency is declared, allows for exceptional trials before emergency state security courts whose judgments are not subject to appeal. Egypt has lived most of its contemporary history, since the founding of the republic, in an almost continuous state of emergency.

Since their establishment, emergency state security courts have faced a number of legal challenges to the constitutionality of their formation and operation on several grounds, among them the validity of their creation by presidential decree (courts are ostensibly established by a law enacted by the legislative authority)[32] and the contradiction between certain articles of the emergency law and the provisions of successive Egyptian constitutions.

A brief look at the proceedings in case no. 1059/2021 demonstrates that the problem is not only the exceptional nature of the emergency court or the unconstitutionality of some articles of the emergency law, but also the failure of the competent bodies to comply with the letter of the exceptional law itself. This is evident when one considers the correctness of a number of procedures from the beginning of the case until the issuance of the judgment. This part of the report reviews the general problems of trials under the emergency law and the likely unconstitutionality of several of the law's articles; it also discusses problematic procedural issues and the lack of compliance with even the provisions of this constitutionally questionable law.

1. Unconstitutional

When an accused is referred to trial under the emergency law, he or she risks being convicted and sentenced in a legal framework that violates the precept of equality,

32 EIPR, "SCC Commissioners Begin Considering Challenge of Emergency Law" (Arabic), February 3, 2013, https://eipr.org/press/2013/02/%D9%85%D9%81%D9%88%D8%B6%D9%8A-%D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1%D9%8A%D8%A9-%D8%AA%D8%A8%D8%AF%D8%A3-%D9%86%D8%B8%D8%B1-%D8%A7%D9%84%D8%B7%D8%B9%D9%86-%D8%B9%D9%84%D9%89-%D9%82%D8%A7%D9%86%D9%88%D9%86-%D8%A7%D9%84%D8%B7%D9%88%D8%A7%D8%B1%D8%A6.

undermines the presumption of innocence, and denies him the right to appeal. That right—the right to appeal or request a review of judgments against him—is the most basic right that must be available to every defendant in any criminal or other proceedings, without which a trial does not meet the minimum level of justice. Of course, all the defendants in case no. 1059/2021 suffered from all these shortcomings. During the trial, it was argued that at least four articles of the emergency law were unconstitutional because they infringed, or superseded, guarantees for a fair trial enshrined in the constitution.

It should be noted that Article 29 of Law 48/1979 on the Supreme Constitutional Court (SCC) gives the subject-matter court—here, the Emergency State Security Felony Court—absolute discretion with regard to defense arguments for the unconstitutionality of statutes. The subject-matter court may stay proceedings in the case before it pending the SCC's ruling on the constitutionality of the statute in question or it may dismiss these arguments and defenses. There is no other way for litigants in Egypt to plead the unconstitutionality of statutes - i.e. to go to the constitutional court - that bypasses the subject-matter court adjudicating its case.

Relying on its broad discretion, the Emergency State Security Felony Court did not permit the defense to challenge the constitutionality of Articles 12, 14, and 19 of the emergency law before the SCC,[33] nor did it accept the defense's motion to stay the proceedings pending the SCC's determination of the constitutionality of the same statutes. In its reasoning, the court said that these arguments were without merit and that the defendants' counsel was seeking to "prolong the proceedings."[34]

2. In the name of the presidency

Article 12 of the emergency law creates a parallel, exceptional path for dealing with court judgments, entailing two basic violations: firstly, it does not permit appeals, denying defendants more than one degree of litigation, and secondly, related to the

33 Khaled Ali, defense brief filed on behalf of Abdel Moneim Aboul Fotouh in case no. 1051/2021, Fifth Settlement, March 2022.

34 Written judgment issued by the Emergency State Security Felony Court, 3rd circuit Tora, in Public Prosecution case no. 1059/2021/feloniesESS, Fifth Settlement, docketed as no. 707/2021/New Cairo Plenary.

finality of judgments, the court's judgment only becomes effective by a decision of the president.

This case was already prolonged before the actual proceedings began, after the State Security Prosecution took more than three years to refer the accused to trial. The irony is that the emergency court denied the defense argument for the unconstitutionality of articles of the emergency law, under which they were being tried, claiming that the defendants were stalling in determining their legal position. The court explained its refusal to refer Article 12 of the emergency law to the SCC for a ruling on its constitutionality by saying that the article's objective in limiting litigation to one degree is "the speedy adjudication of this type of case"— the same case that took more than three years to be referred to trial. Meanwhile, the defendants either continued to be held in pretrial detention beyond the maximum duration allowed by Egyptian law, or had their remand renewed repeatedly in violation of the law, or were held in prolonged pretrial detention for years, ostensibly legally, but in fact based on the circumvention of the law and the State Security Prosecution's abuse of its authority by refiling similar charges against the defendants in new cases to re-incarcerate them for an open-ended periods, or the practice of "recycling."

It is worth mentioning that between the referral of case no. 1059/2021 to trial before the Emergency State Security Court in August and the lifting of the state of emergency in October of the same year, the president himself released the National Human Rights Strategy in September 2021.[35] The document—the first of its kind—stated that among its objectives, within the framework of strengthening fair trial guarantees, was the enactment of a law that would allow for the appeal of felony judgments issued by all types of courts, suggesting movement to ensure the right of more than one degree of litigation for all defendants without exception. This objective is provided for as a constitutional obligation in the 2014 constitution, which has been consistently ignored since its adoption. Should this obligation be implemented, several articles of the emergency law would need to be amended.

35 The strategy was issued on September 11, 2021, https://sschr.gov.eg/media/xaonutei/arabic-strategy-final.pdf.

3. A difference in timing

The mandate of the emergency law can be easily inferred from its name. It is ostensibly invoked when a state of emergency is declared that requires a number of swift measures and legal steps, including the exceptional formation and operation of the Emergency State Security Court. It is exceptional in that it supersedes the procedures of ordinary times and also because it is governed by a specific timeframe. The exception should not, after all, become the rule. The State Security Court considers cases whose facts took place and were referred to trial during the state of emergency. Article 19 of the law regulates when the State Security Court operates, providing that it has jurisdiction over cases already referred to it during the state of emergency, even if the state of emergency is lifted before proceedings begin. Cases that are initiated during a state of emergency, but are not referred to the court, fall within the jurisdiction of the ordinary courts.

While Article 53 of the constitution affirms that all citizens are equal before the law without discrimination, Article 19 of the emergency law distinguishes between accused citizens of the same legal status. In other words, if two individuals face similar charges under a state of emergency but only one of them is referred to trial while the state of emergency is in force while the referral of the other is delayed until after the emergency is lifted, the first will undergo an exceptional trial under articles of the emergency law that are of questionable constitutionality and curtail fair trial guarantees; the second will have the opportunity to appear before his natural judge, appeal the judgment issued against him before a different court or judicial circuit, and litigate on more than one level. There is no justification whatsoever for this distinction save the text of a flawed statute.

4. Was it really an emergency?

According to Article 154 of the Egyptian constitution of 2014, "The president of the republic, after consulting the Cabinet, may declare a state of emergency as regulated by law. This declaration must be submitted to the House of Representatives within the following seven days to decide on it as it deems fit…In all cases, a majority of the members of the House must approve the declaration of a state of

emergency. The state of emergency shall be declared for a specified period not exceeding three months, which may only be extended for another similar period with the approval of two-thirds of the members of the House." This means that a single emergency can last a maximum of six months, inclusive of permitted renewals. It is self-evident from the reading of this provision that when this state of emergency expires, another state of emergency cannot be proclaimed immediately thereafter in connection with the same circumstances and causes. The implication of this constitutional provision is that a state of emergency must in no way exceed six months. That is, it is improper for the country to be in a state of emergency for two or three years, or even seven months, whatever the circumstances; the state has a responsibility to return things to normal within a specific, limited timeframe. Each new state of emergency, therefore, should commence with procedures and for reasons that are wholly independent of the past emergency, operating within a separate timeframe.

In April 2017, a state of emergency was declared after what had been a relatively long interruption in contemporary Egyptian history. Accordingly, the Official Gazette published Presidential Decree 157/2017 imposing a state of emergency from 1 p.m. on Monday, April 10, and delegating to the prime minister the powers of the president stipulated in the emergency law. Exactly three months later, Decree 289/2017 was issued to extend the state of emergency from 1 pm on Monday, July 10, 2017. This state of emergency should have ended three months after July 10, 2017.

But what in fact happened was that the same state of emergency remained in effect in Egypt for four and a half years without interruption. After each formal expiration, a decree was published in the Official Gazette declaring a new state of emergency the following day. On October 25, 2021, President Abdel Fattah El-Sisi announced, through a Facebook post, that he had decided "for the first time in years, to cancel the extension of the state of emergency throughout the country,"[36] bring the total duration of the emergency since 2017 to 54 months.

Legally speaking, the situation is as follows: between April 2017 and October 2021, nine decrees imposing a state of emergency were issued, and nine decrees extending

36 See the president's official Facebook page, https://www.facebook.com/AlSisiofficial/posts/435850381239394.

it were issued, each following the expiry of the initial imposition by a few days at most. That is, despite the general understanding that a single state of emergency continued uninterrupted during this period—an impression explicitly, perhaps accidentally, reflected in the president's statement about lifting the emergency for the first time—the four years are divided into nine discrete, independent emergency periods, each lasting six months, with no ostensible relationship between each emergency and the next, over nine successive states of emergency.

The president treated the emergency as having been invoked on a permanent basis, in the form of a single, prolonged state of emergency, which is contrary to the spirit and the letter of the constitution. Accordingly, the decision to lift it was officially celebrated as a positive step promising to improve the situation, in the hope that the judiciary would again begin to operate without exceptional measures.

5. Invalidity of the referral to the Emergency State Security Court

More than three years after case no. 1059/2021 was opened, and after only two questioning sessions with a few of the defendants, the State Security Prosecution deemed it necessary to begin an emergency trial, and so it referred 25 defendants to the Emergency State Security Felony Court on August 25, 2021, just two months before the announcement of the suspension of the state of emergency. The referral order clarified that the defendants' alleged crimes were committed within a timeframe that ended on August 21, 2018—that is, during the third state of emergency[37]—although the referral order was issued after the end of the emergency period during which alleged crimes occurred and after five additional, theoretically distinct (but legally dubious) emergencies.

Since no new evidence had emerged, and National Security did not continue its investigations after February 2018, the prosecution should have referred the case to trial during the emergency imposed at the time, instead of during the ninth emer-

37 Imposed by Decree 168, which lapsed after the emergency was extended on October 14, 2018.

gency imposed in three years, which should be unrelated to the case.[38] However, the text of Article 19 of the emergency law, coupled with the repeated imposition of states of emergency simulated the prolonged state of emergency in place in Egypt before 2014 (i.e. before the new constitution explicitly barred in Article 154 the open-ended renewal of emergencies like those of the 1980s and 1990s).

According to the emergency law, the key factor in the validity of a referral to an exceptional trial is the date of the referral, not the date the crime occurred. Article 19 states: "At the end of a state of emergency, the state security courts shall retain jurisdiction over cases referred to them and continue to hear them in accordance with the procedures followed in these courts. Crimes in which the accused have not been brought before the courts shall be referred to the competent ordinary courts, which shall follow the applicable procedures." Here arises a problem: Article 19 renders meaningless - at least as far as trials are concerned - the constitution's provision for the discrete, independent nature of successive states of emergency.

Under Article 19, only cases referred to them during the emergency period can be heard by the emergency state security courts, irrespective of the date of the offense or the real threat to public security posed by the offense or incident under investigation. In circular no. 7/2017, the public prosecutor, clarifying the application of the provisions of the emergency law, states that during the imposition of a state of emergency, crimes that occurred before the emergency and have not yet been disposed of must be referred to the Emergency State Security Court. This suggests that the goal of prosecution is not to adjudicate crimes committed under the state of emergency, but rather to refer the largest number of crimes to exceptional courts. In other words, the exceptional trial has become an end in itself, not a necessity imposed by exigent circumstances.

It cannot be ignored that for three years, the competent authorities apparently did not believe that case no. 1059/2021 merited urgent or exceptional action, as demonstrated by the release of the accused from custody and the long period of time that elapsed without investigations, the interrogation of the accused, or the emergence of new evidence. The date of the trial referral is therefore remarkable.

38 The ninth state of emergency was imposed pursuant to Presidential Decree 174/2021 and was extended for three months by Presidential Decree 290/2021, ending on October 24, 2021.

Absent any new developments over the years in which this case was pending, the State Security Prosecution abruptly decided to refer it to trial, shortly before the president announced that the state of emergency would not be renewed. The objective of the referral before the lifting of the emergency was thus to ensure the application of Article 19 to allow for an exceptional trial.

Despite a statutory framework that is conducive to the referral of as many cases as possible to exceptional trials before the Emergency State Security Court, the referral of case no. 1059/2021 to the emergency court remains of questionable validity.

Aboul Fotouh's counsel insisted that the Emergency State Security Court had no jurisdiction over the case pursuant to Article 19, which makes a distinction between cases referred to the emergency court and others in which the defendants have not yet been referred to trial. The defense explained that a suit is only correctly lodged with a criminal court after three steps have been taken: a referral order is issued; the defendant is notified of the matter; and the defendant is summoned to appear. In cases that have been referred to the emergency court, and which the court continues to hear after the lifting of the state of emergency, the defendant must have been notified and summoned to appear on a specific date.[39]

The Public Prosecution referred case no. 1059/2021 to the Emergency Supreme State Security Court on August 25, 2021, which means that possession of the case file was transferred from the State Security Prosecution to the appellate court (tasked with assigning cases to courts), whose president should have then set a date for the hearing. Aboul Fotouh's defense explained that his client was not notified of or summoned to attend his trial. Moreover, the case file contains nothing from which such knowledge could be inferred. Indeed, Aboul Fotouh learned of his referral to trial when he was brought to the first court hearing on November 24, 2021—that is, one full month after the state of emergency had ended.

The emergency court rejected the defendants' arguments that the trial referral was in breach of Article 19 and therefore invalid, reasoning that since the referral order was issued before the president announced his intention not to again impose a

39 Dr. Mohammed Selim al-Awa, defense brief filed on behalf of Abdel Moneim Aboul Fotouh in case no. 1051/2021, Fifth Settlement, March 12, 2022.

state of emergency, it was strictly valid. Even if we follow this logic; not only is this inconsistent with the letter and the spirit of the constitution, it disregards our argument that successive states of emergency must be unrelated to one other; otherwise, they are illegal under the Egyptian constitution.

VI. Conclusion and recommendations

As of the date of publication of this report, more than five months after the pronouncement of the judgment in case no. 1059/2021, the judgment is still not subject to appeal under the emergency law. But it is not yet final, and none of the detained, convicted defendants has begun to serve their sentence. Their fate is still undetermined, awaiting the submission of the judgment to the president, who, acting in accordance with the exceptional powers granted to him under the flawed emergency law, will issue a decree to ratify it, reduce the sentence, or vacate the judgment and order a retrial.

The emergency court dismissed all the defense arguments put before it without exception and accepted in full the account of NationalSecurity and the State Security Prosecution. A quick perusal of the case file, however, makes evident a laundry list of legal violations and irregularities, not to mention several logical fallacies, which makes even the filing of the charges in their current form—to say nothing of the conviction of those charged—a matter of concern. It sends a clear message that citizens can be prosecuted and punished in a framework that threatens their lives and infringes all due process guarantees enshrined in both Egyptian law and international humanitarian law.

The present moment offers a rare, possibly singular opportunity to prove that there is a genuine will to reconsider the situation and achieve justice, as stated in the president's official statements. This will only happen if a number of steps are taken:

1. Take swift action to protect the lives of detainees in case no. 1059/2021, who are awaiting ratification of the judgment against them. Urgent health care must be provided to Abdel Moneim Aboul Fotouh, and he must be transferred to a hospital to stop the further deterioration of his health. Moreover, it is necessary

to ensure that all prisoners enjoy the rights stipulated in Egyptian prison regulations, including ending prolonged solitary confinement and permitting proper visitation, exercise, and reading.

2. Vacate the judgment against the defendants, based on the authority granted to the president under Article 14 of the emergency law (Law 162/1958), and close all similar cases into which defendants have been "recycled."

3. Open a serious investigation into the violations of the rights of the defendants in this case, including enforced disappearance, torture, the coercion of confessions, and medical neglect, and hold the offenders responsible for these violations.

4. Amend the emergency law to end the issuance of judgments not subject to appeal and permit defendants to appeal judgments already issued against them; end the enforcement of Article 19, with retroactive effect, which allows defendants to be referred to exceptional courts regardless of the date of their alleged offense, arrest, or interrogation.

5. Amend Law 8/2015 regulating the lists of terrorist entities and terrorists to include a precise, unambiguous definition of "terrorist" and protect due process guarantees by upholding the right of those accused of terrorism-related infringements to have their statements heard and mount a defense based on a presumption of innocence, instead of including them on the lists without their knowledge; reconsider the legal effects of inclusion on the lists to ensure that they do not become a type of preemptive punishment.

6. Immediately release all persons in pre-trial detention who have been in custody beyond the maximum duration permissible by law and end the practice of recycling by prohibiting the filing of the same charges against the same individuals in multiple cases.