

# Politicized and Unfair Trials before the Emergency State Security Court

The case of Ahmed Samir Santawy



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# **Politicized and Unfair Trials before the Emergency State Security Court**

The case of Ahmed Samir Santawy

A briefing paper

November 2021

## I. OVERVIEW

This briefing summarizes the findings of a trial monitoring report documenting the 2021 trial of student Ahmed Santawy before Egypt's Emergency State Security Court, published on 26/11/2021 by the Egyptian Commission of Rights and Freedoms (ECRF)<sup>1</sup>. In light of Egypt's binding obligations under international human rights law, this document outlines violations of Mr Santawy's right to a fair trial and other human rights violations committed against him in the context of the criminal proceedings before the Emergency State Security Court.

The findings summarized below demonstrate the need for more extensive criminal trial monitoring in Egypt to enhance the transparency of judicial proceedings and begin to hold Egypt to account for any violations of international human rights law. However, additional, independent public trial observation can only be carried out if Egypt revokes its restrictions on public scrutiny of trials, including its 2021 laws<sup>2</sup> criminalizing media coverage and other reporting on criminal trials.

The present briefing concludes by addressing a list of detailed recommendations to the Egyptian authorities on effective remedies for the fair trial violations in this specific case and considerations for future legal and judicial reform processes in Egypt.

### Background

Since coming to power on 8 June 2014, President Fattah al-Sisi has instrumentalized largely unchecked executive power to cement his rule over Egypt, including imposing a "state of emergency" on 10 April 2017.<sup>3</sup> Although the stated primary objective of the "state of emergency" was to respond to a "terrorist threat",<sup>4</sup> many, including the UN Special Rapporteur on counter-terrorism and human rights, emergency powers have, instead, "[...] enable[d] increasing practices of arbitrary detention with the heightened risk of torture, the absence of judicial oversight and procedural safeguards, restrictions on freedom of expression, the right to freedom of association and the right to freedom of peaceful assembly".<sup>5</sup>

On 25 October 2021, President al-Sisi formally lifted the "state of emergency".<sup>6</sup> The ICJ and ECRF find that this decision alone does not dismantle the range of laws that guarantee the continuation of exceptional measures, including those that enable military courts to try civilians for protesting in public spaces,<sup>7</sup> and designate criticism of the State as "terrorism".<sup>8</sup> Whatever its import in reality, President al-Sisi's announcement presents a good moment to take stock of one of the defining elements of the "state of emergency": the use of emergency courts to silence dissent.

<sup>1</sup> Egyptian Commission of Rights and Freedoms (ECRF), '[The charge of publishing false news is a tool to crush freedom of opinion expression : Trial observation report in the case of researcher Ahmed Samir Santawy, Case 774 of 2021 at the Emergency State Security Court \(Misdemeanour Court\), First Chamber](#)' 26 November 2021.

<sup>2</sup> [Law 71 of 2021](#), 5 June 2021 and [Law 149 of 2021](#) amending certain articles of the Counter-Terrorism Law, 11 November 2021.

<sup>3</sup> Egypt Presidential Website, '[The President Abdel-Fattah al-Sisi announces decision to end the State of Emergency in all areas of the Country for the first time in years](#)', 25 October 2021.

<sup>4</sup> Human Rights Committee, State Party Report, Egypt, UN Doc. CCPR/C/EGY/5, 18 November 2020, para. 13.

<sup>5</sup> United Nations Office of the High Commissioner for Human Rights, '[Egypt's Updated Terrorism Law Opens the Door to More Rights Abuses](#)', says UN expert, 9 April 2020.

<sup>6</sup> Egyptian Presidency, '[President Abdel-Fattah al-Sisi decides to annul the extension of the state of emergency in all corners of the country, for the first time in years](#)', 25 October 2021.



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Law no 162 of 1958 (“the Emergency Law”) established the institution of the Emergency State Security Court (ESSC) to adjudicate crimes that violate the terms of a “state of emergency”.<sup>9</sup> In 2017, the Prime Minister transferred “protesting” and “terrorism-related” offences to the jurisdiction of the ESSC, to which was added crimes from first two chapters of the Penal Code, including those relating to ‘spreading fake news’ in January 2021.<sup>10</sup>

While Egypt has failed to publicly disclose the number and nature of cases before the ESSC, Amnesty International estimates that at least 143 cases (many of which concern more than one defendant) have been heard by the ESSC since 2017.<sup>11</sup> Reports indicate a systematic<sup>12</sup> targeting of those suspected of opposing the authorities, as well as others simply because of their exercise of human rights guaranteed under international human rights law binding on Egypt, including the right to freedom of expression.

The ICJ and ECRF consider that the case of Ahmed Santawy is a prime example of this concerning trend.<sup>13</sup>

### **The case of Ahmed Santawy before Egypt’s Emergency State Security Court**

On 1 February 2021, the Egyptian authorities detained Ahmed Santawy, an Egyptian national studying in Austria, following his return to Egypt on 20 December 2020. He was subsequently subjected to enforced disappearance for five days, during which time he was beaten in the face by members of the security service. On the 6 February, the Supreme Security State Prosecutor (SSSP) charged him with publishing “fake news” under article 80(1) and 102 (bis) of the Penal Code and named the case against him Case 65. The charges related to Facebook posts concerning COVID-19 in Egypt, and Mr al-Santway denied authorship of the posts. He was transferred to Leman Tora Prison, Cairo and remanded in custody. Over the three months that followed he attended a series of pre-trial investigative hearings, and was only granted limited access to his legal representatives during this time.

Between 22 and 29 May, Mr al-Santway was charged with effectively the same offence in another case, Case 887. On the 29 May 2021, the SSSP joined Case 887 to a third case, Case 774, charging Mr al-Santway with “spreading fake news outside and inside the country”. The SSSP then referred Case 774 to the ESSC.

In light of the above, the ICJ and ECRF are concerned that Ahmed Santawy was seemingly subjected to the practice known as *tadwir*, or “rotation”, which is common to trials before the ESSC. *Tadwir* refers to the practice of initiating a new criminal case (B) against individuals while they are in pre-trial detention for another criminal case (A), where the charges and fact patterns are the same in both A and B.

On 1 June 2021, Mr Santawy was summoned to the ESSC for his first trial hearing in Case 774. At the hearing, his defence team requested access to the case files, and the court granted this request, adjourning the trial, and remanding Mr Santawy in custody. A second trial hearing before the same court took place on the 8 June 2021, during which the prosecution presented their case, based on a technical report showing images of Facebook posts allegedly attributed to Mr Santawy, and Mr Santawy pleaded not guilty. The judge reserved judgment for a verdict hearing, and again ordered that Mr al-Santway be remanded in custody. Mr al-Santway was only permitted one, heavily monitored, five-minute consultation with his legal representatives during these hearings.

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<sup>9</sup> Law 162 of 1958, The Emergency Law, 28 September 1958, Art. 7.

<sup>10</sup> Prime Ministerial Decision no. 2165/2017, Art. 1.

<sup>11</sup> See analysis by Amnesty International, ‘Egypt: stop trials by emergency courts’, 31 October 2021.

<sup>12</sup> *Ibid.*

<sup>13</sup> Ahmed Santawy’s three co-defendants were tried in absentia and are not named in this report.

On the 22 June 2021, the ESSC convicted Ahmed Santawy of “spreading fake news outside and inside the country”, and sentenced him to four years’ imprisonment and a fine of 500 LE (\$30). To date, the President of Egypt has not yet ratified the verdict in Ahmed Santawy’s case<sup>14</sup> and, therefore, he remains in pre-trial detention. Case 65 is still pending against him. Despite the lifting of the “state of emergency”, the ESSC retains jurisdiction to hear Case 65. Article 19 of the Emergency Law 1958 provides for cases under consideration by the ESSC to continue to be heard, even when a “state of emergency” has ended.

With respect to Mr Santawy’s conviction and sentence in Case 774, in particular, the ICJ and ECRF are concerned that:

1. The charges against Mr al-Santawi were brought to criminalize his legitimate exercise of his right to freedom of expression as recognized and protected by the Egyptian Constitution and international human rights law by which the country is bound;
2. The breadth of the criminal provision on which the charges were based is inconsistent with the principle of legality, which requires that criminal offences be clearly and precisely defined within the law.
3. The proceedings against Mr Santawy failed to meet internationally recognized standards of fairness. In particular, the ICJ and ECRF consider that that his fair trial rights were violated as a result of and following his arrest, and leading up to his trial, which was manifestly unfair;
4. The trial of Mr Santawy before the ESSC reflects a pattern of human rights violations to which individuals prosecuted by SSSP and tried by ESSC are subjected. This pattern begins with their arbitrary arrest, enforced disappearance, torture and other ill-treatment, arbitrary and unlawful prolonged pre-trial detention, and ends with grossly unfair trials;
5. Since 13 June 2021, legal amendments have been introduced to limit public scrutiny over criminal trials. Law 71 of 2021 sets the penalty for disseminating information obtained during a criminal trial hearing at between 110,000 and 300,000 LE (\$6,986 and \$19,000). Law 139 of 11 November 2021 makes this penalty applicable to those observing “terrorism” trials. These amendments run counter to Egypt’s binding obligations under international human rights law, including the right to a public hearing and freedom of expression.

## II. VIOLATIONS IN THE CASE OF AHMED AL-SANTWAY

The ICJ and ECRF are concerned that Ahmed Santawy’s arrest, pre-trial detention, trial before the ESSC, as well as his conviction and sentencing by the same court, violated his right to a fair trial, his right to liberty and security of person, his right to freedom from torture and other ill-treatment and his right to access to justice and effective remedies for human rights violations, rights guaranteed by international human rights law binding on Egypt.<sup>19</sup>

<sup>14</sup> Law 162 of 1958, The Emergency Law, Art. 15, under which the President of the Republic is charged with ratifying judgements of the ESSC.

<sup>15</sup> See, Human Rights Committee, General Comment 34, Article 19, Freedom of Expression, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 25.

<sup>16</sup> Criminal offences must be prescribed by law and must conform to the principle of legality. See, Human Rights Committee, Nicholas v Australia, UN Doc. CCPR/C/80/D/1180/2002 (2004), para. 7.5; and UN Human Rights Committee, General Comment 32, UN Doc. CCPR/C/GC/32, 2007, para. 30. See, Inter-American Court of Human Rights, Castillo Petruzzi et al v Peru, 30 May 1999, para. 121.

<sup>17</sup> Law 71 of 2021, 5 June 2021.

<sup>18</sup> Law 149 of 2021 amending certain articles of the Counter-Terrorism Law, 11 November 2021.

<sup>19</sup> Egypt has ratified the following applicable International Human Rights Law treaties and as such is bound to comply with obligations therein: the International Covenant on Civil and Political Rights (ICCPR), see United Nations Treaty Collection, Chapter IV Human Rights, 4. The ICCPR ; the Arab Charter of Human Rights, see Egypt Official Gazette, Decision of the Ministry of Foreign Affairs No 12 of 2019, 13 June 2019 ; The African Charter on Human and People’s Rights, see African Commission on Human and People’s Rights, State Parties; the Convention against Torture, United Nations Treaty Collection, Chapter V, Human Rights, 9. Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. For a detailed review of these standards, please see Amnesty International, Fair Trial Manual Second Edition, 2014; and the International Commission of Jurists, Trial Observation Manual, 2009.

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### a. Rights on Arrest

Mr Santawy attended a police station in the Fifth District of Cairo on 1 February 2021 following a request issued by police who conducted a warrantless search of his family home on the 23 January 2021.<sup>20</sup> He was held in detention for five days at an unknown location, during which time his family submitted a written request to the Prosecutor's office for information about his whereabouts and received no response. Mr Santawy was not officially presented before the SSSP until the 6 February 2021. The SSSP recorded that the first day of his detention was the 6 February 2021, thus completely denying that he was detained between the 1 and 6 February.<sup>21</sup> Mr Santawy's legal team brought the circumstances of the detention to the attention of the SSSP during pre-trial hearings, alleging that the detention amounted to enforced disappearance. However, the Prosecutor failed to investigate these allegations.

The fact that Mr Santawy was held incommunicado between the 1 and 6 February, coupled with the Egyptian authorities' failure to acknowledge that he was in their custody, both at the time and since the facts, provide evidence that he had been subjected to enforced disappearance in violation of Egypt's obligations under international human rights law.<sup>22</sup> Under the International Convention for the Protection of All Persons from Enforced Disappearance, enforced disappearance is 'the [...] deprivation of liberty by agents of the State [...], followed by a refusal to acknowledge the deprivation of liberty [...], which place such a person outside the protection of the law'.<sup>23</sup> Whilst Egypt has not ratified this treaty specifically, the prohibition on Enforced Disappearance is embodied in other treaties ratified by Egypt. The Human Rights Committee<sup>24</sup> has held that, under the International Covenant on Civil and Political Rights (ICCPR), enforced disappearances violate the right to liberty and security of person, the right to freedom from torture and other prohibited ill-treatment, the right to recognition as a person before the law, the right to life and the right to an effective remedy for violations of one's rights.<sup>25</sup> By being a party to the ICCPR, Egypt is bound to respect those rights.

### b. Arbitrary detention and a violation of the right to liberty

Mr Santawy remains in pre-trial detention in Leman Tora Prison, Cairo, pending an official presidential ratification of the ESSC's judgment in his case.<sup>26</sup> Three aspects of his pre-trial detention hold an arbitrary character under international standards.

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<sup>20</sup>Human Rights Watch, 'Egypt – scholar unjustly detained', 24 March 2021.

<sup>21</sup>ECRF report, 2021.

<sup>22</sup>See, inter alia, The ICCPR, Articles 9 and 10 and Human Rights Committee, inter alia, Views of 3 April 1997, *A [name deleted] v. Australia*, Communication No. 560/1993, para. 9.2.

<sup>23</sup>See the UN International Convention on Enforced Disappearance, Art. 2. However, this has not yet been signed by Egypt.

<sup>24</sup>The UN Human Rights Committee is the body of 18 independent human rights experts established under the ICCPR. The Committee monitors State parties' implementation of the ICCPR and its Second Optional Protocol. The General Comments of the Human Rights Committee provide authoritative guidance on interpretation of the ICCPR. See *Republic of Guinea v Democratic Republic of the Congo*, International Court of Justice (2010), Paras 66-68.

<sup>25</sup>See the Human Rights Committee, *General Comment 35 on the right to liberty and security of person*, CCPR/C/GC/35, 16 December 2014, Para. 35.

<sup>26</sup>The Emergency Law 162 of 1958, art. 7.

First, the charges against Ahmed Santawy relate to his alleged use of social media to share opinions on the mishandling of the COVID-19 pandemic in Egypt.<sup>27</sup> The charges give rise to offences under Article 80(1) of the Penal Code, which prohibits 'any Egyptian from deliberately sharing fake news abroad about the internal situation of the country which would weaken external economic confidence in the state', and Article 102 (bis) which prohibits any Egyptian from 'sharing news, information/data, or false or tendentious rumors, or propagates exciting publicity, if this is liable to disturb public security, cast horror among the people, or cause harm and damage to public interest'.<sup>28</sup> Even if Mr Santawy admitted his authorship of these posts, which he has not, these posts appear to reflect the legitimate exercise of the right to freedom of expression, guaranteed under, among others, Article 19 of ICCPR. The Human Rights Committee has clarified that 'detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression'.

Second, the detention of Mr Santawy does not meet basic safeguards<sup>30</sup> guaranteed by international human rights law to ensure that the use of pre-trial detention be consistent with the right to liberty and security of person and the presumption of innocence, including:

- (i) the presumption of liberty pending trial on criminal charges;
- (ii) the requirement for States to demonstrate reasonable suspicion that the individual in question has committed a criminal offence that is punishable by imprisonment;
- (iii) the requirement that deprivation of liberty pursuant to the criminal law must have a legitimate aim and must also serve a genuine public interest, in accordance with international human rights law and standards, which, notwithstanding the presumption of innocence, outweighs the individual's right to liberty;
- (iv) the requirement for States to demonstrate that there are substantial reasons for believing that, if released, the individual would either abscond or commit a serious offence, or interfere with the investigation or the course of justice, or pose a serious threat to public order, and that there is no possibility that alternative measures would address these concerns;
- (v) the requirement that, in light of above, detention must be both necessary and reasonable in the individualized case; and
- (vi) periodic judicial review of the continuing lawfulness and necessity of detention in each individual case.

The abusive<sup>31</sup> use of pre-trial detention by the SSSP in Egypt demonstrates that there is a presumption in favour of pre-trial detention, and that assessments as to the necessity and reasonableness of such detention are not being made in an individualized way, if at all.

<sup>27</sup> See commentary of Amnesty International, '[Egyptian Masters Student Sentenced to Four Years in Prison for Spreading 'False News'](#)', 22 June 2021,

<sup>28</sup> Egypt, [The Penal Code](#), Art. 80(1) and 102 (bis).

<sup>29</sup> See HRC, [General Comment 35](#), para. 15.

<sup>30</sup> See HRC, [General Comment 35](#), para. 38. See also Arab Charter on Human Rights 2004, Art. 14 (5) ; [UN Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment](#), adopted by UN General Assembly Resolution 42/173 of 9 December 1998, Principle 39, [UN Standard Minimum Rules for Non-Custodial Measures](#) (The Tokyo Rules), Adopted by General Assembly resolution 45/110 of 14 December 1990, Rule 6 and African Commission on Human and People's Rights, [Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa](#), 2003, Section M(1)(e).

<sup>31</sup> See TIMEP and the ICJ, '[Targeting the last line of defence : Egypt's attacks against lawyers](#)', September 2020, p. 12.



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Third, inadequacies in ESSC's procedures have deprived Mr Santawy of his right to challenge the lawfulness and necessity of his detention, as guaranteed under international human rights law, including Article 9(4) of the ICCPR. Individuals held in pre-trial detention under the jurisdiction of the ESCC may only challenge the legality of their detention in a petition to the ESSC itself.<sup>32</sup> The Human Rights Committee has clarified that this challenge must be brought before a court that 'enjoys judicial independence'.<sup>33</sup> Given the role of the Egyptian President in ratifying decisions and controlling the ESSC's composition, the ESSC appears not to meet the standard of judicial independence outlined by the Human Rights Committee (see below, at F).

### c. Prohibition against Torture and Cruel or Inhuman or Degrading Treatment or Punishment and obligation to investigate

Ahmed Santawy reported that he was beaten 'in the face' by the security services while he was detained between the 1 and 6 February.<sup>34</sup> His defence team requested that the SSSP conduct an investigation into these allegations on the 22 May 2021,<sup>35</sup> as required by international human rights law. To date, however, the SSSP has failed to carry out an investigation into these allegations.

Under international human rights law, being beaten in the face and subject to enforced disappearance for five days amount to violations of one's right to freedom from torture or other prohibited ill-treatment.<sup>36</sup> In addition, the failure to investigate the ill-treatment allegations amounts in its own right to a separate violation of Egypt's binding<sup>37</sup> obligation under international human rights law, including under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to conduct a prompt, independent and impartial investigations into credible allegations disclosing evidence of torture or other prohibited ill-treatment.<sup>38</sup> The obligation of the SSSP to investigate these allegations was triggered as soon as Ahmed Santawy's legal team "br[ought] the facts to the attention of an authority of the State",<sup>39</sup> that is, on the 22 May 2021.

### d. The Right to a defence.

As set out above in section A, Mr Santawy did not have access to his lawyers at the time of his arrest, was subsequently held incommunicado and subjected to an enforced disappearance for five days. Between February and May 2021, during the pre-trial hearings conducted by the SSSP relating to the first set of charges against Mr al-Santway in Case 65, he was only permitted a five-minute consultation with his lawyers before each pre-trial hearing. When Case 774 was referred to the ESSC, Mr al-Santway was not permitted to consult with his legal representatives before his first trial hearing on the 1 June, nor was he able to consult with them between the 1 and 8 of June, when he was brought to the court for his second trial hearing. On that occasion, the court, at the request of the defence team, permitted Mr al-Santway a five-minute consultation with his legal representatives. However, an employee of the State Security Services monitored this consultation.

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<sup>32</sup> See Law 162 of 1958, The Emergency Law, Art. 3(a)(2).

<sup>33</sup> See HRC, General Comment 35 art. 45.

<sup>34</sup> ECRF report, 2021.

<sup>35</sup> ECRF report, 2021.

<sup>36</sup> See, among others, HRC, General Comment 36 on the Right to Life, UN Doc. CCPR/C/GC/36, 30 October 2018, Para. 58.

<sup>37</sup> See, United Nations Treaty Collection, Chapter V, Human Rights, 9. Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>38</sup> See, *inter alia*, Convention Against Torture, Art. 16, 12 and 13.

<sup>39</sup> Blanco Abad v Spain, CAT Communication No. 59/1996, 14 May 1998, para. 8.6.

It follows that Mr Santawy's right to a defence guaranteed under international human rights law was violated throughout the entirety of the proceedings against him, thereby severely undermining the fairness of his trial,<sup>40</sup> and further compounding the arbitrariness of his detention.<sup>41</sup> Under the ICCPR, among others, the right to a fair trial necessitates adequate time and facilities for the preparation of one's defence, including by being guaranteed private, prompt communication with one's own counsel.<sup>42</sup> Five-minute consultations held in the presence of a State Security employee, at irregular intervals, do not meet this standard.

#### e. The presumption of innocence

The trial failed to ensure Mr Santawy's right to be presumed innocent, as guaranteed by international human rights law, in at least two ways.<sup>43</sup> First, a presumption of guilt was effectively applied on arrest and characterized Mr Santawy's (still on-going) pre-trial detention (see above, Section B). Second, the ESSC issued a verdict convicting Mr Santawy of the charges despite the absence of credible, admissible evidence to support and prove the prosecution's case beyond a reasonable doubt that Mr Santawy had indeed published "fake news" from outside Egypt and that such "news incited anti-state sentiments". Indeed, the prosecutor's case relied solely on a technical report showing an image of Facebook posts, which Mr Santawy had denied posting. No steps were taken to confirm that Mr Santawy was the author of the said Facebook posts, nor did the prosecution produce other evidence of wrongdoing. As such, his conviction finding him guilty of the charges violated the standard required by international human rights law, namely, beyond any reasonable doubt.<sup>44</sup>

#### f. The right to be tried before an independent and impartial tribunal

The ESSC is subject to strong executive influence, as attested by the President's powers to ratify and amend judgments, control the courts' composition and appoint judges.<sup>45</sup> The ESSC fails to meet international standards on judicial independence.<sup>46</sup> The Human Rights Committee has expressed concern about the President's broad authority over the ESSC, including with respect to 'ratifying judgments and issuing pardons', describing this role as 'both part of the executive and part of the judiciary system'.<sup>47</sup>

#### g. Equality of arms

In addition to the restrictions on the right to a defence outlined above at Section D, during the trial hearing on 8 June 2021, the ESSC reportedly refused the request of the defence team to access all the incriminating evidence on which the prosecution's case relied.<sup>48</sup> Under international human rights law, the principle of equality of arms requires that "each side be given the opportunity to contest all the arguments and evidence adduced by the other party".<sup>49</sup> Therefore, Mr Santawy's defence should have been granted access to the prosecutor's files 'in full equality' with the prosecution.<sup>50</sup> However, in this case the defence team were unable to fully respond to the prosecution's case, in clear violation of international standards relating to the equality of arms.

<sup>40</sup>See, inter alia, ICCPR, Article 14 (3)(b), and 75. Human Rights Committee, General Comment 32, Article 14, Right to Equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, para. 34.

<sup>41</sup>See the UN Working Group on Arbitrary Detention, Revised Fact Sheet No. 26, 8 February 2019, Section IV (A).

<sup>42</sup>ICCPR, Art. 14(3)(b) ; HRC, General Comment 32, para. 34.

<sup>43</sup>Arab Charter on Human and People's Rights, 22 May 2004, Art. 16 ; ICCPR, Art. 14 (2).

<sup>44</sup>ICCPR, Art. 14(3)(b); HRC, General Comment 32, Article 14, Right to Equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, para. 30.

<sup>45</sup>Egypt, Emergency Law 1958, Arts. 12-14.

<sup>46</sup>ICCPR, Art. 14(1). See also The ICJ, 'Egypt – A Return to Permanent State of Emergency?', June 2018.

<sup>47</sup>Human Rights Committee, Concluding Observations on Egypt, UN Doc. CCPR/C/79/Add.23, 1993, para. 9.

<sup>48</sup>ECRF Report, p. 22.

<sup>49</sup>See, inter alia, HRC, General Comment 32, para. 13.

<sup>50</sup>ICCPR, Art. 14(3) and *ibid*

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### h. Right of appeal

Under article 12 of the Emergency Law, decisions by the ESSC are not subject to appeal.<sup>51</sup> The President may, however, commute or reduce a sentence, suspend its execution or order a retrial before another branches of the ESSC.

These provisions violate Egypt's obligations under international law to ensure the right to appeal a verdict of guilt. Article 14 of the ICCPR provides that 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law', and the Human Rights Committee has confirmed that this right applies during a "state of emergency".<sup>52</sup>

### i. The principle of double jeopardy or ne bis in idem

Ahmed Santawy's case epitomizes the worrying trend of *tadwir*, or 'rotating', of cases before the ESSC. *Tadwir* refers to the practice of charging an individual in a case (Case A) and then initiating a new case (case B) against the same individual while they are in pre-trial detention for Case A. However, the charges in Cases A and B are based on the same facts, and therefore once the individual has served the sentence in Case B, the prosecutor can refer Case A to the court, effectively trying the individual for the same crime twice.

The SSSP first charged Mr Santawy in Case 65, on 6 February 2021. In Case 65, he was charged with "spreading fake news", and it is understood that Facebook posts about COVID-19 in Egypt served as the basis for this charge. The SSSP initiated a separate case against Mr Santawy on the 22 May 2021 – Case 887. The charges against him in Case 887 were very similar to those under Case 65; they refer to "spreading fake news outside and inside the country" and are based on the same articles of the Penal Code. It is understood that the charges in Case 887 re based on the same Facebook posts as that of Case 65. On 29 May 2021, Case 887 was joined to Case 774 and referred to the ESSC, resulting in the sentence of a four-year term in prison.

This practice suggests that Egypt is not operating in line with international standards that protect individuals from being tried twice for the same crime – the principle of double jeopardy or ne bis in idem. The risk that Mr Al-Santway be subjected to double jeopardy is very real, as Case 65 remains open, and the SSSP may refer the case to the ESSC.

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<sup>51</sup> The Emergency Law 1958, Art. 12.

<sup>52</sup> ICCPR, Art. 14 (5) ; Human Rights Committee ,General Comment 29 on states of emergency, UN Doc. CCPR/C/21/Rev.1/Add. 11, 31, August 2001, para 16 read in line with Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, Art. 73.

### **III. RECOMMENDATIONS TO EGYPT**

In light of the findings outlined above, the ICJ and ECRF call on the Egyptian authorities to comply with their obligations under international human rights law and:

- I. In relation to the case against Ahmed Santawy:**
  - (i). Quash his conviction, substitute it with an acquittal and annul his sentence under case 774;**
  - (ii). Drop all other pending criminal cases against him;**
  - (iii). Immediately and unconditionally release him; and,**
  - (iv). Order an immediate investigation into the allegations of enforced disappearance, torture and ill-treatment in his case.**
- II. Abolish the ESSC, including by repealing relevant provisions of the Emergency Law. Any existing proceedings before the ESSC should be either nullified or transferred to the ordinary courts;**
- III. Criminalize, prevent and investigate allegations of enforced disappearance.**
- IV. End of the practice of prolonged incommunicado detention, and all other forms of arbitrary detention;**
- V. Reform the pre-trial detention framework, including with a view to ensuring that it is an exceptional measure based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, including specific and relevant factors defined in the law, such as to prevent flight, tampering with evidence or interfering with witnesses or the commission of serious offences, and that the accused has the right to regular judicial review of the continuing lawfulness and necessity of their detention. To this end, the authorities must amend the Code of Criminal Procedure, including with a view to providing exhaustive, clear and precise grounds and criteria for pre-trial detention, in accordance with international standards on appropriateness, predictability and due process of law;**
- VI. Order an independent, impartial and thorough investigation into allegations of torture and other ill-treatment and enforced disappearance in relation to individuals charged in cases before the ESSC;**
- VII. Afford prompt, private access to counsel for all defendants in cases before the ESSC, and provide them with adequate time and facilities to prepare an adequate defence.**
- VIII. Guarantee the presumption of innocence in all criminal cases, including by ensuring that the prosecution presents admissible evidence capable of establishing guilt beyond reasonable doubt.**
- IX. Ensure that the defence has access to all incriminating evidence on which the prosecution's case relies so as to respect the equality of arms principle.**
- X. End the practice of tadwir, nullifying recycled charges, and close related cases.**
- XI. Revoke Law no. 71 of 2021 and Law 139 of 2021 in order to enable effective trial monitoring and ensure the right to a public trial and to freedom of expression.**

# Commission Members

March 2021 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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