

United Arab Emirates (UAE): Summary Trial Observation Briefing Paper on the UAE5 case

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Summary

Jennie Pasquarella traveled to the UAE in September- October 2011 representing four international human rights organizations as a trial observer in the case against the 'UAE5', the collective name given to Ahmed Mansoor, Nasser bin Ghaith, Fahad Salim Dalk, Hassan Ali al-Khamis, and Ahmed Abdul Khaleq. The five UAE residents – four nationals and one stateless resident - are currently on trial in the UAE , as set out in article 176 of the UAE Penal Code, for "publicly insulting" UAE rulers. The Supreme Court is scheduled to issue its verdict on November 27.

At the time of writing, the coalition of four groups – Amnesty International, the Arabic Network for Human Rights Information, Front Line Defenders and Human Rights Watch - had been augmented by three others, with the addition of Alkarama (Dignity), the Gulf Centre for Human Rights and Index on Censorship.

This report provides an interim assessment of the case to date.ⁱ

This briefing paper highlights two main categories of human rights violations in this case: first, the government's unlawful prosecution of the activists for exercising their legitimate right to free speech; and, second, flagrant due process violations that have unfolded in the course of the trial.

The report concludes that:

- The prosecution of the UAE 5 for their political speech violates international law;*
- The case, having no legitimate legal or factual basis, was brought to suppress and/or deter political dissent;*
- The trial has been fundamentally unfair.*

The report recommends that the UAE authorities:

- Immediately and unconditionally release the UAE5;*
- Dismiss the charges against them;*
- Conduct an independent judicial review into how the UAE5 came to be prosecuted and the manner in which they were prosecuted;*
- Issue an immediate invitation for the UN Special Rapporteur on the Independence of Judges and Lawyers to visit the country.*

1. Right to free expression and association on trial

All five activists in this case are charged with violating Articles 176 and 8 of the UAE Penal Code for statements made on the UAE *Hewar* website – an online political discussion forum – that allegedly publicly insulted the president, vice-president and ruler of Dubai, and the crown prince.ⁱⁱ The UAE suspended public access to the website in early 2010.

Article 176 of the Penal Code permits a sentence of up to five years in prison for the vaguely-formulated crime of "publicly insult[ing] the State President, its flag or national emblem." Article 8 of the Code widens the application of the provision to include the vice-president, the crown prince, members of the Supreme Council of the Federation, and other top officials.

Each defendant, with the exception of Ahmed Mansoor - who is charged as a co-conspirator - is charged under Article 176 and 8 violations based on one or in some cases two statements that they each allegedly made. These statements include the following:

- "In the days of Sheikh Zayid, may he rest in peace, he was the real ruler of the state. But not Sheikh Khalifa, may God prolong his life, is a weak personality, with all due respect to his person and noble morals."
- "So, if I look at the conduct, ideas, and practices of His Highness Sheikh Muhammed Bin Zayid, we won't get anywhere, and not because of weak analysis or a certain focus on him. No, the main reason is that this man fumbles about left and right, like a wind that storms through the desert from opposite directions. It's clear that His Highness is following an agenda drafted by foreign nations and interests, and he's compelled to apply it domestically. . . ."
- "If Sheikh Sultan Bin Zayid were in his original position, the country wouldn't be in this shape."
- "The problem is not with Sheikh Khalifa. He's a proud patriot. The problem is with the Crown Prince, who because he alone sits at the top of the pyramid and has assumed power has become the de facto ruler of the state. For a long time, this man has been planning to usurp power. . . . This man is working with Western forces to enable them to achieve their plans, whether locally or regionally."

The Constitution of the UAE guarantees the right to "[f]reedom of opinion and expressing it verbally, in writing or by other means of expression shall be guaranteed within the limits of law."ⁱⁱⁱ International standards and best practice requires that "everyone shall have the right to freedom of expression" including the "freedom to seek, receive and impart information and ideas of all kind regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."^{iv}

Under the International Covenant on Civil and Political Rights, the right to free expression may only be restricted when provided by law and necessary to protect (a) the rights or reputations of others or (b) national security, the public order [] or public health or morals.^v While the UAE is not a party to the ICCPR, it constitutes an authoritative source and guideline reflecting international best practice.^{vi} The Arab Charter on Human Rights, ratified by the UAE in 2008, states in article 32 that it guarantees the right to freedom of information and to freedom of opinion and expression.

Articles 176 and 8 violate basic international protections of freedom of speech in a few core respects. First and most importantly, the laws criminalize public debate concerning public figures in the political domain, an area of speech where the UN Human Rights Committee and others have said the value placed upon uninhibited expression is particularly high.

Second, the laws do not satisfy the narrow circumstances in which restrictions on speech may be permitted under international law. For example, the law does not define the meaning of "insult," allowing the

government to enforce the law in a selective and arbitrary manner without notice to the public as to what conduct is prohibited.^{vii} In this case it allows the authorities to define “insult” as any political critique of the ruling officials.

The law is not narrowly tailored to any specific threat to national security or public order, and in fact after criminalizing any insult to the rulers, it contains no limitation on this severe restriction of political speech. . Clearly, “insulting” a ruler does not pose a threat to national security and criminalizing such speech is not necessary to preserve national security or public order. Embedded in the law is a disturbing, and unlawful, premise that the expression of an “insult,” or any critique of the UAE rulers, is itself to be construed as a criminal act.^{viii} Under international law, it is never necessary or permissible to prohibit anyone from disseminating or publishing material “solely on the basis that it may be critical of the government or the political social system espoused by the government” or to penalize them for doing so.^{ix}

Accordingly, the government’s prosecution of the UAE 5 under Articles 176 and 8 violates international free speech protections. All five are on trial solely for allegedly expressing their political opinions, critiques and analyses of the UAE and its leaders.

Under UAE law such statements would also have to be made publicly in order to violate Article 176 and 8. However, the alleged statements were made on the UAE *Hewar* website after the government blocked public access to the website. Although the government is prosecuting this case as a State Security case – allowing the authorities to deprive the defendants of basic rights regularly afforded to criminal defendants – the only threat to the state that can be derived from the alleged statements are their suggestions for political change. In truth, this case, therefore, is about suppressing and/or deterring political dissent in the UAE.

2. An Unfair Trial: Flagrant due process violations

Under applicable international law, all persons have a right to a fair trial.^x These defendants have been deprived of basic due process rights in the administration of this trial. These flagrant violations have made this trial fundamentally unfair.

2.1 Denial of the right to be informed of the charges

International standards guarantee that any person charged with a criminal offense has “the right to be informed promptly, in detail and in a language which he understands, of the charges against him.”^{xi}

The defendants in this case:

- Were not charged until nearly two months after their arrest^{xii};
- Have been denied – despite repeated requests by their lawyers to the court - by the prosecutor and the court any meaningful opportunity to see the charges and any evidence against them.

On September 26, the presiding judge reportedly told defendants that they would be provided with the charge sheet once the prosecution rested its case, when it would be the defense’s opportunity to present its case, in contravention of fair trial standards. This never happened.

The lack of clarity about what charges the defendants face has facilitated the government’s public campaign of misinformation. The Ministry of Justice has produced at least two different versions of the charge sheets, leading to confusion and significant lack of clarity surrounding the alleged crimes involved in this case. A general version appears on the Ministry of Justice website, while defense counsel has a more specific and detailed version.

2.2 Denial of the right to adequate time and facilities to prepare a defense

International law affords every criminal defendant the “right to have adequate time and facilities for the preparation of his defense and to be allowed to communicate with his family.”^{xiii}

Without access to see the charges and the evidence against them, defendants cannot assist their counsel in preparing their defense, crippling defense counsels’ ability to adequately represent their clients, as it is only their clients that have the information and knowledge of the UAE *Hewar* website and can provide necessary information about the statements the prosecution alleges they made.

In addition, the prosecution has denied defendants’ meaningful access to their counsel:

- Prison authorities do not permit or provide counsel with confidential attorney-client contact visits. Rather, the defendants and their lawyers must speak through a pane of glass, over phones monitored by the prison authorities. As a result, they are completely deprived of any ability to confidentially communicate with their clients in the prison. They are also deprived of any ability to confidentially share documents because to do so requires passing the documents through prison authorities;^{xiv}
- Attorney-client visits are limited to one weekly session, on Tuesdays. In order for the attorneys to visit the defendants any other day of the week, they must obtain permission from the State Security Prosecutor;
- State Security officials have specifically restricted the access of defendants Mansoor and bin Ghaith to their attorney, Dr. Mohammad Al Roken. Although these defendants are permitted to place phone calls to Dr. Abdelhamid Al Kumaiti, the attorney who represents all five defendants, they are not permitted to call Dr. Al Roken, the attorney who specifically represents the two of them.

2.3 Denial of right to a public hearing

International standards mandate that as a general rule, court hearings must be conducted publicly. In general, hearings must not only be open and accessible to the public, but the Court must publicly announce the time and venue of the hearing. If the Court orders the hearing be closed to the public, it must articulate the legal basis for closing the hearing to the public and make publicly available its order and justifications. Further, courts are required to accommodate all members of the public who seek to attend a trial.

The conduct of this trial violated these standards by in the following ways:

- The first four hearings were held *in camera*. While the Court apparently decided that the hearings be closed, it never formally ordered the hearings to be closed and did not formally articulate any basis, including any legal basis, for closing the hearing to the parties nor to the public;
- The Court did not publish information about the dates and times of hearings nor whether the hearings would be open or closed, leading to significant confusion and frustration for family members, journalists and observers who all had an interest in observing the hearings;
- The Court failed to respond to written requests by Human Rights Watch and Amnesty International to observe the first four hearings in the case;
- The Court rejected defense counsel petitions that the Court conduct hearings in public. In response, the Court provided no legal basis for continuing to hear the case behind closed doors and only indicated that it would remain closed until the Court was finished hearing the prosecution’s witnesses;
- The Court’s closure was enforced in an inequitable manner: in the first three hearings, the Court permitted a State Security official to attend the hearing and take notes to write a report on the course of the trial. In a statement passed to the press by the defendants, they noted that “despite the secret hearings, State Security officers were prepared to write reports on the course of the trial, which is a

breach of the concept of secret hearings, which are unjustifiable in any case.”) In the third hearing, Nasser bin Ghaith asked the judges why – if the hearing was apparently closed – a witness from the State Security was allowed to be present and the judges eventually asked the witness to leave;^{xv}

- The Court only selectively permitted members of the public to attend the 2 October hearing, on a limited basis, and permitted only previously approved family members, international observers, members of the media, members of the State Security, and selected members of the public to attend. Because only certain individuals were allowed to attend with advance permission the hearing remained effectively closed to the public.

During the fourth hearing on September 26, four of the five defendants demanded that before the hearing formally commence, the hearing be opened to the public. The presiding judge responded, stating that the hearing was closed to the public for the defendants’ “own safety.” Nasser bin Ghaith told the judge “if that is the reason why the hearing is closed, then we will accept the risk.” The judge nonetheless held the hearing behind closed doors.

2.4 Lack of independence and impartiality of the court

A basic tenet of the right to a fair trial is that a criminal defendant be tried before an independent and impartial court^{xvi} so that “justice must not only be done, it must be seen to be done.” For two main reasons, this trial has fallen short of this standard.

On account of historical and structural shortages of qualified judges since the establishment of the UAE, the UAE employs foreign jurists. All four judges on the panel reviewing the case are, in this instance, foreigners. Two are Egyptian, one is Syrian, and one is Sudanese. As foreign judges, they do not have tenure positions on the Court, as do Emirati judges. Instead, the executive branch of government must renew their contracts when they come up for renewal every four to six years. As a result of this system, these judges cannot be seen to be either independent or impartial. Their individual interests in having their contracts renewed and maintaining good favor with the leaders of the UAE create an apparent if not actual bias to the government, particularly in high-profile, politically-charged cases such as this one.

With respect to the case of the UAE⁵ specifically, the impartiality and the fundamental competence of the judges to adjudicate this case have been significantly compromised by the impermanence of the judges involved in the case: the judges have repeatedly changed throughout the course of the trial.

During the first three hearings, a panel of three judges heard the case. At the first hearing, a Sudanese judge presided, and the other two panel members were an Egyptian judge and a Syrian judge. At the second and third hearings, the Sudanese judge was not present; instead a new Egyptian judge was added, apparently in his place. The second and third hearings were presided over by the same panel of three judges – two Egyptians and one Syrian.

At the fourth hearing, these same three judges remained but the Sudanese judge returned, making a panel of four judges. During the fifth hearing, the same panel of four remained.

The ever-changing composition and size of the panel of judges presiding over this case is fundamentally unfair. A judge who has not heard all of the witnesses in the case, reviewed all the evidence, or heard all the arguments in a criminal trial is not competent to adjudicate the case. Allowing a judge to adjudicate in such circumstance is fundamentally unfair.

2.5 Lack of procedural equality

The Court has failed to provide procedural equality or a reasonable opportunity for both parties to prepare and present their cases, in conditions that do not substantially disadvantage either party. Instead, it has provided little and or no time to the defense to present its case.

By way of example, on September 26, after the Court heard the last of the prosecution's witnesses, the presiding judge declared that the following hearing, on October 2, would be reserved for closing arguments from both sides, even though the defense had not yet had an opportunity to call any witnesses or cross-examine the prosecution's witnesses. Following objections, the Court modified its decision, admitting that they could not hear closing arguments before the defense had presented its case. It agreed that the defense could call a witness during the October 2 hearing.

Despite this decision, on October 2, the Court nevertheless heard closing argument from the prosecution, in spite of the fact that the defense had still not presented its case.^{xvii} The Court then told the defense that it expected to hear their closing arguments during the following hearing, on October 9, and that they would be allowed to call one witness, but would not be permitted to re-examine any of the prosecution's witnesses, even though the defense did not previously have an adequate opportunity to cross-examine them at earlier hearings.

In addition, the defense noted that they could not be expected to present their closing arguments until they had access to all the evidentiary documents that the prosecution had access to during their closing argument. The defense told the court that despite their requests to the prosecution to turn them over, they still had not been provided the trial transcripts of the witnesses' testimonies, transcripts the prosecution cited in its closing.

Rather than ordering the prosecution to turn over the transcripts, the Court told the defense they would nevertheless need to make their closing argument.

Further, while the Court has provided the prosecution ample time to be heard, the Court has acted prejudicially against the defense. It routinely curtailed their right to be heard, cutting them off abruptly when they objected to procedural deficiencies and when they made motions, and depriving them of the right to call witnesses and to cross-examine witnesses. Almost every motion that the defense has made has been put off and ignored by the Court.

During the hearing on October 2, the defense filed its fifth motion for the defendants to be released on bail. The Court again ignored the request and said it would address it later. The defense also made a motion for a mistrial, which the Court did not consider, but rather ignored. They also again called for a court injunction against the State Security forces' alleged harassment of the defense lawyers and their staff since the start of the trial, which according to Dr. Kumaiti, has apparently resulted in the government deporting two of his staff lawyers, as well as continual surveillance of him and his staff. The Court again refused to address the defense's request.

The Court has ignored every request of the defense for access to the full set of evidence entered against the defendants, continuing to deprive the defendants of the ability to review the charges and evidence against them.

2.6 Preferential treatment before the court

In a display of apparent procedural inequality and *ex parte* communication between the prosecution and the judges, during the October 2 hearing, the trial observer witnessed the prosecution lawyers pass a note to the

four judges. That note was not read aloud to the Court, nor shared with the defense. The same occurred at the hearings on October 9 and 23.

In addition, during the October 2 hearing, the Court permitted four private attorneys to intervene in the case, in spite of the Court's ruling during the previous hearing that these lawyers did not have the right to intervene nor standing to appear. These lawyers claimed that they had a right to file civil claims for damages against the defendants for the emotional harm they suffered as a result of the statements the defendants made about the UAE rulers.

Despite the defendants' objections to the intervention of these lawyers, on the grounds that they lacked standing to bring the claims they asserted and that in any case this was not the proper forum for their claims, which would need to be heard before a lower court in a civil matter, the Court allowed the lawyers to remain in Court.

As well, the Court permitted these lawyers to sit at counsel table and to stand and make counter-arguments to the defense. Their intervention – despite having previously been told they had no standing at court – appeared clearly to be intended to unduly influence the Court, to distract from and impede the defense's ability to present their case. Its effect was to further the government's efforts to portray the defendants as enemies of the State.

2.7 Denial of the right to confront witnesses against them

International law provides that a criminal defendant has the right to examine the prosecution's witnesses and to call his or her own witnesses according to the same conditions applied to the prosecution's witnesses.^{xviii}

During the first five hearings, the Court did not afford the defense a meaningful opportunity to cross-examine the prosecution's witnesses. During these five hearings, the prosecution called eight witnesses. During the first three hearings, the Court did not permit the defense to cross-examine one of the witnesses, who was a State Security officer, at all. And it permitted the defense to ask only a handful of questions to three other witnesses, significantly curtailing their cross-examination.

In the fourth hearing, the Court reportedly allowed the defense to cross-examine the three witnesses heard in the hearing, who were computer forensic technicians. In the fifth, the Court again significantly curtailed the defense's cross-examination, allowing them only to ask a handful of questions.

The Court also did not permit the defense to re-examine any of the prosecution's witnesses despite not having a meaningful opportunity to cross-examine them in the first instance..^{xix}

2.8 Denial of the right to appeal

Every criminal defendant has the right, if convicted, to appeal that conviction to a higher tribunal^{xx}. Because State Security is prosecuting defendants, they are subject to State Security criminal procedure, which requires that they be tried in the Federal Supreme Court as the court of first and only instance: in contravention to international norms, they have no right of appeal under UAE law.

ⁱ This summary briefing does not address the arrest of the UAE5. Nor does it set out details of the specific human rights standards relevant to this case. For a detailed timeline of the case, see: http://ifex.org/united_arab_emirates/2011/10/28/uae5timeline.pdf

ⁱⁱ These are the only charges facing four of the five defendants. Only Ahmed Mansoor faces additional charges.

ⁱⁱⁱ Art. 30.

^{iv} International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, Art. 19(2).

^v ICCPR, Art. 19(3).

^{vi} (1) The Human Rights Committee has stated that "...when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself". In the January 2000 report to the UN Commission on Human Rights, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression urged "all Governments to ensure that press offences are no longer punishable by terms of imprisonment, except in cases involving racist or discriminatory comments or calls to violence. In the case of offences such as "libeling", "insulting" or "defaming" the head of State and publishing or broadcasting "false" or "alarmist" information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights."(E/CN.4/2000/63, ¶ 205)

^{vii} Articles 176 and 8 of the Penal Code are not "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly" while their imprecision may "[...] confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."

^{viii} Article 176 is so vaguely worded that it could readily be applied to basic political expression as well.

^{ix} United Nations Human Rights Committee, General Comment No. 34, ¶ 25, U.N. Doc. CCPR/C/GC/34 (July 21, 2011) ("General Comment No. 34")

^x ICCPR, Art. 14 & 16; Arab Charter on Human Rights, adopted by the Council of the League of Arab States on May 22, 2004, U.N. Doc. CHR/NONE/2004/40/Rev.1, entered into force March 15, 2008, art. 13(1) ("Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations.").

^{xi} See, inter alia, ICCPR 14(2)(a)] and The Arab Charter, Art. 16(1)

^{xii} Nasser bin Ghaith published an article on the impact of the 'Arab Spring' in the Gulf Cooperation Council countries and the UAE, on 1 April, a week before his arrest

^{xiii} See, inter alia, the ICCPR, Art. 14(2)(b) and Principle 21 of Basic Principles Role of Lawyers.

^{xiv} The defendants are not able to write anything and give it to their lawyers without it either being confiscated or read by State Security officials, including those in *al-Wathba* Prison.

^{xv} It is believed that State Security brought this witness solely to pressure and intimidate the judges.

^{xvi} See ICCPR, Art. 14(1)

^{xvii} The prosecution showed a short slideshow of patriotic images of the UAE rulers set to soft music as an introduction to their closing argument. The video appeared designed to influence the media, as this was the first hearing opened to the public.

^{xviii} ICCPR, Art. 14(3)(e).

^{xix} In addition, the defence did not have any pre-trial opportunity to examine the witnesses

^{xx} ICCPR, Art. 15, which states: 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Article 16 (7) of the Arab Charter provides for "The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal."