

Mass Convictions Following an Unfair Trial: The UAE 94 Case

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The UAE 94 case**

A report by the International Commission of Jurists

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Executive Summary

The International Commission of Jurists (ICJ) is concerned that 94 individuals (known as "the UAE 94") may have been detained and/or prosecuted, and most of them convicted, for the peaceful exercise of their rights to freedom of expression and association.

On 27 January 2013, the Prosecutor-General announced that a case against 94 "suspects" had been referred to the State Security Chamber of the Federal Supreme Court for trial on charges of "*establishing and managing an organization with the aim of committing crimes that harm State security, opposing the Constitution and the basic principles of the UAE ruling system and having links and affiliations to organizations with foreign agendas*".¹

Sixty-nine of the accused were convicted on 2 July 2013 by the State Security Chamber and sentenced to serve terms of imprisonment. Fifty-six of those convicted were sentenced to 10 years' imprisonment; 5 others were sentenced to 7 years' imprisonment and 8 others, who were tried *in absentia*, were sentenced to 15 years' imprisonment.² The remaining 25 accused were acquitted.

The ICJ is deeply concerned that the proceedings against all of these individuals failed to meet internationally recognised standards of fairness. In particular the ICJ considers that the rights of the accused were violated as a result of and following their arrest, and leading up to the trial. Furthermore the ICJ considers that 69 of the accused were convicted and sentenced to terms of imprisonment following a manifestly unfair trial.

Following its review of the written judgment, the organization notes that, among other things, the Court failed to specify in its judgment the evidential basis on which each of the 69 convicted individuals was found guilty and the justification for both the prison sentences imposed and the differences between the sentences that were imposed on each of them.

The proceedings against the UAE 94 were initiated in the context of an escalated crackdown, over the past two years, by the authorities of the United Arab Emirates (UAE) against individuals and organizations calling for peaceful political reform.

In March 2011, 132 pro-reform activists in the UAE signed a petition calling for constitutional reform and increased political participation.³ Many of the individuals who signed the petition were subsequently prosecuted and/or stripped of their citizenship and deported.

Among those prosecuted were five prominent political activists, known as the "UAE 5", who were arrested in April 2011 and two months later formally charged with "publicly insulting" the UAE's President, Vice-President, and Crown Prince.⁴

¹ Referral Order in the case 79/2012 State security; UAE Ministry of Justice, Public Prosecution, section of the State security Prosecution; 27 January 2013

² The Court also ordered the confiscation of varying amounts of money seized during the arrest of some of the accused, as well as the confiscation of shares in various companies linked by the prosecution to Dawat Al-Islah. In addition, the Court ordered the closure of four social centres and five websites linked by the prosecution to Dawat Al-Islah.

³ The Petition, 3 March 2011, available at <http://www.ipetitions.com/petition/uaepetition71/>

⁴ Article 8 of Federal Law No.3 of 1987, Concerning the Criminal Code as amended by Federal Law No.34/2005 and Federal Law No.52/2006, Book 1, states: "*Provisions contained in this Law concerning crimes against the President of the State shall also apply to the crimes perpetrated against the Vice-President of the State and members of the Supreme Council of the Federation.*"

Later in the year, the UAE authorities engaged in a comprehensive crackdown on the *Da'wat Al Islah* association (Association for Reform and Guidance).⁵ The group had operated legally in the country since 1974 and neither the Association itself nor its activities had ever before been designated as unlawful. However, following the April arrests, individuals alleged by the authorities to have links to the group were stripped of their citizenship. Others were among those arrested, detained and charged in the context of the case against the UAE 94.

The 94 accused included lawyers, judges, prosecutors, human rights defenders and political activists, all of who were reportedly linked, by the prosecution, to *Da'wat Al Islah*. Several of them signed the March 2011 petition.

The ICJ believes that the sweeping charges against the accused were unlawful, in particular because they were brought to criminalise the legitimate exercise of fundamental human rights, including the rights to freedom of expression, association and assembly, all of which are recognized and protected by the UAE Constitution and international human rights law.

Furthermore, the ICJ considers that the breadth of the criminal provision on which the charges were based is inconsistent with the principle of legality (*nullum crimen sine lege*), a cornerstone of contemporary criminal and international human rights law, which requires States to ensure that criminal offences are clearly and precisely defined within the law. It is satisfied when an individual can know from the wording of the legal provision, as interpreted by the courts, what acts and/or omissions would make him or her criminally liable.

The ICJ is also concerned that the proceedings against the accused fell well below international fair trial standards, for the following reasons:

Rights on arrest

- Many of the detainees were not presented with an official warrant at the time of arrest;
- Most of the detainees were not informed of the reasons for their arrest and promptly notified of the charges against them;
- Most of the detainees were denied their right to have prompt access to a lawyer, including during interrogation;
- Family members of the detainees were not promptly informed of the arrest and the whereabouts of the detainees;
- The detainees' right to contact family members was largely denied, in particular during the first two months following their arrest;

Right to liberty

- Most of the detainees were not brought before a judge or a judicial authority within 48 hours of their arrest;
- A presumption of detention rather than release pre-trial, was effectively applied against the arrested persons pursuant to UAE law, which requires the arrested person to submit "proof of innocence" in order to secure his/her release pending trial;
- Most of the detainees were held in *incommunicado* detention, including by being denied contact with family members and access to legal counsel;
- Most of the detainees were held in secret and unofficial detention centres;
- Most of the detainees were also held in prolonged solitary confinement, which in some cases lasted more than 236 days;

Book 2, Article 176 states "*Shall be sentenced to imprisonment for a term not exceeding five years, whoever publicly humiliates the State President, its flag or national emblem*".

⁵ Website of Al Islah, available at <http://www.aleslaah.net/site/page.php?id=2>

- Most of the detainees were not able to challenge the lawfulness of their detention before a competent court;
- The prosecutor failed to respond to complaints or requests filed by defence counsel regarding the whereabouts and circumstances of many of the detainees;

Prohibition against torture and other ill-treatment

- Most of the UAE 94 who were detained, were reportedly subjected to torture or other ill treatment by the authorities, including severe beatings, pulling out detainees' hair, sleep deprivation, exposure to extreme light during the day and night, death threats and other threats and verbal abuse, as well as prolonged *incommunicado* detention and solitary confinement;
- Allegations of torture and other ill-treatment made by detainees were not promptly, independently and impartially investigated. Those responsible have yet to be held to account;
- Thorough and independent medical examinations, conforming to the standards set out in the Istanbul Protocol, were not carried out on either those detainees who had alleged, or those about whom there were reasonable grounds to believe, that they had been subjected to torture and other ill-treatment;

Rights of defence

- The rights of the detainees to defence were largely undermined, including by:
 - Denying or severely limiting detainees' access to legal counsel, including during interrogations and remand renewal hearings;
 - Restrictions placed on the duration of meetings between the accused and their counsel and the right of the accused to communicate confidentially with their lawyer;
 - Restrictions placed on the accused and their legal counsel's access to the case file, including the formal charges against the accused;
 - Harassment and other reprisals against lawyers who assisted the detainees, including arrest and prosecution or deportation;

Presumption of innocence

- The right of the accused to the presumption of innocence was largely denied, including through:
 - Public statements made by officials, including the public prosecutor, affirming the guilt of the accused prior to the trial;
 - The presumption of guilt that effectively applies on arrest and during pre-trial detention;
 - The Court's verdict convicting 69 of the accused despite the absence of a reasoned judgment of the evidential basis on which each of the 69 individuals was found guilty, including in light of the lack of credible admissible evidence produced by the prosecution to support and prove guilt beyond a reasonable doubt of the charges against each of them;

Equality of arms

- The right to equality of arms between the defence and the prosecution was largely undermined, including through:
 - The above restrictions on the rights of defence;
 - Prohibiting defence counsel from bringing materials into the courtroom, including pens and papers, until 3 hours into the first hearing;
 - Severely restricting the cross-examination of witnesses by defence counsel and the accused, in the absence of similar restrictions on the prosecution;

Reliance on statements obtained through torture

- The right of the accused to be protected from torture and other ill-treatment was violated by:
 - The failure of the Court to investigate, or order a prompt, independent, impartial and thorough investigation of a complaint lodged with the Court by 71 detainees, all of whom alleged that they were subjected to torture and other ill-treatment;

- The admission as evidence by the Court of statements and “confessions” alleged to have been obtained as a result of torture or other ill-treatment;
- The Court’s failure to require, before the admission of such evidence, that the prosecution prove beyond reasonable doubt that the “confessions” were obtained by lawful means and voluntarily from the accused;

Right to a public hearing

- Restricting, without a rational, objective and non-discriminatory basis, those permitted to attend the trial hearings to a limited number of family members, two for each male accused and one for each female accused, and local media;
- Requiring family members to sign a statement agreeing not to report details of the proceedings as a pre-condition to being granted access to the Courtroom;
- Subsequently prohibiting a number of relatives of the accused from attending hearings without giving reasons;
- Subjecting some of the relatives who reportedly disclosed information about the trial to various forms of harassment, including criminal prosecutions. For example, the son of one of the detainees was prosecuted, convicted and sentenced to a 10 month prison term for “*tweeting with bad intent about the trial*”; and
- Excluding, without lawful justification, international media and observers from accessing the courtroom and observing the trial; and

Right of appeal

- Denying those individuals that were convicted the right of appeal. The trial was held before the State Security Chamber of the Supreme Court the decisions of which cannot be subject to appeal or review under UAE law.

Given the sweeping and arbitrary nature of the charges and the serious violations of the right to a fair trial, including violations of the rights on arrest, in pre-trial detention and in the course of the trial proceedings, **the ICJ calls on the UAE authorities to:**

- i) Take the necessary measures to ensure that the convictions against each of the individuals who was convicted are quashed and ensure the immediate and unconditional release of all those who are detained or imprisoned as a consequence of the trial or its verdict;**
- ii) Ensure that an independent, impartial and thorough investigation is carried out into allegations that the accused were subjected to torture and other ill-treatment;**
- iii) Ensure that those responsible for torture or other ill-treatment are brought to justice; and**
- iv) Ensure that those who have been subjected to arbitrary detention and/or torture or other ill-treatment have access to effective remedies and to reparation, including restitution, rehabilitation, compensation and satisfaction.**

A list of detailed recommendations is set out at the end of this report. The ICJ considers that these recommendations could help not only to bring the UAE law and practice in line with international law, but could also be incorporated into any future judicial reform process in the UAE. Their implementation would help to institutionalise judicial independence, impartiality and respect for human rights in the UAE.

This report is based in part on the findings of a mission conducted by the ICJ to the United Arab Emirates in order to observe the 4 and 11 March 2013 hearings of the UAE 94 trial. The mission was led by Justice Ketil Lund, a former judge of the Supreme Court of Norway and ICJ commissioner, and assisted by Marya Farah, ICJ associate legal adviser for the Middle East and North Africa programme.

As detailed at section IV below, the ICJ delegation, together with other international observers and international media, were prevented from attending the first trial hearing, on 4 March 2013, by an official from the Supreme Court. Attempts to comply with administrative procedures that were only disclosed to the ICJ delegation the day after the first hearing did not result in access being granted to the second hearing, on 11 March 2013. Indeed, on 11 March, the ICJ delegation was prevented from approaching the court building by plain-clothed security officials. Security during both hearings was high, including roadblocks and patrols of the area surrounding the Court by security staff. Two other international observers were detained at the airport and deported prior to the first hearing.

The ICJ delegation also requested meetings with UAE authorities, including the Minister of Justice, the Public Prosecutor and the President of the Supreme Court, in order to discuss the trial. Requests for these meetings went unanswered.

This report is therefore largely based on the results of meetings and interviews with defence lawyers and family members of the accused. The report is also based on an assessment of some of the case files to which the ICJ had access, including the referral order by the prosecutor to the State Security Chamber of the Supreme Court. In addition, the report refers to public statements made by the public prosecutor's office and State officials in relation to the case. The ICJ has sought, and as much as possible obtained corroboration, including in media reports, of information received.

The report assesses the compliance of the proceedings in the UAE 94 case with international human rights standards. The standards cited in this report include those which are binding on the UAE because they are either enshrined in treaties to which the UAE is a party or are considered to be part of customary international law. Among others, the UAE is party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Arab Charter for Human Rights.⁶

The report also refers to international treaty and non-treaty standards, which have been agreed and adopted by the international community, as well as authoritative interpretations of international law by expert human rights bodies and mechanisms, from which UAE authorities can draw inspiration.

These standards enshrine the rights of individuals suspected, charged or convicted of criminal offences. They include the Human Rights Committee's interpretation of fair trial provisions of the International Covenant on Civil and Political Rights. The UAE is not yet party to the International Covenant on Civil and Political Rights, although it has said it is considering becoming party to it.⁷

⁶ The UAE acceded to the CAT in July 2012 and ratified the Arab Charter in January 2013. In addition to these two treaties, the UAE is currently a party to the following treaties: the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, having acceded to it in November 2005; the International Convention on the Elimination of All Forms of Racial Discrimination, of 7 March 1966, having acceded to it in June 1974; the International Convention on the Suppression and Punishment of the Crime of Apartheid, of 30 November 1973, having ratified it in October 1975; the Convention on the Elimination of All Forms of Discrimination against Women, of 18 December 1979, the UAE having acceded to it in October 2004; the Convention on the Rights of the Child, of 20 November 1989, having acceded to it in January 1997; Convention on the Rights of Persons with Disabilities, of 13 December 2006, having ratified it in March 2010

⁷ Report of the Working Group on the Universal Periodic Review, 21 March 2013, A/HRC/23/13, para. 54. The UAE is also not yet party to the Optional Protocols to the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) and the Optional Protocols to the Convention on the Rights of the Child many of which also contain important fair trial guarantees.

I. Contextual Background to the UAE 94 Trial

A. UAE political system

The political system in the UAE is based on the Constitution of 18 July 1971.⁸ Pursuant to the Constitution, the UAE federal authorities consist of the Federal Supreme Council (the Supreme Council), the President and Vice President of the Federation, the Council of Ministers of the Federation (the Cabinet), the Federal National Council (the National Council) and the federal judiciary.⁹

In law and practice, however, the heads of the UAE's ruling families exercise effective control over the three branches of government.

For example, despite being the highest executive authority in the federation, the Supreme Council is not an elected democratic body and instead is composed of the rulers of each of the seven Emirates,¹⁰ who are themselves members of the respective ruling families of that Emirate. The Supreme Council selects, from among the members of the Council, the President and the Vice President of the Federation.¹¹

Under the UAE Constitution, the Supreme Council has "*supreme control over the affairs of the federation*",¹² including formulating the general policy of the federation;¹³ ratifying all federal laws and international treaties;¹⁴ approving the appointment and removal of the Prime Minister of the federation;¹⁵ and conducting any other relevant matters provided for in the Constitution or in federal laws.¹⁶

In addition to these extensive powers, the Supreme Council tightly controls the process of appointing the Cabinet. Under the UAE Constitution, the Prime Minister, his deputy and other Ministers are "*chosen from among the citizens of the Federation known for their competence and experience*".¹⁷ In practice, however, the Prime Minister continues to be appointed from the ruling family of Dubai. Other members of the Cabinet are selected on a discretionary basis by the Supreme Council.

The Supreme Council also controls the process of selecting the National Council. Under the UAE constitution, the National Council is comprised of 40 members, who represent different Emirates based on predetermined allocations. Article 69 of the Constitution states that "*[e]ach Emirate shall be free to determine the method of selecting the citizens representing it in the Federal National Council*".

However, prior to 2006, the rulers of the Emirates appointed all 40 members of the Council for two-year terms. The first ever elections took place in 2006 but only 20 of the 40 seats were open for candidates to run for election; the remaining 20 were appointed by the country's rulers in February 2007. It is notable that only individuals on the Electoral College were entitled to vote for the 20 seats. The Electoral College

⁸ UAE Constitution of 18 July 1971, as amended by Constitutional Amendments: No.1 dated 10/02/1972; No.1 dated 6/11/1976; No.2 dated 28/11/1976; No.1 dated 07/11/1981; No.1 dated 15/10/1986; No.1 dated 28/10/1991; No.1 dated 02/12/1996; No.1 dated 10/01/2004; No.1 dated 10/02/2009, preamble. The rulers of the Emirates adopted the 1971 Constitution as a temporary Constitution, but it remains in force.

⁹ *Id.* at Article 45.

¹⁰ *Id.* at Article 46.

¹¹ *Id.* at Article 51.

¹² *Id.* at Article 47(7).

¹³ *Id.* at Article 47(1).

¹⁴ *Id.* at Article 47(2) & 47(4).

¹⁵ *Id.* at Article 47(5).

¹⁶ *Id.* at Article 47(8).

¹⁷ *Id.* at Articles 55 and 56.

was selected by the country's rulers and consisted of 6,689 UAE nationals.¹⁸ The most recent elections took place in 2011. Once again, only 20 of the 40 seats were elected through an expanded Electoral College, which encompassed about 12 per cent of UAE nationals selected by the rulers.

In addition to these severe restrictions on the process of its election, the National Council's competences remain largely limited. Although Article 89 of the Constitution states that the National Council may pass, amend, or reject all draft federal laws, this is subject to Article 110, which allows the President and Supreme Council to override the National Council's decision to amend or reject a bill. The other competences of the National Council are limited to the examination of the budget or the discussion of general matters. However, such discussions can be restricted by the Cabinet where they are deemed "*contrary to the highest interests of the nation*".¹⁹

As highlighted below, under this system, the rights of the UAE citizens to vote, elect their representatives, be elected and take part in the conduct of public affairs have largely been denied.

B. UAE judicial system

The UAE Constitution asserts, "*judges shall be independent and shall not be subject to any authority but the law and their own conscience*".²⁰ It goes on to state that the judges of the Federal Supreme Court, including its President, will "*render justice without fear or favouritism and that they will be loyal to the constitution and the laws of the Union*".²¹

These constitutional provisions are in line with international standards. Article 12 of the Arab Charter for Human Rights (the Arab Charter) requires that, "*All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to bring proceedings before all courts of law.*" Article 13(1) continues: "*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...*" Further, the UN Basic Principles on the Independence of the Judiciary (the UN Basic Principles) provide that the judiciary shall have jurisdiction over all issues of a judicial nature, and shall decide matters before them impartially on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures threats or direct or indirect interference from any quarter or for any reason.²² These principles underscore that "*the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*"²³

However, despite the recognition of judicial independence in the Constitution, the UAE judicial system remains, in practice and under some laws, under the effective control of the Executive.

¹⁸ See Inter Parliamentary Union, United Arab Emirates Majlis Watani Itihadi (Federal National Council), Elections in 2006, available at http://www.ipu.org/parline-e/reports/arc/2333_06.htm

¹⁹ UAE Constitution, *supra* at Article 92.

²⁰ UAE Constitution, *supra* at Article 94.

²¹ UAE Constitution, *supra* at Article 98.

²² UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principles 3 and 2

²³ *Id.*, at Principle 1.

In particular, international standards recognise that the independence of the judiciary is safeguarded by clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.²⁴

In the UAE, however, the Minister of Justice controls the career of judges, including their selection, appointment, promotion, and transfer. Under law No.3 of 1983 on the Federal Judicial Corps, judges are appointed in the federal courts by a federal decree from the Head of State based on the proposal of the Minister of Justice.²⁵ This method of judicial appointment falls short of international standards. The UN Human Rights Committee has recommended that States establish an independent mechanism responsible for the recruitment and disciplining of judges to ensure judicial independence.²⁶ The criteria for appointment must be objective, free from discrimination and based on training and or qualifications in law, ability and integrity.²⁷

Conditions for appointment set out in the same law require candidates to be male, a UAE national, over a minimum age, to have a degree in Islamic Sharia or law, to have a minimum number of years of legal experience and to be "*a person of good conduct and sound reputation*".²⁸ Although the law sets out certain objective selection criteria relating to training, qualifications and integrity the law is discriminatory against women, since only men are eligible to be judges.

The UN Basic Principles provide that "*In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory*".²⁹

As an exception to the nationality requirement, "*nationals of Arab countries*" can be seconded by their government or sign personal contracts to serve as a judge in the UAE "*for a specified period*", if they meet the other conditions mentioned above.³⁰

Guarantees for the independence of judges who are foreign nationals are compromised by the fact that the law does not guarantee a minimum term of office or provide the criteria for the renewal of their contracts. Instead, the Executive enjoys discretionary powers to decide whether to renew or terminate the contracts of foreign judges. This procedure contravenes international standards as it undermines the security of tenure of foreign judges and impairs confidence in their independence. Under international standards, "*Judges, whether appointed or elected, shall have guaranteed tenure, until a mandatory retirement age or the expiry of their term of office, where such exists*".³¹

²⁴ Human Rights Committee General Comment 32, *supra*, at para 19; See UN Basic Principles on the Independence of the Judiciary, *supra*.

²⁵ Federal Law No.3 of 1983, *supra* at Article 21.

²⁶ Concluding Observations of the Human Rights Committee on the second periodic report of the Congo, CCPR/C/79/Add.118, 3/27/2000, para. 14.

²⁷ UN Basic Principles on the Independence of the Judiciary, *supra*, at Principle 10; Human Rights Committee General Comment 32 on ICCPR Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19

²⁸ Federal Law No.3 of 1983, *supra* at Article 18. The precise age and experience requirements depend on whether the judge is being appointed to a Court of First Instance, Appeal Court or the Supreme Court.

²⁹ UN Basic Principles on the Independence of the Judiciary, *supra* at Principle 10.

³⁰ Federal Law No.3 of 1983, *supra* at Article 19.

³¹ UN Basic Principles on the Independence of the Judiciary, *supra*, at Principle 12.

In addition to the role of the Executive in selecting and appointing judges, and with regard to foreign nationals making decisions about their tenure in office, the promotion of judges within the UAE federal court system is also by "resolution" of the Minister of Justice after receiving the opinion of the Supreme Council for the Federal Judiciary (SCFJ).³² The Minister of Justice may also issue a "resolution" for the transfer or secondment of judges to government bodies, public authorities, public institutions or companies and to foreign governments or international bodies, after receiving the opinion of the SCFJ and the consent of the judge.³³ Transfers from one court to another take place in the same way but do not require the consent of the judge being transferred.³⁴

Furthermore, the Minister of Justice exercises substantial powers regarding the evaluation of the performance of judges and the discipline of judges. Disciplinary proceedings against judges are initiated following an investigation ordered by the Minister of Justice. After this investigation, the Public Prosecutor, if requested to do so by the Minister of Justice, refers the case to the disciplinary board composed of the President of the court and a number of senior judges.³⁵

While the law provides for the SCFJ to be consulted on various issues relating to the career of judges, its opinions are not binding on the government. Indeed, the competences of the SCFJ, under Article 6 of law No.3 of 1983, are limited to expressing an opinion on issues relating to the judiciary and the public prosecution; studying and proposing legislation relating to the judiciary; expressing an opinion on the promotion, secondment and delegation of judges and members of the public prosecution, as provided for by the law; and other responsibilities delegated to it by the law.

The SCFJ is composed of seven members in total, including three members of the Executive (the Minister of Justice, the Under-Secretary of Justice and the Director of the Judicial Inspection Department), the Prosecutor General, who is under the "supervision and control" of the Minister of Justice,³⁶ the President of the Supreme Court, and the two longest serving Presidents of the Federal Courts of Appeal, who are appointed or promoted by a decision of the Executive.³⁷

It is the Minister of Justice who presides over the SCFJ and has the casting vote.³⁸ The Minister must be present, together with at least four other members at the meeting of the SCFJ in order for the meeting to be quorate and decisions taken at it to be valid.³⁹ Further, the SCFJ is physically located in the Ministry, unless the Minister directs otherwise. The Director of the Technical Department at the Ministry of Justice heads the secretariat of the SCFJ.⁴⁰

Given its composition and the control exercised by the Executive over its administration and functioning, the SCFJ cannot be considered as an independent institution that can effectively protect and ensure the independence of the judiciary.

³² Federal Law No.3 of 1983, *supra* at Article 22.

³³ *Id.* at Article 25.

³⁴ *Id.* at Article 27. This applies to judges of the Courts of First Instance or Appeal.

³⁵ *Id.* at Article 41. Federal Law No.10 of 1973, Concerning the Supreme Federal Court, Issued 25 July 1973 at Article 23 provides for two of the most senior judges.

³⁶ *Id.* at Article 57.

³⁷ *Id.* at Article 2.

³⁸ *Id.* at Articles 2 and 4.

³⁹ *Id.* at Article 4.

⁴⁰ *Id.* at Articles 4 and 5.

The Executive's control over the judiciary extends also to the office of the Public Prosecutor, which is considered part of the judiciary under UAE law.⁴¹ Article 57 of Law No.3 of 1983 explicitly states: "*The Minister of Justice, Islamic Affairs and Endowments shall supervise and control the Public Prosecution and its members*".⁴² By virtue of Law No.3 of 1983, the Prosecutor General, Principal Advocate-General, Prosecuting Attorneys, Senior Assistant State Counsel, Assistant State Counsels are appointed by a federal decree issued by the Head of State upon the proposal of the Minister of Justice.⁴³ Promotion within the prosecution service is effected by a "resolution" of the Minister of Justice upon the proposal of the Prosecutor General, after obtaining the opinion of the SCFJ. The disciplining of prosecutors and the evaluation of their performance is carried out according to the same procedures as provided for judges.⁴⁴

This framework allows the Executive to exercise effective control over the career of judges and the judiciary as a whole, including the office of the public prosecutor. It is inconsistent with international standards on the independence of the judiciary.

The Human Rights Committee has recommended on numerous occasions that States adopt legislation and measures to ensure that there is a clear demarcation between the competences of the executive and judicial branches of government. Such laws and measures aim to secure and safeguard the separation of powers. With respect to the judiciary, measures are required to safeguard its independence, ultimately so that the Executive cannot interfere in matters for which the judiciary is responsible.⁴⁵

C. Human rights in the UAE

The UAE authorities made several commitments to protect and promote human rights during the UN Human Rights Council's Universal Periodic Review of the UAE in 2008. For example, the UAE Ministry of Interior declared that it "*places human rights at the top of its priorities, based on its strategy of focusing on justice, equality, probity and the protection of human rights as part of its vision and goals as a pathway to security and stability and a greater sense of safety in a multi-ethnic society*".⁴⁶ In addition, the UAE authorities declared their support for a call "*to take concrete measures to limit the number and extent of restrictions on the right to freedom of expression and the freedom of the press*".⁴⁷

Unfortunately, instead of acting in a manner consistent with these commitments, the UAE authorities have continued to deny individuals who are subject to their jurisdiction the enjoyment and legitimate exercise of human rights. As the UAE 94 case demonstrates, the UAE authorities have also continued their crackdown on reform advocates calling for the realization of human rights.

⁴¹ Federal Law No.35 of 1992, Criminal Code of Procedure, as amended by Federal Law No.29/2005 and Federal Law No.35/2006, Article 5.

⁴² *Id.* at Article 57.

⁴³ Federal Law No.3 of 1983, *supra* at Article 21 and 61.

⁴⁴ *Id.* at Article 72, which refers to Articles 41 to 54.

⁴⁵ Concluding Observations of the Human Rights Committee on Romania, CCPR/C/79/Add.111, 28 July 1999, para.10. See also the Committee's Concluding Observations on Peru, CCPR/CO/70/PER, 15 November 2000, para.10.

⁴⁶ National report submitted in accordance with paragraph 15(A) of the annex to human rights council resolution 5/1, 16 September 2008, A/HRC/WG.6/3/ARE/1 para. 4.3, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session3/AE/A_HRC_WG6_3_ARE_1_United_Arab_Emirates_E.pdf

⁴⁷ Report of the Working Group on the Universal Periodic Review- United Arab Emirates, 12 January 2009, A/HRC/10/75, para. 91 (17), http://lib.ohchr.org/HRBodies/UPR/Documents/Session3/AE/A_HRC_10_75_United_Arab_Emirates_E.pdf

For example, under the UAE's constitutional framework described above, the rights of UAE citizens to vote, to elect their representatives, to be elected to public office, to freely determine the form of their constitutional and political systems and to actively take part in the conduct of public affairs are largely denied.

These rights are recognised and protected by various international human rights instruments. Article 21 of the Universal Declaration of Human Rights, recognises the right of each individual to "take part in the government of his country, directly or through freely chosen representatives" and to "equal access to public service in his country".⁴⁸ It also recognises that "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".⁴⁹ These rights are similarly reflected at Article 24 of the Arab Charter and Article 25 of the International Covenant on Civil and Political Rights (ICCPR). The latter guarantees the right of every citizen: "(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."⁵⁰

In its General Comment on Article 25 of the ICCPR, the UN Human Rights Committee affirmed that: "the conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws."⁵¹ The Committee went on to recognize that: "citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves", and that: "this participation is supported by ensuring freedom of expression, assembly and association."⁵²

It was in pursuance of these rights and freedoms that, from 2011 onwards, political activists and reform advocates in the UAE increased their calls for political reforms and participation. One such call came in March 2011 when 132 individuals signed a petition addressed to the UAE authorities, which was circulated widely. The petition requested that the National Council be fully elected by all UAE citizens and granted full legislative powers.⁵³

Many of the individuals who signed the petition were subsequently stripped of their citizenship and/or deported or prosecuted, including in the UAE 5 case and the UAE 94 case.⁵⁴

⁴⁸ Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948.

⁴⁹ *Id.*

⁵⁰ International Covenant on Civil and Political Rights, New York, 16 December 1966, Article 25; Article 24 of the Arab Charter states: "Every citizen has the right:...(2) To take part in the conduct of public affairs, directly or through freely chosen representatives. (3) To stand for election or choose his representatives in free and impartial elections, in conditions of equality among all citizens that guarantee the free expression of his will..."

⁵¹ Human Rights Committee General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 7/12/1996, CCPR/C/21/Rev.1/Add.7, para.5

⁵² *Id.*, para.8

⁵³ The Petition, 3 March 2011, available at <http://www.ipetitions.com/petition/uaepetition71/>

⁵⁴ In December 2011, six individuals had their citizenship revoked, allegedly on security grounds, under the 1972 Law on Nationality and Passports. They were detained and

The ICJ is concerned that these arrests and prosecutions, have been brought with the aim of and used as a means to silence those who call for political and constitutional reforms.

The ICJ is also concerned that, in this context, the UAE authorities have adopted and enforced various repressive laws that undermine the enjoyment and exercise of human rights, including the rights to freedom of expression, association and assembly.

For example, in November 2012, the UAE issued Decree 5 of 2012 on Cyber Crimes (the Cyber Crime Law), which criminalizes a broad range of acts and conduct, including: “*the publishing of information, news or cartoon drawings or any pictures which may endanger the national security and the higher interests of the State or afflicts its public order*”; publishing information with sarcastic intent or that damages “*the reputation, prestige or stature of the State or any of its institutions or its president, vice-president, any rulers of the Emirates, their crown princes, or the deputy rulers of the Emirates, the State flag, the national peace, its logo, national anthem or any of its symbols*”; publishing information that aims or calls to overthrow, “*change the ruling system of the State, or seize it or to disrupt the provisions of the constitution or the laws applicable in the country or to oppose the basic principles which constitute the foundations of the ruling system of the state*”; and the publishing of information that may damage national unity or social peace.⁵⁵

Prosecutions under this law have already taken place.⁵⁶ The ICJ considers that the sweeping provisions of this law are inconsistent with the right of individuals to freedom of expression, including the right to seek, receive and impart information, and the right of citizens to participate in public affairs. In this regard, the Human Rights Committee has noted that: “*the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.*”⁵⁷ The Committee went on to recognize that: “*all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.*”⁵⁸

Because of its broadly worded provisions, the law also contravenes the principle of legality. (This principle is elaborated on in the following section.)

subsequently prosecuted in the UAE 94 case. In July 2012, one of the UAE 5, Ahmed Abdul Khaleq, who was born in the UAE but was without citizenship, was re-arrested following his royal pardon, detained, forced to apply for Comoros citizenship and later deported from the UAE to Thailand, despite having lived in the UAE all his life and not having Thai citizenship.

⁵⁵ Federal Decree Law No. 5 of 2012 on Combating Cyber Crimes.

⁵⁶ For example, as detailed further below, Abdullah Al Hadidi, the son of one of the accused in the UAE 94 case, was prosecuted, convicted and sentenced to 10 months imprisonment under this law. In addition, Muhamed Al-Zumer, arrested on 5 December 2012, has since been charged under Articles 28 and 29 of the Cyber Crime Law and is currently in detention awaiting trial.

⁵⁷ Human Rights Committee General Comment No. 34 on ICCPR Article 19: Freedoms of Opinion and Expression, UN Doc CCPR/C/GC/34 (2011), 7/12/1996, CCPR/C/21/Rev.1/Add.7, para.38

⁵⁸ *Id.*

II. Charges against the UAE 94

The charges against the 94 accused were primarily based on Article 180 of the UAE Criminal Code (CC), which punishes by imprisonment: "*whoever established, founded, organized or administered an association, organization, formation, group, gang or a branch to one of these regardless of its denomination or form, that aims at calling to overthrow or take over the system of government, disrupting the application of the constitution or law provisions, fight the fundamental principles on which is based the governing system in the State, prevent one of the State organizations or one of the public authorities to perform their duties, violate personal freedom of citizens or any other public liberties or rights protected by the constitution or the laws, or jeopardize national unity or social peace.*"⁵⁹

The ICJ considers that the criminal offences prescribed by Article 180 of the CC are not sufficiently precise and free of ambiguity.

Owing to its broad provisions, this article is inconsistent with the principles of the legality of criminal offences (*nullem crimen sine lege*) and legal certainty. The principle of legality is a cornerstone of contemporary criminal law, as well as a principle of international human rights law. It requires States to define criminal offences clearly and precisely within the law.⁶⁰ It is satisfied when an individual can know from the wording of the legal provision, as interpreted by the courts, what acts and/or omissions would make him or her criminally liable.⁶¹ Given the importance of this principle, guaranteed under both the Arab Charter (Article 15) and the ICCPR (Article 15), it is one of the rights which is expressly characterised as non-derogable under both treaties.⁶² Thus it applies and must be respected at all times, including during states of emergency.

In addition, due to its sweeping scope, Article 180 has the potential to jeopardize the enjoyment and legitimate exercise of the rights to freedom of expression, association, and assembly, all of which are guaranteed by the Arab Charter (Articles 24 and 32), as well as other international instruments.⁶³ For example, since Article 180 prohibits the founding or administering of organizations that aim at "*disrupting the application of the constitution or law provisions,*" there is a risk that people who have founded organizations that aim at making peaceful calls for the reform of the Constitution or the law, may be subject to prosecution and, if convicted, imprisoned.

These rights are also enshrined in the UAE Constitution. Article 30 of the UAE Constitution provides "*Freedom of opinion and expressing it verbally or in writing or by other means shall be guaranteed within the limits of the law*". Further, Article 33 of

⁵⁹ Official translation as set out on the UAE Ministry of Justice Legislations Portal, available at <http://www.elaws.gov.ae/EnLegislations.aspx> last accessed 7 August 2013.

⁶⁰ Under international standards, definitions of criminal offences that are vague, ambiguous and imprecise contravene international human rights law and the "*general conditions prescribed by international law*". Commission on Human Rights, Specific Human Rights Issues: New Priorities, In Particular Terrorism, E/CN.4/Sub.2/2003/WP.1, 8 August 2003, para. 67.

⁶¹ See, for example, European Court of Human Rights, Case of *Vyerentsov v. Ukraine*, 11 April 2013, para. 41 Guideline B, where the Court, stressing the importance of these principles, pointed out the requirement for the law to "*be sufficiently precise to enable an individual to assess whether or not his or her conduct would be in breach of the law, and to foresee what the consequences of such breaches would likely be*".

⁶² According to Article 4(2) of the Arab Charter, and under Article 4(2) of the ICCPR; See, Human Rights Committee, General Comment 29: States of Emergency (article 4) 8/31/2001, CCPR/C/21/Rev.1/Add.11, at para.7.

⁶³ ICCPR, *supra* at Article 19, 21 and 22, and UDHR, *supra* at Articles 19 and 20. See also the American Convention on Human Rights "Pact of San Jose, Costa Rica", Articles 13, 15 and 16; African (Banjul) Charter on Human and Peoples' Rights, Articles 9, 10 and 11; and European Convention on Human Rights, Articles 10 and 11.

the UAE Constitution states, "*Freedom of assembly and association shall be guaranteed within the limits of the law*".

However, the UAE legal framework, including the Constitution, does not define the scope of the rights to freedom of association, assembly and expression nor does it limit in any way the restrictions that may be imposed on them or that affect their exercise in practice.

While international law permits certain restrictions on these rights, such restrictions must not extinguish the rights themselves. Furthermore, in accordance with international human rights law, any restrictions of the rights to freedom of expression or association must be: prescribed by law; and both strictly necessary in a democratic society and proportionate for the protection of a set of narrowly prescribed enumerated interests.⁶⁴

In the UAE 94 case, the prosecution has argued that the accused "*established, founded, organized and administered the association Da'wat Al Islah with the aim of challenging the basic principles upon which the government of the State is based (..)*."

However, the ICJ notes that *Da'wat Al Islah* has legally operated in the UAE since 1974. There was therefore nothing to suggest that membership of the organization alone could itself breach Article 180 of the CC or any other provisions of UAE law.

In addition, based on the information available to the ICJ, it appears that throughout the proceedings against the UAE 94, the prosecution failed to provide credible evidence that the association had engaged in any acts that would constitute a criminal offence that was recognizable under international law.

Instead, the ICJ is deeply concerned that the 94 accused were prosecuted, and 69 of them were convicted and sentenced to terms of imprisonment, for the legitimate exercise of their rights to freedom of association and assembly, including the right to freely form and join associations with others, and the right to freedom of expression, including the right to seek, receive and impart information and ideas, such as ideas about the conduct of public affairs including the exercise and organization of political power.

In sum, the ICJ considers that both the law on which the charges against the UAE 94 are based and its application in this case violate international law, because they criminalize the legitimate exercise of the rights to freedom of association, assembly and expression.⁶⁵

Under international human rights law, an individual may only be deprived of their liberty on grounds that are prescribed by law, which itself must be consistent with international law.⁶⁶ The ICJ considers therefore that the arrest of those charged under Article 180 of the CC violated their rights to liberty. Furthermore their prosecution on the basis of this law violated their rights to freedom of association, assembly and

⁶⁴ See, Arab Charter, *supra* at, Articles 24(7) and 32(2). See also Human Rights Committee, General Comment No.2932, *supra* at, para.34.

⁶⁵ See, for example, Human Rights Committee General Comment 34 on ICCPR Article 19: Freedoms of Opinion and Expression, UN Doc CCPR/C/GC/34 (2011), paras 23 and 38; Human Rights Committee General Comment 25; See also, Concluding Observations of the Human Rights Committee: Iceland, CCPR/CP/83/ISL, 25 April 2005, para. 10

⁶⁶ Article 14(2) of the Arab Charter; Article 9(1) of the ICCPR; Article 5(1) of the European Convention on Human Rights; See Medvedyev and Others v France (3394/03), Grand Chamber of the European Court of Human Rights (2010) para 79-80; A v Australia, Human Rights Committee, UN Doc. CCPR/C/59/D/560/1993 (1997) para 9.5

belief. In addition, as described below the ICJ considers that in the course of the proceedings against them, a number of other rights of the accused were violated.

III. The Right to Liberty and Rights on Arrest and Detention in the UAE 94 Case

A. Rights on arrest

Arrest according to procedures proscribed by law

In addition to requiring that arrests only occur on grounds prescribed by law, under international law, including Article 14(2) of the Arab Charter, to be lawful, arrests must be carried out in accordance with procedures prescribed by law.

Article 101 of the UAE Criminal Code of Procedure (CCP) prescribes the procedure for arrests. It states that, *"The member of the public prosecution shall, according to circumstances, issue a subpoena or a writ of *capias* to the accused. Each of these instruments must include the accused name, surname, profession, nationality, residence, the charge imputed to him, date of the writ, place and time of appearance, name of the public prosecution member, his signature, the official seal and the writ of *capias* must, in addition, include assigning to a member of the public authority the task of arresting the accused and bringing him before the public prosecution member in case he refuses to willfully and instantly appear. The said writs shall be notified to the accused by the members of the public authority and he shall be delivered a copy of this notification."*

According to information available to the ICJ however, many of the UAE 94, who were arrested between 26 March 2012 and the first hearing on 4 March 2013, were not presented with an official warrant of arrest. The ICJ therefore is concerned that those of the UAE 94 who were arrested were deprived of their liberty in violation of the procedure established by UAE law, rendering their arrest unlawful.

Right to be informed of the reasons for arrest and promptly notified of the charges

Under international law and standards, individuals must be informed at the time of their arrest of the reasons for the arrest and must be promptly notified of the charges against them. They must also be notified of the right to legal counsel, to be granted prompt access to legal counsel, including during interrogation,⁶⁷ and to notify family members, or have them notified, of their arrest and to have access to them.

These guarantees are necessary to safeguard against arbitrary detention, and enable an arrested person to take immediate steps to secure his or her release if he or she believes that the reasons given are invalid or unfounded.⁶⁸ They are also necessary to safeguard against other human rights violations, including secret detention, enforced disappearance and torture and other ill-treatment.

A range of international instruments enshrine the right of the arrested person to be informed upon arrest of the reasons for the arrest and to be promptly informed of the

⁶⁷ See, Human Rights Committee, General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, para. 34; See also, *"Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention."* UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 7.

⁶⁸ Human Rights Committee, Communication 43/1979, *Drescher Caldas v. Uruguay*, para. 13.2

charges against him/her. For example, the Arab Charter requires States parties, including the UAE, to guarantee, that “*anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him.*”⁶⁹

With regard to the obligation to inform a person promptly of any charges against them, the Human Rights Committee, when interpreting equivalent provisions under the ICCPR, has explained that, “*The right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such.*”⁷⁰

In the UAE, the CCP requires the accused to be brought before the public prosecutor within 48 hours after “*apprehension and arraignment*”, who must, among other things, “*inform the accused of the charge imputed to him*”.⁷¹

In the UAE 94 case, according to the information available to the ICJ, most of the detainees were not informed of the reasons for their arrest upon their arrest and/or the formal charges against them during interrogation by the State Security and prosecution services. Although some of the individuals arrested were told generally that they stood accused of establishing an organization that sought to overthrow the government, many of them were informed of the formal charges for the first time during the first trial hearing, on 4 March 2013.

The ICJ is therefore concerned that, the rights of individuals arrested and charged in the UAE 94 case to be informed of the reasons for their arrest upon arrest and to be promptly of the charges against them, as guaranteed under the law of the UAE and international standards, were violated.

B. Right to liberty

The ICJ is concerned by information indicating that most of the UAE 94 were detained in unofficial and secret places of detention, and held incommunicado, that is without contact with their families, without access to their lawyers and without access to a court for months at a time. During this period of time, attempts by their relatives and lawyers to determine their whereabouts and welfare were unanswered and/or unsuccessful. Their prolonged incommunicado detention was reportedly exacerbated by the fact that most reported that they were held in solitary confinement. These conditions, in the ICJ’s view, violated the prohibition of arbitrary detention, the prohibition of torture and other cruel inhuman or degrading treatment, and the prohibition of enforced disappearance. In addition to themselves amounting to arbitrary detention and torture or other ill-treatment, these conditions facilitated the torture and other ill-treatment to which some of the detainees were reportedly subjected. They also violated the rights of the detainees to be brought promptly before a judge, to counsel, and to adequate time and facilities to prepare their defence.

The ICJ considers that some of these serious violations of the detainees’ rights resulted from the implementation of UAE laws, others, at a minimum, were facilitated by such laws.

⁶⁹ Arab Charter, *supra*, Article 14(2); See also, Article 9(2) of the ICCPR and Principles 10 and 16 of the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 9 December 1998, adopted by the UN General Assembly resolution 43/173 of 9 December 1988.

⁷⁰ Human Rights Committee, General Comment No. 32, *supra* at para. 31. See also Human Rights Committee, General Comment No.13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art 14), para.8.

⁷¹ Federal Law No. 35 of 1992, *supra* at Articles 46, 47 and 99.

Right to be brought promptly before a judge or judicial authority and presumption of release

For example, while Articles 26 and 28 of the Constitution guarantee both the right to liberty and the presumption of innocence, under UAE law, there is a presumption that an individual arrested on a criminal charge will be held in detention, and there is no requirement that a detainee be brought promptly before a judge and no *habeas corpus*-type procedure. In particular:

The CCP provides that upon an individual's arrest, apprehension and arraignment the judicial police officer must "*hear the deposition of the accused immediately*" and, "*if he [the arrested individual] does not submit proof of his innocence, he shall be sent, within 48 hours to the competent Public Prosecution*".⁷²

Following the individual's transfer, "*the public prosecution must immediately interrogate the arrested person or, if this be impossible, he should be put in one of the specialized places of detention until his interrogation*."⁷³ After the interrogation of the accused, the Public Prosecutor may "*order his provisional detention if there is enough evidence and if the act constitutes a felony or a misdemeanour*".⁷⁴

Furthermore, under the CCP, the initial detention is for a period of 7 days, renewable for another period of up to 14 days.

It is only at the end of this period, that the file must be submitted to a judge of the competent criminal court, who can order a further 30 days of detention.⁷⁵ There appears to be no limit within the law as to how many times a judge may renew a detention order.

While a detainee may submit a complaint against an order renewing the detention, there appears to be no timeframe prescribed by law, within which a court must consider a detainee's complaint against the renewal of a detention order.⁷⁶

These laws are inconsistent with the UAE's obligations under international human rights law, to respect and protect the right to liberty and the presumption of innocence of those arrested and detained on a criminal charge.⁷⁷

Respect for these rights under international human rights law, including Article 14(5) of the Arab Charter, requires that: "*Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule*."⁷⁸ According to international jurisprudence interpreting parallel treaty provisions, with few exceptions, delays of more than 48 hours before an arrested individual is brought before a judge or judicial authority are considered to

⁷² Federal Law No.35 of 1992, *supra* at Article 47.

⁷³ *Id.* at Article 104.

⁷⁴ *Id.* at Article 106.

⁷⁵ *Id.* at Article 110.

⁷⁶ *Id.* at Article 110.

⁷⁷ The right to liberty is set out in Article 14(1), and the presumption of innocence is enshrined in Article 16 of the Arab Charter, *supra*.

⁷⁸ Arab Charter, *supra* at Article 14(5).

exceed the promptness requirement.⁷⁹ Furthermore, so as to ensure the requisite independence and impartiality, the judge or judicial authority must be independent from the parties and the executive, and must not have authority to intervene subsequently in the criminal proceedings on behalf of the prosecuting authority.⁸⁰

In addition, in order to meet international standards, if a detainee is brought before a judicial officer other than a judge, the official must be authorised to exercise judicial power; be objective, impartial and independent of the executive and the parties; have the authority to review the lawfulness of the arrest or detention and the reasonableness of the suspicion against the individual; and be empowered to release the individual if the detention or arrest is unlawful.⁸¹

It is notable that under international standards and jurisprudence, public prosecutors cannot be considered as officers authorized to exercise judicial power. The Human Rights Committee considered that "*it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with*". The Committee argued that it was "*not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9(3)*".⁸²

Finally in cases in which it is determined that the initial detention was lawful, the judge must determine whether or not the individual should be released pending investigation and trial. As set out in international standards, respect for the right to liberty means there is no presumption that a person arrested on a criminal charge will be detained pre-trial. For example, Article 9(3) of the ICCPR states: "*It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.*" Article 14(5) of the Arab Charter incorporates this principle. Respect for the presumption of liberty means that it is only in cases in which the prosecution has proved on the basis of objective evidence in the particular case that there is reasonable suspicion that the individual has committed an offence which is punishable by imprisonment,⁸³ and also that the individual's detention is necessary to prevent the individual from absconding; committing a serious offence; interfering with the investigation or the course of justice; or posing a serious threat to public order, and that there is no possibility that alternative measures would address such concerns, that detention pending investigation or pre-trial may be ordered.⁸⁴

⁷⁹ Human Rights Committee General Comment 8: Right to Liberty and Security of the Person (article 9 of the ICPR) (1982), para 2, Human Rights Committee Concluding Observations: El Salvador, UN Doc. CCPR/C/SLV/CO/6 (2010) para.14.

⁸⁰ *Assenov and Others v Bulgaria*, (24760/94) European Court of Human Rights (1998) para.146

⁸¹ For example, *Medvedyev v France* (3394/03), European Court of Human Rights Grand Chamber (2010) §§124-125;

⁸² Human Rights Committee, *Vladimir Kulomin v. Hungary*. Communication No. 521/1992** 22 March 1996. CCPR/C/50/D/521/1992*, paragraph 11.3

⁸³ *Barreto Leiva v Venezuela*, Inter-American Court of Human Rights (2009), para 122

⁸⁴ Rules 6-8 of the Council of Europe Rules on the Use of Remand in Custody, adopted by the Committee of Ministers of the Council of Europe on 27 September 2006, Annexed to Recommendation Rec(2006)13; Human Rights Committee Communication No. 458/1991, *A. W. Mukong v. Cameroon*, at para.9.8; Communication 1502/2006, *Marinich v. Belarus*, para. 10.4; Communication 1940/2010, *Eligio Cedeño v. Venezuela*, para. 7.10; 1547/2007, *Torobekov v. Kyrgyzstan*, para. 6.3; Communicatin 1887/2009, *Peirano Basso v. Uruguay*, para. 10.2; See also Article 5(1) of the European Convention on Human Rights. *Van der Tang v Spain* (19382/92), European Court of Human Rights (1995), para 55; *Patsuria v Georgia* (30779/04), European Court of Human Rights (2007) §65 -77; *Bronstein and others v Argentina* (11.205 et al) Inter-American Commission on Human Rights, (1997) paras. 25-37.

The fact that UAE law appears to permit significant delays that well exceed 48 hours before there is judicial review of the legality of detention is inconsistent with the promptness requirement of Article 14(5) of the Arab Charter.

In addition, the fact that initial decisions about detention are made by the prosecutor rather than a judge or judicial officer also appears inconsistent with the requirements of Article 14(5). The procedure under UAE law, in which the judge may review the case and order detention based on his or her review of the case file rather than requiring the detained individual to be brought before a judge for a hearing, is inconsistent with Article 14(5) of the Arab Charter. This gap in the law may also facilitate torture and other ill-treatment. As the Human Rights Committee has explained, the right to be brought before a judge or other judicial officer "*is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control*".⁸⁵ Further, "*The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody.*".⁸⁶

The ICJ also considers that the apparent presumption of detention rather than a presumption of release within UAE law is inconsistent with Article 14(5) of the Arab Charter. This presumption is written into the law at the stage of interview by the judicial police, which appears to require that a person arrested on suspicion of a criminal charge continue to be detained "*unless he proves his innocence*" during his deposition by the judicial police. This provision reverses the burden of proof in a manner that is inconsistent with the right to liberty and the presumption of innocence. So too does the fact that, under the law, the Public Prosecutor may order an individual to be provisionally detained *solely* if the prosecutor considers that there is enough evidence and if the act constitutes a felony or a misdemeanour.⁸⁷ Such a decision, based on a determination of sufficiency of evidence and the classification of the alleged offence as a misdemeanour or a felony, rather than on objective proof of a particular risk in an individual case, is inconsistent with the right to liberty.

Prohibition of Secret Detention, Detention in unofficial location, and Prolonged Incommunicado Detention

International law requires that detainees be held in officially recognized places of detention.⁸⁸ It also requires states to ensure that no one is held secretly in detention, whether in officially recognised detention facilities or elsewhere.⁸⁹

⁸⁵ Human Rights Committee Communication 1914/2009, *Musaev v. Uzbekistan*, para. 9.3.

⁸⁶ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra* at principle 37.

⁸⁷ *Id.* at Article 106.

⁸⁸ Article 17(2)(c) of the Convention on Enforced Disappearance, adopted by the General Assembly in A/RES/61/177 on 20 December 2006, Article 10(1) of the Declaration on the Protection of All Persons from Enforced Disappearances, U.N. Doc. A/47/49 (1992), adopted by General Assembly resolution 47/133 of 18 December 1992; See also, Section M(6)(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights on 24 October 2011.

⁸⁹ Article 17(1) of the Convention on Enforced Disappearance, *supra*; Article 23 of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (known as the Robben Island Guidelines); See also, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by Its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, 20 May 2010 (hereafter the UN mechanisms Joint Study on Secret Detention), UN Doc. A/HRC/13/42 (2010) §§17-35;

As pointed out by the Human Rights Committee, in order “to guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends”.⁹⁰ Furthermore, the requirement to inform or allow the individual to inform a family member or other third person of their arrest or detention is a safeguard against secret and arbitrary detention and enforced disappearance. International law guarantees access of detained persons to one’s family and one’s lawyer, as well as the right to be brought promptly before a judge, and safeguards against secret and/or incommunicado detention and enforced disappearance.

Allegations that most of the accused in the UAE 94 case were held in secret and unofficial detention from the time of their arrest until the first hearing before the trial court on 4 March 2013 appears to be borne out by the fact that, during the 4 March session of the trial, Presiding Judge Falah Al Hajiri ordered that the accused be transferred to legal, known places of detention.

According to the information available to the ICJ, the UAE authorities did not disclose the detainees’ place of detention and failed to provide information about their fate. In addition, many were reportedly held in prolonged incommunicado detention following their arrest. In particular, for more than two months after their arrest, most of the detainees were prohibited from having any contact with the outside world, including family members and legal counsel.

For example, Ahmed Ghaith Al Suweidi was arrested in March 2012. It is alleged that his whereabouts were unknown for over five months. Rashed Al Roken, who was arrested in July 2012, was reportedly held in *incommunicado* detention for almost five months.

Family members of some of the detainees described in meetings with the ICJ their distress about the lack of information of their loved one’s whereabouts and their limited contact with the detainees, including during the initial period after arrest when most were unaware of the detainees’ whereabouts.

There is no question that holding the detainees in secret detention violated Article 2 of the UAE CCP, which requires that individuals be detained or imprisoned only “*in the places specially reserved for each*”. It also violated a range of their rights under international law. In particular, it removed them from the framework and protection of the law, in violation of Article 22 of the Arab Charter; it violated their rights to liberty and the prohibitions of arbitrary detention and enforced disappearance, enshrined and inherent in Article 14 of the Arab Charter; and it violated their rights to be free from torture or other cruel, inhuman or degrading treatment, guaranteed under Article 8 of the Arab Charter.⁹¹

The prolonged incommunicado detention of the accused was inconsistent with the UAE’s obligations under international law, including the prohibition of torture and other ill-treatment enshrined in the Arab Charter and the Convention against Torture

⁹⁰ Human Rights Committee, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 3/10/1992, para. 11.

⁹¹ See also, Joint Study on Secret Detention, *supra* §§ 8-10; 17-43. In particular see para.17: “*Secret detention is irreconcilable with international human rights law and international humanitarian law. It amounts to a manifold human rights violation that cannot be justified under any circumstances, including during states of emergency*” and para.28: “*Every instance of secret detention also amounts to a case of enforced disappearance*”; and see, Report of the Working Group on Arbitrary Detention, 19 January 2011, A/HRC/16/47, para. 54.

and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).⁹² The Committee Against Torture and the UN Working Group on Arbitrary Detention have clarified that incommunicado detention facilitates the commission of acts of torture and ill-treatment.⁹³ The UN Working Group on Arbitrary Detention has also stated that prolonged incommunicado detention may in itself constitute such treatment.⁹⁴

The ICJ also considers that failure to provide information about the whereabouts of the detainees to members of their families and denying their rights to have access to family members for a prolonged period of time also violated the rights of the family members of the detainees.

Furthermore holding the accused in secret detention, and also holding them in incommunicado detention violated fair trial guarantees, including among others their rights to counsel, and to adequate time and facilities to prepare a defence.

In addition to being subjected to secret and prolonged incommunicado detention, the ICJ is concerned about reports that most of the detainees in the UAE 94 case were also held in prolonged solitary confinement, which in some cases lasted more than 236 days.

The Committee Against Torture has pointed to *"the harmful physical and mental effects of prolonged solitary confinement and has expressed concern about its use, including as a preventive measure during pre-trial detention, as well as a disciplinary measure. The Committee has recommended that the use of solitary confinement be abolished, particularly during pretrial detention, or at least that it should be strictly and specifically regulated by law (maximum duration, etc.) and exercised under judicial supervision, and used only in exceptional circumstances, such as when the safety of persons or property is involved (A/63/175, para. 80)."*⁹⁵

The Special Rapporteur on Torture has clarified that when used intentionally to obtain information or a confession, the use of solitary confinement violates the prohibition against torture and other ill-treatment. He has therefore called for an end to its use in pre-trial detention, since it creates psychological pressure that can induce detainees to make incriminating statements.⁹⁶

The ICJ is concerned that practices of secret and prolonged incommunicado detention and solitary confinement have been tacitly encouraged by various provisions of UAE law, which permit the public prosecution to deny or restrict an arrested person's right to contact or have access to family members and legal counsel in the interest of the investigation.

Article 109 of the CCP states, *"should the investigation procedures so necessitate, the public prosecution member shall issue an order forbidding any contact between the provisionally detained accused and the other detained and any visits by any person whatsoever, without prejudice to the right of the accused to permanently contact in private his attorney"*.⁹⁷

⁹² Arab Charter, *supra* at Article 8; and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 1, 2 and 16

⁹³ Committee against Torture, Communication No. 219/2002, 12 May 2003, CAT/C/30/D/219/2002, para. 6.3; and Report of the Working Group on Arbitrary Detention, *supra* at para. 54.

⁹⁴ *Id.*

⁹⁵ UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment, Note by the Secretary-General, 5 August 2011, A/66/268, para. 31.

⁹⁶ *Id.* at paras 73 and 85.

⁹⁷ Federal Law No.35 of 1992, *supra* at Article 109.

In addition, Article 100 allows the public prosecutor to deny an individual access to his or her attorney during the investigation, in the interest of the investigation.⁹⁸

The ICJ considers that these provisions are inconsistent with the UAE's obligations under international human rights law, including Article 16 (2)-(4) of the Arab Charter that guarantee the rights of everyone charged with a criminal offence to counsel during the course of the investigation and trial.⁹⁹

The ICJ therefore considers that both the UAE legal framework, upon which the arrest and detention was based, and its application in the UAE 94 case violated the rights of the detainees to liberty and security of person, to access to their family and their right to family and private life, to access to their lawyers, and to adequate time and facilities to prepare their defence.

The right to challenge the legality of detention

In attempting to ensure the effective protection of these rights, defence lawyers reportedly submitted demands and complaints on behalf of the detainees to the public prosecutor. These petitions requested that the detainees be: released on bail; granted access to family members; granted access to their lawyer, including during interrogations; and referred to forensic medical professionals for examination. They also called on the authorities to provide information on the places where individuals were being detained.

According to information available to the ICJ, the prosecutor refused to accept receipt of or acknowledge these complaints. Consequently, they went unanswered.

The failure of the public prosecutor to acknowledge and respond to the legitimate requests of defence counsel is inconsistent with their role as one of the three pillars of the justice system who have a key role to play in ensuring respect for human rights and the rule of law.

Under international standards, prosecutors have a duty to act with objectivity and in defence of human rights. The UN Guidelines on the Role of Prosecutors require that in criminal proceedings prosecutors shall, "*perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system*".¹⁰⁰ In so doing, prosecutors must, among other things, "*protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect*".¹⁰¹

The failure of the prosecutors to act in the face of these petitions reveals another lacuna in UAE law: the lack of a procedure, known in some jurisdictions as *habeas corpus*, through which any detained or arrested individual has access to a court and may bring proceedings before the court to challenge the legality of their arrest or

⁹⁸ Article 100 states: "*The attorney for the accused must be enabled to attend the investigation with him and take knowledge of the investigation papers, unless otherwise decided by the member of the public prosecution in the interest of the investigation.*"

⁹⁹ See also UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted by the United Nations General Assembly in December, 2012, Principle 3 and Guideline 4§44(c); and The Council of Europe Rules on remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted by the Committee of Ministers on 27 September 2006, Rule 25.

¹⁰⁰ UN Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Article 12.

¹⁰¹ *Id.* at Article 13(b).

detention. In this regard, Article 14(6) of the Arab Charter, requires that: "*Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful*".¹⁰²

UAE law does not appear to establish a habeas-corpus procedure, and in particular does not set a timeframe within which a court must decide a detainee's challenge to their detention. This is inconsistent with Article 14(6) of the Arab Charter and the right to liberty. The absence of such a procedure, in the ICJ's view, facilitates arbitrary detention, torture and other ill-treatment and other serious human rights violations, as demonstrated in the case of the UAE 94.

C. Prohibition against torture and other ill-treatment

International law prohibits torture and other ill-treatment in all circumstances. The Arab Charter affirms, "*No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment*".¹⁰³

In the UAE, the Constitution states that, "*Physical and moral abuse of an accused person is prohibited*".¹⁰⁴ This is reiterated at Article 2 of the CCP, which states, "*it is forbidden to cause bodily or moral harm to the accused or subject any person to torture or degrading treatment*".¹⁰⁵ Further, the law relating to the Supreme Court states, "*Neither the accused nor the witnesses or others should be subjected to torture or degrading treatment*".¹⁰⁶ More specifically, the CC criminalizes, at Article 242, "*every public servant using, in person or through others, torture, force or threats with the accused, a witness or an expert in order to have him confess a crime, make a statement or give information concerning it or to withhold any relevant matter*".¹⁰⁷

Even though UAE law prohibits torture, the definition of the crime of torture falls short of the definition set out in Article 1 of the CAT, which defines torture as "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*".

In particular, Article 242 of the UAE CC restricts the crime of torture to acts done for the stated purposes only. It also limits the perpetrator to public servants who carry out or order the act. This excludes those officials who consent or acquiesce to, or are complicit in, acts of torture. Further, it is not clear that UAE law includes mental pain or suffering in the definition of torture.

In addition to having been subjected to prolonged solitary confinement and *incommunicado* detention, both of which can amount to torture or other ill-treatment,¹⁰⁸ most of the detainees in the UAE 94 case were reportedly subjected to other forms of torture and ill-treatment.

For example, according to the information available to the ICJ, during the hearing of 26 March 2013, one of the accused, Ahmed Al Zaabi, who is a judge, described to the

¹⁰² Arab Charter, *supra*, Article 14(6)

¹⁰³ Arab Charter, *supra* at Article 8; see also CAT, *supra*, Article 2

¹⁰⁴ UAE Constitution, *supra* at Article 28.

¹⁰⁵ Federal Law No. 35 of 1992, *supra* at Article 2.

¹⁰⁶ Federal Law No. 10 of 1973, *supra* at Article 47.

¹⁰⁷ Federal Law No. 3 of 1987, *supra* at Article 242.

¹⁰⁸ See section II.C above

Court the beatings he received, and stated that as a result of these beatings, he urinated blood and his leg swelled to the extent that he was unable to walk. Another of the accused reported that he was blindfolded and taken to a room where he was severely beaten. He also described being threatened by interrogators and told that, if it had been the interrogator's decision, he would have killed the accused.

On 6 May 2013, 71 of the detainees reportedly addressed a complaint to the President of the State Security Chamber asking him to investigate the incidents of torture to which they had been subjected, with a view to holding the perpetrators to account. The methods of torture they referred to in the complaint included severe beatings, pulling out the detainees' hair, sleep deprivation, exposure to extreme light during the day and night, death threats and other threats, insults and other verbal abuse, and prolonged solitary confinement that lasted, in some cases, more than 236 days. A number of the detainees reportedly underscored during the hearings that their solitary confinement took a severe toll on their mental well-being.

Notwithstanding this complaint and the allegations made by many of the detainees during the hearings, neither the President of the State Security Chamber of the Supreme Court nor the prosecutor ordered or conducted an independent, impartial and thorough investigation into these allegations. Among other things, according to the information available to the ICJ, neither the Court nor the prosecutor even ordered a medical examination of those detainees who alleged that they were subjected to torture or other ill-treatment.

In the light of this information, the ICJ is deeply concerned that UAE authorities have failed to meet their obligations under international law, including the CAT, to prevent torture and other ill-treatment, and to investigate acts of torture and other ill-treatment with a view to holding the perpetrators to account. Article 12 of the CAT requires that, *"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction"*.¹⁰⁹ In addition, Article 13 recognises the right of individuals to make a complaint regarding allegations of torture and *"to have his case promptly and impartially examined by, its competent authorities"*. Those carrying out the investigation must, among other things, seek to *"recover and preserve evidence, including medical evidence, related to the alleged torture to aid in any potential prosecution of those responsible"* and, to this end, should order a medical investigation as soon as possible.¹¹⁰ In addition to prohibiting torture and other ill-treatment and guaranteeing redress within its legal system to those who have been subjected to it (Article 8), the Arab Charter also requires the authorities of the State to guarantee that, *"Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right"*.¹¹¹

In this context, the Committee Against Torture has recognised that, *"Securing the victim's right to redress requires that a State party's competent authorities promptly, effectively and impartially investigate and examine the case of any individual who alleges that she or he has been subjected to torture or ill-treatment. Such an*

¹⁰⁹ See also Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, *supra* at Principles 33 and 34; and The Declaration on the on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/10034 (1975), Article 9.

¹¹⁰ The Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professional Training Series No.8/Rev.1 of UN OHCHR, 2004. Submitted to the UN High Commissioner for Human Rights on 9 August 1999, paras.77 and 104.

¹¹¹ Arab Charter, *supra* at Article 14(4).

investigation should include as a standard measure an independent physical and psychological forensic examination as provided for in the Istanbul Protocol."¹¹²

Furthermore, when conducting these investigations it is "essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities".¹¹³ Indeed, the public prosecutor has the specific obligation to "give due attention to crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences".¹¹⁴

D. Rights of defence

International law and standards contain numerous requirements aiming to ensure and safeguard the rights of defence, including the right of individuals arrested or detained to have prompt access to a lawyer;¹¹⁵ for accused people to have adequate time and facilities to consult with their lawyer in full confidentiality;¹¹⁶ for lawyers to be able to fully perform their duties without harassment or hindrance;¹¹⁷ and for lawyers not to be personally associated with the causes of their clients.¹¹⁸

For example, Article 16(2) of the Arab Charter requires states parties, including the UAE, to ensure that that the accused have "the right to have adequate time and facilities for the preparation of his defense and to be allowed to communicate with his family". Articles 16(3) and (4) require the authorities to ensure and respect the right of an accused person to be defended by a lawyer (of their choice or free appointed counsel if either the accused does not defend himself or the interests of justice require it) during the course of the investigation and the trial. The UN Basic Principles on the Role of Lawyers further provides, "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.... All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."¹¹⁹

¹¹² Committee Against Torture, General Comment No. 3 (2012), Implementation of article 14 by State parties, CAT/C/GC/3, 13 December 2012, para. 25.

¹¹³ Committee Against Torture, General Comment No. 2, Implementation of article 2 by State parties, 24 January 2008, CAT/C/GC/2, para. 26.

¹¹⁴ UN Guidelines on the Role of Prosecutors, *supra* at Article 15.

¹¹⁵ "Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention." UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 7.

¹¹⁶ "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing of law enforcement officials." *Id.* at Principle 8.

¹¹⁷ "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics." *Id.* at Principle 16.

¹¹⁸ "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions." *Id.* at Principle 18.

¹¹⁹ *Id.* at Principles 1 and 8. See also General Assembly, Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Principle 17, which requires that a

The ICJ is concerned that these rights to defence have been violated in a variety of ways in the UAE 94 case.

According to information available to the ICJ, the majority of detainees did not have access to a lawyer upon their arrest or during interrogation by officers of the State Security Services. Two to three months after their arrest, some detainees were interrogated by the prosecution service and faced remand renewal proceedings. These interrogations and hearings were also conducted without the presence of and without prior access to a lawyer.

When some lawyers were granted access to a number of detainees a few days before the first hearing, on 4 March 2013, the meetings were held in the presence of individuals from the prosecutor's office in clear violation of international standards guaranteeing the confidentiality of communications between individuals and their legal counsel. The frequency and duration of these meetings were also restricted, further impeding the rights of the accused to prepare their defence.

In addition, under international law, including Article 16(1) of the Arab Charter, people accused of criminal offences have the right to be informed promptly and in detail of the charges against them. Furthermore, the right to adequate facilities for the preparation of the defence, includes timely *"access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory."*¹²⁰

According to information available to the ICJ, defence lawyers in the UAE 94 case only had access to the case files and the formal charges against the accused a few days before the first hearing.

Furthermore, lawyers attempting to represent the accused have faced intimidation and harassment, including arrest and prosecution or deportation. For example, when Salim Al Shihee, a lawyer assisting some of the detainees, went to the office of the security services in Abu Dhabi to ask about the whereabouts of his clients, he was himself detained, prosecuted, in the same trial, together with the other accused in the UAE 94 case, convicted and sentenced to 10 years' imprisonment on the same charges as the other accused.

In addition, given the large number of accused individuals, the limited number of legal counsel representing them, and the inadequate time and facilities granted for the preparation of their defence, not all detainees were able to consult their lawyer before the first hearing. Indeed, during the sixth trial hearing, one of the accused told the judge that he had yet to meet with his lawyer. During the whole trial, defence counsel continued to face limited access to detainees.

detained person *"shall be provided with reasonable facilities for exercising"* his right to counsel. Furthermore, Principle 18 requires that *"[a] detained person . . . be entitled to communicate and consult with his legal counsel . . . allowed adequate time and facilities for consultations with his legal counsel"* and be allowed *"full confidentiality"* which allows law enforcement to visually observe, but not listen to a detainee's interactions with his legal counsel. See also, Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, para. 93, *"an untried prisoner shall be allowed . . . to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. . . . Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official."*

¹²⁰ Human Rights Committee, General Comment No. 32, *supra* at para. 33.

As a result of the above, the rights of the accused under international law to prepare and present a defence and to have access to legal counsel were so severely curtailed, that the ICJ considers that these rights have been violated. (Additional restrictions on defence lawyers endured during the trial are outlined at section IV.B below.)

IV. Compliance with other International Standards of Fair Trial

The trial proceedings in the UAE 94 case also failed to meet other international minimum standards of fair trial, including the right to be presumed innocent, the right to equality of arms, the prohibition on the reliance on evidence obtained through torture, the right to a public hearing and the right of appeal.

A. Presumption of innocence

Under international law and standards, everyone charged with a criminal offence has the right to be presumed innocent until proven guilty by a court of law following a fair trial.

The Arab Charter requires States Parties, including the UAE, to guarantee that, *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law"*.¹²¹

This is an absolute right from which no derogation is permitted.¹²²

The Human Rights Committee, clarifying the guarantee, has explained: *"The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle."*¹²³

The UAE legal framework fails to ensure respect for this right. Although Article 28 of the UAE Constitution states that the accused is presumed innocent until proven guilty through a *"legal and fair trial"*, as referred to previously, the CCP provides that upon an individual's arrest, apprehension and arraignment, the judicial police officer must *"hear the deposition of the accused immediately"* and *"if he does not submit proof of his innocence, he shall be sent, within 48 hours to the competent Public Prosecution"*.¹²⁴

This article is inconsistent with international standards on the rights to liberty and to be presumed innocent, as it places the burden of proof on the arrested person, rather than on the authorities in charge of arrest and prosecution. It also appears by its wording to presume guilt, and does not clearly ensure protection of the right of the person arrested or detained to the benefit of doubt.

In the UAE 94 case the prosecution relied predominantly on "confessions" of some of the detainees. These statements were, however alleged to have been obtained in the absence of counsel and as result of torture or other ill-treatment (see section IV C

¹²¹ Arab Charter, *supra* at Article 16.

¹²² Human Rights Committee, General Comment No. 29, *supra* para. 11; Human Rights Committee, General Comment No. 32, *supra* at para. 6; Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 247, 253 and 261; and Inter-American Commission on Human Rights, Report No. 49/00 of 13 April 2000, Case No. 11.182, Rodolfo Gerbert Asencios Lindo et al. (Peru), para. 86.

¹²³ Human Rights Committee, General Comment No. 32, *supra* at para. 30.

¹²⁴ Federal Law No.35 of 1992, *supra* at Article 47.

below). According to the information available to the ICJ, the prosecution failed to present credible evidence to support the charges against the accused, including the charges of establishing "a secret organization with a view to seizing power". Moreover, the failure to submit such evidence had the effect of *de facto* shifting the burden of proof onto the accused to prove their innocence.

Continuing a prosecution despite a lack of sufficient evidence or when there are reasonable grounds to believe that evidence was obtained by unlawful means is contrary to international standards, including the UN Guidelines on the Role of Prosecutors. Under these Guidelines, prosecutors are required to refuse to use evidence which they know or reasonably believe was obtained through recourse to unlawful means, such as torture or other ill-treatment. Furthermore, "Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded".¹²⁵

In addition, the right to be presumed innocent under international standards also requires all public authorities to refrain from expressing views or making public statements that might undermine or influence the outcome of a trial. The Human Rights Committee, for example, has pointed out that "it is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused".¹²⁶ Therefore, while it is permissible to inform the public that a particular individual has been charged, they should not express a view as to the guilt of any accused person before the proceedings have concluded or following an acquittal.

In the UAE 94 case, rulers of various emirates as well as the Prosecutor General made public statements prior to the trial proclaiming the guilt of the accused.

For example, in January 2013, after formally charging the accused and referring them to the State Security Chamber, the UAE Prosecutor General, Salim Saeed Kubaish, was reported as saying that they had completed their investigations and that the accused "launched, established and ran an organisation seeking to oppose the basic principles of the UAE system of governance and to seize power". He reportedly went on to say that, "their undeclared aims were, in fact, to seek to seize power and the state's system of governance and to oppose the basic principles of this system" and that "they also communicated with the international Muslim Brotherhood organisation and other similar organisations based outside the State, and asked them for help, expertise and financial support to serve their undeclared goal of seizing power".¹²⁷

In addition, in August 2012, following the arrest and detention of a number of the accused, Sheikh Saud bin Saqr al Qassimi, ruler of Ras Al Khaimah stated, "Today we have the right to cast blame upon this group and to reject their plans to harm their country, its leadership and their own people...Reform means building the country, not destroying it."¹²⁸ While the ruler of Sharjah, Sheikh Sultan bin Mohammed al Qassimi, stated, "to every mother whose son was held, I tell her... please let us fix the situation... the son made a mistake, you didn't deal with it, let us do it...Please be patient, this is for your own good."¹²⁹

¹²⁵ UN Guidelines on the Role of Prosecutors, *supra* at Articles 16 and 14, respectively.

¹²⁶ Human Rights Committee, General Comment No. 32, *supra* at para. 30.

¹²⁷ 94 Emiratis charged with compromising UAE security, The National 28 January 2013, available at <http://www.thenational.ae/news/uae-news/politics/94-emiratis-charged-with-compromising-uae-security>

¹²⁸ RAK Ruler attacks group "trying to destroy" UAE, The National, 9 August 2012, available at <http://www.thenational.ae/news/uae-news/rak-ruler-attacks-group-trying-to-destroy-uae>

¹²⁹ UAE emirate's ruler seeks to calm anger over arrests, Reuters, 2 August 2012, available at <http://uk.reuters.com/article/2012/08/02/uk-uae-arrests-ruler-idUKBRE8711RF20120802>

The ICJ is deeply concerned that these statements undermined the rights of the accused to be presumed innocent and prejudged the outcome of the trial. Indeed, in spite of the lack of concrete evidence to support the charges against the accused, the Court convicted and imposed heavy sentences on most of them.

B. Equality of arms

Respect for the principle of equality of arms at all stages of legal proceedings is a fundamental requirement inherent in the right to a fair trial and recognised under international law, including the Arab Charter.¹³⁰ It ensures that each of the parties, and in criminal proceedings particularly the accused, have a reasonable opportunity to present their case under conditions of equality throughout the proceedings. This and other guarantees also aim to ensure that all people, including those charged with criminal offences, are treated equally before the courts without discrimination and have the same procedural rights except where specified by law.¹³¹ As the European Court of Human Rights has recognised, “a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage”.¹³²

The Human Rights Committee has explained that the duty to ensure equality of arms is placed firmly on the courts: “it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.”¹³³

Article 16(5) of the Arab Charter requires States Parties, including the UAE, to guarantee to everyone charged with a criminal offence, “The right to examine or have his lawyer examine the prosecution witnesses and to defense according to the conditions applied to the prosecution witnesses”. The purpose of this provision has been expanded upon by the Human Rights Committee in relation to the parallel provision of the ICCPR (Article 14(3)(e)): “As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”¹³⁴

In the UAE 94 trial, the principle of equality of arms was undermined in a variety of ways.

In addition to the fact that defence lawyers faced severe restrictions on their ability to prepare and achieve an effective defence of the accused, because of lack of timely access to the accused, lack of respect for the right to confidential communications between the accused and counsel and lack of timely notice of the charges and access to the case files as detailed above, defence counsel were also prohibited by security officers from bringing any materials into the courtroom during the first hearing, including pens and papers. Only after a lawyer highlighted his inability to carry out his work did the presiding judge allow the defence to retrieve their belongings during a break, which was 3 hours into the hearing.

¹³⁰ Arab Charter, *supra* at Articles 13 and 16; ICCPR, *supra* at Article 14(1) and (3); UDHR, *supra* at Article 10.

¹³¹ Trial Observation Manual for Criminal Proceedings, Practitioners Guide No. 5, International Commission of Jurists, p.83.

¹³² *Delcourt v. Belgium*, Application No. 2689/65, European Court of Human Rights, Judgment of 17 January 1970, para. 34.

¹³³ Communication No. 779/1997 *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, (4 February 1997), para. 7.4; See also Communication No. 846/1999, *Gertruda Hubertina Jansen-Gielen v. The Netherlands*, para. 8.2.

¹³⁴ Human Rights Committee, General Comment No.32, *supra* at para. 39. See also Human Rights Committee, General Comment No.13, *supra* at para. 12.

Further, while the prosecution was able to call witnesses and examine them without any restrictions, including as to the number of questions asked, both defence counsel and the accused were severely restricted in their cross-examination of prosecution witnesses. In particular, according to information available to the ICJ, the presiding judge either refused the defence permission to cross-examine a witness or severely restricted the number of questions that could be put to the witness.

In relation to one prosecution witness defence lawyers had prepared a list of 30 questions but were limited by the presiding judge to asking only 2 questions. In relation to another witness they were limited to asking 4 out of 30 questions. The presiding judge also reportedly dismissed a complaint made by one of the accused, Judge Khamees Al Sam, regarding the inability to cross-examine prosecution witnesses.

The ICJ considers that these breaches of the principle of equality of arms put the accused at an unfair disadvantage throughout the proceedings and violated minimum fair trial rights of the accused guaranteed in international standards.

C. Reliance on statements obtained through torture

International standards also prohibit the introduction of statements and other evidence obtained from any person as a result of torture or other ill-treatment in any proceedings, except those brought against the alleged perpetrator of the torture.

For example, Article 15 of the CAT expressly provides that, *“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”*.

However, the scope of the exclusionary rule goes beyond this specific provision. Both torture and other cruel, inhuman or degrading treatment are absolutely prohibited under all circumstances by Article 8 of the Arab Charter, the ICCPR and a range of other treaty and non-treaty standards and by customary international law. Consequently, the Human Rights Committee, the Committee against Torture, other UN experts and regional human rights courts have held that the exclusionary rule arises out of the prohibition and therefore applies also to cruel, inhuman or degrading treatment other than torture.¹³⁵

Moreover, considering that the exclusionary rule is inherent in the prohibition against torture and other ill-treatment, *“All allegations that statements of detainees have been obtained through coercion must lead to an investigation and such statements must never be used as evidence, except as evidence of torture, and the burden of proof, in such cases, should not be borne by the alleged victim”*.¹³⁶

As a safeguard of the presumption of innocence and reinforcing the prohibition of torture and other ill-treatment and the right to a fair trial, international standards, including Article 16(6) of the Arab Charter, require states to respect and guarantee the right of all people charged with a criminal offence not to be compelled to testify against themselves or to confess guilt. The right of an accused not to be compelled to incriminate him or herself or confess guilt is broad. It prohibits any form of coercion,

¹³⁵ Special Rapporteur on torture, UN Doc. A/54/426 (1999) §12(e); HRC General Comments 20, §12, and 32, §60; CAT General Comment 2, §6; *Söylemez v Turkey* (46661/99) European Court (2006) §§121-125; CAT Concluding Observations: Mongolia, UN Doc. CAT/C/MNG/CO/1 (2010) §18; See also, *Malawi African Association and Others v Mauritania*, (54/91 et al), African Commission, 13th Annual Report (2000) §§3, 8, 11, 115.

¹³⁶ Report of the Human Rights Committee, Volume I, A/59/40, (Vol. I), para. 63(12), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/438/07/PDF/G0443807.pdf?OpenElement>

whether direct or indirect, physical or psychological. Such coercion includes, but is not limited to, torture and other cruel, inhuman or degrading treatment.¹³⁷

The Human Rights Committee has noted, "*The law should require that evidence provided by means of...any form of compulsion is wholly unacceptable*".¹³⁸ It has also clarified that in the face of allegations of compulsion the law must provide that the burden is on the State to prove that statements made by the accused have been given of their own free will.¹³⁹

The UN Guidelines on the Role of Prosecutors further details the role of prosecutors in excluding the use of evidence obtained through unlawful means: "*When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.*"¹⁴⁰

While the UAE legal framework, including the CCP, criminalises certain acts that amount to torture or other ill-treatment, it does not explicitly require the exclusion of information, statements or other evidence obtained through torture or other ill-treatment from being relied on as evidence in criminal proceedings.

As noted above, 71 of the accused in the UAE 94 case filed a complaint alleging that they had been subjected to torture and other ill-treatment. Instead of ensuring that these complaints were investigated, the prosecution relied on confessions alleged to have been obtained through torture and other ill-treatment throughout the entirety of the proceedings against the UAE 94.

For example, in the prosecution's referral order and reportedly during the trial itself the prosecution argued that four of the accused, Ahmed Al Suweidi, Ahmed Rached Al Tabour, Ahmed Al Zaabi and Salem Abdellah, "*confessed*" during the interrogation to various crimes, including "*establishing a secret organization that worked against the principles of the UAE in order to gain power*".

However, Ahmed Al Suweidi was reportedly subjected to severe beatings, sleep deprivation, exposure to extreme cold, prolonged solitary confinement and the denial of necessary medical treatment. During the trial, one of the accused asked the Court to provide Al Suweidi with medical assistance because "*this is not the Ahmed I know*". This followed a plea from Al Suweidi himself, who asked for the Court's protection for his life and the life of his family. Further, as detailed above, Ahmed Al Zaabi also reportedly described to the Court the torture he suffered, including severe beatings that left him unable to walk.¹⁴¹

Defence counsel argued that it was as a result of their torture and other ill-treatment that the four accused "*confessed*" and called on the president of the Court to investigate the claims of their clients.

¹³⁷ HRC: General Comment 32, §41, *Berry v Jamaica*, UN Doc. CCPR/C/50/D/330/1988 (1994) §11.7.

¹³⁸ Human Rights Committee, General Comment 13, *supra* at para.14.

See also: Human Rights Committee, General Comment 20, *supra* at para. 12, "[T]he law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."

¹³⁹ Human Rights Committee General Comment 32, *supra*, para 41.

¹⁴⁰ UN Guidelines on the Role of Prosecutors, *supra* at para. 16 (1990).

¹⁴¹ See section III.C

According to information available to the ICJ, the Court did not order such an investigation and did not address the allegations that these "confessions" were obtained by torture or other measures of coercion.

The Court also failed to shift the burden to prove that the "confessions" were not obtained by unlawful means or otherwise involuntarily onto the prosecution.

Under international standards, judges should ensure that no evidence obtained by unlawful means is introduced as evidence in any proceedings. In the face of allegations or evidence to the contrary, they must ensure that the burden rests on the prosecution to prove that the evidence was not obtained by torture or other ill-treatment of any person or that the statements of the accused were voluntary. As recommended by the Special UN Rapporteur on torture, "*where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment*".¹⁴²

Based on the information available to the organization, the ICJ is concerned that evidence was introduced into the proceedings against the UAE 94 that had been obtained as a result of torture or other ill-treatment or coercion. Furthermore, this evidence formed at least part, if not the basis, of the judgment against those who were convicted. As a result, the ICJ considers that the conviction is contrary to international human rights law and should not stand. The failure of the authorities to initiate an independent, impartial and thorough investigation of the allegations of torture or other ill-treatment raises additional concern that those responsible for such unlawful acts will enjoy impunity and the victims will not receive reparation.

D. Right to a public hearing

The Arab Charter requires States to ensure that, "*Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights*".¹⁴³

The Human Rights Committee has clarified that, "*The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large*".¹⁴⁴

Although under Article 14(1) of the ICCPR courts have the power to exclude all or part of the public from parts or all of court proceedings for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, the Human Rights Committee has clarified that, "*apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of person*".¹⁴⁵

In the UAE, Article 14 of Law No.3 of 1983 and Article 161 of the CCP state that court sessions shall be public unless the court orders, for reasons of public policy or morals, that the hearing in whole or in part be examined in closed session or that a certain class of persons be prohibited from attending.

¹⁴² Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38, 17 December 2002, E/CN.4/2003/68, para. 26(k).

¹⁴³ Arab Charter, Article 13(2b); See also Article 14(1) of the ICCPR, *supra*.

¹⁴⁴ Human Rights Committee, General Comment 32, *supra* at para. 28.

¹⁴⁵ *Id.* at para. 29.

The wording of this article is broad and gives the court discretionary powers to decide what constitutes a reason of "*public policy*" and which "*class*" of persons can be denied access to one or more trial sessions.

The UAE 94 trial is pertinent in this regard. It was conducted behind closed doors. The fact that the Court itself did not issue a ruling restricting the public's access to the proceedings, as well as the nature of the restrictions that were imposed and the manner of their implementation, raise concern that restrictions on access to the proceedings were imposed arbitrarily and that the Court may not have been acting independently.

For example, while national media were allowed to attend, international media were barred from attending the hearings. In addition, several international lawyers who intended to observe the 4 and 11 March 2013 hearings, including ICJ observers, were denied access to the courtroom; two other international observers who travelled to the UAE prior to the 4 March hearing to attend the proceedings were denied entry to the country.

In relation to the 4 March hearing, administrative personnel at the Supreme Court explained to ICJ observers that, while the hearings were public, given the number of defendants and the need to accommodate family members, limitations on attendance were necessary and permission needed to be granted from the Ministry of Justice (MoJ). That same day, an official from the MoJ informed the ICJ and other observers that the MoJ was separate from the courts and access could only be gained via permission from the President of the Court. Attempts to comply with administrative procedures did not result in access being granted. On 11 March, international observers were prevented from approaching the court building by plain-clothed individuals in a car outside the Court.

In addition to restrictions on international media and observers, restrictions were also imposed on relatives of the accused. In particular, prior to the 4 March 2013 hearing, relatives were reportedly informed by a court official that only two relatives for each male accused and one relative for each female accused could attend the hearing.

No reason was given for the differential treatment related to the gender of the accused. Relatives of the accused who wished to attend the hearing were also told that they would be required to submit their documents, including their ID, to court officials and to report to a specific location from where they would be transported by bus to the court building.

In addition, those family members who were given permission to attend the proceedings were presented with a piece of paper that they were required to sign before they would be allowed into the courtroom. The paper stated that they agreed not to "*spread rumours or incorrect news on the progress of the trial in the media, social media, or all other means of communication*".

A number of the family members who attended the early trial hearings received phone calls informing them that they were prohibited from attending future hearings at the Court. In some cases individuals making the call reportedly identified themselves as from the Supreme Court, others did not provide their identity. No reason was given for the denial of access.

Abdullah Al Hadidi, the son of one of the accused who attended the first trial hearing, was arrested on 22 March 2013. He was convicted and sentenced under the Cyber Crime Law to a term of 10 months imprisonment for "*tweeting with bad intent about*

the UAE 94 trial".¹⁴⁶ On 22 May 2013, the Appeal Court of Abu Dhabi confirmed his sentence, as did the Court of Cassation of Abu Dhabi on 7 July 2013.

In the UAE 94 case, it is not clear whether the Court or State Security imposed the above restrictions. Further, the varying reasons that were given by staff of the Court and the UAE authorities were not among those permissible under the Arab Charter.

Indeed, the fact that some family members of the accused and local media were allowed to attend the hearings demonstrates that this was not an exceptional situation that justified the exclusion of the public, including international media and observers. The restrictions on public access to the Court, in the ICJ's view, was arbitrary and violated international law. The ICJ also considers that the requirement imposed on relatives of the accused who were allowed to attend trial hearings – to sign a paper restricting what they could say about the proceedings – was not only inconsistent with the right to a public hearing but also had a chilling effect on the enjoyment of the right to freedom of expression, including the right to seek, receive and impart information.

E. Right of appeal

Under international law,¹⁴⁷ including the Arab Charter,¹⁴⁸ the right to appeal against a conviction and/or a sentence before a higher tribunal must be ensured.

The right to have a conviction and sentence reviewed by a higher tribunal, under most standards, applies regardless of the seriousness of the offence or its characterization under domestic law.¹⁴⁹

Further, the right of review requires that there is not only a review of the formal or legal aspects of the conviction but also a review, "*on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case*".¹⁵⁰

It should also be noted that the issuing of pardons or reductions in sentences through a supervisory review once the sentence has commenced do not satisfy the requirements of an appeal under international human rights law.¹⁵¹

In the UAE, Article 99(6) of the Constitution and Article 33(8) of the Supreme Court law includes within the jurisdiction of the Supreme Court, "*Crimes directly affecting the interests of the Federation, such as crimes relating to its internal or external security, forgery of the official records or seals of any of the Federal authorities and counterfeiting of currency*".¹⁵²

¹⁴⁶ Hadidi was charged under Decree No.5 of 2012 on Cyber Crimes. See *Emirati Netizen sentenced to 10 months in jail for tweeting*, IFEX, 9 April 2013.

¹⁴⁷ The ICCPR, *supra* at Article 14(5), states "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*" See also the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, *supra* at Article A(2)(j); and the American Convention on Human Rights, *supra* at Article 8(2)(h).

¹⁴⁸ Article 16(7g) of the Arab Charter states "*Everyone charged with a criminal offense shall be presumed innocent until proved guilty by a final judgment rendered according to law, and in the course of the investigation and trial, he shall enjoy the following minimum guarantees...(T)he right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal.*"

¹⁴⁹ Human Rights Committee, General Comment No.32, *supra* at para.45.

¹⁵⁰ *Id.* at para.48.

¹⁵¹ *Id.* at para.50.

¹⁵² UAE Constitution, *supra* at Article 99(6) and Federal Law No.10 of 1973, *supra* at Article 33(8)

It was pursuant to these provisions that the case against the UAE 94 was heard before the State Security Chamber of the Supreme Court.

Under Article 101 of the Constitution, all judgments of the Supreme Court are final and binding. Article 67 of the Supreme Court law similarly states, "*The decisions of the Supreme Court shall be final and binding on all and shall not be challenged by any means of challenge...*".¹⁵³

As a consequence of these provisions, those who were convicted are unable to appeal the decision.

In this respect, both UAE law and the proceedings against the UAE 94 violate the right of the accused to an appeal.

The Human Rights Committee has addressed situations similar to the present case where the court hearing the case in the first instance is also the highest court in the country from which there is no appeal.¹⁵⁴ In this regard, the Committee has stated, "*Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant.*"¹⁵⁵

V. Conclusion and Recommendations

Since 31 July 2013, many of the prisoners convicted in the UAE 94 case have begun a hunger strike to protest against the conditions of their detention. They have reportedly been subjected to various forms of ill-treatment, including beatings by prison guards and light deprivation. Several individuals have reportedly been arrested and prosecuted under the Cyber Crime Law for tweeting about the conditions of detention of the UAE 94 prisoners.

The UAE authorities have failed to carry out their responsibility to investigate the many human rights abuses alleged to have been committed against those detained in the context of the UAE 94 case. Instead they have kept them arbitrarily detained following an unfair trial. Indeed, the UAE authorities have continued their crackdown on political activists, through means and methods in contravention of international human rights law and standards.

According to information available to the ICJ, a group of 30 individuals, comprising Egyptians and Emiratis, were reportedly referred to the State Security Chamber of the Supreme Court on 19 June 2013 for "*establishing and managing a UAE branch of the Muslim Brotherhood and forming an organisational structure to fulfil the Islamist group's objectives*". They have been remanded in custody pending trial.

The UAE authorities must comply with their legal obligations under international law and ensure an immediate end to their crackdown on political activists and government critics. To this end, the UAE authorities must ensure:

- i) The immediate and unconditional release of all those who are detained or imprisoned as a consequence of the UAE 94 trial or its verdict;**

¹⁵³ Federal Law No. 10 of 1973, *supra* at Article 67.

¹⁵⁴ Human Rights Committee, Communication No. 1073/2002, Jesús Terrón v Spain, CCPR/C/82/D/1073/2002 (2004).

¹⁵⁵ Human Rights Committee, General Comment No.32, *supra* at para.47.

- ii) That an independent, impartial and thorough investigation is carried out into allegations that the accused were subjected to torture and other ill-treatment;
- iii) That those responsible for torture or other ill-treatment are brought to justice; and
- iv) That those who have been subjected to arbitrary detention and/or torture or other ill-treatment have access to effective remedies and to reparation, including restitution, rehabilitation, compensation and satisfaction.

The ICJ further recommends that the UAE authorities undertake the following reforms to:

- i) Ensure that offences under UAE law are defined and set out sufficiently precisely in the law so as to meet international standards of legal certainty and so as to ensure that the law does not criminalize the exercise of universally recognized human rights, including the rights to freedom of expression, association and assembly. To this end, amend Article 180 of the UAE Criminal Code and repeal Decree No.5 of 2012 on Cyber Crimes;
- ii) End the practices of secret, arbitrary and *incommunicado* detention, as well as torture and other ill-treatment and, to this end, ensure that:
 - a. people are deprived of their liberty only in official places of detention;
 - b. all people who are deprived of their liberty have the right to notify or have notified a family member or other third person and a lawyer of the fact and place of their detention and any transfers;
 - c. all people deprived of their liberty are provided with prompt access to their lawyer and their family, including by amending Article 100, 108 and 109 of the UAE Criminal Code of Procedure;¹⁵⁶
 - d. all people deprived of their liberty are brought promptly before a judge, including by amending Article 47 of the Criminal Code of Procedure;
 - e. all people deprived of their liberty enjoy the right to challenge the legality of their detention, before an independent and impartial judicial authority, that will review the case without delay and has the power to release, and indeed releases, the individual if their detention is not lawful under national and international law; and
 - f. independent and impartial monitors have access to all places where people are deprived of their liberty and have the right and authority to speak with all persons deprived of their liberty confidentially;
 - g. the definition of torture under the Criminal Code and the Criminal Code of Procedure is reformed so, at a minimum, it is in line with the definition set out in Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
 - h. the use of solitary confinement in pre-trial detention and all use of prolonged solitary confinement are brought to an end;

¹⁵⁶ Federal Law No. 35 of 1992 Concerning the Criminal Procedural Law, as amended by Federal Law no. 29/2005 and Federal Law no. 35/2006.

- c. when they come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained by unlawful methods, including torture or other ill treatment, refusing to use such evidence other than against those who used such methods and take all necessary steps to ensure that those responsible are brought to justice;**
- x) End prosecutors' powers of oversight of detention facilities and ensure that these facilities are under independent judicial oversight;**
- xi) Ensure the respect and protection of the right to freedom of expression, including the right to seek, receive and impart information on issues relating to increased participation in public affairs;**
- xii) Ensure the rights of all UAE citizens to take part in the conduct of public affairs, including the right to vote, to elect their representatives, to be elected and to decide on and choose the form of their government and constitutional system; and**
- xiii) Reinforce the guarantees for the protection of human rights in the UAE, in particular by acceding to international human rights instruments, including the International Covenant on Civil and Political Rights and its Optional Protocols, the International Covenant on Economic Social and Cultural Rights and its Optional Protocol, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention on the Protection of All Persons from Enforced Disappearance.**

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