

## **LEGAL STATEMENT**

# **BAHRAIN: AN ANALYSIS OF THE LEGITIMACY OF CHARGES AGAINST SHEIKH MAYTHAM AL SALMAN**

FEBRUARY 10, 2016



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## EXECUTIVE SUMMARY

This statement<sup>1</sup> is concerned with the legitimacy of the charges laid by the authorities of Bahrain against human rights defender and cleric Sheikh Maytham Al Salman for expressing an opinion about the trial and imprisonment of a public figure and for criticizing the authorities of Bahrain for the country's governance. He was charged with incitement of hatred towards the system of government and expressing views on an ongoing trial with the intent to change public opinion. This review was prompted by the repeated use of such or similar charges against human rights defenders and political opponents, including Sheikh Maythan Al Salman himself.

The statement analyses the charges in line with international human rights standards and jurisprudence related to freedom of expression. Under international law, freedom of expression may only be restricted if the restrictions satisfy a three-part test: a) legality, b) legitimate grounds and c) necessity and proportionality. Accordingly, this statement analyses whether the charges (incitement and contempt of court) against Sheikh Maytham Al Salman meet the three-part test. This statement also reviews the circumstances surrounding Sheikh Maytham Al Salman detention and charges.

On the basis of a thorough discussion of international, regional and national jurisprudence, this statement concludes that the charges of incitement to hatred against the system of government and of expressing views on an on-going trial fail both the legality and the necessity test. The statement also finds that the Government, by subjecting Sheikh Maytham Al Salman to repeated detention, interrogation and unsubstantiated charges, is creating *in terrorem* conditions, aimed at instilling fears and self-censorship, and amounting to harassment.

In conclusion, Columbia Global Freedom of Expression calls on the authorities of Bahrain to immediately and unconditionally drop all charges against Sheikh Maytham Al Salman and put an end to its harassment of the human rights defender and inter-faith activist.

## I - THE FACTS

1. On January 6, 2016, Bahrain's authorities charged Sheikh Maytham Al Salman with incitement of hatred towards the system of government and expressing views on an ongoing trial with the intent to change public opinion.<sup>2</sup> The charges were based on a speech Sheikh Maytham delivered on December 27, 2015, at a public event held in solidarity with Al-Wefaq's imprisoned Security General (SG), Sheikh Ali Salman.<sup>3</sup>

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<sup>1</sup> This statement was written by Dr. Agnes Callamard (Director, Global Freedom of Expression) and Bach Avezdjanov (Program Officer, Global Freedom of Expression), on behalf of the signatories. It greatly benefited from the support and input of Charles Glasser (Adjunct Professor of Media Ethics and Law, New York University, USA), Peter Noorlander (Chief Executive Officer, Media Legal Defense Initiative, UK), Karuna Nundy (Advocate, Supreme Court of India, India), and Dirk Voorhoof (Professor of Media Law, Ghent University, Belgium).

<sup>2</sup> AhlulBayt News Agency, "Bahrain Authorities Continue to Harass Human Rights Defender," Jan. 9, 2016 <http://en.abna24.com/service/bahrain/archive/2016/01/09/729586/story.html>

<sup>3</sup> Bahrain Center for Human Rights (BCHR), Bahraini Authorities Continue to Harass Human Rights Defenders, Jan.8, 2016 <http://bahrainrights.org/en/node/7682>

2. Al-Wefaq is Bahrain's largest political society<sup>4</sup> and at some point held almost half of Bahrain's parliamentary seats.<sup>5</sup> Its SG, Ali Salman, was arrested on charges of publicly inciting hatred and insulting public institutions.<sup>6</sup> The arrest was widely criticized, with condemnations coming from the United Nations High Commissioner for Human Rights<sup>7</sup>, the United States<sup>8</sup>, the European Union<sup>9</sup>, and over 14 domestic and international NGOs<sup>10</sup>.
3. In his speech, Sheikh Maytham seconded the criticism of Ali Salman's prosecution, calling it legally unfounded, and retaliation for his public appeals for greater democratic governance in Bahrain. He also suggested that Ali Salman's prosecution evidenced the Bahraini authorities' suppression of dialogue of topics concerning the country's governance.<sup>11</sup>
4. Sheikh Maytham Al Salman is an internationally recognized inter-faith leader and peace activist, and the recipient of the 2015 Advocate for Peace Award from the Interfaith Communities United for Justice.<sup>12</sup> He has been working with Columbia University Global Freedom of Expression since April 2015, advising the initiative on its global jurisprudence and religious tolerance projects. He also played an integral part in the development of a MENA strategy to counter incitement to violence at the November 2015 Meeting of MENA Religious Leaders<sup>13</sup> organized by the United Nations Office on Genocide Prevention and the Responsibility to Protect, Columbia Global Centers | Middle East (Amman) and Columbia Global Freedom of Expression.
5. Sheikh Maytham faced similar charges in August 2015. Upon returning to Bahrain from a UN conference on hate-speech, he was charged with inciting hatred against the regime and publication of false news.<sup>14</sup> The charges stemmed from several tweets and a statement that denounced violence

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<sup>4</sup> Political parties are banned in Bahrain, but political societies have been permitted since 2005. See, CIA Fact Book, Bahrain, "Government"

<https://www.cia.gov/library/publications/the-world-factbook/geos/ba.html>

<sup>5</sup> Kareem Fahim, "Bahrain Opposition Leader Sentenced to 4 Years in Prison," The New York Times, June 16, 2005

<http://www.nytimes.com/2015/06/17/world/middleeast/bahrain-opposition-leader-sentenced-to-4-years-in-prison.html>

<sup>6</sup> Kareem Fahim, "Bahrain Opposition Leader Sentenced to 4 Years in Prison," The New York Times, June 16, 2005

<http://www.nytimes.com/2015/06/17/world/middleeast/bahrain-opposition-leader-sentenced-to-4-years-in-prison.html>

<sup>7</sup> UN OHCHR, "Bahrain: UN rights experts urge release of opposition politician detained for peaceful expression," Feb. 4, 2015

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15541&LangID=E#sthash.e9QHPEQt.dp>

<sup>8</sup> Reuters, "U.S. concerned over detention of Bahraini opposition leader," Jan. 1, 2015 <http://www.reuters.com/article/us-bahrain-arrest-usa-idUSKBN0KA1E420150101>

<sup>9</sup> European Union External Action, "Statement by the Spokesperson on the sentencing of al-Wefaq Secretary General Ali Salman in Bahrain," June 17, 2015 [http://eeas.europa.eu/statements-eeas/2015/150617\\_03\\_en.htm](http://eeas.europa.eu/statements-eeas/2015/150617_03_en.htm)

<sup>10</sup> ADHB, "NGOs Call for the Immediate Release of Al-Wefaq General-Secretary Shaikh Ali Salman," Dec. 29, 2014

<http://www.adhrb.org/2014/12/ngos-call-for-the-immediate-release-of-al-wefaq-general-secretary-shaikh-ali-salman/> and

HRW, "Joint NGO Letter: Human Rights Situation in Bahrain," July 16, 2015

<https://www.hrw.org/news/2015/07/16/joint-ngo-letter-human-rights-situation-bahrain>

<sup>11</sup> The speech is reproduced in Annex One. See AhlulBayt News Agency, "Bahrain Authorities Continue to Harass Human Rights Defender," Jan. 9, 2016

<http://en.abna24.com/service/bahrain/archive/2016/01/09/729586/story.html>

<sup>12</sup> Bahrain Center for Human Rights, "ICUJP honours Sheikh Maytham Al Salman with the 2015 Advocate of Peace Award," Oct. 8, 2015, <http://www.bahrainrights.org/en/node/7638>

<sup>13</sup> Columbia Global Freedom of Expression, "[Religious Leaders from the Middle East and North Africa develop a regional strategy to prevent and counter incitement to violence that could lead to atrocity crimes](https://globalfreedomofexpression.columbia.edu/updates/2015/11/religious-leaders-from-the-middle-east-and-north-africa-develop-a-regional-strategy-to-prevent-and-counter-incitement-to-violence-that-could-lead-to-atrocity-crimes/)," Nov. 15, 2015

<https://globalfreedomofexpression.columbia.edu/updates/2015/11/religious-leaders-from-the-middle-east-and-north-africa-develop-a-regional-strategy-to-prevent-and-counter-incitement-to-violence-that-could-lead-to-atrocity-crimes/>

<sup>14</sup> IFEX, "How one Bahraini man's work on countering hatred got him arrested for hate speech," Aug. 11, 2015

[https://www.ifex.org/bahrain/2015/08/11/countering\\_hate\\_speech\\_or\\_inciting\\_it/](https://www.ifex.org/bahrain/2015/08/11/countering_hate_speech_or_inciting_it/)

and extremism, and called upon all in Bahrain to fight against discrimination.<sup>15</sup> He was released after 12 hours, pending investigation, but with a travel ban imposed, which was lifted shortly afterwards.

## II - THE LEGAL FRAMEWORK

### II.I The Founding Principles of Freedom of Expression

6. Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees the right to freedom of expression.<sup>16</sup> It provides: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>17</sup> Although the UDHR is not binding on states, it offers legal interpretive guidance.<sup>18</sup>
7. The International Covenant for Civil and Political Rights (ICCPR) establishes the legal framework for the protection of freedom of expression in Article 19.<sup>19</sup> Particularly, Article 19 establishes that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>20</sup> Bahrain is a signatory to the ICCPR and has not made any reservations to Article 19.<sup>21</sup>
8. Freedom of expression is not absolute and Article 19(3) allows restrictions to be imposed on it provided that they satisfy a strict three-part test that meets the following conditions:
  - (a) restrictions must be provided by law;
  - (b) restrictions must address one of the aims enumerated in paragraph 3 (a) and 3 (b) of Article 19 (rights and reputation of others, national security, public morals or health) and;
  - (c) restrictions must be necessary to achieve a legitimate purpose.<sup>22</sup>
9. ICCPR’s Article 20 also explicitly prohibits “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>23</sup> In 2013, the High Commissioner for Human Rights (OHCHR) released the Rabat Plan of Action which represents an important step in clarifying state obligations to prohibit incitement to violence, discrimination and hostility, while

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<sup>15</sup> Columbia Global Freedom of Expression, “Arrest of Inter-Faith Activist and Columbia Global Freedom of Expression expert Maytham Al Salman,” Aug. 10, 2015 <https://globalfreedomofexpression.columbia.edu/updates/2015/08/arrest-of-inter-faith-activist-and-columbia-global-freedom-of-expression-expert-maytham-al-salman/>

<sup>16</sup> UDHR, Article 19 <http://www.un.org/en/universal-declaration-human-rights/>

<sup>17</sup> UDHR, Article 19 <http://www.un.org/en/universal-declaration-human-rights/>

<sup>18</sup> Hurst Hannum, “The Status of the Universal Declaration of Human Rights in national And International Law,” GA. J. Int’l & Comp. L., p. 336

<http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1396&context=gjicl>

<sup>19</sup> <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>20</sup> ICCPR, Article 19, para. 2, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>21</sup> Geneva Academy for International Humanitarian law and Human Rights, see Bahrain, [http://www.geneva-academy.ch/RULAC/international\\_treaties.php?id\\_state=21](http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=21)

<sup>22</sup> See, UN HRC, *Faurisson v France*, Communication No. 550/1993, 8 November 1996 [http://www.bayefsky.com/pdf/128\\_francevws55058.pdf](http://www.bayefsky.com/pdf/128_francevws55058.pdf)

<sup>23</sup> ICCPR, Article 20, para. 2, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

providing coherent protection to the rights to freedom of expression and freedom of religion<sup>24</sup>. Amongst other things, the Rabat Plan of Action recommends that:

- a. States should be guided by express references to Article 20(2) of ICCPR in their domestic legislation;
- b. States should repeal blasphemy and defamation of religion laws because these laws are fundamentally incompatible with the rights to freedom of expression and freedom of religion;
- c. An independent judiciary should ensure consistent interpretation of incitement to hatred cases, including assessing them through a comprehensive 6 part test; and
- d. States should apply a broad set of measures to promote: intercultural dialogue; pluralism and diversity; and positive measures for the protection of minorities and vulnerable groups.

10. In September 2011, the UN Human Rights Committee (HRC), an international body of independent experts charged with monitoring the implementation of the ICCPR, issued General Comment No. 34 to clarify the scope of freedom of expression and its limitations.<sup>25</sup>

## II.2. Regional Standards

11. ICCPR's guarantees for the protection of freedom of expression are echoed in regional legal instruments. Particularly, the Council of the League of Arab States to which Bahrain belongs adopted the Arab Charter on Human Rights (Arab Charter) in 2008.<sup>26</sup> Article 32 of the Charter secures freedom of opinion and expression, restricted by the fundamental values of society and subject only to "such limitation as are required to ensure respect for the rights or reputations of others or the protection of national security, public order and public health or morals."<sup>27</sup>

12. Similarly, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>28</sup> guarantees everyone the right to freedom of expression that includes "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." Article 10's Paragraph 2 allows restrictions on freedom of expression, provided they are "prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."<sup>29</sup>

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<sup>24</sup> OHCHR, The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, February 2013,

[http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf)

<sup>25</sup> UN HRC, General Comment 34, CCPR/C/GC/34

<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

<sup>26</sup> ICNL, NGO Law Monitor: League of Arab States, Aug. 10, 2015

<http://www.icnl.org/research/monitor/las.html>

<sup>27</sup> Arab Charter for Human Rights, art. 34, para. 1

<http://www1.umn.edu/humanrts/instreet/loas2005.html>

<sup>28</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, para. 1

[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>29</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, para. 2

[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

13. The American Convention on Human Rights also provides a framework of protection for freedom of expression.<sup>30</sup> Article 13 establishes that everyone has the right to freedom of thought and expression, which cannot be subject to prior restraint, and all other restrictions must be “provided by law to the extent necessary to ensure a) respect for the rights or reputation of others; or b) the protection of national security, public order, or public health or morals.”<sup>31</sup>
14. Under Article 9, the African Charter for People’s and Human Rights guarantees every individual the right to receive information and express and disseminate his/her opinions within the law. The African Commission on Human and People’s Rights, established by virtue of Article 30 of the African Charter on Human and People’s Rights interpreted Article 9 and determined that such laws should not override international human rights standards

### II.3 Bahrain’s National Law

15. Bahrain’s Constitution reflects the legal framework of the ICCPR and guarantees freedom of expression “under the rules and conditions laid down by law, provided that the fundamental beliefs of Islamic doctrine are not infringed, the unity of the people is not prejudiced, and discord and sectarianism is not aroused.”<sup>32</sup>
16. In November 2011, the Cabinet of Bahrain passed legislative amendments to Bahrain’s Criminal Penal Code (CPC) to enhance freedom of expression.<sup>33</sup> One of the amendments was to Article 169 of the CPC establishing that all restrictions on freedom of expression shall be construed within the limits of democratic values.<sup>34</sup>

## III - ARGUMENT

### III.1 Incitement of Hatred towards the System of Government

#### A. Article 165 that Penalizes Incitement of Hatred Towards the Government Lacks Clarity and Foreseeability

17. The Bahraini authorities brought the charge of incitement of hatred towards the government against Sheikh Maytham Al-Salman under Article 165 of the CPC that reads: “a prison sentence shall be passed against any person who expressly incites others to develop hatred or hostility towards the system of government.”<sup>35</sup>

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<sup>30</sup> American Convention on Human Rights, Article 13

[http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm)

<sup>31</sup> American Convention on Human Rights, Article 13, para. 1 and 2

[http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm)

<sup>32</sup> The Constitution of the Kingdom of Bahrain, 2002, art. 23

<http://www.refworld.org/docid/48b54f262.html>

<sup>33</sup> BICI Follow Up Unit, “Moving Beyond 2011, A Special Report Detailing the Government of Bahrain’s Implementation of the Recommendations of the Bahrain Independent Commission of Inquiry,” p. 44

[http://www.bna.bh/pdf/BICI\\_Implementation\\_report\\_ENGLISH.pdf](http://www.bna.bh/pdf/BICI_Implementation_report_ENGLISH.pdf)

<sup>34</sup> Criminal Penal Code of the Kingdom of Bahrain, 2012, art. 169

[https://www.unodc.org/res/cld/document/bhr/1976/bahrain\\_penal\\_code\\_html/Bahrain\\_Penal\\_Code\\_1976.pdf](https://www.unodc.org/res/cld/document/bhr/1976/bahrain_penal_code_html/Bahrain_Penal_Code_1976.pdf)

<sup>35</sup> Criminal Penal Code of the Kingdom of Bahrain, 2012, art. 165

[https://www.unodc.org/res/cld/document/bhr/1976/bahrain\\_penal\\_code\\_html/Bahrain\\_Penal\\_Code\\_1976.pdf](https://www.unodc.org/res/cld/document/bhr/1976/bahrain_penal_code_html/Bahrain_Penal_Code_1976.pdf)

18. As previously laid-out, a legitimate restriction to freedom of expression must be provided by law. In General Comment 34, the HRC specified that “a norm to be characterized as a law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.”<sup>36</sup> It cannot confer upon government (this includes rulers of any kind, and parliaments) “unfettered discretion”<sup>37</sup> and it must be compatible with all the provisions of the ICCPR<sup>38</sup>.
19. For its part, the European Court of Human Rights (ECtHR) emphasized that there are two elements to the prescribed by law threshold: 1) the law must be adequately accessible; 2) the law must be sufficiently precise to foresee to a reasonable degree, the consequences of a citizen’s action.<sup>39</sup>
20. The ECtHR accepted that that the “wording in many statutes is not absolutely precise”<sup>40</sup>, that absolute foreseeability is unattainable,<sup>41</sup> and that persons may rely on expert legal advice to help them determine the consequences of their actions.<sup>42</sup> Nonetheless, there must be sufficient precision in legislation to enable citizens to regulate their conduct and thus to allow citizens to foresee the consequences of their actions.<sup>43</sup>
21. Article 165 of the CPC fails to meet the requirements of legality on at least two grounds.
22. Firstly, it fails to define the term “hatred.” What are the boundaries or limits of the term? This is particularly important in view of the fact that the term refers to a feeling or a state of mind, and not an action. Is the Article 165 concerned with the most extreme emotions of disgust and animosity? Or is it concerned with the emotion similar to that a child when forced to eat something he or she does not like, which is momentary and harmless? Without clarity of meaning, the law makes it impossible to regulate one’s conduct.
23. Equally importantly, the provision fails to provide sufficient guidance to those responsible with its execution, to “enable them to ascertain what sorts of expression are properly restricted and what sorts are not”<sup>44</sup>,” thus contravening a fundamental tenant of legality, namely that “A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”<sup>45</sup> How are Police Officers or Prosecutors supposed to assess how this feeling and form of Hate manifest itself vis-à-vis a system of government in the absence of any definition?
24. In *Dawood v Minister of Home Affairs*, South Africa’s High Court held that “if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what

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<sup>36</sup> UN General Comment 34, para. 25, citing communication No. 578/1994, *de Groot v The Netherlands*, views adopted on 14 July 1995

<sup>37</sup> General Comment No.27

<sup>38</sup> See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 30 March 1994.

<sup>39</sup> Eur. Ct. H.R., *The Sunday Times v U.K.*, Apr. 26, 1979, Application No. 6538/74, para. 49

<sup>40</sup> Eur. Ct. H.R., *Kokkinakis v Greece*, Judgment of Apr. 19, 1993, para. 40

<http://minorityrights.org/wp-content/uploads/old-site-downloads/download-383-Kokkinakis-v-Greece.pdf>

<sup>41</sup> Eur. Ct. H.R., *The Sunday Times v U.K.*, Apr. 26, 1979, Application No. 6538/74, para. 49

<sup>42</sup> Eur. Ct. H.R., *Tolstoy Miloslavsky v U.K.*, Judgment of June 23, 1995, para. 41

<http://www.Srb.com/wp-content/uploads/2013/10/Tolstoy-Miloslavsky-v-United-Kingdom-ECHR-13-Jul-1995.pdf>

<sup>43</sup> See, *The Sunday Times v U.K.*, para. 49 and HRC Gen. Comm. 34 para. 25

<sup>44</sup> General Comment 34, Par. 25

<sup>45</sup> Human Rights Committee, General Comment No. 27.



circumstances they are entitled to seek relief from an adverse decision.”<sup>46</sup> In the case at hand, the ambiguity of Article 165 allows the Bahraini authorities to arbitrarily apply it.

25. Secondly, the reference to “system of government” is also problematic from a legality standpoint. It would have been expected for the provisions to name the system of government in question – is it democracy? The Kingdom? Some other systems of government? The fact that the Bahrain penal code does not determine which “system” of government cannot be the object of “hatred” renders the provision quite unintelligible.
26. The reference to “system” does not specify whether it is meant in reference to values, as in “democratic values”, institutions, Ministries, individuals – many of which under international human rights law should not be the object of specific protection.
27. In conclusion, Article 165 attributes not only too much discretion to the Prosecutor’s Office, it is also preventing necessary and legitimate debates and expressions in the public interest, aiming at questioning or critiquing the system of government, seeking to improve it and ensuring it meets human rights obligations, as laid out in the ICCPR.
28. Article 165 limits the right to freedom of expression to such a large extent that it cannot be in conformity with international and global standards. This vagueness made it impossible for Sheikh Salman to foresee the consequences of his statements, even with the aid of legal experts. Thus, the limitations to freedom of expression, laid out in Article 165, cannot be considered to be provided by law.

## **B. Defamation of the State**

29. Even if one was to interpret Article 165 as prohibiting defamation of the government, this too will fail to meet international standards. The notion of “defamation” as applied to State, Government or their officials have been found by repeated courts to pose a grave danger to freedom of expression and democratic values. As a result, they have been continuously criticized by human rights treaty bodies and experts.
30. In 1999, the UN HRC in its concluding observations on Mexico’s compliance with the ICCPR, deplored the existence of the offence of “defamation of the State” and called for the abolishment of the crime.<sup>47</sup> As the Inter-American Commission on Human Rights and its Special Rapporteur on Freedom of Expression articulately put, laws punishing defamation of the state or its institutions “conflict with the belief that freedom of expression and opinion is the ‘touchstone of all the freedoms to which the United Nations is consecrated’ and ‘one of the soundest guarantees of modern democracy’.”<sup>48</sup>

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<sup>46</sup> *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000)*, para 47  
<http://www.saflii.org/za/cases/ZACC/2000/8.html>

<sup>47</sup> United Nations Human Rights Committee, Concluding Observations of the Human Rights Committee, Mexico, U.N. Doc. CCPR/C/79/Add.109 (1999) <https://www1.umn.edu/humanrts/hrcommittee/mexico1999.html>

<sup>48</sup> IACHR, Annual Report 1994, Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. Title I: Introduction. OEA/Ser.L/V/II.88. Doc. 9 rev.1. February, 17, 1995  
[http://www.cidh.oas.org/annualrep/94eng/chap.5.htm#\\_ftn4](http://www.cidh.oas.org/annualrep/94eng/chap.5.htm#_ftn4)

31. Furthermore, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression declared that “[c]riminal defamation laws may not be used to protect abstract or subjective notions or concepts, such as the State, national symbols, national identity, cultures, schools of thought, religions, ideologies or political doctrines .... international human rights law protects individuals and groups of people, not abstract notions or institutions that are subject to scrutiny, comment or criticism.”<sup>49</sup>
32. Defamation laws also create a broad chilling effect on expression concerning the government. The ECtHR reflected this argument in *Lingens v Austria* by stating that even when penalties for certain speech do not directly prevent a speaker’s expression, “they nonetheless amount[t] to a censure, which ... [is] likely to discourage him from making criticisms of that kind again in the future.”<sup>50</sup> The ECtHR has also clarified that a King, a President or a Prime Minister, being the symbol of the State, cannot be shielded from legitimate criticism, as this would amount to an over-protection of Heads of State.<sup>51</sup> In *Ergdođdu v Turkey* the ECtHR was of the opinion that a court order refraining an editor of a journal from publishing any article contrary to the interests of the State, amounted to a violation of his right to freedom of expression. Such a limitation on freedom of journalistic expression was disproportionate, as it would be excessive to limit in that way freedom of journalistic expression to generally accepted ideas that are favourably received or regarded as inoffensive or as a matter of indifference.<sup>52</sup>

### C. Protection of Political Expression

33. International human rights law provides for particularly high level of protection to political speech. Courts around the world have particularly insisted on three fundamental characteristics of this protection.
34. First, political expression and debates are particularly well protected. Hence General Comment 34, founded on a review of the HRC Jurisprudence, places high value and protection on political discourse<sup>53</sup> and public debate: “The Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high<sup>54</sup>” and speech related to public figures: “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<sup>55</sup>.”

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<sup>49</sup> United Nations Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/23

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf>

<sup>50</sup> Eur. Ct. H.R., *Lingens v Austria*, Application no. 9815/82, para 44

<sup>51</sup> Eur. Ct. H.R., *Otegi Mondragon v Spain*, Application no. 2034/07, para. 56-60 ; *Eon v France*, Application no. 26118/10, paras. 57-61 and *Tuđalp v Turkey*, Application nos. 32131/08 and 41617/08, paras. 44-51

<sup>52</sup> Eur. Ct. H.R., *Erdođdu v Turkey*, Application no. 25723/94, para 62-63 and para 72

<sup>53</sup> UN HRC, General Comment 34, CCPR/C/GC/34, para. 11, citing communication No. 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.8

<http://www1.umn.edu/humanrts/undocs/html/vws414.htm>

<sup>54</sup> See communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005, Quoted in UN HRC, General Comment 34

<sup>55</sup> See communication No. 1128/2002, *Marques v. Angola*, quoted in General Comment 34

35. In *Lingens v. Austria*, the ECtHR held that “freedom of political debate is at the very core of the concept of a democratic society”.<sup>56</sup> The Inter-American Court of Human Rights (IACHR) offers a similarly high defense of political discourse. In the *Case of Herrera-Ulloa v. Costa Rica*, the IACHR established that “it is logical and appropriate that statements concerning public officials and other individuals who exercise functions of a public nature should be accorded... a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a truly democratic system.”<sup>57</sup>
36. Protection of political expression can also be found in national jurisprudence. In the case of *Sanskar Marathe vs The State Of Maharashtra And Anr*, Bombay’s High Court declared that “a citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder.”<sup>58</sup>
37. The protection of political expression in international jurisprudence is well highlighted by legal scholars. For instance, Dirk Voorhoof, a legal scholar on freedom of expression and a law professor at the University of Gent, recently wrote on the basis of his extensive review of court cases that “especially in cases where information is published on alleged corruption, fraud or illegal activities in which politicians, civil servants or public institutions are involved, journalists, publishers, media and NGOs can count on the highest standards of protection of freedom of expression.”<sup>59</sup>
38. Second, International human rights jurisprudence has also consistently held that permissible critiques of the actions of Government, governmental entities or individual members of the Governments, are particularly high, as compared to “ordinary” citizens. Hence, in *Bodrozic v. Serbia and Montenegro*, the HRC stressed that “in circumstances of public debate the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.”<sup>60</sup>
39. European jurisprudence also insists on the importance of freedom of political expression and debate, even when it may be offensive or disturbing, recognizing that there are wider limits of acceptable criticism as regards governments, executive bodies, a politician or a public figure as such, than as regards a private individual.<sup>61</sup> In several judgments, the Court has reiterated that a politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of

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<sup>56</sup> Eur. Ct. H.R., *Lingens v Austria*, Application no. 9815/82, par. 42. See also Eur. Ct. H.R., *Dyuldin and Kislov v Russia*, Application no. 25968/02; Eur. Ct. H.R., *Standard Verlags GmbH (n° 3) v Austria*, Application no. 34702/07 and Eur. Ct. H.R., *Axel Springer AG (no.2) v Germany*, Application no. 48311/10

<sup>57</sup> IACHR, *Herrera-Ulloa v. Costa Rica [Herrera]*, [2004] IACHR 3, para. 128

[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_107\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf)

<sup>58</sup> Ind. Bombay High Ct., *Sanskar Marathe vs The State Of Maharashtra And Anr*, Cri.PIL 3-2015, Mar. 17, 2015, para. 25

<http://indiakanoon.org/doc/57916643/>

<sup>59</sup> Dirk Voorhoof, “Freedom of Expression, Media and Journalism under the European Human Rights System : Characteristics, Developments, and Challenges”, P. MOLNÁR (ed.), Central European University Press, Budapest - New York, 2015, 59-104

<sup>60</sup> Communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Oct. 31, 2005

<https://www1.umn.edu/humanrts/undocs/1180-2003.html>

<sup>61</sup> Dirk Voorhoof, “Freedom of Expression, Media and Journalism under the European Human Rights System : Characteristics, Developments, and Challenges”, P. MOLNÁR (ed.), *Free Speech and Censorship Around the Globe*, Central European University Press, Budapest - New York, 2015, 59-104

tolerance”.<sup>62</sup> With regard to public debate and criticism about governments and executive bodies the ECtHR emphasizes that “the limits of permissible criticism are wider with regard to a government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion”.<sup>63</sup> Members of parliament, local politicians, governments, public authorities or public figures in general have to accept even sharp criticism, sometimes expressed in a harsh or hostile tone. The ECtHR takes into account “that political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society”.<sup>64</sup>

40. In *Özgür Gündem v Turkey* the ECtHR declared that the “dominant position enjoyed by the State authorities makes it necessary for them to display restraint in resorting to criminal proceedings. The authorities of a democratic State must tolerate criticism, even if it may be regarded as provocative or insulting.”<sup>65</sup>
41. These conclusions are directly relevant to Sheikh Maytham’s speech. He participated in a public event held in solidarity with the currently imprisoned head of Al-Wefaq, Bahrain’s largest opposition party, Sheikh Ali Salman (Sheikh Ali thereafter). Sheikh Ali’s arrest and trial had been broadly criticized by eminent representatives of the international community. Sheikh Maytham cited this criticism in his statement. Quoting from international human rights law and from international bodies, Sheikh Maytham argued that the trial and detention of Sheikh Ali constituted a violation of international human rights law, and he called on the government to return to its initial commitments to reform criminal law and the system of government.
42. Sheikh Maytham’s speech regarding the imprisonment of the head of the largest political party in the country falls squarely within the definition of public interest and legitimate political expression protected by international human rights law.
43. Sheikh Maytham was not only providing information in the public domain on a matter of public interest, he was also calling on the Government to espouse democratic and human rights principles and obligations. A fundamental tenet of international law, related to the legitimate restrictions to freedom of expression under article 19 (3) of the ICCPR, is that these “may **never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.**”<sup>66</sup>
44. Sheikh Maytham was advocating for democracy, and the protection of human rights, based on commitments, which the Government of Bahrain itself had made publicly when it had agreed to the establishment and investigation by the BICI.
45. Finally, the Human Rights Committee, the European Court for Human Rights, and the Inter-

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<sup>62</sup> Eur. Ct. H.R., *Ukrainian Media Group v Ukraine*, Application no. 72713/01; Eur. Ct. H.R., *Mladina d.d. Ljubljana v Slovenia*, Application no. 20981/10 and Eur. Ct. H.R., *Brosa v Germany*, Application no. 5709/09.

<sup>63</sup> Eur. Ct. H.R., *Castells v. Spain*, Application No. 11798/85, para. 46 ; Eur. Ct. H.R., *Dyuldin and Kislov v Russia*, Application no. 25968/02.

<sup>64</sup> Eur. Ct. H.R., *Lopes Gomes Da Silva v Portugal* , Application no. 37698/97 and Eur. Ct. H.R., *Mladina d.d. Ljubljana v Slovenia*, Application no. 20981/10.

<sup>65</sup> Eur. Ct. H.R., *Özgür Gündem v Turkey*, Application no. 23144/93, para. 43

<sup>66</sup> See communication No. 458/91, *Mukong v Cameroon*, Views adopted on 21 July 1994.

American Court have repeatedly insisted that freedom of expression applies to unpopular expressions and even to views that some may find offensive. Hence in the words of the HRC, State power to restrict freedom of expression is not a “license to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in ICCPR Article 19, paragraph 3.”<sup>67</sup>

46. While some members of the Government and some sectors of the Bahraini public may have disagreed with Sheikh Maytham’s allegations regarding the imprisonment of Sheikh Ali, and while his views may have been particularly unpopular or indeed offensive to some, such reactions are not in any way sufficient ground for curtailing his freedom of expression.

47. This view is particularly well elaborated upon and re-emphasized in the European Court’s case law since the *Handyside v the United Kingdom* judgment of 7 December 1976, para 49:

*“Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.”*

48. In *Castells v. Spain*, the European Court for Human Rights (ECtHR) dismissed the State’s argument that the applicant overstepped the limits of political debate and insulted a democratic government with the aim to destabilize it, stating that pluralism in a democratic society demands protection of not only statements that are favorable and inoffensive but “as well as those that offend, shock or disturb.”<sup>68</sup>

49. In *Arslan v Turkey*, the ECtHR found that even biased and offensive political speech that fell short of incitement and criticized the government on issues of public interest was within the realm of political speech and thus its restriction failed to meet the necessity requirement.<sup>69</sup>

50. There is little doubt that Sheikh Maytham’s views regarding the imprisonment of Sheikh Ali, as unpopular they may have been, are legitimate and protected speech, as well demonstrated by the case law from around the world.

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<sup>67</sup> UN HRC, *Faurisson v France*, Communication No. 550/1993, Nov. 8, 1996, para. 8

[http://www.bayefsky.com/pdf/128\\_francevws55058.pdf](http://www.bayefsky.com/pdf/128_francevws55058.pdf)

<sup>68</sup> Eur. Ct. H.R., *Castells v. Spain*, Application No. 11798/85, para. 42. See also Eur. Ct. H.R., Grand Chamber, *Pedersen and Baadsgaard*, Application no. 49017/99; Eur. Ct. H.R., *Raichinov v Bulgaria*, Application no. 47579/99; *Tuşalp v Turkey*, Application nos. 32131/08 and 41617/08 and Eur. Ct. H.R., Grand Chamber, *Axel Springer AG v Germany*, Application no. 39954/08

<sup>69</sup> Eur. Ct. H.R., *Arslan v. Turkey*, Application No. 23462/94, para. 40

#### D. Incitement to Violence

51. International human rights law and international jurisprudence has recognised that incitement to violence or to commit a crime may be the object of legitimate and necessary restrictions. A joint submission by three United Nations experts to the OHCHR expert workshop on the prohibition of incitement defines incitement as “statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.”<sup>70</sup> In order to conclude that incitement has taken place, courts have focused on establishing the intent of the Speaker to incite, the likelihood of violence to take place and a causal link between the Speaker’s speech and violence<sup>71</sup>.
52. An analysis of the international jurisprudence on incitement to violence provides ample evidence that it is in no way applicable to the speech delivered by Sheikh Maytham. This is first demonstrated by the content of the speech itself, focusing as it does on principles of rule of law, fair trial, democracy and human rights obligations. Indeed, Sheikh Maytham was doing quite the opposite of inciting violence, he was speaking of values that are the foundations for peace.
53. In *Faruk Temel v. Turkey* (2011), the applicant, the chairman of a legal political party, read out a statement to the press at a meeting of the party, in which he criticised the United States’ intervention in Iraq and the solitary confinement of the leader of a terrorist organisation. He also criticised the disappearance of persons taken into police custody. Following his speech the applicant was convicted of disseminating propaganda, on the ground that he had publicly defended the use of violence or other terrorist methods. The applicant contended that his right to freedom of expression had been breached. The European Court held that there had been a violation of Article 10 of the Convention. It noted in particular that the applicant had been speaking as a political actor and a member of an opposition political party, presenting his party’s views on topical matters of general interest. It took the view that his speech, taken overall, had not incited others to the use of violence, armed resistance or uprising and had not amounted to hate speech.
54. In *Arup Bhuyan vs State Of Assam*, the Supreme Court of India, held that even expression that advocates or teaches clearly criminal activities “will become illegal only if it incites to imminent lawless action.”<sup>72</sup> In *S.Rangarajan v. P. Jagjivan Ram*, India’s High Court added that “the expression of thought should be intrinsically dangerous to the public interest.”<sup>73</sup>
55. The Calcutta High Court in the case of *Kamal Krishna v. Emperor* acquitted a speaker who encouraged young men to join an organization to spread communist propaganda, calling it absurd

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<sup>70</sup> Joint submission by the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance for the “OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred,” July 2011

<http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/SRSubmissionBangkokWorkshop.pdf>

<sup>71</sup> See the extensive review of the Jurisprudence globally, conducted for the OHCHR workshops on article 20 which cumulated in the adoption of the Rabat Plan of Action: Rabat Plan of Action on the prohibition of the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, OHCHR, Geneva, 2012

<sup>72</sup> *Arup Bhuyan vs State Of Assam* on 3 February, 2011

<http://indiankanoon.org/doc/792920/>

<sup>73</sup> *S.Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574, para 207

<http://indiankanoon.org/doc/341773/>

to penalize expression on the basis of incitement of hatred against the government without an explicit call to violence and stated that “to suggest some other form of Government is not necessary to bring the present Government into hatred or contempt.”<sup>74</sup>

56. In a 2004 concurring opinion at the Inter-American Court in the case of *Hererera Ulloa vs. Costa Rica*, Judge Sergio Garcia Ramirez made some pertinent observations regarding the resort to criminal law and criminal sanctions, which may be applicable to the case under study:

“In an authoritarian political milieu, the criminal law solution is used frequently: it is not the last resort; it is one of the first, based on the tendency to ‘govern with the penal code in the hand,’ a proclivity fostered by blatant and concealed authoritarianism and by ignorance, that can think of no better way to address society’s legitimate demand for security... classifying behaviors as criminal offenses must be done carefully and by rigorous standards, and the punishment must always be tailored to the importance of the protected interests, the harm done to them or the peril to which they are exposed, and the culpability of the perpetrator. The lawmaker has a number of useful options available to choose from, as does the judge. Of course, a distinction has to be made between the ‘real need’ to use the criminal law system, which must have a clear, objective basis, and the ‘false need’ to do so because the authorities have been ineffective in doing their job and then pretend ‘to correct’ the problem by unleashing the repressive machinery.”

57. In conclusion:

- a. Sheikh Maytham’s statement focused on a matter of high public interest and the subject of political debate: the arrest and imprisonment of a leader of the Opposition;
- b. His speech reiterated information already in the public domain regarding the trial of Sheikh Ali and the Government’s commitments under the BICI process;
- c. He paraphrased at length from the conclusions of eminently legitimate and well-regarded human rights actors, including the Bahrain Independent Commission of Inquiry (which had been set up with the government’s authorization), and the Special Rapporteurs on Arbitrary Detention, Freedom of Religion and Consciousness, and Human Rights Defenders.
- d. Sheikh Maytham’s speech contained no offensive rhetoric<sup>75</sup>, direct or indirect calls to violence. There is also no evidence that Sheikh Maytham’s statements caused or had potential to cause any violence.
- e. He seconded criticism of the trial and imprisonment of Al-Wefaq and suggested that it was evidence of the Bahraini authorities’ repression of discussion on the country’s governance. He also urged Bahrain’s authorities to implement the recommendations of the BICI and abide by its human rights obligations. This is legitimate and protected political expression.
- f. Thus, the charges and threat of penal action in the form of imprisonment cannot be justified as they fail to meet the necessity and proportionality test.

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<sup>74</sup> Calcutta High Court, *Kamal Krishna v. Emperor*, AIR 1935 Cal 636

<sup>75</sup> AhlulBayt News Agency, “Bahrain Authorities Continue to Harass Human Rights Defender,” Jan. 9, 2016 <http://en.abna24.com/service/bahrain/archive/2016/01/09/729586/story.html>

## III.2. Expressing an Opinion about an Ongoing Trial

### A. Contempt of Court

58. Contempt of court is a legal doctrine that aims to protect the administration of justice and the right to fair trial.<sup>76</sup> The doctrine relates to interferences with ongoing legal proceedings and the legitimacy of restrictions of statements that might prejudice said proceedings.<sup>77</sup>
59. The HRC in General Comment No. 34 lists contempt of court as a legitimate restriction on freedom of expression. This means that the restriction, to be legitimate under international human rights law, must be provided by law<sup>78</sup>, must be necessary and proportionate and it must be tested against valid grounds.
60. The European Convention of Human Rights is the only international human rights instrument, which makes specific reference to the administration of justice with regard to permissible limits to freedom of expression. In article 10 (2), the European Convention permits “such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for maintaining the authority and impartiality of the judiciary.”<sup>79</sup>
61. In adjudicating the three-part test, Courts around the world have insisted that there must be a real risk of serious prejudice to the administration of justice.
62. For instance, the Australian High Court held in *Hinch and Macquire Broadcasting Holdings Ltd v Attorney General for the State of Victoria*<sup>80</sup> that a publication constituted contempt only if there was a “substantial risk of serious interference with the trial”. The Philippines Supreme Court has stated that commenting on matters *sub judice* is punishable only when “there exists a substantive evil which is extremely serious and that the degree of its imminence is so exceptionally high as to warrant punishment for contempt and sufficient to disregard the constitutional guaranties of free speech and press.”<sup>81</sup>
63. The South African Supreme Court of Appeal held in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* that a contempt of court will be committed only “if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial”.<sup>82</sup> It stressed that “the test to be overcome before publication will be susceptible to prior restraint has always been considerable.”<sup>83</sup>

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<sup>76</sup> UK Law Commission, Contempt of Court, Chapter 2: Contempt by Publication, para. 2.4

<sup>77</sup> Article 19, “Background Paper on Freedom of Expression and Contempt of Court,” discussion of the “*sub judice*” rule, p. 5, Nov. 2000

<sup>78</sup> UN HRC, General Comment 34, CCPR/C/GC/34, para.24, citing communication No. 1373/2005, *Dissanayake v. Sri Lanka*

<sup>79</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, para. 2  
[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>80</sup> [1987] HCA 56; (1987) 164 CLR 15

<sup>81</sup> *People v. Godoy and others*, G.R. Nos. 115908-09 March 29, 1995

<sup>82</sup> *Midi Television*, para. 13.

<sup>83</sup> *Midi Television*, para. 15.



64. The necessity of narrowly defining contempt of court through an insistence on substantial risk is also made clear in national legislation. As a result of the ECtHR judgment in *Sunday Times*, the U.K. introduced a Contempt of Court Act in 1981 to prohibit contempt by publication, which includes spoken or written statements.<sup>84</sup> The legislation, however, is explicit in requiring “a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.”<sup>85</sup> The Act introduced a public interest defence, which protects publications, which are part of a discussion on matters of public interest.

65. Second, Courts have also emphasized that any restriction on the ground of contempt of court on freedom of expression must be a matter of last resort, and that lesser means would not suffice. As the UK Court of Appeal stated in *R v Sherwood, ex parte Telegraph Group*, a judge “would still have to consider whether the risk could satisfactorily be overcome by some less restrictive means. If so, it could not be said to be ‘necessary’ to take the more drastic approach...”<sup>86</sup>

66. The Canadian Supreme Court has similarly held:<sup>87</sup>

A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban.

67. Thirdly, Courts have also stressed the importance of court reporting to public debates and the public interest. The European Court for Human Rights has repeatedly emphasized that there is a very strong public interest in reporting on court proceedings and on important legal matters. In *Sunday Times v. United Kingdom*, the ECtHR argued that:

“[F]reedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. These principles are of particular importance as far as the press is concerned. **They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large**<sup>88</sup>.”

68. Hence in *Sunday Times v. United Kingdom*, the ECtHR rejected the government’s argument that public interest in freedom of expression should be balanced against the public interest in the fair administration of justice, instead declaring that the “Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of

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<sup>84</sup> U.K., Contempt of Court Act 1981, para. 2(1) <http://www.legislation.gov.uk/ukpga/1981/49>

<sup>85</sup> U.K., Contempt of Court Act 1981, para. 2(2)

<sup>86</sup> [2001] EWCA Crim 1075; (2001) 1 WLR 1983 at 1991G-1992A.

<sup>87</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at 891: <http://scc.lexum.umontreal.ca/en/1994/1994scr3-835/1994scr3-835.html>.

<sup>88</sup> Eur. Ct. H.R., *The Sunday Times v U.K.*, Apr. 26, 1979, Application No. 6538/74, para.65

exceptions which must be narrowly interpreted.”<sup>89</sup> Therefore, to be legitimate, restrictions on legal expression must serve the purpose of administration of justice and satisfy the elements of the three-part test.

69. The Inter-American Court for Human Rights has considered contempt of court in *Palamana-Iribarne v Chile*<sup>90</sup>, where it found that Chile had violated Article 13 of the inter-American Convention because the conviction for contempt of court was neither necessary nor proportionate (par.88):

“The Court believes that the contempt laws applied to Palamara-Iribarne established sanctions that were disproportionate to the criticism leveled at government institutions and their members, thus suppressing debate, which is essential to the functioning of a truly democratic system, and unnecessarily restricting the right to freedom of thought and expression.”

70. In cases involving the disclosure of confidential information related to court proceedings, the ECtHR insisted that even in cases of documents obtained through a breach of secrecy, the Court had to consider whether the information released contributed to a public debate<sup>91</sup>. The European Court also introduced another element, directly relevant to the case of Sheikh Maytham: the extent to which the confidential information was indeed confidential or whether it was in totality or partly already available to the public<sup>92</sup>.

“It is open to question, however, whether there was still any need to prevent disclosure of information that was already, at least partly, available to the public (see *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, p. 23, § 51, and *Vereniging Weekblad Bluf! v. the Netherlands*, judgment of 9 February 1995, Series A no. 306-A, p. 15, § 41) and might already have been known to a large number of people (see *Fressoz and Roire*, cited above, § 53) having regard to the media coverage of the case, on account of the facts and of the celebrity of many of the victims of the telephone tapping in question.

... In conclusion, the Court considers that the judgment against the applicants constituted a disproportionate interference with their right to freedom of expression and that it was therefore not necessary in a democratic society.”

## **B. The Information in Sheikh Maytham’ Speech Was in the Public Domain**

71. Sheikh Maytham delivered his speech at a public event commemorating the imprisonment of Al-Wefaq’s Secretary General on December 27, 2015.<sup>93</sup> Ali Salman, Al-Wefaq’s SG, was arrested on

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<sup>89</sup> Eur. Ct. H.R., *The Sunday Times v U.K.*, Apr. 26, 1979, Application No. 6538/74, para.65

<sup>90</sup> *Palamana-Iribarne v Chile*, Inter-American Court of Human Rights, November 22 2005

<sup>91</sup> See for instance *Dupuis v. France* (2008) 47 EHRR 52, par. 45-46 and *Campos Damaso v Portugal*, Application No 17107/05, 24 April 2008

<sup>92</sup> *Dupuis v. France*, par. 45 and par. 49

<sup>93</sup> AhlulBayt News Agency, “Bahrain Authorities Continue to Harass Human Rights Defender,” Jan. 9, 2016 <http://en.abna24.com/service/bahrain/archive/2016/01/09/729586/story.html>

December 28, 2014,<sup>94</sup> and the court delivered its imprisonment sentence on June 16, 2015.<sup>95</sup> A Google Search of the terms “Ali-Salman Arrested” generates over six thousand results.<sup>96</sup>

72. During those six months, the international community widely criticized the arrest.<sup>97</sup> Condemnations came from UN organizations, the European Union<sup>98</sup>, and other domestic and international organizations<sup>99</sup>, and even the United States, Bahrain’s strategic ally.<sup>100</sup> All of this criticism is available to the public.
73. Sheikh Maytham began his allegedly illegitimate statement with “The joint letter sent to the authorities in Bahrain by the Special Rapporteur on Arbitrary Detention and the Special Rapporteur on Freedom of Expression, the Special Rapporteur on the Right to Freedom of Peaceful Assembly and Association, the Special Rapporteur on Freedom of Religion and Consciousness, the Special Rapporteur for Human Rights Defenders and the Special Rapporteur on the Independence of Judges and Lawyers clearly revealed that United Nations experts consider the arrest of Sheikh Ali Salman as a direct response by the authority to his public expression of political views.”<sup>101</sup> The joint letter is available to the public and has been published on UN OHCHR’s website on February 4, 2015.<sup>102</sup> Clearly, the information that Sheikh Maytham delivered in his statement was in the public domain.
74. In *Manyatshe v M&G Media Ltd and Others*, South Africa’s Supreme Court of Appeal reviewed the legitimacy of an order to prevent the publication of certain information and held that “Even if we should find that on the facts of this case an interim interdict should have been granted, it will not help the appellant because the publication he sought to prevent had taken place. It is water under the bridge.”<sup>103</sup>
75. In *Attorney-General v Guardian Newspapers (No 2)*, the United Kingdom House of Lords likewise dismissed the government’s request to prevent the distribution of a book after its publication.<sup>104</sup> Sir Nicolas Browne-Wilkinson, the presiding judge in the case delivered: “I have felt like the little Dutch

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<sup>94</sup> BBC, Bahrain opposition leader Sheikh Ali Salman arrested, Dec. 28, 2014

<http://www.bbc.com/news/world-middle-east-30620615>

<sup>95</sup> Kareem Fahim, “Bahrain Opposition Leader Sentenced to 4 Years in Prison,” The New York Times, June 16, 2005

<http://www.nytimes.com/2015/06/17/world/middleeast/bahrain-opposition-leader-sentenced-to-4-years-in-prison.html>

<sup>96</sup> Results of a Google.com search with the parameters “Ali-Salman Arrested.” The search was undertaken on January 27, 2016.

<sup>97</sup> UN OHCHR, “Bahrain: UN rights experts urge release of opposition politician detained for peaceful expression,” Feb. 4, 2015

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15541&LangID=E#sthash.e9QHPEQt.dp>

<sup>98</sup> European Union External Action, “Statement by the Spokesperson on the sentencing of al-Wefaq Secretary General Ali

Salman in Bahrain,” June 17, 2015 [http://eeas.europa.eu/statements-eeas/2015/150617\\_03\\_en.htm](http://eeas.europa.eu/statements-eeas/2015/150617_03_en.htm)

<sup>99</sup> HRW, “Joint NGO Letter: Human Rights Situation in Bahrain,” July 16, 2015

<https://www.hrw.org/news/2015/07/16/joint-ngo-letter-human-rights-situation-bahrain>

<sup>100</sup> Reuters, “U.S. concerned over detention of Bahraini opposition leader,” Jan. 1, 2015 <http://www.reuters.com/article/us-bahrain-arrest-usa-idUSKBN0KA1E420150101>

<sup>101</sup> AhlulBayt News Agency, “Bahrain Authorities Continue to Harass Human Rights Defender,” Jan. 9, 2016

<http://en.abna24.com/service/bahrain/archive/2016/01/09/729586/story.html>

<sup>102</sup> Bahrain: UN rights experts urge release of opposition politician detained for peaceful expression

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15541&LangID=E>

<sup>103</sup> *Manyatshe v M&G Media Ltd and Others*, [2009] ZASCA 96 (17 September 2009), para. 12

<sup>104</sup> *Attorney-General v Guardian Newspapers (No 2)*, [1990] 1 AC 109, [1988] UKHL 6, [1987] 1 WLR 776, [1988] 3 All ER 545

<http://swarb.co.uk/attorney-general-v-guardian-newspapers-ltd-no-2-spycatcher-hl-13-oct-1988-2/>

boy being asked to put a finger in the hole in the dyke when in fact the whole embankment has broken down two hundred yards upstream.”<sup>105</sup>

76. The government of Bahrain threatens Sheikh Maytham with imprisonment by charging him for sharing information, which is widely available and easily accessible, in contradiction to existing related jurisprudence. Therefore, the charges against Sheikh Maytham for expressing an opinion about an ongoing trial are unnecessary.

### C. Serious Concerns Regarding the Legality of the Restriction

77. Sheikh Maytham was charged for expressing opinion about an ongoing trial with the purpose of changing public opinion under Article 168 of Bahrain’s CPC that reads: “imprisonment for a period of no more than two years and a fine not exceeding BD 200 or either penalty shall be the punishment for any person who deliberately disseminates false reports, statements or malicious rumors, or produces any publicity seeking to damage public security, terrorize the population or cause damage to the public interest.”<sup>106</sup>
78. It has been established that international norms and global jurisprudence allow restrictions on statements concerning ongoing trials under the legal doctrine of “contempt of court.”<sup>107</sup> However, the ECtHR recognized that such restrictions must still satisfy the three-part test.<sup>108</sup> This includes whether or not the restriction is provided by law.
79. In *Kruslin v France*, the ECtHR held for a norm to be considered a law for the purposes of the three-part test, it must explicitly sanction the restriction at issue.<sup>109</sup> Article 168 fails the condition because it does not contain a single word related to the sanction of statements about ongoing trials.
80. As a matter of fact, Sheikh Maytham was charged with “expressing an opinion about an ongoing trial with the purpose of changing public opinion” under Article 168 of Bahrain’s CPC. However, the Article in question reads as follow: “imprisonment for a period of no more than two years and a fine not exceeding BD 200 or either penalty shall be the punishment for any person who deliberately disseminates false reports, statements or malicious rumors, or produces any publicity seeking to damage public security, terrorize the population or cause damage to the public interest.”<sup>110</sup>
81. Furthermore, the doctrine of contempt of court was established for the purposes of protection of the administration of justice and the right to fair trial.<sup>111</sup> With this in mind, the HRC allowed contempt of court proceedings to be tested against public order, but as it relates to the court’s ability to maintain orderly proceedings: “In conditions where contempt of court claims are made in

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<sup>105</sup> *Attorney-General v Guardian Newspapers (No 2)*, [1990] 1 AC 109, [1988] UKHL 6, [1987] 1 WLR 776, [1988] 3 All ER 545, 1248 at 1269

<sup>106</sup> Kingdom of Bahrain, Criminal Penal Code, art. 168

[http://www.unodc.org/res/cld/document/bhr/1976/bahrain\\_penal\\_code\\_html/Bahrain\\_Penal\\_Code\\_1976.pdf](http://www.unodc.org/res/cld/document/bhr/1976/bahrain_penal_code_html/Bahrain_Penal_Code_1976.pdf)

<sup>107</sup> See, paras. 21-23

<sup>108</sup> See, para 25

<sup>109</sup> Eur. Ct. H.R., *Kruslin v France*, 24 Apr. 1990, Application no. 11801/85, para. 32

<sup>110</sup> Kingdom of Bahrain, Criminal Penal Code, art. 168

[http://www.unodc.org/res/cld/document/bhr/1976/bahrain\\_penal\\_code\\_html/Bahrain\\_Penal\\_Code\\_1976.pdf](http://www.unodc.org/res/cld/document/bhr/1976/bahrain_penal_code_html/Bahrain_Penal_Code_1976.pdf)

<sup>111</sup> UK Law Commission, *Contempt of Court*, Chapter 2: Contempt by Publication, paras 2.4-2.8

relation to the public order (*ordre public*) ground, “*such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court’s power to maintain orderly proceedings.*”<sup>112</sup> In other words, contempt of court on public order ground can only be applied very narrowly, and related to order in the courtroom.

82. Article 168’s main purpose is clearly national security and public order of the nation, rather than that of a courtroom. This point is supported by the fact that Bahrain’s CPC contains prohibitions of publication of information concerning court deliberations, more akin the standard contempt of court doctrine, in Article 246.<sup>113</sup> Particularly, Article 246 punishes with imprisonment for up to a year or a fine not exceeding BD 100 for publication of court deliberations, news reports concerning ongoing investigations, or ongoing legal procedure.<sup>114</sup>
83. The existence of Article 246 also purports that even the broadest interpretation of Article 168 should not include statements related to ongoing court proceedings. Therefore, Sheikh Maytham’s charges of expressing opinion about an ongoing trial brought under Article 168 are not prescribed by law.

### III.3 State Harassment

84. The Human Rights Committee (HRC) declared in General Comment 34 that Article 19 prohibits “the harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold.”
85. On December 31, 2015 Sheikh Maytham was summoned to the Criminal Investigation Department - Ministry of Interior, released several hours later, and on January 6, 2016, was called back in to Public Prosecution. On both occasions, a large police force surrounded his home. On the first occasion, police forces surrounded the home for some time because he was not there at the time.
86. This is not the first time Sheikh Maytham faced charges of incitement of hatred towards the regime under Article 165. In August 2015 he was detained at the airport after returning from a UN conference and held for 12 hours. Then, just as now, his charges stemmed from peaceful statements over Twitter. Particularly, his tweets, translated from Arabic were, “*Seriously resisting national division and the promotion of hatred among citizens constitutes both a national and a religious duty. And a must for Bahrain and the region*”, and “*Pejorative epithets against certain groups found on some media and religious platforms perpetuate hostility in Bahrain. Anyone hostile to Sunnis because they are Sunni, or Shiites because they are Shiite cannot make any claim to good citizenship, which is grounded on civil coexistence and the acceptance of diversity.*”<sup>115</sup>
87. There is an *ad terrorem* effect to being subjected to repeated detention and interrogation stemming from unsubstantiated charges. Sheikh Maytham’s treatment in the hands of the

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<sup>112</sup> UN HRC, General Comment 34, CCPR/C/GC/34, para.31, citing communication No. 1373/2005, *Dissanayake v. Sri Lanka*

<sup>113</sup> Kingdom of Bahrain, Criminal Penal Code, art. 246

[http://www.unodc.org/res/cld/document/bhr/1976/bahrain\\_penal\\_code\\_html/Bahrain\\_Penal\\_Code\\_1976.pdf](http://www.unodc.org/res/cld/document/bhr/1976/bahrain_penal_code_html/Bahrain_Penal_Code_1976.pdf)

<sup>114</sup> Kingdom of Bahrain, Criminal Penal Code, art. 246

[http://www.unodc.org/res/cld/document/bhr/1976/bahrain\\_penal\\_code\\_html/Bahrain\\_Penal\\_Code\\_1976.pdf](http://www.unodc.org/res/cld/document/bhr/1976/bahrain_penal_code_html/Bahrain_Penal_Code_1976.pdf)

<sup>115</sup> Columbia Global Freedom of Expression, “Arrest of Inter-Faith Activist and Columbia Global Freedom of Expression expert Maytham Al Salman,” Aug. 10, 2015 <https://globalfreedomofexpression.columbia.edu/updates/2015/08/arrest-of-inter-faith-activist-and-columbia-global-freedom-of-expression-expert-maytham-al-salman/>

authorities serves as an example to other civil society and human rights activists of the risks associated with government criticism and has a chilling effect on their work. Such practices underscore the weakness of the case against Sheikh Maytham as their aims seem to be that of spreading fear among those criticizing the Bahrain's government, rather than any legitimate purposes outlined in Article 19 of the ICCPR. In short, Sheikh Maytham has been a victim of state harassment.

88. In *Sir Dawda K. Jawara v. The Gambia*, The African Commission on People's and Human Rights held that state harassment aimed at disrupting legitimate activities of an organization informing and educating people about their rights clearly violated the right to freedom of expression.<sup>116</sup> Similarly, Bahrain's authorities violated Sheikh Maytham's freedom of expression by harassing him for his peaceful work.

## CONCLUSION

89. Article 165 that penalizes incitement of hatred towards the system of government fails to narrowly define the scope of its restrictions on freedom of expression. International norms and global jurisprudence require legitimate restrictions to be narrowly defined to enable people to foresee the consequences of their actions. However, Article 165 comes short of this requirement because it fails to define the requisite elements of the crime of incitement of hatred towards the system of government and thus cannot be considered a legitimate restriction on freedom of expression.
90. International law and global jurisprudence mandate restrictions on freedom of expression to be necessary and proportionate to the aim that they pursue. Sheikh Maytham quoted from well-known and well-circulated international criticism of the trial and imprisonment of Al-Wefaq's Secretary General. His speech did not contain any of the elements pertaining to incitement to violence. His statements constituted typical political expressions enjoying a high level of protection. Therefore the charges brought against Sheikh Maytham fail to satisfy the test of necessity and proportionality.
91. The charges brought against Sheikh Maytham under Article 168 are not provided by law. Article 168 does not explicitly sanction statements about court proceedings. Indeed, a completely different Article 246 of Bahrain's CPC penalizes such expression. Moreover, contempt of court restrictions must serve administration of justice rather than national security, which is the main concern of Article 168. Thus, there is no basis suggesting that Article 168 could be applied to statements about ongoing court proceedings. This concludes that the charges brought against Sheikh Maytham are not provided by law.
92. Even if the charges against Sheikh Maytham were provided by law, the information he shared belonged to the public domain and the government had no legitimate reason to penalize him. The arrest and imprisonment of Al-Wefaq's Secretary General took place in December 2014, and there has been subsequent and repeated criticisms ever since. Extensive information can be found easily online, including a joint letter drafted by several UN Special Rapporteurs, quoted by Sheikh

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<sup>116</sup> See *Sir Dawda K. Jawara v. The Gambia*, Communications 147/95 and 149/96 <http://caselaw.ihrda.org/doc/147.95-149.96/view/en/#holding>

Maytham. Therefore, Sheikh Maytham has not shared information or expressed an opinion about an ongoing trial that has not already been disseminated globally.

93. A framework that prohibits incitement of the system of Government is incompatible *per sé* with democracy, the rule of law and respect for rights. Such framework is open to abuse and permits the authorities to subject its critics to state harassment. The constant threat of being summoned by law enforcement and charged with crimes carrying imprisonment penalties for expressing legitimate criticisms of the government has a chilling effect on freedom of expression in Bahrain.
94. On the basis of this review, it is clear that the charges against Sheikh Maytham do not meet international standards related to the legitimacy of restrictions of freedom of expression. Therefore, Columbia Global Freedom of Expression calls on the authorities of Bahrain to immediately and unconditionally drop all charges against Sheikh Maytham Al Salman.

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\*\*Affiliations are for purposes of identification, not necessarily institutional endorsement.



## ANNEX ONE

### SHEIKH MAYTHAM AL SALMAN SPEECH OF 27 DECEMBER 2015<sup>117</sup>

"The joint letter sent to the authorities in Bahrain by the Special Rapporteur on Arbitrary Detention and the Special Rapporteur on Freedom of Expression, the Special Rapporteur on the Right to Freedom of Peaceful Assembly and Association, the Special Rapporteur on Freedom of Religion and Consciousness, the Special Rapporteur for Human Rights Defenders and the Special Rapporteur on the Independence of Judges and Lawyers clearly revealed that United Nations experts consider the arrest of Sheikh Ali Salman as a direct response by the authority to his public expression of political views.

The international consensus on the invalidity of the trial of Sheikh Ali Salman and its breach of the tenth article of the Universal Declaration of Human Rights, which states that: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him', is clear and not in doubt by international experts, legal scholars and international human rights organizations.

There is a consensus that the trial is retaliation against Sheikh Ali Salman for expressing his political views publicly. Those views clearly call for the improvement of the political system in the country, so that the people become true decision makers in the political process. Sheikh Ali Salman has constantly called for activating the first article of the constitution of the Kingdom of Bahrain which states that 'the system of government in the Kingdom of Bahrain is democratic; sovereignty being in the hands of the people, the source of all powers'.

In order to conduct a fair trial the following principle has to be applied: 'a crime or penalty can only be determined by law'. Is there anything in law that criminalizes someone who calls for activating the first article of the constitution - which says 'the people are the source of all powers'? Is there a legal provision that criminalizes the call for democracy and developing the political system to address the social and economic challenges the country is facing?

Does it make Sheikh Ali Salman a criminal to call for the implementation of the UN Periodic Review and the Bahrain Independent Commission of Inquiry [BICI] recommendations? There is no single provision in law that criminalizes Sheikh Ali Salman for his pro-democratic views and calls to end human rights violations and implement the international human rights commitments on Bahrain.

Sheikh Ali Salman's trial does not comply with the principle of 'a crime or penalty can only be determined by law', and therefore, it is not a fair trial in accordance with international standards.

Sheikh Ali Salman's arrest is another proof that authorities have not implemented the Bahrain Independent Commission of Inquiry recommendations. The report, in paragraphs 1279 and 1281, stated that some Criminal Code Articles are used to punish the opposition and violate the right of freedom of expression contrary to Bahrain's international commitments. The report found that these articles are being used to ban and suppress freedom of expression regarding the country's governance structures and system or even the call to develop them.

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<sup>117</sup> Reproduced in Abna24.com: <http://en.abna24.com/service/bahrain/archive/2016/01/09/729586/story.html>

The report has clearly recommended abolishing all the sentences against the opposition members who peacefully expressed their political views, because that clearly contradicts article 19 of the International Covenant of Political and Civil Rights.

Sheikh Ali Salman's imprisonment as well as Ibrahim Sherif's trial reveal the unwillingness of the government in implementing Professor Bassiouni's recommendations as head of the BICI commission.

If you are serious and eager to implement the BICI recommendations invite Professor Bassiouni to officially visit Bahrain again in order to verify the implementation of his own recommendations.

One year has passed and Sheikh Ali Salman still calls on the authority, from his prison cell, to engage in a serious, meaningful dialogue process which could achieve political, social and economic stability. The government must utilize these calls. Continuously ignoring them does not serve Bahrain. If the government continues to refuse to open doors for dialogue, the international community will clearly understand that the authorities are responsible for the continuance of the political crisis and the ongoing human rights violations. It is also important to point out that any future dialogue should include the imprisoned leaders who have constantly called for dialogue as the only means to resolve social and political disputes in the country."