

2255 E. Evans Ave  
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## **Report of the Ved Nanda Center for International and Comparative Law on the Prosecution of Democracy Advocates in Bahrain<sup>1</sup>**

### **I. Introduction**

In the wake of widespread protests last year in Bahrain, a number of individuals have been prosecuted for charges including “inciting hatred of the government of Bahrain”. The government-appointed Bahrain Independent Commission of Inquiry (BICI) called into question the legitimacy of many of these prosecutions under international law. It also questioned the use of National Safety Courts to prosecute civilians and the use of evidence derived from torture. The government of Bahrain (GoB) has committed to implementing the recommendations of the BICI.

The Ved Nanda Center has evaluated the case of two prominent civil society leaders, Mahdi Abu Deeb and Mohammad al-Tajer, and found that their prosecutions violate international law and the recommendations of the BICI. The two cases are emblematic of the broader trend of illegal prosecutions undertaken by the GoB in response to the protests.

### **II. Statement of the Facts**

#### **a. General Background**

##### **i. The Bahrain Government and Judiciary**

The Kingdom of Bahrain is a constitutional hereditary monarchy.<sup>2</sup> The King is the head of state and has extensive executive authority, including over the armed forces, the appointment of judges, and the “Higher Judicial Council”.<sup>3</sup>

The judicial system in Bahrain is a mixture of Islamic, regional, and British Common Law. Within the judiciary, there are separate systems for the Civil (including non-military criminal matters), Islamic and Military jurisdictions. The Military Court system handles all judicial matters pertaining to the armed forces, including criminal cases. However, the jurisdiction of the Military courts can be expanded to cover civilians during times when “martial law is declared

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<sup>2</sup> CONSTITUTION OF THE KINGDOM OF BAHRAIN Feb. 14, 2002, art. 1(b), [http://www.unhcr.org/refworld/country\\_LEGAL\\_LEGISLATION\\_BHR\\_4562d8cf2\\_48b54f262.0.html](http://www.unhcr.org/refworld/country_LEGAL_LEGISLATION_BHR_4562d8cf2_48b54f262.0.html) [hereinafter Constitution of Bahrain 2002]; U.S. Department of State, Website, *Background Note: Bahrain*, <http://www.state.gov/r/pa/ei/bgn/26414.htm#gov>.

<sup>3</sup> *Id.* at art. 33(g-h).



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and within the bounds prescribed by law.”<sup>4</sup> Finally, the Constitution established a Constitutional Court to review the constitutionality of proposed or passed legislation.<sup>5</sup>

## ii. Demonstration and Governmental Response

Mirroring popular demonstrations that were occurring throughout the Middle East and North Africa, mass protests calling for democratic reforms formed in the capital city of Bahrain, Manama, in early February 2011. Coined the “February 14<sup>th</sup> Revolution” in recognition of anniversaries marking the formation of the current Bahrain government, groups published calls on the internet for mass demonstrations to start on February 14 in order to bring about “political, economic and social reform in Bahrain.”<sup>6</sup> On February 14, an “erupt[ion]” of demonstrations started throughout Bahrain, with a large concentration in Manama.<sup>7</sup> One protestor was killed. During the funeral procession the following day, police and protesters clashed. When the police ran out of non-lethal weapons to deal with the altercation, two shotgun shots were fired at the crowd, leading to the death of another protester.<sup>8</sup>

Despite public statements from prominent governmental and political leaders, including King Hamad of Bahrain, stating that the two deaths would be investigated and the basic rights of the Bahraini people were to be respected, the demonstrations swelled in size. The protestors congregated in the Gulf Cooperation Council (GCC) roundabout, where civil society leaders gave speeches calling for democratic reforms.<sup>9</sup>

On the morning of February 17, over 1,000 police officers were ordered to take back control of the GCC roundabout. This effort led to intense clashes between the police and demonstrators. At the end of these clashes, the government took control of the GCC roundabout, 4 protesters were fatally shot, 50 demonstrators suffered injuries, and 47 police officers were also injured.<sup>10</sup> Two days later on February 19, the number of demonstrators attempting to take back the GCC caused the police to withdraw.<sup>11</sup>

As negotiations between the government and opposition leaders began,<sup>12</sup> a wave of labor strikes ensued on February 20 resulting in approximately 80% of the country’s entire labor force going on strike.<sup>13</sup> In early March, the political divide widened and the demonstrations intensified.

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<sup>4</sup> *Id.* at art. 105.

<sup>5</sup> *Id.* at art. 106.

<sup>6</sup> MAHMOUD CHERIF BASSIOUSNI ET AL., REPORT OF THE BAHRAIN INDEPENDENT COMMISSION OF INQUIRY 65 (2011) [hereinafter *BICI Report*], at 65.

<sup>7</sup> *Id.* at 68.

<sup>8</sup> *Id.* at 70-71.

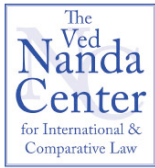
<sup>9</sup> *Id.* at 71-73.

<sup>10</sup> *Id.* at 73- 74.

<sup>11</sup> *Id.* at 81-82.

<sup>12</sup> *Id.* at 82.

<sup>13</sup> *Id.* at 83.



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While many groups continued to call for a constitutional monarchy, a Coalition for the Republic was formed among prominent opposition groups that demanded the creation of a republican form of government.<sup>14</sup>

Starting on March 13, the overall security situation within Bahrain deteriorated.<sup>15</sup> Crowd clearing efforts were conducted by state security personnel.<sup>16</sup> Some called for martial law to be instituted.<sup>17</sup> Dialogue between the government and the opposition broke down.<sup>18</sup> This breakdown culminated on March 14 when Gulf Cooperation Council Shield Forces crossed into Bahrain from Saudi Arabia.<sup>19</sup>

The next day, the King issued Royal Decree No. 18, which instituted a state of national safety in Bahrain for a period of three months.<sup>20</sup> Thereafter, security forces continued to engage with protesters and many people were injured and killed.<sup>21</sup>

On March 17, the government began to arrest, detain, and interrogate many prominent opposition leaders.<sup>22</sup> Demonstrations were banned in Bahrain, checkpoints established, and curfews enforced.<sup>23</sup> Despite sporadic demonstrations,<sup>24</sup> the Bahrain security situation eventually stabilized and normal life returned in the later parts of March.

One of the major criticisms of the GoB throughout the protests was that the government granted preferential treatment to Sunnis, many of whom are expatriate members of the security forces.<sup>25</sup> The GoB alleges that opposition parties have fueled “anti-foreigner sentiment” targeting the expatriate population.<sup>26</sup>

The Commission found that violence against expatriates and Sunnis did occur during this time period, with most attacks occurring on March 13<sup>th</sup> and 14<sup>th</sup>.<sup>27</sup> It also found that some protestors held banners “threatening” expatriates, while others “shouted slogans calling for Sunni-Shia

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<sup>14</sup> *Id.* at 115-16, 120, 122.

<sup>15</sup> *Id.* at 126, 129-30, 132.

<sup>16</sup> *Id.* at 127.

<sup>17</sup> *Id.* at 131.

<sup>18</sup> *Id.* at 131.

<sup>19</sup> *Id.* at 134.

<sup>20</sup> *Id.* at 139.

<sup>21</sup> *Id.* at 143-47.

<sup>22</sup> *Id.* at 147-48.

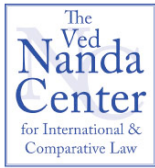
<sup>23</sup> *Id.* at 150-51.

<sup>24</sup> *Id.* at 157-61

<sup>25</sup> *Id.* at 364.

<sup>26</sup> *Id.* at 358.

<sup>27</sup> *Id.* at 360.



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unity.”<sup>28</sup> Finally, it found that some misconduct by security personnel was accompanied by sectarian insults.<sup>29</sup>

The BICI Report also discussed the allegations that the media – including government-controlled media – incited sectarianism.<sup>30</sup> It concluded that “much of this material . . . contained derogatory language and inflammatory coverage of events, and some may have been defamatory.”<sup>31</sup> However, it did not find any evidence of “media coverage that constituted hate speech or incitement to violence.”<sup>32</sup>

### **iii. Establishment of the Bahrain Independent Commission of Inquiry**

In response to international condemnation of the violations of human rights, the King established an independent, international commission of experts to investigate the events of February/March 2011 and subsequent governmental responses.<sup>33</sup> The Commission was tasked with undertaking a thorough and wide-ranging “fact finding” mission making “any recommendation” deemed appropriate.<sup>34</sup> It released its report (Commission or BICI Report) on November 23, 2011.<sup>35</sup> In response to the report, the GoB subsequently established a committee to oversee implementation of the Commission’s recommendations.<sup>36</sup>

### **b. BICI Findings and Recommendations**

The Commission found that a range of human rights abuses occurred throughout the protests. Starting with the arrests of civil society leaders, the Commission found that “a substantial number of the arrests [were] made pursuant to [a] pattern [that] violated international human rights law and Bahrain law. [I]n many cases, the manner in which the arrest was performed involved unnecessary excessive force.”<sup>37</sup> The Commission concluded that “the very fact that a systematic pattern of behaviour existed indicates that this is how these security forces were trained and how they were expected to act. This could not have happened without the knowledge of higher echelons of the command structure of the [Ministry of the Interior] and [National Security Agency].”<sup>38</sup>

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<sup>28</sup> *Id.* at 359-60.

<sup>29</sup> *Id.* at 158, 280.

<sup>30</sup> *Id.* at 392-94.

<sup>31</sup> *Id.* at 399-400.

<sup>32</sup> *Id.*

<sup>33</sup> Royal Order No. 28 of 2011 (establishing an independent commission), July 1, 2011, <http://www.bici.org/bh/wp-content/uploads/2011/08/RoyalOrder28of2011.pdf> [hereinafter Royal Order No. 28].

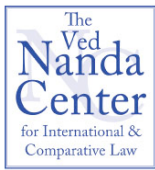
<sup>34</sup> *Id.* at art. 4, 10.

<sup>35</sup> BICI Report, *supra* note 5, cover page.

<sup>36</sup> Bahrain News Agency, *HM King Hamad Orders Setting up Up an Independent National Commission*, BAHRAIN NEWS AGENCY, Nov. 26, 2011, <http://bna.bh/portalportal/en/news/482045>.

<sup>37</sup> BICI Report, *supra* note 5, at 281.

<sup>38</sup> *Id.*



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### **c. Specific Conclusions Reached by BICI**

#### **i. Criminalization of Calls for Democratic Governance**

In addition to finding that abuses occurred during the arrest process, the Commission found that human rights violations occurred during the prosecution of civil society leaders. It found that the GoB prosecuted individuals for calling for regime change and democratic governance in Bahrain, in violation of their right to freedom of expression. The GoB charged over 300 protestors<sup>39</sup> with various speech-related crimes, including possession of and/or distribution of material calling for regime change; inciting hatred towards the regime; and spreading false rumors likely to disturb public order.

According to the Commission, various provisions of the Bahrain Penal Code were used to “restrict opinion and expression by criminalising incitement to hatred towards the regime or damaging public interest, without requiring any material act that causes social or individual harm. They have been applied to repress legitimate criticism of the GoB.”<sup>40</sup> The Commission also found that Article 168, which criminalizes “any false or malicious news reports, statements or rumours or spreads adverse publicity,” was applied in a manner that “raise[s] concerns about the overly broad restrictions imposed by this article.”<sup>41</sup>

With regards to labor strikes that occurred during the protests, the Commission also found that:

[T]he workers’ strikes that occurred during February/March 2011 were within the permissible bounds of the law. The calls by various labour and trade unions to strike were related, at least in part, to concerns for the safety and mistreatment of workers, calls for an improvement in the socio-economic conditions of their members and their families, and assurances against retaliation against participating members, pursuant to the purposes outlined under article 20 of Decree Law No. 33 of 2002.<sup>42</sup>

After reviewing applicable international and national law, the Commission found that the GoB applied its criminal code “in a way that infringes upon the freedoms of opinion and expression by excluding from the public debate opinions that express opposition to the existing system of government in Bahrain[.]”<sup>43</sup> Therefore, the BICI Report recommended that the GoB “review [the] convictions and commute [the] sentences of all persons charged with offences involving

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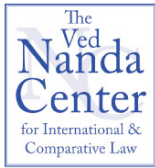
<sup>39</sup> *Id.* at 307-08.

<sup>40</sup> *Id.* at 312.

<sup>41</sup> *Id.* at 311-12.

<sup>42</sup> *Id.* at 353.

<sup>43</sup> *Id.* at 311.



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political expression, not consisting of advocacy of violence, or, as the case may be, to drop outstanding charges against them.”<sup>44</sup>

## ii. Procedural Irregularities in the National Safety Courts

The BICI Report highlighted chronic problems with the administration of justice at the *ad hoc*, two-tiered National Safety Courts established on March 15, 2011, which were military prosecutions of crimes allegedly committed by civilians.<sup>45</sup> The Commission received complaints that defendants were not notified of the charges against them, denied access to government held evidence and denied the right to testify in their own defense. It addition, it found that information obtained through torture was admitted into evidence.<sup>46</sup>

The Commission concluded that a “pattern of due process violations occurred at the pre-trial and trial levels that denied most defendants elementary fair trial guarantees”, particularly at the National Safety Courts.<sup>47</sup> The report also concluded that Royal Decree that purported to grant the National Safety Courts jurisdiction over civilian matters was interpreted by the government in a manner that led to arbitrary detention and questioning lasting up to two months, and that no authority was assigned to inspect the conditions of detention.<sup>48</sup> Therefore, the Commission recommended that the GoB provide a “[full] review in ordinary courts [of] all convictions and sentences rendered by the National Safety Courts where fundamental principles of a fair trial, including prompt and full access to legal counsel and inadmissibility of coerced testimony, were not respected[.]”<sup>49</sup>

## iii. Use of Evidence Derived from Torture

According to the Commission, the National Security Agency and Ministry of the Interior “followed a systematic practice of physical and psychological mistreatment, which in many cases amounted to torture, with respect to a large number of detainees in their custody.”<sup>50</sup> At several places in the report, the Commission found that the purpose of committing such torture or other inhuman treatment was in part to obtain confessions to use against the victim or another defendant in criminal trials.<sup>51</sup> As a result, the use of torture-obtained evidence against torture victims in subsequent proceedings was commonplace in both Bahrain military and civilian criminal cases. The Commission stated that “forced confessions have been used in criminal

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<sup>44</sup> *Id.* at 313.

<sup>45</sup> Royal Decree No. 18 of 2011, *supra* note 32, arts 7-9; BICI Report, *supra* note 5, at 48, 51-52.

<sup>46</sup> BICI Report, *supra* note 5, at 405.

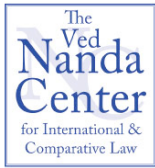
<sup>47</sup> *Id.* at 419.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 423.

<sup>50</sup> *Id.* at 298.

<sup>51</sup> *Id.* at 296, 417.



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proceedings, either in the special courts established pursuant to the National Safety Decree or, in some cases, in the ordinary criminal courts.”<sup>52</sup>

### **III. Summary of the Case against Abu Deeb**

Abu Deeb is part of the leadership of the Bahrain Teachers’ Society (BTS), serving as its president during February/March 2011. The Society organized multiple protests during February and March 2011. During the relevant dates, Abu Deeb gave multiple speeches at the GCC and published articles that were supportive of the protesters and critical of the government and its response to the demonstrations.<sup>53</sup>

Specifically, Abu Deeb is alleged to be responsible for multiple statements, issued in the name of the BTS. The first statement, issued on February 17, 2011, expressed support for the protestors, condemnation at the “regime” for how it dealt with the protests, and requested that the political leadership be more “just in its treatment of its people and to listen to the calls for justice and to resort to political solutions.”<sup>54</sup> As the protests grew larger and the GoB’s response grew more aggressive, the BTS issued its second statement on February 18, 2011. This statement declared that the nation’s teachers would stand in protest outside their respective schools, would not teach, and would demand a more democratically elected government. Parents and guardians were advised to keep their children home for fear that security forces would engage the teachers.

The teachers’ strike lasted from February 20, 2011 to February 23, 2011, when the BTS issued a statement officially suspending it. In this February 23<sup>rd</sup> statement, the BTS renewed its commitment to support the demands of the protestors and expressed concern that the Ministry of Education had threatened teachers with loss of employment. Indeed, over the course of the teachers’ strike, the Ministry had brought in “volunteer” teachers to serve as substitutes. In another BTS statement, issued on February 27, 2011, the Society documented the difficulties many teachers had in returning to school after striking. The statement described how school principals would not give teachers their schedules, but would force teachers to train their “volunteer” replacements. The statement also expressed concern that principals were agitating parents and students against the teachers, causing concern over the lack of security, as violent incidents began occurring within schools.

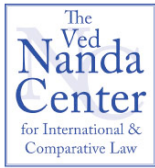
From the end of February, 2011 up until March 3, 2011, the BTS issued several statements critical of how teachers were being depicted in the media and angry at the Ministry’s failure to

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<sup>52</sup> *Id.* at 417.

<sup>53</sup> *Id.* at 304. While the Commission report does not include the names of the defendants, it is possible to identify particular cases based on court documents and other publicly available information.

<sup>54</sup> Bahrain Teacher’s Society, Statement #1 (Feb. 17, 2011), <http://www.bhteachers.org/portal/news.php?action=view&id=61>. The Center relied upon the statements posted on the Society’s website, which appear to be consistent with the description of the statements in the trial court decision. Unofficial translation on file with the author.



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provide security at schools to deal with the increasing tension between pro-democracy and pro-government students within the schools. The statements implored students to refrain from any ethnic clashes or conduct that would damage national unity. The statements also asked for the termination of the “volunteer” teachers and for the intervention of the Crown Prince. Ultimately, the BTS called for the Minister of Education to resign, and the Society called for a protest outside the Ministry of Education.<sup>55</sup>

In the first weeks of March, tensions at the Bahraini schools boiled over. According to press reports, on March 10, 2011, at the Saar Secondary School for Girls, angry parents entered the school and attacked student-protestors.<sup>56</sup> Similarly, clashes occurred at the Hamad Town Secondary School for Girls and the Yathrib Preparatory School for Girls.<sup>57</sup> Parents and student also protested, criticizing the Minister of Education for the retention of “volunteer” or substitute teachers who lacked the requisite training and experience.<sup>58</sup> In response to the deteriorating security at Bahraini schools, the BTS called for a strike to begin on March 14, 2011, with its emphasis on the lack of security at schools and outright indignation at how protesting-teachers had been treated by the Ministry of Education.<sup>59</sup> Some of these strikes occurred in front of the Ministry of Education, while others at the GCC Roundabout. The strike lasted until March 23, 2011.<sup>60</sup>

Abu Deeb was ultimately arrested. According to his statement to the Commission, after being arrested and brutally beaten at his uncle’s house on April 6, 2011,<sup>61</sup> Abu Deeb was detained at Al Qurain and Juw prison sites. During detention, he was tortured through regular beatings with a hose – for a four day stretch at time – and placed in solitary confinement for over a month.<sup>62</sup>

In September, after a trial before the National Safety Court of First Instance, he was tried and later convicted for, *inter alia*, violations of Bahrain Penal Code, 1976 and for violations of “Law Number 58 from the year 2006, Concerning the Protection of Society from Terrorist Acts.” Specifically, Abu Deeb was convicted of “favor[ing] or advocate[ing] in any manner whatsoever, the overthrow or change of the country’s political, social or economic system with the use of force, intimidation or such other illegal methods,”<sup>63</sup> for “expressly incite[ing] others to develop hatred or hostility towards the system of government,”<sup>64</sup> for “resort[ing] to violence, intimidation or any other illegal method to force any of the Ministers or his deputy to perform or to abstain

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<sup>55</sup> See generally BICI Report, at 337, which gives context as to how the Ministry reacted to the teachers’ actions.

<sup>56</sup> <http://www.alwasatnews.com/3107/news/read/531650/1.html>

<sup>57</sup> <http://www.alwasatnews.com/3108/news/read/531720/1.html>

<sup>58</sup> <http://www.alwasatnews.com/3098/news/read/529825/1.html>

<sup>59</sup> <http://www.bhteachers.org/portal/news.php?action=view&id=61>.

<sup>60</sup> <http://www.bhteachers.org/portal/news.php?action=view&id=62>.

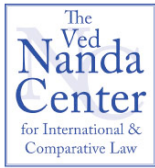
<sup>61</sup> BICI Report, Annex B, Case No. 21, p. 450. (His beating included being dropped from a distance of two floors). On the same day as his arrest, the Government’s Social Development Ministry officially dissolved the BTS.

<sup>62</sup> *Id.*

<sup>63</sup> Bahrain Penal Code, Article 160, which allows for a period of incarceration of up to 10 years upon conviction.

<sup>64</sup> Bahrain Penal Code, Article 165.





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from performing any act that lawfully falls within his competence,”<sup>65</sup> and for “disseminat[ing] false reports, statements or malicious rumors, or produc[ing] any publicity seeking to damage public security, terrorize the population or cause damage to the public interest.”<sup>66</sup> Additionally, Abu Deeb was convicted of “incit[ing] others by any method of publication to hate or show contempt for a certain faction, if such incitement undermines the public peace,”<sup>67</sup> for “offend[ing], by any method of expression the National Assembly, or other constitutional institutions, the army, law courts, authorities or government agencies.”<sup>68</sup>

In arriving at its decision, the Military Court focused on the numerous statements and publications made by the BTS. Preliminarily, it reasoned that by calling for strikes, by leading protests, and by advising parents to keep their children from school, Abu Deeb committed a terrorist act, namely impeding the course of education within the Kingdom. The Court characterized Abu Deeb’s subsequent protests to be terrorism as well, in that he called for the withdrawal of the substitute teachers and sought the resignation of the Minister of Education. These activities were labeled “terrorism” as they allegedly weakened public order and prevented the Ministry from pursuing its function.

For describing and denouncing the deteriorating security situation at Bahrain schools, the Court found that Abu Deeb was guilty of spreading rumors and false reports. For calling for teachers to strike, the Court concluded that Abu Deeb incited others to commit crimes. For criticizing the retention of the substitute teachers, the Court deemed Abu Deeb’s acts as inciting hatred and contempt for a sect of people. For demanding the resignation of the Minister of Education and for supporting the pro-democracy protests, the Court found that Abu Deeb incited hatred and contempt for the regime. The Court relied on multiple eyewitnesses, a majority of whom were security personnel at the Ministry of Education, and Abu Deeb’s confession. No evidence was presented that Abu Deeb committed any act of violence or participated with others in any act of violence.

He was sentenced to ten years imprisonment.<sup>69</sup> His appeal hearing will be held on February 19, 2011 before a civilian court of appeal.<sup>70</sup>

#### **IV. Applicable Law**

##### **a. Freedom of Expression**

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<sup>65</sup> Bahrain Penal Code, Article 167.

<sup>66</sup> Bahrain Penal Code, Article 168.

<sup>67</sup> Bahrain Penal Code, Article 172.

<sup>68</sup> Bahrain Penal Code, Article 216. Additionally, Mr. Abu Deeb was convicted of violating Articles

<sup>69</sup> BICI report, *supra* note 5, at 304.

<sup>70</sup> Press Release, Human Rights First, *News Reports Says No More Excuses – Time for Radical Change in Bahrain* (Dec 12, 2011) <http://www.humanrightsfirst.org/2011/12/12/new-report-says-no-more-excuses-time-for-radical-change-in-bahrain/>; TrustLaw, *Bahrain: End Takeover of Lawyers’ Group*, (Dec 20, 2011) <http://www.trust.org/trustlaw/news/bahrain-end-takeover-of-lawyers-group>



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Bahrain is a party to the International Covenant on Civil and Political Rights (ICCPR) and the Arab Charter on Human Rights.<sup>71</sup> Article 19 of the ICCPR provides that “[e]veryone shall have the right to freedom of expression[.]” Article 32 of the Arab Charter on Human Rights “guarantees the right to information and to freedom of opinion and expression[.]”

Article 19(2) of the ICCPR protects both the dissemination of an opinion as well as one’s right to receive it. In evaluating whether a government’s interference with a person’s Article 19(2) right to expression is justified, the UN Human Rights Committee looks to Article 19(3), which sets out that:

[t]he exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

The Committee’s jurisprudence has truncated this language into a framework whereby the restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of Article 19, and it must conform to the strict tests of necessity and proportionality.<sup>72</sup>

The “provided for by law” requirement looks upon the legal authority used to support the restriction. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.<sup>73</sup> The European Court of Human Rights, interpreting virtually identical language in the European Convention on Human Rights, has held that the phrase “prescribed by law” requires that the law must be foreseeable in order for a person to have an indication of the legal rules applicable to a given case, and that it must be formulated with sufficient precision to enable a person to regulate his or her conduct.<sup>74</sup> The State party bears the burden of establishing the legal basis for the restriction.<sup>75</sup>

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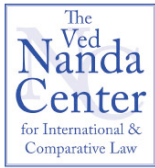
<sup>71</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 ICCPR, art. 19 [hereinafter ICCPR]. Bahrain acceded to the ICCPR on 20 September 2006 upon promulgation of Decree Law No. 56 of 2006 (passing the ICCPR into national legislation); Decree Law No. 7 of 2006 (promulgated to pass the Arab Charter on Human Rights into national legislation).

<sup>72</sup> See *Ross v. Canada*, CCPR/C/70/D/736/1997, Commun. No. 736/1997, para. 4.8, 11.1-11.6 (18 October 2000) <http://www.unhcr.org/refworld/country,,HRC,,CAN,,3f588efc0,0.html>.

<sup>73</sup> BICI Report, *supra* note 5, at 397.

<sup>74</sup> See e.g. *Sunday Times v. United Kingdom* (No. 1), 2 Eur. Ct. H.R. 245, 20 (1979)) at paragraph 49; see also INTERIGHTS, FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ARTICLE 10)19 (Oct 2009) <http://www.interights.org/document/107/index.html>.

<sup>75</sup> See *Korneenko et al. v. Belarus*, CCPR/C/88/D/1274/2004, Commun. No. 1553/2007, para. 7.5 (31 October 2006) [http://www.worldcourts.com/hrc/eng/decisions/2006.10.31;Korneenko\\_v\\_Belarus.htm](http://www.worldcourts.com/hrc/eng/decisions/2006.10.31;Korneenko_v_Belarus.htm).



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The UN Human Rights Committee has set out that restrictive measures must be necessary to achieve a legitimate aim, such as public order, and must conform to the principle of proportionality, such that the restriction must be “the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected.”<sup>76</sup> The requirement of necessity is not met if the restriction’s aims could be achieved in other ways that do not restrict freedom of expression.<sup>77</sup>

Article 20(2) of the ICCPR provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

### **b. Freedom of Assembly**

Article 21, of the ICCPR, provides that:

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 8 of the International Covenant on Economic, Social and Cultural Rights provides for the right to strike, provided that it is exercised in conformity with the laws of the particular country.<sup>78</sup> In addition, the right to freedom of assembly is assured by Article 28(b) of the Constitution of Bahrain and Article 24 of the Arab Charter.

### **d. Use of Evidence Derived from Torture**

International and Bahraini law is clear that evidence obtained through torture is inadmissible in a court of law in cases against the torture victim and/or co-defendants. Article 15 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates 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.”<sup>79</sup> The Bahrain Constitution in Article 19 enshrines this

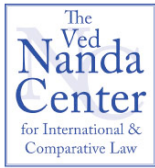
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<sup>76</sup> UN Human Rights Committee, General Comment No. 27, Feb 2, 1999, para. 14; *Marques de Morais v. Angola*, CCPR/C/83/D/1128/2002, Commun. No. 1128/2002, para. 6.8 (29 March 2005).

<sup>77</sup> See *Ballantyne et al. v. Canada*, CCPR/C/47/D/359/1989, Commun. No. 359, 385/89, para. 11.4 (5 May 1993) <http://www1.umn.edu/humanrts/undocs/html/v359385.htm>.

<sup>78</sup> 993 UNTS 3, 16 December 1966. Bahrain acceded to the ICESCR on 27 September 2007 upon promulgation of Decree Law No. 10 of 2007 passing the ICESCR into national legislation. Bahrain has deposited a reservation in respect of article 8(1)d of the ICESCR stating that “[t]he obligation of the Kingdom of Bahrain to implement article 8, paragraph 1 (d), of the Covenant shall not prejudice its right to prohibit strikes at essential utilities”.

<sup>79</sup> UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec 10, 1984, U.N.T.S. 85, art. 15, <http://www.hrweb.org/legal/cat.html>.



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prohibition, stating that “[a]ny statement or confession proved to have been made under torture, inducement, or such treatment, or the threat thereof, shall be null and void.”<sup>80</sup>

## V. Analysis of Abu Deeb’s Case

### i. The defendants were charged pursuant to articles of the Penal Code that were not proscribed with sufficient clarity to meet the requirements of international law

Abu Deeb, as well as Al-Tajer, were charged with violating Article 165 of the Bahrain Penal Code, which provides that “[a]ny person who uses one of the publication methods to incite hatred toward the ruling regime or show contempt towards it shall be punished with imprisonment.”<sup>81</sup> This provision does not define the proscribed offense with sufficient precision to enable individuals to regulate their conduct in order to conform to the law. As such, this provision violates international standards as it is impermissibly vague.

The ICCPR requires that any restrictions on freedom of expression be “provided by law.”<sup>82</sup> The European Court of Human Rights, interpreting virtually identical language in the European Convention on Human Rights, has held that the phrase “prescribed by law” requires that the law must be foreseeable in order for a person to have an indication of the legal rules applicable to a given case, and that it must be formulated with sufficient precision to enable a person to regulate his or her conduct.<sup>83</sup> It has also held that, to satisfy the “necessary in a democratic society” requirement, any restriction must be justified by a pressing social need<sup>84</sup> and must be proportionate to the legitimate aim sought to be achieved by the government.<sup>85</sup> The UN Human Rights Committee has held “that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights”<sup>86</sup>

The BICI Report concluded that Article 165 “was applied in a way that infringes upon the freedoms of opinion and expression by excluding from the public debate opinions that express opposition to the existing system of government in Bahrain[.]”<sup>87</sup> The Commission, as a result, recommended that the GoB “review convictions and commute sentences of all persons charged with offences involving political expression, not consisting of advocacy of violence, or, as the

<sup>80</sup> CONSTITUTION OF THE KINGDOM OF BAHRAIN Feb. 14, 2002, *supra* note 1, at art. 19(d).

<sup>81</sup> BICI Report, *supra* note 5, at 303.

<sup>82</sup> ICCPR, *supra* note 70, art. 18(3).

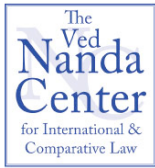
<sup>83</sup> *See e.g. Sunday Times v. United Kingdom* (No. 1), 2 Eur. Ct. H.R. 245, 20 (1979); *see also* Interights, Freedom Of Expression Under The European Convention On Human Rights (Article 10), 19 (2009).

<sup>84</sup> *United Communist Party of Turkey and Others v. Turkey*, 1998 Eur. Ct. H.R. 1, 2.

<sup>85</sup> *Christian Democratic People's Party v Moldova*, 2006 Eur. Ct. H.R. 13.

<sup>86</sup> *Albert Womah Mukong v. Cameroon*, CCPR/C/51/D/458/1991, Commun. No. 458/1991, para. 9.7 (10 August 1994) <http://www1.umn.edu/humanrts/undocs/html/vws458.htm>.

<sup>87</sup> BICI Report, *supra* note 5, at 311.



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case may be, to drop outstanding charges against them.”<sup>88</sup> As examples of such prosecution, it cited the case – without naming Abu Deeb.<sup>89</sup>

Due to the inherent vagueness of Article 165, the defendants could not foresee that mere criticism of the government would constitute a violation of Article 165. Holding otherwise would have the effect of criminalizing any criticism of the regime and would directly contravene Bahrain’s obligations under the ICCPR.

The Commission concluded that Articles 165, 168 and 169 were used to “restrict opinion and expression by criminalizing incitement to hatred towards the regime or damaging public interest, without requiring any material act that causes social or individual harm. They have been applied to repress legitimate criticism of the GoB.”<sup>90</sup> The Commission’s finding clearly applies to the current case.<sup>91</sup>

## **ii. The GoB’s actions were not necessary and proportional to achieve public order**

The prosecution of Abu Deeb merely for calling for protests was not justified by any legitimate need and was not proportional to any alleged harm. It is therefore inconsistent with the requirements for any restriction on freedom of expression set forth in Article 19 of the ICCPR.

In this regard, the UN Human Rights Committee has previously held that statements made in furtherance of a labor dispute are protected under the ICCPR, Article 19(1) and (2).<sup>92</sup> In that decision, the president of a trade union explicitly endorsed the labor strike of another trade union, and when authorities threatened to intervene with force, he issued a public statement critical of the government’s threat. He was arrested and criminally charged with violating the Labour Dispute Adjustment Act, which criminalized a third-party’s involvement in labor disputes. The Committee found that his rights under the ICCPR had been harmed, such that by “joining others in issuing a statement supporting the strike and criticizing the Government, [he]

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<sup>88</sup> *Id.* at 313.

<sup>89</sup> *Id.* at 304, 306-07.

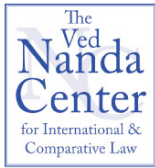
<sup>90</sup> *Id.* at 312.

<sup>91</sup> The GoB has proposed a new article of the Penal Code that would ensure that other provisions of the code are interpreted in a manner consistent with international law. Proposed Article 169 provides that:

Restrictions defined in this or any other law on the freedom of expression shall be construed as limited to those which are compatible with the values of a democratic society. The exercise of the freedom of expression can only be punished through restrictions that are so limited.

BICI Report, *supra* note 5, at 411.

<sup>92</sup> *Jong-Kyu Sohn v. Republic of Korea*, CCPR/C/54/D/518/1992, Commun. No. 518/1992, para. 10.1-11 (3 August 1995) <http://www1.umn.edu/humanrts/undocs/html/vws518.htm>.



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was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.”<sup>93</sup> The State party asserted that the interference was necessary to protect national security and public order, as the statement was disguised for the incitement to a national strike. The Committee, however, rejected this contention, finding that the Republic failed to provide a precise nature of the threat and could not present any argument as to how the interference of the freedom of expression was compatible with paragraph 3 of article 19.<sup>94</sup>

Abu Deeb’s statements and speeches related to school security and teacher treatment are within the scope of Article 19(2). Furthermore, his prosecution for making the statement was not justified by any of the permissible purposes for such restrictions allowed by Article 19(3).

The statements were delivered with the intent of seeking and altering the employment status and conditions of employment of the members of the BTS. To assert that these statements made in March implicate national security and public order concerns does not comport with Article 19. All strikes, by their nature, would cause disruption and subsequently disrupt public order if this assertion were true.

The GoB’s initial response to hire substitute teachers was a proper measure for ensuring public order and serves as evidence that less restrictive measures were available to the government. In contrast, the GoB’s response to Abu Deeb’s criticism of the decision, and the Minister of Education, was wholly disproportionate and unnecessary.

Abu Deeb’s criticism of the Minister of Education is permissible expression under Article 19(2) and his conviction for criticizing the regime is not consistent with international law. In its jurisprudence, the UN Human Rights Committee has found that harsh critiques of the government are permissible under Article 19(2).<sup>95</sup> The Committee, in finding impermissible governmental interference, held that:

when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>96</sup>

Abu Deeb’s criticism of the Minister of Education was designed to challenge the policies and practices of the regime. He did not advocate or endorse harming or injuring the Minister, and he did not seek to overtake the functions of administration. His criticism and call for resignation was designed to address the conditions of Bahraini teachers.

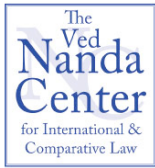
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<sup>93</sup> *Id.* at para. 10.3.

<sup>94</sup> *Id.* at para. 10.4.

<sup>95</sup> *Marques de Morais v. Angola*, *supra* note 75, para. 6.8

<sup>96</sup> UN Human Rights Committee, General Comment No. 34, Sept 12, 2011, para. 35 *citing* Shin v. Republic of Korea, CCPR/C/80/D/926/2000, Commun. No. 926/2000, para. 7.3 (19 April 2004)  
[http://www.bayefsky.com/html/rokorea\\_t5\\_iccpr\\_926\\_2000.php](http://www.bayefsky.com/html/rokorea_t5_iccpr_926_2000.php).



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**iii. The evidence does not support convictions for either incitement of violence or incitement of hatred**

Abu Deeb's February statements and speeches, those expressing support for the GCC roundabout protesters, are also within the scope of conduct protected by Article 19(2). The GoB did not produce evidence that demonstrated that he incited acts of violence. Abu Deeb did not expressly call for acts of violence, nor did he make statements in a context where it was reasonable to anticipate that they would incite violence or hatred. To the contrary, the evidence shows that he was committed to advocating for democratic reforms through peaceful means.

As previously discussed, international law prohibits restrictions on freedom of expression unless they are provided by law, directed at a legitimate aim, and necessary in a democratic society.<sup>97</sup> Speech aimed at inciting violence is prohibited, but it must be foreseeable that particular speech is "prescribed by law."<sup>98</sup> Therefore, the individual's purpose in expressing his views must be evaluated to determine whether the speech crossed the line into incitement.<sup>99</sup> Furthermore, speech cannot be prohibited unless it is necessary to do so in a democratic society because it may incite harm in that particular context.<sup>100</sup> While an expression can be incitement of violence without a causal link to actual violence,<sup>101</sup> there must be a risk of harm that is "reasonable to anticipate"<sup>102</sup> or foreseeable "to a degree that is reasonable in the circumstances".<sup>103</sup>

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<sup>97</sup> See *Ross v. Canada*, CCPR/C/70/D/736/1997, Commun. No. 736/1997, para. 11.1-11.6 (18 October 2000) <http://www.unhcr.org/refworld/country,,HRC,,CAN,,3f588efc0,0.html>; *Rekvényi v Hungary*, App. No. 25390/94, *Judgement of 20 May 1999*, Eur. Ct. H.R., para. 27 (1999); *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, *Judgment of July 2, 2004*, para. 120 (July 2, 2004) (Prevailing international and regional human rights instruments vary slightly on the "legitimate aims" or "legitimate purpose" of domestic restrictions on the freedom of expression; nevertheless, the restrictions uniformly deal with significant issues, such as public health, public order, and respect for the reputation of others); ICCPR, *supra* note 70, art. 19(3)(a-b); 20(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 10(2), 10, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; Arab Charter on Human Rights, League of Arab States, art. 13(2)(1-2), (5) May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (entered into force Mar. 15, 2008).

<sup>98</sup> *Rekvényi v Hungary*, App. No. 25390/94, *Judgement of 20 May 1999*, Eur. Ct. H.R., para. 34 (1999).

<sup>99</sup> *Prosecutor v. Nahimana et al.*, Case No. ICTR- R-99-52-T, *Judgement and Sentence*, para 1000-10 (Dec 3, 2003) <http://www.unictt.org/Portals/0/Case/English/Nahimana/judgement/Judg&sent.pdf> (discussing the relevant principles of incitement of violence after reviewing relevant Nuremberg Tribunal, UN Human Rights Committee, and European Court of Human Rights case law).

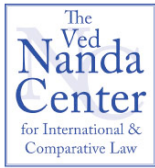
<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at para. 1007-10.

<sup>102</sup> *Ross v. Canada*, *supra* note 106, at para. 11.6,

<http://www.unhcr.org/refworld/country,,HRC,,CAN,,3f588efc0,0.html>; but see *Prosecutor v. Nahimana et al.*, Case No. ICTR- R-99-52-T, *Judgment and Sentence*, para 1015 (Dec 3, 2003) (applying the lower standard of "potential" harm in the context of incitement of genocide where there was a clear and present danger of violence), <http://www.unictt.org/Portals/0/Case/English/Nahimana/judgement/Judg&sent.pdf>.

<sup>103</sup> *Rekvényi v Hungary*, *supra* note 107, para. 34.



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Prominent international jurists have articulated the permissible restrictions on incitement in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Principle 6 states that:

“Expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence;
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”

Abu Deeb led his organization, the Bahrain Teachers’ Society, on pre-planned, peaceful demonstrations on February 20th. The Commission stated that demonstrations held on the 20<sup>th</sup> were of a “generally peaceful nature” and there were a “limited number of clashes with security forces” on this day.<sup>104</sup> This fact is not surprising given that the Bahrain Teachers’ Society, in its February 19<sup>th</sup> statement calling for demonstrations on February 20<sup>th</sup>, included “its commitment to maintaining the non-violent character of the demonstrations”, as confirmed by the Commission.<sup>105</sup> The Bahrain Teachers’ Society’s insistence on non-violent protest was echoed in its March 2<sup>nd</sup> call for a “peaceful demonstration”.<sup>106</sup> Therefore, it is not reasonable to assume that Abu Deeb intended to incite violence, or that his actions would result in violence. Additionally, the GoB did not present any causal link or nexus between the February strike and any instance of violence.

Moreover, the GoB could not establish that arresting Abu Deeb in April for those statements made in February was necessary and proportional to the need to maintain public order. No evidence was presented that Abu Deeb intended to intensify the BTS’ actions. The BTS has ceased its second strike on March 23, 2011. Therefore, the GoB failed to establish a need to maintain public order by arresting Abu Deeb months after making a statement covered under Article 19(2).

As previously mentioned, the GoB alleged that Abu Deeb’s March statements were intended to incite hatred of a sect of people. His prosecution for incitement of hatred, however, is not consistent with international standards. Prohibitions on the incitement of hatred of a sect of people is permitted but only if they meet the aforementioned criteria of provided by law, directed at a legitimate aim and necessary in a democratic society.<sup>107</sup> Specifically, the purpose and context must be evaluated to determine whether it was foreseeable that the speech was prescribed

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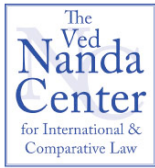
<sup>104</sup> BICI Report, *supra* note 5, at 85.

<sup>105</sup> *Id.* at 331.

<sup>106</sup> *Id.* at 332.

<sup>107</sup> *See, e.g., Ross v. Canada, supra* note 106, para. 11.1-11.5.





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and it was reasonable for the defendant to anticipate that the speech would contribute to an environment that will endanger others.<sup>108</sup>

Abu Deeb allegedly incited “hatred for and contempt of a sect of people, which tended towards disturbance of public peace, [by issuing] [s]tatements on behalf of the Teachers’ Society which contained incitement to hatred of and contempt for substitute teachers, which led to the occurrence of discord and the spreading of chaos and disturbances in schools.” Abu Deeb is also alleged to have “incited hatred of and contempt for naturalized citizens, describing them as ‘mercenaries,’ and accusing them of illegitimate activities[.]”

The evidence submitted by the government does not support the contention that Abu Deeb’s statements regarding substitute teachers rose to the level of incitement of hatred. Rather, it demonstrates that the defendant criticized the government for hiring substitute teachers in an effort to reduce the impact of the strike. Abu Deeb called for acts of civil disobedience to promote democratic reforms, not actions targeting substitute teachers as such. The judgment against Abu Deeb does not provide sufficient evidence of imminent danger against the substitute teachers leading up to the issuing of the statements or during Abu Deeb’s speech.

The application of the Bahrain Penal Code to restrict criticism of the government for hiring substitute teachers does not satisfy the requirement that restrictions on freedom of expression be “provided by law” and “foreseeable.” The term “sect of people” usually refers to ethnic and religious groups, not occupations, which are not typically the subject of sectarian tensions. Therefore, it was not foreseeable that criminal restrictions on “incitement of hatred of a sect of people” would apply to criticisms of substitute teachers. Furthermore, the evidence tends to show that the defendant supported nonviolent protest. It is therefore difficult to conclude that he intended to incite hatred.

In addition, as applied in this case, the Bahraini Penal Code does not satisfy the requirement that any restriction on freedom of expression be “necessary in a democratic society” because there was no actual risk that the conduct in question would be interpreted as sanctioning hatred. Abu Deeb allegedly incited hatred by referring to naturalized citizens as “mercenaries.” This is a reference to the GoB’s practice of hiring naturalized citizens in the security forces. It is widely believed that these individuals are generally Sunni and that the Bahraini security forces habitually engage in human rights violations.

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<sup>108</sup> See *Jersild v. Denmark*, 22 August 1994, App. No. 15890/89; *Erbakan v. Turkey*, 6 July 2006, App. No. 59405/00, para. 68; *Faurisson v. France*, UN Human Rights Committee, 8 November 1986, Communication No. 550/1993, para. 4 (stating that expressions “were of a nature as to raise or strengthen anti-Semitic feelings.”); *Ross*, *supra* 106, para. 11.6 (upholding the Supreme Court of Canada’s ruling that the defendant’s words constituted hate speech because they created a “poisoned environment” and “it is possible to ‘reasonably anticipate’ the causal relationship between that environment and the author’s publications.”).



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Abu Deeb delivered one of the speeches during the protest under a banner that read, in English, “No Shea [sic], No Sonna [sic], All Bahriani.”<sup>109</sup> This evidence strongly suggests that his intent was not to incite hatred of Sunnis. The mere fact that he may have characterized some members of Bahraini security forces as “mercenaries” is not sufficient to support the allegation that he was urging listeners to hate naturalized citizens or Sunnis.

Lastly, Abu Deeb was also found guilty of disseminating false reports. In support of his call for a teachers’ strike, he allegedly stated that it was not safe for the teachers and students to attend class. Despite evidence of clashes at Bahraini schools, the GoB alleged these claims to be false. Under the circumstances, it was not unreasonable for Abu Deeb to have legitimate concerns about the safety of the teachers or the students. Therefore, the charge that he issued false statements is not supported by the facts. As the Commission found in its report, allegations of dissemination of false statements were used “to repress legitimate criticism of the government.”<sup>110</sup>

#### **b. The National Safety Courts did not comply with international standards**

According to the Commission, the National Safety Courts created by Royal Decree No. 18 of 2011 failed to adhere to applicable international legal standards. Therefore, Bahraini civilians, including Abu Deeb, who were prosecuted at these courts had – and continue to have – a right for their cases to be adjudicated by ordinary civilian criminal courts in Bahrain.

While Abu Deeb’s appeal will be heard before a civilian court, he has not been granted a retrial in civilian court, as has happened with other similarly situated individuals. In similar contexts, the UN Human Rights Committee has held that “equal[ity] before the courts and tribunals,” requires “that similar cases are dealt with in similar proceedings.”<sup>111</sup> It follows that the differential treatment of Abu Deeb is not consistent with international law.

Given the irregularities during the proceedings before the court and the differential treatment of Abu Deeb’s appeal, his conviction and detention by a National Safety Court is not consistent with international law or the recommendations of the Commission.

#### **c. Use of Evidence Derived from Torture**

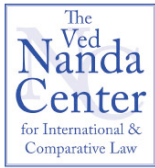
Abu Deeb presented evidence that, while in custody, he was subjected to torture and coerced to confess. Despite this statement, the Military Court relied on his confession notwithstanding the

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<sup>109</sup> Video available at [http://www.youtube.com/watch?v=d3-\\_LEwmAXg&feature=related](http://www.youtube.com/watch?v=d3-_LEwmAXg&feature=related).

<sup>110</sup> BICI Report, *supra* note 5, at 312.

<sup>111</sup> UN Human Rights Committee, General Comment No. 32, Aug 23, 2007, at para. 14, <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.



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fact that there are credible allegations that he was tortured.<sup>112</sup> The Court made this finding because the confessions were “fortified by statements of prosecution witnesses.”<sup>113</sup>

The Commission concluded that evidence derived from torture was admitted in both the National Safety Court and civilian courts.<sup>114</sup> As noted earlier, in confirming that both National Safety Court and ordinary civilian courts used torture evidence, the Commission additionally found that torture was specifically employed to induce evidence to be used in subsequent criminal cases against the torture victim or a co-defendant(s). This fact alone necessitates a retrial in this case.

## VI. Summary of Al-Tajer’s Case

Al-Tajer is a prominent defense lawyer who has defended members of political opposition groups and human rights defenders. He served as one of the lead lawyers for the twenty three individuals who were arrested last August and September on charges of plotting a coup, a topic which he spoke openly about during the protests.<sup>115</sup>

Al-Tajer attended the demonstrations at the GCC roundabout 4-5 times in February/March, 2011. During these visits, he gave two speeches and one television interview.<sup>116</sup> The first speech was given to a large audience, as the organizers of demonstration asked him to speak about his current representation of accused terrorists. During this first speech, al-Tajer criticized the GoB’s use of foreign security forces to maintain order. Al-Tajer maintained that the GoB seemed more concerned with providing security to itself than to the people. Al-Tajer also spoke about his defense of his clients accused of terrorism, stating that the facts supporting their charges have been fabricated and their confessions coerced through the use of electrocution. Al-Tajer criticized the failures of the country’s educational system and health services. He argued that two-thirds of the GoB’s budget went directly to security and military forces to the detriment of other services the nation needed. He spoke broadly about the theft of land and administrative corruption by the GoB. He called for a “change or correction” to the National Constitution.

The second speech was delivered to a group of lawyers in a tent at the GCC roundabout designated specifically for attorneys. His speech involved the national security cases he was

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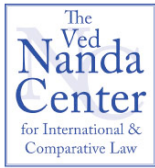
<sup>112</sup> Case Number: 550/2011, Courts of National Safety, at 10 (25/9/2011). Unofficial translation on file with the author.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 417.

<sup>115</sup> Website, New York City Bar, *City Bar Calls on Bahraini Government to Respect Fundamental Rights and the Role of Lawyers; Cites Case of Detained Defense Lawyer Mohammed al-Tajer*, June 30, 2011, <http://www.nycbar.org/44th-street-blog/2011/06/30/city-bar-calls-on-bahraini-government-to-respect-fundamental-rights-and-the-role-of-lawyers-cites-case-of-detained-defense-lawyer-mohammed-al-tajer/> [*hereinafter* NYBAR]; Amnesty International, *Lawyer Released in Bahrain*, Aug 9, 2011, <http://www.amnesty.org/en/library/asset/MDE11/042/2011/en/9a2e45fa-6324-4512-9c6b-c0339f9a7cae/mde110422011en.html> [*hereinafter* Amnesty al-Tajer].

<sup>116</sup> Al-Tajer’s speeches and television interview are described in his custodial statement which was included in the GoB’s case file submitted to the National Safety Court.



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defending and he critiqued the laws used to support the prosecution's cases. In a television interview he gave to Al-Alam TV, he asked for a change of government, with a broad call for resignations, and changes to the National Constitution.

Due to these speeches and statement, security forces entered his home on April 15, 2011, searched his home, threatened his family, and subsequently arrested him without a warrant and detained him at the General Directorate of Criminal Investigations and Forensic Evidence ("CID"). Blindfolded for two days, he was forced to stand for long periods of time and subject to psychological abuse. He was later transferred to the Al-Qurain Prison and held in poor conditions while still undergoing further abuse.<sup>117</sup>

He was not seen until two months later on June 12 when he appeared at a National Safety Court hearing without his lawyer as there was no notification of this hearing.<sup>118</sup> When he was subsequently referred to a civilian court, he was released on August 9, 2011. Upon release, he reported that his bank account was frozen, government authorities took items from his office, and his wife was dismissed from her work. Prior to his release, al-Tajer was forced to sign a statement that obligated him to appear at court or interrogation at any time and to refrain from speaking out against the government.<sup>119</sup>

Al-Tajer has been charged with "expressly incit[ing] others to develop hatred or hostility towards the system of government,"<sup>120</sup> for "disseminat[ing] false reports, statements or malicious rumors, or produc[ing] any publicity seeking to damage public security, terrorize the population or cause damage to the public interest,"<sup>121</sup> for "incit[ing] others by any method of publication to hate or show contempt for a certain faction, if such incitement undermines the public peace,"<sup>122</sup> and for "tak[ing] part in a demonstration in a public place where at least five persons are assembled with the aim of committing crimes or acts intended to prepare or facilitate the commission of such crimes or aimed at undermining public security, even though for the realization of a legitimate objective."<sup>123</sup>

## VII. Analysis of al-Tajer's case

### a. The relevant articles of the Penal Code did not state with precision the prescribed conduct, as required by international law

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<sup>117</sup> BICI Report, *supra* note 5, at 306-07; NYBAR, *supra* note 124; Amnesty al-Tajer, *supra* note 124.

<sup>118</sup> NYBAR, *supra* note 124.

<sup>119</sup> Amnesty al-Tajer, *supra* note 124.

<sup>120</sup> Bahrain Penal Code, Article 165.

<sup>121</sup> Bahrain Penal Code, Article 168.

<sup>122</sup> Bahrain Penal Code, Article 172.

<sup>123</sup> Bahrain Penal Code, Article 178.



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Al-Tajer is charged with “disseminat[ing] false reports, statements or malicious rumors, or produc[ing] any publicity seeking to damage public security, terrorize the population or cause damage to the public interest.”

The BICI Report, in reviewing Article 168, found that:

The absence of clear thresholds governing the application of this provision, and the ambiguity of notions such as “malicious news reports”, “rumours” and “adverse publicity”, raise concerns about the overly broad restrictions imposed by this article. These concerns are heightened by the manner in which the provision was applied in connection with the events of February/March 2011.<sup>124</sup>

As the Report points out, the lack of any firm definition of the operative terms poses a challenge to its compliance. Moreover, as it has been applied, it seems immaterial as to whether one must know, prior to dissemination, the veracity of the statements. Thus, as written, one could be guilty of this crime if he disseminated statements or opinions that, when made were believed to be true, but later found to be false.

Presumably in an effort to rectify the inconsistency of this article with international law, according to press reports, Article 168 has been amended to bring it into compliance with international law.<sup>125</sup> Under the Amended Article 168:

[I]mprisonment for a period of no more than two years and a fine not exceeding BD 200, or either penalty, may be imposed on any person who deliberately disseminates a false statement knowing that it may be damaging to national security, public order or public health, and consequently such damage occurs.(b) A statement can only be subject to criminal penalties for damaging national security under subparagraph (a) if it (i) deliberately incites imminent violence; (ii) it is likely to incite such violence and (iii) there is a direct and immediate connection between the statement and the likelihood or occurrence of such violence.<sup>126</sup>

Under this new standard, al-Tajer’s is clearly not guilty. Indeed, the BICI Report stated that this new Article 168 would be “beneficial” to such cases.<sup>127</sup>

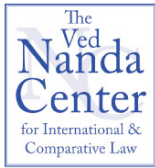
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<sup>124</sup> BICI Report, *supra* note 5, at 312.

<sup>125</sup> *Major criminal law changes approved*, Gulf Daily News, Feb. 1, 2012, <http://www.gulf-daily-news.com/NewsDetails.aspx?storyid=322843> .

<sup>126</sup> <http://pomed.org/wordpress/wp-content/uploads/2011/10/Bahrain-Freedom-of-Expression-Amendments.pdf>. In a statement related to this Amendment, Parliament declared, “The government of Bahrain takes very seriously its commitments under international law, including its obligations under the International Covenant on Civil and Political Rights (ICCPR), which guarantees freedom of expression within certain limits under Article 19. The language of the proposed amendment takes into account the most recent pronouncements by the UN on the evolving norms relating to freedom of expression under the ICCPR.”

<sup>127</sup> BICI Report, *supra* note 5, at 409.



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**b. The GoB's actions were not necessary and proportional to achieve public order**

Al-Tajer is being prosecuted for conduct associated with being a lawyer, in violation of his right to freedom of expression. Article 23 of the UN's Basic Principles on the Role of Lawyers states, "[l]awyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights..."

To the extent that the GoB seeks to criminalize al-Tajer's public statements concerning his representation of defendants, such a maneuver would be outside the boundaries of international norms associated with a government's treatment of lawyers. Moreover, criminalizing his statements about the legality of the government's conduct is unduly restrictive of his role as a lawyer.

In relation to his rights under Article 19, the UN Human Rights Committee has reviewed cases involving outspoken human rights proponents, like al-Tajer, who were subjected to government restriction for simply expressing their opinion on the status of human rights. Justification for the government restriction typically relied on "preserving public order." For instance, a human rights activist distributed leaflets containing the text of the Universal Declaration of Human Rights.<sup>128</sup> The activist was arrested and fined. In declaring that the activist's Article 19(2) rights were illegally restricted, the Committee noted that:

the freedom of expression is of paramount importance in any democratic society, and any restrictions on the exercise of this right must meet a strict test of justification. In the present case, however, the State party has not invoked any specific ground on which the restrictions imposed on the author's activity which, whether or not it took place within the context of a meeting, it is uncontested did not pose a threat to public order.<sup>129</sup>

In sum, the mere expression of human rights issues does not meet any of the legitimate reasons for restrictions on freedom of express permitted by paragraph 3(b) of Article 19.

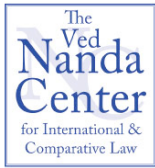
The principle of proportionality must also take account the subject matter of the statement. The UN Human Rights Committee has held that debate concerning public figures in the political domain and public institutions is particularly protected.<sup>130</sup> Thus, all public figures, including those exercising the highest political authority such as heads of state and government,<sup>131</sup> the

<sup>128</sup> Velichkin v. Belarus, No. 1022/2001.

<sup>129</sup> *Id.* At 7.3.

<sup>130</sup> Bodrozic v. Serbia and Montenegro, No. 1180/2003.

<sup>131</sup> Marques de Morais v. Angola, No. 1128/2002.



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army, or various institutions,<sup>132</sup> are legitimately subject to criticism and political opposition under the ICCPR.

In al-Tajer's case, it is difficult to conclude that it was necessary to arrest and prosecute him on the basis of preserving public order, in particular when the GoB waited months to initiate an arrest. The concept of restricting one's freedom of expression to preserve public order requires an immediate or imminent threat. Also, for nearly three months, the government was unsure as to what crime or crimes they should charge al-Tajer with, implying that a complete and thorough investigation had not been completed. Consequently, it is hard to claim that al-Tajer's arrest and prosecution for expressing himself was necessary to achieve public order.

In sum, al-Tajer's two speeches and one television statement are within the scope of conduct protected by Article 19(2). Those elements of his speeches that concern the application of Bahraini law and his defense of the accused are the sort of expressions that implicate the broader role of being a lawyer. His critique of the GoB, the deteriorating security within the nation, and the desires for changes to the government fit squarely into the jurisprudence of the UN Human Rights Committee. The lack of any causal link to any act of violence subsequent to his speech proves that his words were not a threat to public order.

### **VIII. Conclusion**

The Ved Nanda Center's review of the cases against Mahdi Abu Deeb and Mohammed al-Tajer finds that the GoB has infringed upon the defendants' right to freedom of expression by failing to establish that they engaged in the crimes as alleged. As currently formulated, the case is therefore inconsistent with international law and the recommendations of the Commission.

Abu Deeb's case should be dismissed, consistent with the recommendation of the Commission that all prosecutions based purely on criticisms of the government should be dismissed. At a minimum, he deserves a new trial in a civilian court, wherein his confession is excluded from evidence, as there is credible evidence that it was the byproduct of torture and coercion. Abu Deeb deserves to argue that the speeches and statements made by the BTS were within the scope of Article 19(2), and the GoB should have the burden to explain, with precision, how his words undermined public order or national safety.

Al-Tajer's right to freedom of expression has been unduly restricted, especially in light of his profession as a lawyer. His statements that were critical of how the GoB are forms of expression that are well-within the scope of Article 19(2). His case should be dismissed.

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<sup>132</sup> Concluding observations on Costa Rica (CCPR/C/CRI/CO/5); concluding observations on Tunisia (CCPR/C/TUN/CO/5).