

INCITEMENT AND DEFAMATION IN SAUDI ARABIA: THE CASE OF HUMAN RIGHTS LAWYER WALEED ABU AL-KHAIR

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Abstract

Saudi human rights lawyer and pro-democracy activist Waleed Abu Al-Khair was convicted for “inciting public opinion” and “harming the reputation of the King.” As a result, he is currently serving a fifteen-year prison sentence in the Kingdom of Saudi Arabia. This Article analyzes Abu Al-Khair’s criminal conviction under international law, with a focus on the universal standard for the protection of freedom of expression. Specifically, this article explores international law rules that call for narrow constructions of the offenses of “incitement” and “defamation” under domestic law when dealing with public figures and public affairs. Portions of this paper have been reproduced with updates from a prior 2016 Human Rights Foundation Report, written by the same authors of this article. This Article is intended to replace the 2016 Report previously published.***

I. INTRODUCTION

This Article analyzes the case of Waleed Abu Al-Khair, a human rights lawyer in Saudi Arabia, under international law. Abu Al-Khair was convicted for “inciting public opinion” and “harming the reputation of the King,” and is currently serving a fifteen-year prison sentence in Saudi Arabia. Part I provides a succinct overview of the Kingdom of Saudi Arabia’s legal system. Part II lays out the standards of international law for the protection of freedom of expression as applicable to the case of Waleed Abu Al-Khair. Part III analyzes all the actions and omissions by the government of Saudi Arabia under international law. Part IV summarizes the conclusions reached in each part of this Article.

II. SAUDI ARABIA’S LEGAL SYSTEM

Saudi Arabia is an absolute monarchy,¹ which bases its legal system²

*** See *infra* note 39.

1. Article 5 of the Basic Law of Governance of Saudi Arabia states:

on Shari'a law,³ as advocated by the Wahhabi movement.⁴ The Shari'a, which translates as the law of God, is a set of moral precepts interpreted as binding law primarily sourced in the Qur'an and the Sunnah of the Prophet.⁵ Shari'a law regulates all areas of Muslim life,⁶ including family,

Monarchy is the system of rule in the Kingdom of Saudi Arabia. Rulers of the country shall be from amongst the sons of the founder King Abdulaziz bin Abdulrahman Al-Faisal Al-Saud, and their descendants. The most upright among them shall receive allegiance according to Almighty God's Book and His Messenger's Sunna (Traditions) . . . Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.

Basic Law of Governance of Saudi Arabia, art. 5 (adopted by decree) (1992) [hereinafter Basic Law of Governance]; ANN BLACK ET AL., MODERN PERSPECTIVES ON ISLAMIC LAW 256 (2013). Saudi Arabia is the "best model of the authoritarian view" of Shari'a law. BLACK ET AL., *supra* note 1.

2. See SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 157 (Jan Michiel Otto ed., 2010) [hereinafter SHARIA INCORPORATED].

It is often claimed that Saudi law is nothing but Islamic Shari'a. However, supplemented by government-issued regulations concerning labor, commerce companies and so forth, the law is more encompassing than at first glance. Also, one cannot rule out the importance of tribal values and customs in Saudi society, like in most Middle Eastern societies.

See BLACK ET AL., *supra* note 1, at 71 ("In the domestic law of some Muslim countries, such as Saudi Arabia, Iran and Malaysia, Islam is either the principal source of law or a source of law and, therefore, being a Muslim has significant legal consequences under these domestic legal systems").

3. See SHARIA INCORPORATED, *supra* note 2, at 23 (internal citation omitted) ("According to Islamic jurisprudence, theology and historiography, the rules of sharia are based on the revelation by God of his plan for mankind to the Prophet Muhammad until his death in 632. In order to interpret God's will from the available sources, religious scholars developed Islamic jurisprudence (*fiqh*) from the eighth century onwards. The scholars (*ulama*) put God's revelation into effect, drafting a scientific, legal corpus of behavioural rules." "There is no such thing as a, that is one, Islamic law, a text that clearly and unequivocally establishes all the rules of a Muslim's behaviour. There is a great divergence of views, not just between opposing currents, but also between individual scholars within the legal currents, of exactly what rules belong to Islamic law."). See BLACK ET AL., *supra* note 1, at 10 ("the assumption is that there are four major sources of Islamic law: the Quran, the Sunna, analogical reasoning (*qiyas*) and consensus of opinion (*ijma*)").

4. The term "Wahhabi" derives from the religious scholar and jurist Muhammad ibn Abd al-Wahhab, (1703-1793) who "based his ideas on the works of the Salafi tradition within Islam, particularly as [adopted] by two legal scholars, namely Ahmad ibn Hanbal, founder of the Hanbali School of Law The Hanbali doctrine distinguish[es] itself from other Sunni schools of law by its strict adherence to the holy sources." See SHARIA INCORPORATED, *supra* note 2, at 142. "The Wahhabi interpretation of the Shari'a necessitates the abandonment of precedent and jurisprudence, providing individual Saudi judges with wide discretion." AMERICANS FOR DEMOCRACY & HUMAN RIGHTS IN BAHRAIN, THE PRETENSE OF PROGRESS iii (2015) http://www.adhrb.org/wp-content/uploads/2015/03/ADHRB_Pretense-of-Progress_v1_web.pdf [hereinafter PRETENSE OF PROGRESS].

5. The Sunnah is defined as

tort, contract, commercial, property, and criminal law.⁷ In addition, religious scholars have developed Islamic jurisprudence (“*fiqh*”) for all matters that are not addressed in the Qu’ran and the Sunnah.⁸ Islamic jurisprudence provides an additional authoritative source to the Shari’a law and is used by judges in their administration of justice.⁹

Unlike most Muslim majority states, Saudi Arabia has not codified the Shari’a principles in local statutes or codes.¹⁰ Furthermore, Saudi Arabia has no codified laws with the exception of the Basic Law of Governance and additional regulations enacted by royal decrees.¹¹ As a consequence, most areas of the law, including criminal law, are regulated by religious principles that are not embodied in a written legal instrument and are therefore subject to the discretion of Saudi judges. Under the Wahhabi doctrine, the law is subject to judicial interpretation of holy texts and jurisprudence is based on a particular judge’s religious beliefs and personal understanding of Islam.¹² Saudi judges are not bound to resort to previous decisions relating to similar cases.¹³ Therefore, neither the *stare decisis* nor the *jurisprudence constante* doctrines are followed in Saudi Arabia.

[A] body of established customs and beliefs that make up a tradition. In Muslim legal and religious thought, the term became associated more specifically with the actions and sayings of the Prophet Muhammad. Inspired by God to act wisely and in accordance with his will, Muhammad provided an example that complements God’s revelation as expressed in the Qur’an. His actions and sayings became a model for Muslim conduct as well as a primary source of Islamic law.

Sunnah, OXFORD ISLAMIC STUD. ONLINE, <http://www.oxfordislamicstudies.com/article/opr/t243/e33> (last visited Jan. 20, 2018).

6. See BLACK ET AL., *supra* note 1, at 243 (in “Islamic monarchies, like Saudi Arabia, . . . Sharia is pivotal to all aspects of law and governance”).

7. Toni Johnson & Mohammed Aly Sergie, *Islam: Governing Under Sharia*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgroundunder/islam-governing-under-sharia> (last updated July 25, 2014).

8. See ABU AMEENAH BILAL PHILIPS, THE EVOLUTION OF FIQH (ISLAMIC LAW & THE MADH-HABS) 8 (1990), https://d1.islamhouse.com/data/en/ih_books/single/en_evolution_of_fiqh.pdf.

9. See *Law of the Judiciary*, ROYAL EMBASSY SAUDI ARABIA, art. 1, <https://www.saudiembassy.net/law-judiciary> (last visited Jan. 20, 2018) (in the administration of justice judges should apply the “provisions of Sharia and laws in force,” which in this case include ‘fiqh.’).

10. Nathan J. Brown, *Why Won’t Saudi Arabia Write Down Its Laws?*, FOREIGN POL’Y (Jan. 23, 2012, 2:10 PM), <http://foreignpolicy.com/2012/01/23/why-wont-saudi-arabia-write-down-its-laws/>.

11. See SHARIA INCORPORATED, *supra* note 2, at 156 (“The King can promulgate regulations (called nizams) where the Shari’a law does not provide a direct answer to certain legal questions but where regulations are nevertheless necessary such as in commercial matters.”).

12. See MAHA A. Z. YAMANI, POLYGAMY AND LAW IN CONTEMPORARY SAUDI ARABIA 139 (2008).

13. *Id.*

Due to the overt control of the executive power over prosecutors and judges, the judiciary is not an independent authority in Saudi Arabia.¹⁴ Furthermore, the wide authority given to Saudi judges in interpreting and applying Islamic laws contribute to creating a judicial system characterized by pervasive arbitrariness and abuse of power. This has led in practice to a considerable amount of arbitrary prosecutions of peaceful activists and dissenters on politically motivated charges.

Saudi Arabia is among the worst violators of basic human rights, in particular the right to freedom of opinion and expression.¹⁵ The Kingdom scored the worst possible grade in Freedom House's 2015 Freedom in the World index, which focuses on civil liberties and political rights in a particular country.¹⁶ Although the Kingdom has signed several United Nations (U.N.) human rights treaties,¹⁷ it has firmly opposed the Universal Declaration of Human Rights (UDHR) for allegedly being in contradiction with the principles of the Shari'a Law.¹⁸

III. STANDARD FOR THE PROTECTION OF THE RIGHT TO FREEDOM OF EXPRESSION UNDER INTERNATIONAL HUMAN RIGHTS LAW

The legal framework for the freedom of expression, a fundamental human right, is firmly established in the UDHR and the International

14. See GAN BUS. ANTI-CORRUPTION PORTAL, SAUDI ARABIA CORRUPTION REPORT (2016), <https://www.business-anti-corruption.com/country-profiles/saudi-arabia>.

15. Arch Puddington & Tyler Roylance, *Anxious Dictators, Wavering Democracies: Global Freedom Under Pressure*, FREEDOM HOUSE (2016), <https://freedomhouse.org/report/freedom-world-2016/overview-essay-anxious-dictators-wavering-democracies>.

16. *Freedom in the World—Saudi Arabia (2015)*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2015/saudi-arabia#.VSWKSktN1Zg> (last visited Jan. 20, 2018).

17. See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; Committee on the Elimination of Discrimination against Women, Concluding Comments of the Committee on the Elimination of Discrimination Against Women, Saudi Arabia, 40th Sess., U.N. Doc CEDAW/C/SAU/CO/2 (Apr. 8, 2008); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. (noting that the Kingdom ratified these conventions with reservations).

18. See Jonathan Russell, *Human Rights: The Universal Declaration vs. The Cairo Declaration*, LSE MIDDLE E. CTR. BLOG (Dec. 12, 2010), <http://blogs.lse.ac.uk/mec/2012/12/10/1569/>.

Most Muslim-majority countries including Egypt, Iran and Pakistan signed the UDHR in 1948, but crucially Saudi Arabia, where the King must comply with the Shari'a and Qur'an, did not sign the declaration, arguing that it violated Islamic law and criticising it for failing to take into consideration the cultural and religious context of non-Western countries.

See also *id.* (explaining that Saudi Arabia refused to sign the UDHR believing that it violated the Qur'an and Sharia law).

Covenant on Civil and Political Rights (ICCPR).¹⁹ One hundred and sixty-nine countries, excluding Saudi Arabia, are parties to the ICCPR.²⁰ Additionally, Saudi Arabia is both a member of the U.N. and the U.N. Human Rights Council (UNHRC) and is thus bound to promote and encourage respect and human rights for all.²¹ In fact, the rights and freedoms provided in the ICCPR are inspired by the principles proclaimed in the Charter of the U.N., which binds member states to “promote universal respect for, and observance of, human rights and fundamental freedoms,”²² pursuing the “ideal of free human beings enjoying civil and political freedom”²³ in accordance with the UDHR.

The freedom of expression maintains universal recognition, evidenced by its inclusion in every regional human rights treaty, including Article 10 of the European Convention on Human Rights,²⁴ Article 13 of the American Convention on Human Rights,²⁵ and Article 9 of the African Charter on Human and Peoples’ Rights.²⁶

19. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; G.A. Res. 217A (III), art. 19, Universal Declaration of Human Rights (Dec. 10, 1948).

20. See *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, ch. IV, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-4&chapter=4&lang=en (last visited Jan. 20, 2018).

21. G.A. Res. 16/18, at 1 (Apr. 12, 2011).

22. ICCPR, *supra* note 19, pmb1.

23. *Id.*

24. Freedom of Expression:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as 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.

Freedom of Expression, Eur. Conv. on H.R. art. 10, ¶¶ 1–2.

25. Freedom of Thought and Expression:

Similarly, Saudi Arabia maintains obligations under the regional human rights framework. Article 32 of the Arab Charter on Human Rights holds that the “Charter shall ensure the right to information, freedom of opinion and freedom of expression, freedom to seek, receive and impart information by all means, regardless of frontiers.”²⁷ Saudi Arabia has ratified the Arab Charter on Human Rights,²⁸ and must honor the obligations it undertook under Article 32. Furthermore, Saudi Arabia has been a member state of the Organization of Islamic Cooperation²⁹ (OIC)

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1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Freedom of Thought and Expression, Am. Conv. on H.R., art. 13, ¶¶ 1–5.

26. Afr. Charter on Human and Peoples' Rights art. 9, ¶¶ 1–2. (stating that “[e]very individual shall have the right to receive information [and] [e]very individual shall have the right to express and disseminate his opinion within the law”).

27. League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) (entered into force Mar. 15, 2008), *translated in* UNIV. OF MINN. HUM. RTS. [hereinafter Arab Charter].

28. See Mohamed Y. Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 HARV. HUM. RTS. J. 91, 93 (2013) (listing the Middle East and North Africa Region (MENA) states that have thus far ratified the Arab Charter on Human Rights).

29. *History*, ORGANISATION ISLAMIC COOPERATION, https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en (last visited Jan. 20, 2018).

since 1969. Among the objectives stated in the Charter of the OIC is the promotion of “human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in Member States in accordance with their constitutional and legal systems.”³⁰

By adopting the ICCPR, the international community legally recognized 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.”³¹ This includes the right of individuals to “hold opinions without interference.”³²

The U.N. Human Rights Committee³³, charged with compliance and oversight of the ICCPR, stated in its observations on the subject that “[f]reedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.”³⁴ The [Human Rights Committee] also affirmed that “[f]reedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”³⁵ In addition, respect of freedom of opinion should be binding on all branches of the state and on all

The Organi[z]ation of Islamic Cooperation (OIC) [formerly Organization of the Islamic Conference] is the second largest inter-governmental organization after the United Nations with a membership of 57 states [and] spreads [across] four continents. The [OIC] is the collective voice of the Muslim world . . . [and ensuring] to safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world. The [OIC] was established upon a decision of the historical summit which took place in Rabat, Kingdom of Morocco on 12th Rajab 1389 Hijra (September 25, 1969) following the criminal arson of Al-Aqsa Mosque in occupied Jerusalem. *Id.*

30. Charter of the Organization of Islamic Cooperation, art. 1, ¶ 14.

31. ICCPR, *supra* note 19, art. 19.

32. *Id.*

33. The United Nations Human Rights Committee is the body responsible for overseeing and advising ratified States on the implementation of the ICCPR treaty principles within that State. As of April 2012, 160 States had ratified the ICCPR. *Introduction: Monitoring Civil and Political Rights*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> (last visited Jan. 23, 2018).

34. Human Rights Committee, Article 19: Freedoms of Opinion and Expression, General Comment No. 34, ¶ 2, U.N. Doc. CCPR/C/GC/34, (Sept. 12, 2011) [hereinafter General Comment No. 34].

35. *Id.* ¶ 3.

governmental authorities at whatever level.³⁶ Furthermore, the scope of protection of this right “includes expression of views and opinions that offend, shock or disturb.”³⁷ Therefore, and especially in a context of political debate, restrictions to the right to freedom of opinion should not be applied to “expression of opinion and dissent, religion or belief.”³⁸

The international standard of freedom of expression protects against abusive use of defamation laws aiming at criminalizing legitimate criticism and stifling freedom of expression.

A. Defamation Under the International Standard of Freedom of Expression

1. General Prohibition Against the Criminalization of Speech

The Human Rights Committee stated that criminalizing the holding of an opinion is incompatible with Article 19, Paragraph 1 of the ICCPR.³⁹ In fact, any efforts to coerce the holding or not holding of any opinion is prohibited,⁴⁰ and “harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of Article 19, Paragraph 1.”⁴¹

2. Special Prohibition Against the Criminalization of Speech Directed at Public Officials

Under the universal standard of the ICCPR, defamation laws must not stifle freedom of expression.⁴² For official defamation law to comply with international law requirements, it must satisfy the following six-prong test.

36. Human Rights Committee, Nature of the General Legal Obligation on States Parties to the Covenant, General Comment No. 31, ¶ 4, 80th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004).

37. Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, ¶ 37, 17th Sess., U.N. Doc. A/HRC/17/27 (May 16, 2011) [hereinafter HRC 17th Sess.].

38. Human Rights Council, Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, ¶ 81, 14th Sess., U.N. Doc. A/HRC/14/23 (Apr. 20, 2010) [HRC 14th Sess.].

39. JAVIER EL-HAGE & CELINE ASSAF BOUSTANI, HUMAN RIGHTS FOUND., THE CASE OF WALEED ABU AL-KHAIR 25 (2016).

40. *Id.* See also Yong-Joo Kang v. Republic of Korea, Commc’n No. 878/1999, U.N. Doc. CCPR/C/78/D/878/1999 (2003).

41. EL-HAGE & BOUSTANI, *supra* note 39, at 25; see Andre Alphonse Mpaka-Nsusu v. Zaire, Commc’n No. 157/1983, U.N. Doc. Supp. No. 40 (A/41/40) at 142 (1986) [hereinafter HRC Zaire].

42. General Comment No. 34, *supra* note 34, ¶ 47.

The first prong requires that laws on defamation are drafted in accordance with the elements used to measure limitations on freedom of expression, as set forth in Article 19, Section 3 of the ICCPR, namely the legality, legitimacy, necessity and proportionality of those limitations.⁴³ First, restrictions on freedom of expression must be formally provided for by law.⁴⁴ In other words, they must be codified by a country's statutes. Moreover, they must not be overbroad and must be precise enough that it is clear what particular types of behaviors are precluded by the law.⁴⁵ Second, those limitations must emanate from a need to protect a legitimate state interest.⁴⁶ Recognized state interests include protecting the rights of others, maintaining national security, ensuring public order and health, and/or preserving morals.⁴⁷ Third, restrictions on freedom of expression must be necessary.⁴⁸ In other words, a restriction should only be applied if it is the only way to achieve protection of the legitimate state interest.⁴⁹ Finally, restrictions on the freedom of expression must be proportional.⁵⁰ Methods of limiting expression, if necessary and for a legitimate purpose, must be implemented in the narrowest possible manner. In other words, criminal or civil penalties discouraging particular forms of expression must not be overboard,⁵¹ and must be proportionate to the interest being protected. Proportionality requires applying the minimum criminal or civil sanction possible to expressions that must be limited for necessary and legitimate purposes.⁵²

The second prong requires the defamatory statement in question to be a fact statement instead of an opinion that is not subject to verification.⁵³ The third prong imposes a heightened standard for public officials and

43. *Id.* ¶¶ 24–25, 33–34.

44. *Id.* ¶ 22.

45. *Id.* ¶¶ 34–35.

46. *Id.* ¶¶ 29, 34.

47. General Comment No. 34, *supra* note 34, ¶ 21.

48. *Id.* ¶ 33.

49. *Id.* See also Human Rights Committee, Ballantyne, Davidson, and McIntyre v. Canada, Commc'n Nos. 359/1989 and 385/1989, ¶ 11.4, 47th Sess., U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1, (Mar. 31, 1993) [hereinafter HRC 47th Sess.].

50. General Comment No. 34, *supra* note 34, ¶ 34.

51. *Id.*

52. See Human Rights Committee, Article 12 (Freedom of Movement), General Comment No. 27, ¶ 14, 67th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.9, (Nov. 2, 1999); Human Rights Committee, Rafael Marques de Morais v. Angola, Communication No. 1128/2002, ¶ 6.8, 83rd Sess., U.N. Doc. CCPR/C/83/D/1128/2002, (Mar. 14–Apr. 2005) [hereinafter HRC 83rd Sess.].

53. See General Comment No. 34, *supra* note 34, ¶ 47.

figures, because they are naturally subject to criticisms and opposition.⁵⁴ The fourth prong requires the existence of actual malice in the defendant's actions in cases concerning public officials/figures.⁵⁵ The fifth prong indicates that the burden of proof lies with the plaintiff.⁵⁶ The sixth and last prong sets forth the defenses available to the defendant—truth and public interest of the subject matter.⁵⁷

Throughout the years, the Human Rights Committee has developed a stringent standard rejecting the criminalization of speech directed at public officials and highlighting that citizens of any society must be able to freely criticize their government “without fear of interference or punishment.”⁵⁸ In the 2009 UNHRC Report, The U.N. Special Rapporteur on Freedom of Opinion and Expression (Special Rapporteur) stated, “[m]echanisms for criticism, particularly of political leaders, were deemed important so that leaders were held to account [and that] [f]reedom of expression was not limited to statements considered appropriate or beneficial.”⁵⁹

Non-democratic countries around the world commonly abuse criminal defamation laws to stifle freedom of expression, and silence the opposition in circumstances of public debate. In this context, the Human Rights Committee held that “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.”⁶⁰ Laws such as *lèse majesté*, *desacato*,⁶¹ or offenses such as disrespect for authority,⁶² disrespect for flags and symbols, defamation of

54. See Human Rights Committee, *Adimayo, M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, Communications Nos. 422/1990, 423/1990 & 424/1990, ¶ 7.4, 57th Sess., U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 & 424/1990, (July 12, 1996) [hereinafter HRC 57th Sess.].

55. See General Comment No. 34, *supra* note 34, ¶ 47.

56. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United Kingdom of Great Britain and Northern Ireland*, ¶ 25, 93rd Sess., U.N. Doc. CCPR/C/GBR/CO/6, (July 30, 2008) [hereinafter HRC 93rd Sess.].

57. See General Comment No. 34, *supra* note 34, ¶ 47; Human Rights Committee, *Pavel Kozlov v. Belarus*, Communication No. 1986/2010, ¶ 7.5, 111th Sess., U.N. Doc. CCPR/C/111/D/1986/2010, (July 7–25, 2014).

58. HRC 57th Sess., *supra* note 54, ¶ 7.4.

59. Human Rights Council, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, ¶ 10, 10th Sess., U.N. Doc. A/HRC/10/31/Add.3, (Jan. 16, 2009) [hereinafter HRC 10th Sess.].

60. HRC 83rd Sess., *supra* note 52, ¶ 6.8.

61. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Dominican Republic*, ¶ 22, 71st Sess., U.N. Doc. CCPR/CO/71/DOM, (Apr. 26, 2001).

62. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Honduras*, ¶ 17, 88th Sess., U.N. Doc. CCPR/C/HND/CO/1, (Dec. 13, 2006).

the head of state⁶³ and the protection of the honor of public officials,⁶⁴ and any defamation laws should be carefully drafted and implemented to ensure that they comply with the ICCPR. Furthermore, the Human Rights Committee recommends that all such laws include the defense of truth and “with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice.”⁶⁵

In any case of defamation, imprisonment should never be an appropriate penalty. The Special Rapporteur stated that “[s]anctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied.”⁶⁶

Consequently, domestic defamation laws must be constructed carefully to meet the international standards articulated by the six-prong test, and so as to not infringe on free speech aimed at both holding public officials accountable and promoting good governance. Criminal sanctions for such speech will almost certainly render a state as non-compliant with their international obligations.

B. Incitement Under the International Standard of Freedom of Expression

1. General Prohibitions Against Incitement and Hate Speech

Preventing incitement of violence and hate speech are important tenants of international law as articulated by Article 20, Paragraph 2 of the ICCPR. Article 20, Paragraph 2 states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law” (the Incitement Prohibition).⁶⁷ The Incitement Prohibition is “fully compatible with the right of freedom of expression as contained in [A]rticle 19 [of the ICCPR],

63. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Zambia, ¶ 25, 90th Sess., U.N. Doc. CCPR/C/ZMB/CO/3, (Aug. 9, 2007).

64. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Costa Rica, ¶ 11, 91st Sess., U.N. Doc. CCPR/C/CRI/CO/5, (Nov. 16, 2007).

65. HRC 93rd Sess., *supra* note 56, ¶ 25.

66. Commission on Human Rights, Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain, ¶ 28(h), 55th Sess., U.N. Doc. E/CN.4/1999/64 (Jan. 29, 1999).

67. Human Rights Instruments, General Comment No. 11: Article 20, ¶ 2, 19th Sess., U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008) [hereinafter HRI 19th Sess.].

the exercise of which carries with it special duties and responsibilities.”⁶⁸ For it to become effective, “there ought to be a law making it clear that . . . advocacy as described [is] contrary to public policy and providing for an appropriate sanction in case of violation.”⁶⁹

According to the Human Rights Committee, “restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”⁷⁰ Under this provision, “[a]ny restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of Article 19, and it must be necessary to achieve a legitimate purpose.”⁷¹

68. *Id.*; Human Rights Committee, *Malcolm Ross v. Canada*, Comm’n No. 736/1997, ¶ 11.6, 70th Sess., U.N. Doc. CCPR/C/70/D/736/1997, (Oct. 20, 2000) [hereinafter HRC 70th Sess.]. The HRC recognized the overlapping nature of Articles 19 and 20, stating that it considered that restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. HRC 70th Sess., *supra* note 68, ¶ 11.6.

69. HRI 19th Sess., *supra* note 67, ¶ 2.

70. HRC 70th Sess., *supra* note 68, ¶ 10.6.

71. Human Rights Committee, *Robert Faurisson v. France*, Communication No. 550/1993, ¶ 9.4, 58th Sess., U.N. Doc. CCPR/C/58/D/550/1993, (Nov. 8, 1996); General Comment No. 34, *supra* note 34, ¶ 12 (elaborating on the links between Articles 19 and 20 of the ICCPR):

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.

51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.

52. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.

2. Three-Prong Test to Determine the Validity of Measures Implementing the Incitement Prohibition

Any restriction of freedom of expression implementing Article 20 of the incitement prohibition requires compliance with the three-prong test set forth in Article 19, paragraph 3.

The Human Rights Committee's General Comment 34 breaks down the elements of the three-prong test that must be met in order to impose exceptional restrictions on freedom of expression.⁷² The first prong requires that laws are formally provided for in a way that they are understandable to the public, allowing the public to conform their behavior accordingly, and which are also capable of being applied in a consistent way by those charged with their execution.⁷³ The second prong requires that laws be necessary for a legitimate purpose.⁷⁴ If an alternate restriction is capable of achieving the legitimate aim, then the law is an inappropriate use of the restrictions permitted under Article 19.⁷⁵ The third prong requires proportionality, and that the restrictive measure is the least intrusive means of achieving the protective function.⁷⁶ Both formalized laws, in addition to the judicial authorities charged with their administration, must reflect this least restrictive principle.⁷⁷ Furthermore, the proportionality of restrictions must take into account the form of expression being restricted, and when issues of public importance are the subject of these expressions, the ICCPR calls for uninhibited expression.⁷⁸ Finally, in instances where there is a necessary and proportionate restriction aimed at legitimate concerns posed by the exercise of freedom of expression, the state must, in each case where it imposes criminal sanctions or penalties against specific individuals, demonstrate a causal nexus between that individual's expression, the immediate threat posed by that expression, and the particular and urgent cause of sanctions against that specific individual.⁷⁹

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has detailed the three-prong test for the incitement

72. General Comment No. 34, *supra* note 34, ¶ E.5.

73. *Id.*

74. HRC 47th Sess., *supra* note 49.

75. General Comment No. 34, *supra* note 34, ¶ 34.

76. *Id.*

77. *Id.*

78. *Id.*

79. Human Rights Committee, Hak—Chul Shin v. Republic of Korea, Communication No. 926/2000, ¶ 7.3, 80th Sess., U.N. Doc. CCPR/C/80/D/926/2000, (March 15–April 2, 2004) [hereinafter HRC 80th Sess.].

prohibition more succinctly. According to the OHCHR, “Article 20 of the ICCPR requires there be a high threshold” when restricting free speech with incitement laws, so as to conform to Article 19 requirements of legality, proportionality, and necessity.⁸⁰ The restrictions should be clear and not limit free speech in an overly broad or untargeted way. When sanctions limiting speech are applied, the benefit to the protected interest must outweigh the harm to freedom of expression caused by the sanctions.⁸¹

In addition, there have been several cases in which the Human Rights Committee has looked at the intent behind the incitement to discrimination, hostility, or violence. In 1997, the Human Rights Committee distinguished between “critical discussion” and “advocating contempt against a group” in order to determine if the speech restriction was permissible.⁸² A 2001 Joint Statement on Racism and Media by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression states that “no one should be penalized for the dissemination of ‘hate speech’ unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence.”⁸³

IV. ANALYSIS OF THE CONDUCT OF THE KINGDOM OF SAUDI ARABIA IN RELATION TO INTERNATIONAL HUMAN RIGHTS LAW

Waleed Abu al-Khair is a Saudi Arabian human rights lawyer and activist. He is an outspoken advocate for political reform, particularly for establishing a democratic state in the Kingdom of Saudi Arabia. He focuses on advancing individual liberties and defending victims of human rights violations. In 2009, he founded the Monitor of Human Rights in Saudi Arabia (MHRSA), an independent human rights organization.⁸⁴ On October 29, 2013, in retaliation for his work as a human rights lawyer and activist, Abu al-Khair was sentenced by the criminal court in Jeddah to three months in prison for “contempt of the judiciary” by publically criticizing a court decision against his client. On February 6, 2014, the Court of Appeal in Mecca upheld the sentence.

80. ICCPR, *supra* note 19, art. 19.

81. Human Rights Council, Annual Report of the United Nations High Commissioner for Human Rights, ¶ 18, 22nd Sess., U.N. Doc. A/HRC/22/17/Add.4, (Jan. 11, 2013).

82. HRC 70th Sess., *supra* note 68, ¶ 11.5.

83. *Racism and the Media*, ORG. FOR SECURITY & CO-OPERATION EUR. (Feb. 27, 2001), <http://www.osce.org/fom/40120?download=true>.

84. E-mail from Ekuia Quansah, Human Rights Award Selection Committee, to LSUC Human Rights Award Selection Committee (June 15, 2016), http://www.lrwc.org/ws/wp-content/uploads/2016/11/Waleed-Abu-al-Khair.Nomination.Ltr._-LRWC.UIA._LSEW_.15-June_2016.pdf.

A few weeks earlier on October 6, 2013, a second case was filed against Abu al-Khair before the Specialized Criminal Court on various charges, including “harming the reputation of the Kingdom,” “inciting the public opinion against the Kingdom,” “breaking allegiance to the ruler,” and “subverting public order in the Kingdom,” for similar reasons. In July 2014, he was sentenced to fifteen years in prison with a five-year suspended sentence. On January 12, 2015, the Court of Appeal upheld the conviction of the Specialized Criminal Court and extended the sentence from ten to fifteen years after Abu al-Khair refused the judge’s offer to apologize for his acts.

This Part analyzes the second case against Waleed Abu al-Khair under international human rights law.

A. *Violation of the Right to Freedom of Expression and Opinion*

According to international human rights law, everyone shall have the right to freedom of expression and the right to hold opinions without interference through any media or form of expression.⁸⁵ This right includes criticism towards the government, its officials and public affairs.⁸⁶ The obligation to respect the right to freedom of expression and opinion is binding on all branches of the state (executive, legislative, and judicial) and extends to “expression of views and opinions that offend, shock or disturb.”⁸⁷ International human rights law also recognizes that “mechanisms for criticism, particularly of political leaders, were deemed important so that leaders were held to account and that freedom of expression was not limited to statements considered appropriate or beneficial.”⁸⁸

Saudi Arabia is a nondemocratic country where the fundamental rights of citizens are denied.⁸⁹ The Kingdom is ruled by a fully authoritarian regime where freedom of expression is neither guaranteed nor respected.⁹⁰ Under this regime, any kind of public dissent is prohibited and dissenters are severely

85. Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, ¶ 20(a), 77th Sess., U.N. Doc. A/HRC/17/27, ¶ 20, (May 16, 2011).

86. *Id.*

87. *Id.* ¶ 37.

88. HRC 10th Sess., *supra* note 59, ¶ 10.

89. Mayan Derhy, *Top Five Non-Democratic Countries*, BORGEN PROJECT (Jan. 10, 2017), <https://borgenproject.org/top-five-non-democratic-countries/>.

90. Erwin van Veen, *Return of Authoritarianism Primes Middle East for More Conflict*, CLINGENDAEL (Dec. 19, 2017, 13:33), <https://www.clingendael.org/publication/return-authoritarianism-primers-middle-east-more-conflict>.

punished, especially those who openly express their disagreement with the government or discuss reforming the Kingdom's political system.

The prosecution and sentencing of Waleed Abu al-Khair for expressing his criticism of the judiciary were carried out within the context of full authoritarianism. In 2011, the public prosecutor charged Abu al-Khair with "contempt of the judiciary" and "harming the reputation of the Kingdom" pursuant to general principles of Shari'a law. The charges were based on the fact that Abu al-Khair publically criticized a court decision sentencing Samar Badawi, his client at the time, to six months in prison in a male guardianship case against her abusive father. In addition, Abu al-Khair was accused of sharing information about Badawi's case with international organizations and for signing a petition,⁹¹ which criticized the severity of the sentence against peaceful political activists and condemned the use of violence by security forces against protesters. Based on the indictment of the public prosecutor, the criminal court in Jeddah, and subsequently the court of appeal in Mekkah, sentenced Abu al-Khair to three months in prison for "contempt of the judiciary" for signing a petition, which the court qualified as damaging to the judiciary and to Islam.⁹²

In the second case filed against Abu al-Khair before the Specialized Criminal Court, the charging document filed by the public prosecutor included charges of "criticizing and insulting the judiciary" and "communicating with international organizations in order to undermine the reputation of the Kingdom." These charges were based on the same facts mentioned in the indictment document filed a year earlier, namely: "criticizing the Kingdom by communicating on the internet and satellite channels materials related to the sentences against [political] reformers," "signing a petition," and "publishing comments on twitter criticizing the government and the human rights status in the Kingdom."⁹³ In 2014, the Specialized Criminal Court in Jeddah, and subsequently the appellate court, sentenced Abu al-Khair to fifteen years in prison based on the charging document of the public prosecutor, which included the public defamation offenses of "criticizing and insulting the judicial authority" and "harming the reputation of the Kingdom."

91. See EL-HAGE & BOUSTANI, *supra* note 39, at 33.

92. *Id.* The Petition included statements such as: "unjustified security escalation," "unfair judgments," and "painful repressive measures." The Petition condemns "the use of weapons" and demands the constitution of a "judicial fact-finding committee, the identification of persons and entities involved in the killings, and bringing them to justice." It is worth noting that Abu al-Khair was not involved in the drafting of the Petition but was one of the sixty-two petitioners who signed it.

93. *Id.* Twitter comments include the following: "Human Rights in Saudi Arabia . . . going backwards!"; "Saudi Arabia through its oil, buys the silence of the western world due to what is happening in Bahrain."; "The politicians remain careful to gain legitimacy from Wahhabism in a regime that has not much on the human level."

Charging and sentencing on the basis of the expression of one's opinion, in any form whatsoever, even if such opinion is deemed critical or offensive toward any third party, including public officials, violates the principle consecrated in Article 19 of the ICCPR.⁹⁴ The criminalization of Abu al-Khair's expression by the Saudi Arabian court violated this standard.

Therefore, by violating Abu al-Khair's right to express opinions and ideas freely, even if such opinion offended public officials, or were found shocking or disturbing by the judicial and executive authorities of the country, Saudi Arabia has violated international human rights law.

B. Violation of the General Prohibition Against the Criminalization of Speech Directed at Public Officials

1. Saudi Arabia's Restrictions on Speech Directed at Public Officials

According to international human rights law, criminalizing the holding of an opinion is prohibited.⁹⁵ The "harassment, intimidation, arrest, detention, trial or imprisonment" of any individual based on the expression of an opinion, constitutes a violation of the ICCPR.⁹⁶ As discussed above, international law recognizes a special prohibition against the criminalization of speech directed at public officials due to public figures being "required to tolerate a greater degree of criticism than private citizens," and because "mechanisms for criticism, particularly of political leaders, were deemed important so that leaders were held to account."⁹⁷

The Saudi laws expressly criminalize any critical speech directed at the government or its officials and Saudi judges broadly interpret these laws to stifle any form of speech that criticizes the Kingdom and its public affairs.⁹⁸ The Law of Terrorism Crimes and its Financing defines a terrorist crime as any act carried out by the perpetrator to commit a criminal activity . . . towards the purpose of disabling the Basic Law or any of its articles; harming the reputation or status of the country.⁹⁹ The Saudi government relies on this law to crush peaceful opposition and justify severe sentences against those who express critical opinions.

94. ICCPR, *supra* note 19, art. 19.

95. *Id.*

96. EL-HAGE & BOUSTANI, *supra* note 39, at 34; *see also* HRC Zaire, *supra* note 41.

97. HRC 10th Sess., *supra* note 59, ¶ 10.

98. *Saudi Arabia: New Terrorism Regulations Assault Rights*, HUM. RTS.WATCH (Mar. 20, 2014, 12:00 AM), <https://www.hrw.org/news/2014/03/20/saudi-arabia-new-terrorism-regulationsassault-rights>.

99. PRETENSE OF PROGRESS, *supra* note 4.

Similarly, the Anti-Cyber Crime Law of 2009 lists “defamation” as one of the cyber-crimes subject to imprisonment, but fails to define this offense.¹⁰⁰ With such a broad term, any critical expression can amount to a punishable crime under this law. Article 6 of the same law provides that the “[p]roduction, preparation, transmission, or storage of materials impinging on public order, religious values, public morals, and privacy” is a cyber-crime, which similarly encompasses any communication of material deemed critical towards public affairs or religion.¹⁰¹

The opinions expressed by Abu al-Khair, whether in the petition, on television, or via Twitter, were directed at the judicial authority and are protected by international law. Despite that, and according to the facts of this case, the Saudi Arabian legal system criminalized this expression by pressing charges against Abu al-Khair for the alleged crime of insulting the judiciary, and the criminal court sentenced him to three months in prison on that charge. Two years later, the Specialized Criminal Court sentenced Abu al-Khair to fifteen years in prison for charges related to “harming the reputation of the Kingdom” and “inciting the public opinion against the Kingdom,” based on the provisions of the Law of Terrorism Crimes and its Financing and Anti-Cyber Crime Law. Under a broad definition of “terrorist crime” and “defamation,” these laws harshly criminalize holding any opinion suspected of harming the reputation of the Kingdom or any of its officials.

The sentencing of Abu al-Khair based on defamation charges violates the universal standard on defamation set out in international law. The analysis of the case, in light of the six-prong test discussed in the above section, demonstrates that Saudi Arabia fails to comply with international law requirements.

2. Analysis of the Multi-Prong Test Related to Defamation

The first prong of this test requires that the laws on defamation must be provided by law and must not be overbroad; must address one of the legitimate aims set out in paragraph 3(a) and (b) of Article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals); must be necessary to achieve a legitimate purpose; must be the least intrusive instrument necessary to achieve the protective function; and must be proportionate to the interest being protected.¹⁰²

100. Anti-Cyber Crime Law, M/17, art. 3(5) (Sa.) (March 26, 2007) [hereinafter M/17]. Article 3, Section 5 of the Anti-Cyber Crime Law states, “Any person who commits one of the following cyber crimes shall be subject to imprisonment for a period not exceeding one year and a fine not exceeding hundred thousand riyals or to either punishment: Defamation and infliction of damages upon others through the use of various information technology devices.” *Id.*

101. *Id.*

102. General Comment No. 34, *supra* note 34, ¶¶ 26–30.

Saudi Arabian laws expressly criminalize defamatory statements that harm the reputation of public officials or the Kingdom. The Law of Terrorism Crimes and its Financing harshly punishes any speech that “harm the reputation or status of the country,”¹⁰³ and the Anti-Cyber Crime Law criminalizes defamation including any expression deemed critical to public affairs and religion.¹⁰⁴ The Law of Printed Materials and Publications proscribes expression of opinion that is “insulting to Islam and to the system of government”¹⁰⁵ and bans and criminalizes any speech that is “damaging to the reputation of the Grand Mufti, members of the Council of Senior Religious Scholars, or senior government officials.”¹⁰⁶ While the laws on defamation are codified, these laws include overbroad expressions such as “reputation or status of the country,” “public affairs and religion,” “Islam [or] the system of government,” which render these laws not precise enough to enable an individual to regulate his or her conduct accordingly.¹⁰⁷ In addition, the predominance of the Shari’a law in the Kingdom adds to the broadness of such laws, especially that Saudi judges have broad discretion in the interpretation of the law.

Moreover, the ground for restrictions provided in the Saudi Arabian laws and on which the court decisions in Abu al-Khair’s case are based, is the protection of the reputation of the country and its judicial system. Legitimate interests for restriction of free speech include: the rights of others,¹⁰⁸ such as the human rights articulated by the ICCPR; national security,¹⁰⁹ such as the violent overthrow of the constitutional order; and public order,¹¹⁰ such as speaking in a public place that may be disruptive to the public order. This interest of Saudi Arabian law is not protected by the universal standard of the ICCPR and restricting Abu al-Khair’s speech on this basis is therefore not necessary for a legitimate purpose. Therefore,

103. PRETENSE OF PROGRESS, *supra* note 4.

104. M/17, *supra* note 100, art. 6.

105. Law of Printed Materials and Publications, M/32, art. 18 (Sa.) (Nov. 2000) [hereinafter M/32].

106. EL-HAGE & BOUSTANI, *supra* note 39, at 10.

107. General Comment No. 34, *supra* note 34, ¶¶ 25, 34. Paragraph 34 requires restricting laws not to be overbroad and Paragraph 25 states that laws “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.” *Id.*

108. See Human Rights Committee, Jong-Cheol v. Republic of Korea, Commc’n No. 968/2001, ¶ 8.3, 85th Sess., U.N. Doc. CCPR/C/84/D/968/2001, (July. 25, 2005).

109. See Human Rights Committee, AK & AR v. Uzbekistan, Commc’n No. 1233/2003, 95th Sess., U.N. Doc. CCPR/C/95/D/1233/2003, (Mar. 31, 2009).

110. See Human Rights Committee, Patrick Coleman v. Australia, Commc’n No. 1157/2003, ¶ 7.3, 87th Sess., U.N. Doc. CCPR/C/87/D/1157/2003, (July 10–28, 2006).

sentencing Abu al-Khair to fifteen years in prison on the basis of defamation charges is neither proportional nor justified.

Because the legality, legitimate grounds, necessity and proportionality elements are not satisfied, Saudi Arabia fails this prong of the test.

The second prong of the test requires that the defamatory statement in question be a fact instead of an opinion.¹¹¹ The third prong imposes a heightened standard for public officials and figures, because they are naturally subject to criticisms and opposition.¹¹² The Saudi Arabian laws on defamation and the judges in the case of Abu al-Khair do not distinguish between statements of fact and opinion. Additionally, they do not suggest that public officials and public figures are subject to a heightened level of criticism. In fact, harming the reputation of the country, including its officials, carries a sentence of up to twenty years in prison.¹¹³ The second and third prongs of the test are therefore not satisfied.

The fourth prong of the test requires the existence of actual malice in the defendant's actions in cases concerning defamation of public officials.¹¹⁴ The Saudi Arabian laws do not mandate the existence of actual malice as a prerequisite for persecution.¹¹⁵ The court in Abu al-Khair's case does not state actual malice as a requirement for criminal defamation and charged him solely based on the fact that he expressed a critical opinion. This prong is therefore not satisfied.

The fifth prong indicates that the burden of proof lies with the plaintiff.¹¹⁶ In other words, when an individual is criminally prosecuted for violating statutes legitimately and necessarily restricting free speech, the prosecution must plead with particularity how the individual on trial violated the law, and has the burden of proving these facts before a court of law. The Saudi statutes do not set forth the burden of proof and Abu al-Khair's case lacked the due process required for demonstrating proof in an impartial judicial proceeding. Saudi Arabia's prosecution and sentencing of Abu al-Khair violated his right to a fair trial and the right to due process. After he was arrested during a hearing on April 15, 2014, he was denied access to his lawyer. On April 22, 2014, the judge refused to provide Abu al-Khair's lawyer with any explanation for his arrest and detention, and he was thus unable to present his defense. Consequently, the plaintiff-prosecutors did not present any proof for the charges against Abu al-Khair

111. HRC 17th Sess., *supra* note 37.

112. General Comment No. 34, *supra* note 34, ¶ 38.

113. HRC 17th Sess., *supra* note 37.

114. General Comment No. 34, *supra* note 34, ¶ 47.

115. The fourth prong of international standards relating to defamation under the ICCPR requires the existence of actual malice on the part of the defendant in cases concerning public officials.

116. See ICCPR, *supra* note 19, art. 14(2).

who was charged based on the evidence gathered by the Bureau of Investigation and Public Prosecution during an interrogation. The plaintiff-prosecutors in this case could not have met their burden of proving their case if Mr. Abu al-Khair was denied a defense, as there was no impartial judicial proceeding within which to prove their case. This prong is therefore not satisfied.

The sixth prong sets forth the defenses available to the defendant: truth and public interest of the subject matter.¹¹⁷ Saudi laws do not state that truth and public interest are justifications for the defamatory statement.¹¹⁸ Likewise, in Abu al-Khair's case, he was unable to present his defense as he was denied access to his lawyer. This prong is therefore not satisfied.

The fact that the Saudi Arabian laws and its application by the courts do not comply with the multi-prong test renders Saudi Arabia as a non-compliant state with the universal standard on defamation. By enacting and implementing laws that unambiguously proscribe the expression of one's opinion, and even more harshly when directed at public figures, Saudi Arabia, acting through its executive branch, is internationally responsible for violating the prohibition against criminalization of speech and the special prohibition against the criminalization of forms of expression directed at public officials.¹¹⁹ Additionally, by detaining and imprisoning Abu al-Khair based on such laws, Saudi Arabia, acting through its judicial branch, has violated the prohibition against criminalization of speech and the special prohibition against the criminalization of forms of expression directed at public officials.¹²⁰

C. *Violation of the Incitement Prohibition*

1. The Incitement Prohibition

The incitement prohibition limits the right to freedom of expression when hatred, hostility or violence are encouraged through the speech.¹²¹ According to international human rights law, a particular government's measures in implementing the incitement prohibition requires a high threshold because, as a matter of fundamental principle, limitations on speech must always remain an exception.¹²² Such a threshold must be read

117. *Id.* art. 14(3)(d).

118. HRC 17th Sess., *supra* note 37.

119. ICCPR, *supra* note 19, art. 19.

120. *Id.*

121. *Id.* art. 20(2).

122. *Id.* arts. 19–20.

in consonance with the three-prong test for restrictions¹²³—namely, such restrictions must be provided by law (legality test); be narrowly defined to serve a legitimate interest (proportionality test); and be necessary to protect that interest (necessity test). In particular, the legal provision must not be overly broad or restrict speech in a wide or untargeted way.¹²⁴ Similarly, the principle of proportionality must be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.¹²⁵ As a result, when a state party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in a 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.¹²⁶

2. Analysis of the Three-Prong Test Related to the Incitement Prohibition

The legality test requires that the incitement prohibition restricting freedom of expression must be provided by law in a clear and targeted way, and must address one of the aims set out in paragraph 3(a) and (b) of Article 19 in respect of the rights and reputation of others, protection of national security or public order, or public health or morals.¹²⁷

Saudi laws and Shari'a law that govern most areas in the Kingdom are unclear, overly broad, and restrict speech in a wide or untargeted way, especially when the speech is found to be offensive, shocking, disturbing, or merely critical of the government or of Islam. In fact, the Law of Terrorism Crimes and its Financing,¹²⁸ the Anti-Cyber Crime Law,¹²⁹ the Law of Printed Materials and Publications,¹³⁰ and the Law on Electronic Publications,¹³¹ all include provisions that restrict the right to freedom of expression, and are not formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. Instead, the legal system confers arbitrary discretion on prosecutors and judges to restrict

123. ICCPR, *supra* note 19, art. 19(3).

124. General Comment No. 34, *supra* note 34, ¶ 34.

125. *Id.*

126. HRC 80th Sess., *supra* note 79.

127. General Comment No. 34, *supra* note 34, ¶ 25.

128. PRETENSE OF PROGRESS, *supra* note 4.

129. M/17, *supra* note 100, art. 6 (Sa.).

130. M/32, *supra* note 105, art. 18 (Sa.).

131. *Saudi Arabia: Rescind New Online Restrictions*, HUM. RTS. WATCH (Jan. 7, 2011, 6:04 P.M.), <https://www.hrw.org/news/2011/01/07/saudi-arabia-rescind-new-online-restrictions>.

freedom of expression and apply the incitement prohibition arbitrarily. Even if the laws were properly narrowly constructed, the unlimited interpretation power possessed by the Saudi judiciary corrupts the equal application of the law necessary to safeguard the limitations of the incitement prohibition enshrined in international human rights law.

In addition, the restrictions to freedom of expression as provided in the Saudi Arabian laws are not based on legitimate grounds set out in the ICCPR. The Law of Terrorism Crimes and its Financing and the Anti-Cyber Crime Law state that the grounds for restriction are to protect “public order,” “the stability of the state,” “national unity,” “the reputation or status of the country,” and impinging on public order and “religious values.”¹³² Most of these grounds are not legitimate grounds according to the universal standard, which recognize as such the “the rights or reputations of others” and “the protection of national security or of public order or of public health or morals.”¹³³ Therefore, Saudi Arabia fails the legality test for the implementation of the incitement prohibition as established under international human rights law because the law on incitement is neither adequately clear nor targeted.

The proportionality test requires that the incitement prohibition restricting freedom of expression must not be overbroad, must be the least intrusive instrument necessary to achieve the protective function, and must be proportionate to the interest being protected.¹³⁴

In both legal cases against Abu al-Khair, the courts failed to demonstrate that the legal provisions of the Law of Terrorism Crimes and its Financing, the Anti-Cyber Crime Law, and the Shari’a law used by the courts were clearly and narrowly defined to protect a legitimate government interest and that they were aimed at the “respect of the rights and reputation of others, protection of national security or of public order, or of public health or morals.”¹³⁵ As evidenced by the charges in both indictment documents and court decisions, the government’s alleged interest in this case is the protection of the reputation

132. General Comment No. 34, *supra* note 34, ¶¶ 21, 29, 30. Paragraph 29 provides that although the exercise of the right to freedom of expression carries with it special duties and responsibilities leading to restriction of freedom of expression in order to protect the rights or reputations of others or the protection of national security or of public order, such restricting laws should not jeopardize the freedom of expression as a right. *Id.* ¶ 29. Paragraph 29 cautions that extreme care must be taken by States parties to ensure that such laws relating to national security or public order crafted and applied in a manner that conforms to the strict requirements of Paragraph 3 of Article 19 of ICCPR. *Id.* It is not compatible with Paragraph 3 to invoke such laws to suppress the public information of legitimate public interest that does not harm national security or to prosecute journalists and other human rights defenders. *Id.* PRETENSE OF PROGRESS, *supra* note 4; M/17, *supra* note 100, art. 6 (Sa.).

133. General Comment No. 34, *supra* note 34.

134. *Id.* ¶ 34.

135. ICCPR, *supra* note 19, art. 19(3).

of the Kingdom both inside and outside the country. Abu al-Khair is charged and sentenced with “subverting public order in the Kingdom,” “discrediting the Kingdom,” and “inciting public opinion against the Kingdom,” and “transmitting information prejudicial to public order”. These charges are based on the fact that Abu al-Khair expressed criticism toward the Kingdom, signed a petition calling for democratic reforms, and communicated with international organizations and provided information about the status of human rights in Saudi Arabia.

The charge of “subverting public order,” and “inciting public opinion against the Kingdom” is not justified given that Abu al-Khair’s peaceful activities legitimately exercised his right to freedom of expression under the ICCPR. In addition, prohibiting criticism towards the Kingdom and its officials in order to preserve its reputation is not a legitimate interest under international legal standards and especially in the circumstances of public debate since expressing critical views is a right guaranteed by the ICCPR. In addition, the ICCPR places a higher value on expression critical to public figures, even when the expression is offensive, shocking or disturbing.¹³⁶

The punishment of imprisonment for fifteen years with a fifteen-year travel ban after release is clearly disproportional to any interest being protected. In fact, as the interests being protected are not legitimate, any penalty imposed could never be proportionate. Therefore, Saudi Arabia fails the proportionality test required for the implementation of the incitement prohibition.

The necessity test requires that the incitement prohibition restricting freedom of expression must be necessary to protect a legitimate interest, and must be the only way to achieve protection.¹³⁷

The Specialized Criminal Court sentenced Abu al-Khair for “subverting public order in the Kingdom” and “transmitting information prejudicial to public order,” because he publically criticized the judiciary by signing a petition and shared information about the human rights’ situation of the country with international organizations. The Court interpreted these simple acts of expression, protected by international human rights law, as threatening to the public order. Although the protection of public order is considered a legitimate government interest by international human rights law, in this case the actual interest at issue is the protection of the reputation of the Kingdom. Legitimate grounds must conform to the strict requirements of Article 19, Paragraph 3.¹³⁸ As the Human Rights Committee has noted: “a) It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the

136. See Human Rights Committee, *Bodrožić v. Serbia and Montenegro*, Communication No.1180/2003, ¶ 7.2, 85th Sess., U.N. Doc. CCPR/C/85/D/1180/2003, (Oct. 17–Nov. 3, 2005).

137. General Comment No. 34, *supra* note 34, ¶ 33.

138. *Id.* ¶ 30.

public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.”¹³⁹

Legitimate grounds related to national security involve restricting expressions that promote the violent overthrow of the government¹⁴⁰ or expressions related to official secrets and sedition,¹⁴¹ a far cry from the expressions made by Abu al-Khair which were simply critical to the government. Examples of legitimate grounds connected to public order involve contempt of court¹⁴² and parliamentary privilege.¹⁴³ However, even here the scope of the legitimacy for these grounds is strictly limited, and manifestly distinct from the statements made by Abu al-Khair.¹⁴⁴ His statements criticizing the Kingdom’s judiciary for sentencing peaceful activists fall well outside the scope of expressions legitimately restricted under international law.

In any case, the court failed to demonstrate that sentencing Abu al-Khair to fifteen years in prison was justified and necessary to protect any legitimate interest, especially when the forms of expression used by Abu al-Khair (i.e. signing a petition, publishing comments on Twitter, communicating with international organizations) did not involve any kind of violence or incitement of violence whatsoever. Even where a legitimate interest exists, such as with contempt of court, the punishment must fit the crime.¹⁴⁵ International jurisprudence demonstrates that the lengthy prison sentence handed to Abu al-Khair was unnecessary and disproportionate to his actions.¹⁴⁶ Necessity and proportionality are both strict requirements a state must adhere to in order to abide by their Article 19 responsibilities.¹⁴⁷

139. *Id.*

140. A.K. and A.R., U.N. Doc. CCPR/C/95/D/1233/2003 (2009); 16 IHRR 719 (2009), ¶ 7.2.

141. General Comment No. 34, *supra* note 34, ¶ 30.

142. Human Rights Committee, *Fernando v. Sri Lanka*, Commc’n No. 1189/2003, ¶ 9.2, 83rd Sess., U.N. Doc. CCPR/C/83/D/1189/2003, (Mar. 31, 2005) [hereinafter HRC 83rd Sess.].

143. Human Rights Committee, *Robert W. Gauthier v. Canada*, Communication No. 633/1995, ¶ 13.4, 13.6, 65th Sess., U.N. Doc. CCPR/C/65/D/633/1995 (May 5, 1999).

144. HRC 83rd Sess., *supra* note 142. The court in this case noted that contempt of court has traditionally been a ground for limiting speech, but only when the dignity and integrity of the court are at stake. This suggests that only speech made in court that disrupts the actual administration of justice qualifies as a legitimate ground for restriction.

145. *Id.* The court noted that even in cases of equivocal contempt, criminal sanctions are likely an unnecessary restriction. *See also* Ballantyne, Davidson and McIntyre v. Canada, *supra* note 49, ¶ 11.4 (prohibiting English advertising is not a necessary restriction of speech, necessary to protect the legitimate aim of protecting the marginalized Francophone population, as other methods could accomplish this legitimate goal).

146. *See, e.g.,* *Erbakan v. Turkey*, Eur. Ct. H. R. No. 59405/00, ¶ 56.

147. General Comment No. 34, *supra* note 34, ¶ 35; HRC 80th Sess., *supra* note 79.

In addition, the universal standard as established by the ICCPR requires the existence of an intent, specifically an intent to incite discrimination, hostility, or violence.¹⁴⁸ It requires causation between the expression and threat.¹⁴⁹ However, the court failed to demonstrate that Abu al-Khair had the intent to “incite violence” as it is suggested by the charges against him. He was charged for signing a petition that is critical of the government and for defending victims of human rights violations. His acts did not involve any kind of violence. Abu al-Khair was charged in relation to his opinions and expressions about social and political issues in the country. There was no threat associated with his expression and the court failed to demonstrate any causation between his speech and any threat to the public order.

In conclusion, the speech restrictive measures adopted by the Kingdom and implemented by its judicial authorities fail to meet the three-prong test under the ICCPR, which renders the Saudi Arabian state as non-compliant with the universal standard on incitement. As a result, through these measures, the Kingdom of Saudi Arabia violated the right of Abu al-Khair to freely hold and express his opinion and to disseminate information to others whether inside or outside of the Kingdom.

As a result, Saudi Arabia is responsible for the violation of Article 19 of the UDHR, Article 19 of the ICCPR and Article 32 of the Arab Charter for Human Rights, depriving Abu al-Khair from fundamental rights recognized by all international legal instruments.¹⁵⁰ Saudi Arabia’s domestic law does not meet the minimum thresholds of legality, proportionality, and necessity under international law with regards to freedom of expression.

148. EL-HAGE & BOUSTANI, *supra* note 39, at 34; HRC 70th Sess., *supra* note 68.

149. General Comment No. 34, *supra* note 34, ¶ 38 (stating that “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties”).

150. See ICCPR, *supra* note 19, art. 19. Article 19 of the ICCPR provides that:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) 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 *Id.*

Article 19 of UDHR stipulates that “[E]veryone 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.” G.A. Res. 217A (III), *supra* note 19, art. 19. See Arab Charter, *supra* note 27, art. 32. Article 32 of Arab Charter stipulates that:

- (1) The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.
- (2) Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals. *Id.*

V. CONCLUSION

Saudi Arabia is ruled by an absolute monarchy, with no independent judiciary, separation of powers, independent media, or political parties.¹⁵¹ Citizens have no freedom of thought, expression, religion or association. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens, especially for those who openly express their disagreement with the government.

The prosecution and trials in the case of Waleed Abu al-Khair were carried out in the context of arbitrariness, abuse of power and full authoritarianism in Saudi Arabia. This article concludes that Saudi Arabia has violated Abu al-Khair's right to freedom of expression. He was convicted under defamation and incitement laws simply for expressing his opinions, calling for democratic reform, and advocating for human rights in the Kingdom. Specifically, he was charged and later convicted under the internationally wrongful grounds of harming the Kingdom's reputation and inciting public opinion against the Kingdom.

Moreover, Waleed Abu al-Khair was not provided a fair trial or the opportunity to present a defense, as is required by international law. He was given a fifteen-year prison sentence, an unnecessary and disproportionate response to comments made without malice and without the intent to incite violence. His expressions were simply aimed at promoting the human rights articulated by the ICCPR and other international instruments.

Abu al-Khair has been imprisoned since April 2014 and his case is one among many. Despite its seat at the UNHRC and its recent appointment to lead an influential U.N. Human Rights panel,¹⁵² the Kingdom still regularly engages in the systematic repression of activists and human rights defenders, often leading to numerous years of imprisonment, without trial, and the use of repressive measures against them.¹⁵³

151. Basic Law of Governance, *supra* note 1, art. 5 (stating that "(a) [T]he system of governance in the Kingdom of Saudi Arabia shall be monarchical. (b) Governance shall be limited to the sons of the Founder King 'Abd al-'Aziz ibn 'Abd ar-Rahman al-Faysal Al Sa'ud, and the sons of his son . . .").

152. Christopher Ingraham, *Why One of the World's Worst Human Rights Offenders Is Leading A U.N. Human Rights Panel*, WASH. POST (Sept. 28, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/09/28/why-one-of-the-worlds-worst-human-rights-offenders-is-leading-a-un-human-rights-panel/?utm_term=.d2ea7e456357.

153. AMNESTY INT'L, SAUDI ARABIA: REPRESSION IN THE NAME OF SECURITY 18, 29 (2011), <https://www.amnestyusa.org/wp-content/uploads/2017/04/saudisecurity.pdf> ("In July 2007 the Ministry of Interior announced that 9,000 people had been arrested during counter-terrorism operations between 2003 and 2007 and that 3,106 of them remained held.").