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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 94/2017 concerning Yousuf bin Khamis bin Moosa al Balouchi (Oman)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 13 September 2017 the Working Group transmitted to the Government of Oman a communication concerning Yousuf bin Khamis bin Moosa al Balouchi (also known under his pen name Yousuf al Haj). The Government replied to the communication on 7 November 2017. The State is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Al Balouchi is an Omani journalist born in 1973. He is also known under the pen name of Yousuf al Haj. He is a former editor of the *Al-Zaman* newspaper. He usually resides in Al Musana'a, Al Batinah South Governate, Oman.

5. The source reports that, on 27 July 2016, *Al-Zaman* published an article entitled "Supreme bodies tie the hands of justice" concerning alleged manipulation and corruption in the Supreme Court of Oman regarding an inheritance case and implicating the Attorney General and the President of the Supreme Court in that regard. In his role as deputy editor-in-chief of *Al-Zaman*, Mr. Al Balouchi had interviewed the Vice-President of the Supreme Court for that article.

6. According to the source, on 9 August 2016, the Ministry of Information issued an order to halt the circulation and publication of *Al-Zaman*. On the same day, 9 August 2016, Mr. Al Balouchi was allegedly arrested at a barbershop by officials of the Omani internal security service, without any warrant and without being informed of the reasons for his arrest. On 11 August 2016, he contacted his family for the first time from the hospital where he had been transferred due to a serious asthma attack.

7. The source reports that Mr. Al Balouchi's first hearing was held on 15 August 2016, during which he was charged with, inter alia, undermining the status and the prestige of the State, publishing content that might be prejudicial to public security and contempt for the judiciary. Reportedly, he had been unable to communicate with his lawyer prior to the hearing. Mr. Al Balouchi was tried together with two of his colleagues.

8. The source reports that subsequent hearings were held on 22 and 29 August 2016, during which the judge refused to hear any defence witnesses. Although Mr. Al Balouchi was allowed access to his lawyer, their meetings prior to the hearing were not private and were always attended by officers of the Omani internal security service. After his second hearing, on 22 August 2016, Mr. Al Balouchi reportedly went on hunger strike in protest against his unfair trial and his conditions of detention.

9. Reportedly, during the fourth hearing, on 5 September 2016, Mr. Al Balouchi's defence counsel requested a change of judge, claiming that the current judge was not impartial given that he had mocked the defendant at previous hearings. The judge had allegedly affirmed that it was shameful that Mr. Al Balouchi was a journalist and had laughed when the defence counsel had stated that Mr. Al Balouchi was innocent. The hearing for a change of judge, set for 8 September 2016, was reportedly postponed twice. On 18 September 2016, the court rejected the request made by Mr. Al Balouchi's counsel.

10. The source informs that, on 26 September 2016, Mr. Al Balouchi was sentenced to three years' imprisonment and a fine of 3,000 Omani rials. Mr. Al Balouchi was allegedly detained in solitary confinement from the moment of his arrest to the time when the judgment was handed down in his regard. In the same case, the court of first instance in Muscat reportedly also ordered that *Al-Zaman* be shut down and banned.

11. According to the source, Mr. Al Balouchi appealed against his sentence and the corresponding hearings before the Court of Appeal began on 10 October 2016. According to the source, on 26 December 2016, the Court of Appeal upheld the conviction but reduced his sentence to one year's imprisonment. The Court of Appeal overturned the court of first instance's decision to shut down and ban *Al-Zaman*. The public prosecution service appealed against the Court of Appeal's decision to overturn the ban before the Supreme Court and the newspaper remains banned to this day.

12. On 29 March 2017, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of

human rights defenders sent a letter[1] to the Government of Oman expressing their concern at the arrest, detention and conviction of Mr. Al Balouchi.

13. The source claims that Mr. Al Balouchi's detention is arbitrary under categories II and III of the categories referred to by the Working Group.

Category II arbitrary detention — deprivation of liberty resulting from the exercise of freedom of expression

14. According to the allegations made by the source, Mr. Al Balouchi was arrested, prosecuted and detained are a direct result of his activity as a journalist and, therefore, of exercising his fundamental right to freedom of expression, enshrined in article 19 of the Universal Declaration of Human Rights. Mr. Al Balouchi's arrest was subsequent to the publication of an article in which allegations of corruption of judicial bodies and criticism of the integrity of the judiciary were made. Furthermore, the source states that the judgment against Mr. Al Balouchi was accompanied by a decision to ban the publication of *Al-Zaman*. The source, therefore, concludes that the judgment against Mr. Al Balouchi restricts his right to freedom of expression and is a direct result of the exercise of this right and therefore falls within category II of the categories applicable to the cases submitted to the Working Group.

Category III arbitrary detention — non-observance of international norms relating to the right to a fair trial

15. In addition, the source submits that Mr. Al Balouchi's arrest, detention and subsequent trial were marked by violations of his right to a fair trial. Mr. Al Balouchi was allegedly denied access to his lawyer before the start of his trial and was later only allowed to consult his lawyer in the presence of Omani internal security service officers. According to the source, during Mr. Al Balouchi's trial, the judge refused to listen to the defence witnesses and showed signs of bias and prejudice. As a consequence, the source argues that the international norms related to a fair trial were not respected and that such a violation renders Mr. Al Balouchi's detention arbitrary under category III of the categories applicable to the cases submitted to the Working Group.

Response from the Government

16. On 13 September 2017, the Working Group transmitted the source's allegations to the Government of Oman under its regular communication procedure, requesting the Government to provide detailed information by 13 November 2017 concerning the current situation of Mr. Al Balouchi and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying his continued detention and to provide details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular the norms of international human rights law, which bind Oman. Moreover, the Working Group called upon the Government to ensure Mr. Al Balouchi's physical and mental integrity.

17. In its response dated 7 November 2017, the Government notes Mr. Al Balouchi's release and transmits the information from the public prosecution service set out below.

18. According to the Government, Mr. Al Balouchi was charged with violations of the law on the media and publications, the law on cybercrime and various provisions of the Penal Code. He was convicted of publishing an article attacking the Supreme Court that appeared on the front page of *Al-Zaman* newspaper on 7 and 9 August 2016. The article reported the arrest of *Al-Zaman*'s editor-in-chief, Ibrahim Al Maamari, in violation of an order issued by the Ministry of Information on 31 July 2016 banning the publication of any information related to the investigation of Mr. Al Maamari as well as to the legal case that was the subject of the *Al-Zaman* article entitled "Supreme bodies tie the hands of justice" that led to Mr. Al Maamari's arrest. The Government's submission also reiterated the judgments concerning

[1] Available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23047.

Mr. Al Balouchi handed down by the court of first instance, the Court of Appeal and the Supreme Court.

19. Regarding the submission concerning the violation of his right to freedom of expression enshrined in article 19 of the Universal Declaration of Human Rights, the Government stresses that the legal basis for Mr. Al Balouchi's arrest and detention complies with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Basic Statute of the State, the Penal Code and the law on cybercrime.

20. With regard to article 19 of the Universal Declaration of Human Rights, the Government states that the freedom to hold opinions is an absolute right that cannot be limited or interfered with, whereas the right to freedom of expression is subject to certain necessary limitations, including those specified in article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights). In Mr. Al Balouchi's case, his right to hold opinions was never in any doubt. However, Mr. Al Balouchi's expression of those opinions was harmful and unlawful and it was necessary to protect public order, as stipulated in domestic law, and to uphold the prestige of the judiciary, one of the pillars of the state, without prejudice to the right to criticize in accordance with the legal framework.

21. The Government notes that, in the light of the provisions of the European Convention on Human Rights and the Covenant, all freedoms and rights are subject to restrictions in the sense that their exercise must not be detrimental to the public interest, national security or public order, as well as to the rights and freedoms of others in a democratic society.

22. According to the Government, Mr. Al Balouchi was charged with and convicted of the publication of information prejudicial to public security. The offence for which Mr. Al Balouchi was convicted was unrelated to his professional activity as a journalist, or to his right to express his opinion concerning efforts to combat corruption in the judiciary. He was not arbitrarily detained, given that the charges and proceedings against him had a legal basis. Acts such as those committed by Mr. Haj were criminalized in order to maintain public order and to protect the rights and freedoms of others. Articles 12 (3), 18 (3), 19 (3) and 22 (2) of the Covenant make provision for the restrictions on the freedom of opinion and of expression applied in Mr. Al Balouchi's case. Therefore, article 29 of the Basic Statute of the State, which provides that the freedoms of opinion and of expression through speech, writings and other means are guaranteed within the limits of the law, is compatible with international standards.

23. In addition, according to the Government, the international principles concerning the conduct of journalists include established legal and ethical standards that members of the press should adhere to when exercising their profession and that are set out in international covenants, treaties and declarations, as well as in instruments adopted by the League of Arab States. In the light of the contents of those documents, media professionals have both a duty and a responsibility to:

(a) Carry out investigations and seek out and transmit the truth in an honest manner, without suppressing or falsifying information;

(b) Prioritize public opinion and public interests over those of media organizations or of individual journalists;

(c) Respect privacy and refrain from harming individuals and institutions through press publications and respect their wishes or the desire of their parents not to disclose their names;

(d) Refrain from creating prejudice and be precise and clear in the terms and expressions used in press coverage;

(e) Avoid defamation and slander of individuals, groups, institutions and bodies;

(f) Uphold the rule of law and support the judiciary in its efforts by refraining from publishing the proceedings of an ongoing trial that may disturb public order and undermine national security.

24. In response to the allegation that Mr. Haj's arrest, detention, trial proceedings and denial of access to his lawyer before the trial violated his right to a fair trial, the Government claimed that Mr. Haj was allowed to appoint and meet with two lawyers, Basma al Kiyoumi and Yacoub al Harthy. The request was submitted on 23 August 2016 and transmitted to the competent authority on 24 August 2016. The Committee to Protect Journalists was also allowed to meet Mr. Al Balouchi at the place of his detention. The Oman Human Rights Commission followed up on Mr. Al Balouchi's communication with his family and his lawyers. A member of the Commission met with Mr. Al Balouchi in prison to monitor his condition and Mr. Al Balouchi's lawyers were allowed to attend all hearings before the court of first instance and the Court of Appeal. They made no complaints concerning denial of access to their client.

25. The Government further explains that, in accordance with articles 10 and 11 of the Universal Declaration of Human Rights, Mr. Al Balouchi was tried before a judge with competence over all criminal cases within his jurisdiction, with all prescribed legal guarantees and no special court of special procedures was arraigned. He was given the opportunity to respond to the charges brought against him and to present his defence, assisted by his lawyers, as part of a public trial. The verdict and sentence were pronounced in public and Mr. Al Balouchi exercised his right to appeal to the Supreme Court. Mr. Al Balouchi was presumed innocent until proven guilty at a public trial, during which he enjoyed all the guarantees necessary for his defence.

26. The Government categorically denies the allegation that the judge refused to call witnesses for the defence and displayed signs of bias and prejudice, in violation of international fair trial norms.

27. As for Mr. Al Balouchi's treatment in detention and his current status, the Government reports that he was released on 23 October 2017 after serving his sentence. The Government asserts that Mr. Al Balouchi enjoyed all the rights stipulated in articles 9 and 10 of the Covenant. During his imprisonment, Mr. Al Balouchi received humane treatment and made no claims to the contrary during the investigation or trial. He served his sentence at Samail Central Prison, which runs reform and rehabilitation programmes in accordance with the law. He had medical visits to Al Nahdha Hospital on 18 September 2016 and a police hospital on 21 September 2016, and the corresponding medical reports were presented to the court during the trial. All prisoners are guaranteed access to health-care services. Doctors are permanently employed by the Directorate General of Prisons to evaluate the state of health of detainees and provide medical treatment.

28. The Government maintains that all relevant provisions of the Basic Statute of the State are in conformity with international norms and appeals to the Working Group to respect the principle of non-intervention in domestic matters, in particular with regard to the work of the judiciary.

Further comments from the source

29. The response from the Government was transmitted to the source for further comments on 7 November 2017. In its response of 15 November 2017, the source welcomes the response of the Government but highlights that most of the information provided either failed to address the allegations raised or refuted them outright without providing compelling evidence.

30. The source recalls that the Government has neglected to refute or address the allegation concerning his arrest without a warrant and without being informed of the reasons for his arrest. The Government also ignored the allegation that Mr. Al Balouchi had been held incommunicado during the first days of his detention.

31. The source refers to the apparent contradiction in the Government's claim that Mr. Al Balouchi's detention was not related to his activity as a journalist and its suggestion that he had been prosecuted for his failure to carry out those legal and ethical duties recognized under international instruments that must be adhered to in the conduct of media activities. The source recalls that the charges against Mr. Al Balouchi were clearly linked to his activity as a journalist and maintains that his detention resulted directly from his exercise of the right to

freedom of opinion and expression as guaranteed by article 19 of the Universal Declaration of Human Rights.

32. In response to the Government's claim that Mr. Al Balouchi's detention was a legitimate restriction under article 19 (3) of the Covenant, namely: (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 source reaffirms that Mr. Al Balouchi was merely fulfilling his role as a journalist by disseminating information to the public. His article accused the President of the Supreme Court, Ishaq bin Ahmed al Busaidi, of corruption based on his interview with the Vice-President of the Supreme Court, Ali bin Salem al Nomani, and has clear relevance for Omani society as a whole. Therefore, Mr. Al Balouchi's exercise of his right to the freedom of expression did not constitute slander or a personal attack on the reputation of private individuals for the purpose of article 19 (3) of the Covenant.

33. The source cites paragraph 38 of the Human Rights Committee's general comment No. 34 (2014) on the freedoms of opinion and expression, which states 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, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority, such as heads of State and government, are legitimately subject to criticism and political opposition.

34. In addition, the source disputes the claim by the Government that Mr. Al Balouchi's detention can be justified by the fact that it was in the public interest, as it upholds the prestige of the judiciary, which is one of the fundamental pillars of Omani society. The source maintains that exposing corruption in public institutions can hardly be defined as being contrary to the public interest, and that publications undermining public confidence in the judiciary authorities do not qualify as a threat to national security and stability.

35. The source also refers to paragraph 14 of the Human Rights Committee's general comment No. 27 (1999) on freedom of movement, which states that restrictive measures must: conform to the principle of proportionality; be appropriate to achieve their protective function; be the least intrusive instrument among those which might achieve the desired result; and be proportionate to the interest to be protected.

36. In the more specific context of the right to freedom of expression, paragraph 34 of the Human Rights Committee's general comment No. 34 (2014) on the freedoms of opinion and expression states that the principle of proportionality must also take account of the form of expression at issue, as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

37. The source notes the Government's acknowledgement that Mr. Al Balouchi could only access his lawyers on 23 August 2016, i.e. two weeks after his arrest and after the beginning of his trial. His interrogation without the presence of his lawyers, the fact that he was not allowed to prepare his defence with them and the presence of agents of the Omani internal security service during his conversation with his lawyers infringed upon his right to confer with his lawyers in private.

38. According to the source, contrary to the Government's claim that Mr. Al Balouchi's right to access his lawyers was respected and that he received a visit from them as soon as he filed the corresponding request and thus never made any complaints in that regard before the court, Mr. Al Balouchi raised such violations of his rights before the court during the trial but the judge took no action in that regard.

39. The source underlines that the Government did not deny that Mr. Al Balouchi was held in prolonged solitary confinement but stated, in vague terms, that he was held in a place separate from that of convicted detainees. During his period of detention at Samail Central Prison, he was held in solitary confinement for over 40 days, treatment which amounts to torture or other cruel, inhuman or degrading treatment or punishment. The source therefore reiterates that the Government violated its obligation to treat him humanely during his detention, as provided for by article 5 of the Universal Declaration of Human Rights.

40. The source also states that the public prosecution service failed to adequately respond to the allegation that, during Mr. Al Balouchi's trial, the judge both refused to hear the defence witnesses and displayed signs of bias and prejudice.

41. For the above-mentioned reasons, the source reaffirms that Mr. Al Balouchi's right to a fair and public hearing by an independent and impartial tribunal, as provided for under articles 10 and 11 of the Universal Declaration of Human Rights, has been violated.

42. On a further note, the Ministry of Information extended the closure of *Al-Zaman* on 8 January 2017 despite the Court of Appeal's 26 December 2016 decision quashing the court of first instance's prior ruling. Mr. Al Maamari, *Al-Zaman*'s editor-in-chief, whose sentence had been reduced to six months by the Court of Appeal, was released on 10 April 2017 after time served. The Supreme Court's decision of 5 October 2017, not only upheld the conviction of and sentence concerning Mr. Al Balouchi, who was released shortly after on 23 October 2017 after time served, but also ordered the permanent closure of *Al-Zaman*. The President of the Supreme Court, Ishaq bin Ahmed al Busaidi, whose alleged corrupt practices were the subject of Mr. Al Balouchi's reporting for *Al-Zaman*, did not recuse himself during the proceedings.

Discussion

43. The Working Group thanks the source and the Government for their engagement and for their submissions in relation to Mr. Al Balouchi's detention.

44. At the outset, the Working Group welcomes Mr. Al Balouchi's release on 23 October 2017. With his release, the Working Group has the option of filing the case or rendering an opinion in conformity with paragraph 17 (a) of its methods of work. In this particular case, the Working Group has decided to render the present opinion. In making this decision, the Working Group gives particular weight to the fact that, although Mr. Al Balouchi and his colleagues have all been released: (i) the circumstances in which they were detained were serious and warrant further attention,[2] as the individuals concerned were arrested, tried and convicted for their reporting on alleged corruption at the highest level of the judiciary; (ii) Mr. Al Balouchi was deprived of his liberty for over one year and two months; and (iii) Mr. Al Balouchi's criminal conviction, as upheld by the Supreme Court on 5 October 2017, may serve as the legal precedent for the arrest, detention and punishment or threat thereof to silence critics in the future. The Working Group further notes with concern that *Al-Zaman* remains closed because of the Ministry of Information's disregard for the Court of Appeal's decision of 26 December 2016 and the Supreme Court's decision of 5 October 2017.

45. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

46. The Working Group recalls that, where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.[3]

47. The Working Group wishes to reaffirm that any national law allowing deprivation of liberty should be made and implemented in compliance with the relevant international provisions set forth in the Universal Declaration of Human Rights and other relevant international legal instruments. Consequently, even if the detention is in conformity with

[2] See opinion No. 50/2017, para. 53 (c).

[3] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010,* p. 639, at para. 55, pp. 660–661; See also opinions No. 41/2013, para. 27; and No. 59/2016, para. 61.

national legislation, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[4]

48. The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[5] However, the Working Group reiterates that it has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the application of national law by the judiciary.[6]

49. The Working Group also reiterates that it applies a heightened standard of review in cases where the freedom of expression and opinion is restricted or where human rights defenders are involved.[7] Mr. Al Balouchi's role as a prominent journalist of a newspaper closed by the authorities for its critical reporting of alleged judicial corruption requires the Working Group to undertake this kind of strict scrutiny.

Category I

50. The Working Group will examine the relevant categories applicable to its consideration of this case, including category I.

51. The Working Group notes that the Government has neither refuted nor addressed the allegation that Mr. Al Balouchi was arrested without a warrant and without being informed of the reasons for his arrest and that he was held incommunicado during the first days of his detention until he suffered an asthma attack.

52. Article 9 of the Universal Declaration of Human Rights, which prohibits arbitrary arrest and detention, is a deeply entrenched human rights norm, reflected in both State practice and *opinio juris*.[8] Prohibition of arbitrary deprivation of liberty is part and parcel of customary law that bears an absolute character and is in fact a peremptory norm (*jus cogens*) of international law and therefore binding upon all States, irrespective of their treaty obligations.[9]

53. The Working Group underlines that the right to liberty and security of person, enshrined in article 3 of the Universal Declaration of Human Rights, applies to everyone and is further guaranteed through article 9 of the Universal Declaration of Human Rights, which prohibits arbitrary detention. As stated in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court, deprivation of liberty is regarded as unlawful when it is not on such grounds and in accordance with procedures established by law.[10] In order to ascertain such legal basis, the authorities must present the charges when a person is arrested and detained, which did not happen in the present case.

[4] See opinions No. 58/2017, para. 35; No. 20/2017, para. 37; No. 48/2016, para. 41; and No. 28/2015, para. 41.

[5] See opinions No. 58/2017, para. 36; and No. 33/2015, para. 80.

[6] See opinions No. 58/2017, para. 36; No. 59/2016, para. 60; No. 12/2007, para. 18; No. 40/2005, para. 22; and No. 10/2002, para. 18.

[7] See opinions No. 57/2017, para. 46; No. 41/2017, para. 95; No. 62/2012, para. 39; No. 54/2012, para. 29; and No. 64/2011, para. 20. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, in particular especially when there are claims of a pattern of harassment: see opinion No. 39/2012, para. 45. See also A/RES/53/144, annex, article 9 (3).

[8] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at para. 65, p. 663; and ibid., Separate Opinion of Judge Cançado Trindade, at paras. 107–142, pp. 763–777. See also opinions Nos. 30/2011, para. 18; 31/2011, para. 16; 33/2011, para. 16; 41/2011, para. 15; 42/2011, para. 21; 43/2011, para. 16; 44/2011, para.18; 45/2011, para. 21; 22/2012, para. 44; 53/2012, para. 20; and 14/2014, para. 18.

[9] See A/HRC/22/44, paras. 42–51; see also A/HRC/30/37, para. 11; and opinions No. 63/2017, para. 51; No. 15/2011, para. 20; and No. 16/2011, para. 12; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at para. 91, p. 42.

[10] See A/HRC/30/37, para. 12.

54. Furthermore, during the first days of his detention, the Working Group finds that Mr. Al Balouchi was placed outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights.

55. The incommunicado detention also prevented Mr. Al Balouchi from being brought promptly before a judge or other officer authorized by law to exercise judicial power and from taking proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention. It also violated his right to be tried within a reasonable time or to be released. Mr. Al Balouchi's incommunicado detention therefore subjected him to arbitrary detention in violation of articles 3 and 9 of the Universal Declaration of Human Rights.

56. The Working Group also notes that the inability to have access to legal counsel prior to his first hearing would have undermined Mr. Al Balouchi's right to challenge the legality of his detention and his right to defence. Furthermore, the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[11] The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also consistently urged all States to declare incommunicado detention illegal.[12]

57. The Working Group therefore considers that the arrest and incommunicado detention of Mr. Al Balouchi from 9 August 2016 to 15 August 2016 by the Omani internal security service lack any legal basis, in violation of articles 3, 6 and 9 of the Universal Declaration of Human Rights and principles 2 and 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[13] The Working Group thus concludes that Mr. Al Balouchi's detention was arbitrary, falling under category I.

Category II

58. The Working Group acknowledges the reference of the Government to the provisions of the Covenant, as well as of the European Convention on Human Rights, in assessing the principle of necessity and proportionality concerning the right to freedom of expression in its submission, even though Oman is a party to neither of those instruments. The Working Group recognizes the willingness of the Government to adhere to these common standards for universal human rights, which constitute peremptory norms (*jus cogens*) of customary international law.

59. The Working Group recalls that the right to hold and express opinions, including opinions that are not in accordance with official government policy, is protected by article 19 of the Universal Declaration of Human Rights. The Government must respect, protect and uphold the right to freedom of opinion and expression, even where opinions have been expressed which are not to its liking, under the peremptory norms (*jus cogens*) of customary international law.

60. The Working Group notes that the Human Rights Committee, in paragraph 34 of its general comment No. 34 (2011) on the freedoms of opinion and expression, stated that restrictions on the freedom of expression must: not be overbroad; conform to the principle of proportionality; be appropriate to achieve their protective function; be the least intrusive instrument among those which might achieve their protective function; and be proportionate to the interest to be protected. It is worth noting that the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

61. The Working Group considers 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 and that all public figures, including those exercising the highest political authority such as heads of State and government, are legitimately subject to criticism and political

[11] See A/54/44, para. 182 (a).

[12] See A/54/426, para. 42; and A/HRC/13/39/Add.5, para. 156.

[13] See also articles 14 and 22 of the Arab Charter on Human Rights.

opposition. The Human Rights Committee, in paragraph 39 of its general comment No. 34 (2011) on the freedoms of opinion and expression, specifically expressed its concern regarding laws prohibiting disrespect for authority, the protection of the honour of public officials and criticism of institutions. In paragraph 38, the Committee stated that laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. In paragraph 42, the Committee stated that the penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.

62. In the same vein, the Working Group notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reiterated that the right to freedom of expression includes expression of views and opinions that offend, shock or disturb (see A/HRC/17/27, para. 37). In addition, Human Rights Council, in its resolution No. 12/16, paragraph 5 (p) (i), stated that restrictions on discussion of government policies and political debate are not consistent with article 19 (3) of the Covenant.

63. In the present case, the Working Group is convinced that the charges against Mr. Al Balouchi are clearly connected to his activities as a journalist and that his detention resulted directly from his exercise of the right to freedom of opinion and expression guaranteed by article 19 of the Universal Declaration of Human Rights. The Working Group also finds that Mr. Al Balouchi's arrest and detention and the closure of *Al-Zaman* for reporting on alleged corruption at the highest level of the judiciary was neither legitimate, necessary nor proportionate under the four-prong test.

64. It also appears that Mr. Al Balouchi and his two colleagues and co-defendants at the trial were detained owing to their work and positions at *Al-Zaman*. The same Supreme Court decision that upheld Mr. Al Balouchi's conviction also ordered the closure of *Al-Zaman*. Given that, under article 20 of the Universal Declaration of Human Rights, the term "association" usually refers to trade unions, non-governmental organizations and private businesses for the purposes of freedom of association, it is natural to include *Al-Zaman* in the present case.[14] For the reasons stated above, Mr. Al Balouchi's detention was neither necessary nor proportionate.

65. The Working Group therefore considers that Mr. Al Balouchi's deprivation of liberty is arbitrary, as it resulted from his exercise of the rights or freedoms guaranteed under articles 17, 19, 20 and 23 of the Universal Declaration of Human Rights, and falls within category II.[15]

Category III

66. The Working Group will now consider whether the violations of the right to a fair trial and due process suffered by Mr. Al Balouchi were grave enough to give his deprivation of liberty an arbitrary character, so that it falls within category III.

67. According to the information provided by the source, which the Government has not rebutted, Mr. Al Balouchi was arrested without a warrant and was neither promptly informed of the reasons for his arrest nor of any charges against him. Such arrest is arbitrary and in violation of article 9 of the Universal Declaration of Human Rights, as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[16]

68. The source alleges, and the Government has again not refuted, that Mr. Al Balouchi was subsequently held incommunicado by the Omani internal security service during the first days of his detention, which placed him outside the protection of the law. Furthermore, Mr. Al Balouchi's incommunicado detention entailed the denial of his right to notify and

[14] "Religious societies, political parties, commercial undertakings and trade unions are as protected by art. 22 as cultural or human rights organizations, soccer clubs or association of stamp collectors." See M. Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (Engel Publishers, 1993), p. 386.

[15] See also arts. 24, 32 and 34 of the Arab Charter on Human Rights.

[16] See opinions No. 63/2017, para. 66; No. 21/2017, para. 46; and No. 48/2016, para. 48.

communicate with his family and lawyer in accordance with principles 15, 16, 17, 18 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and his right to be brought promptly before a judge and to be tried within a reasonable time, as stipulated in principles 37 and 38 of the Body of Principles. The source alleged that his incommunicado detention resulted in the cumulative violation of articles 6, 8, 9, 10 and 12 of the Universal Declaration of Human Rights.

69. The Working Group also notes that, other than making vague references to Mr. Al Balouchi being held separately from convicted detainees and citing article 10 (2) of the Covenant, the Government failed to rebut the allegation that, following his incommunicado detention, Mr. Al Balouchi was held in solitary confinement during his period of pretrial detention. The Working Group notes that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated that solitary confinement in excess of 15 days was "prolonged", at which point some of the harmful psychological effects of isolation could become irreversible.[17] Such prolonged solitary confinement may amount to cruel, inhuman or degrading treatment or punishment and, in certain instances, may amount to torture (see A/63/175, paras. 56 and 77). In this case, the Working Group considers that Mr. Al Balouchi's solitary confinement violated article 5 of the Universal Declaration of Human Rights, as well as article 8 of the Arab Charter on Human Rights.

70. Furthermore, the Working Group finds that the denial of adequate time and facilities to Mr. Al Balouchi for the preparation of his defence and private communication with his counsel constitute a violation of principles 17 (1) and 18 (1), (2) and (3) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and of principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

71. Nor was Mr. Al Balouchi promptly informed of the nature and cause of the charges against him, brought promptly before a judge, released pending the trial, allowed to take proceedings before a court to determine the lawfulness of his detention or permitted to obtain the attendance and examination of witnesses on his behalf, as stipulated in articles 9 and 14 of the Covenant, the provisions which collectively detail the minimum due process and fair trial guarantees protected under articles 9, 10 and 11 of the Universal Declaration of Human Rights.[18] The trial judge's refusal to hear defence witnesses also played a part in the violation of Mr. Al Balouchi's due process and fair trial rights.

72. For the reasons states above, the Working Group finds that the violations of the right to a fair trial and due process suffered by Mr. Al Balouchi were grave enough to give his deprivation of liberty an arbitrary character, so that it falls within category III.

Ratification of the International Covenant on Civil and Political Rights

73. The Working Group avails itself of this opportunity to invite the Government to ratify the International Covenant on Civil and Political Rights as a sign of its commitment to defend the liberty of person and to eliminate its arbitrary deprivation. The Government already made reference to the provisions of the Covenant in its submission and ratification would be a further step. The Working Group refers to its statement in its annual report (A/HRC/19/57, para. 69) indicating that arbitrary deprivations of liberty constitute a violation of peremptory norms (*jus cogens*) of international law that are non-derogable, a position that echoes that of the Human Rights Committee in paragraph 11 of its general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency.[19] The duty to comply with international human rights standards that are peremptory and *erga omnes* norms,

[17] See A/66/268, paras. 26 and 61. See also rule 44 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), which likewise refers to solitary confinement for a time period in excess of 15 consecutive days as prolonged solitary confinement.

[18] See also principle 36 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and articles 12, 13, 14, 15 and 16 of the Arab Charter on Human Rights.

[19] See opinion No. 59/2016, para. 69.

such as the prohibition of arbitrary detention, rests with all bodies and representatives of the State, all officials, including judges, prosecutors, police and security officers and prison officers with relevant responsibilities, and all other natural and legal persons.[20]

Disposition

74. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Yousuf bin Khamis bin Moosa al Balouchi, being in contravention of articles 3, 5, 6, 8, 9, 10, 11, 17, 19, 20 and 23 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II and III.

75. The Working Group requests the Government of Oman to take the steps necessary to remedy the situation of Mr. Al Balouchi without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights.

76. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Al Balouchi an enforceable right to compensation and other reparations, in accordance with international law.

77. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

78. The Working Group encourages the Government to ratify the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance.

Follow-up procedure

79. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparations have been made to Mr. Al Balouchi and his two fellow journalists;

(b) Whether an investigation has been conducted into the violation of Mr. Al Balouchi's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Oman with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

80. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

81. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would

[20] See opinions Nos. 22/2014, para. 25; 48/2013, para. 14; 36/2013, paras. 34 and 36; 35/2013, paras. 35 and 37; 34/2013, para. 34; 9/2013, para. 40; 60/2012, para. 21; 50/2012, para. 27; and 47/2012; paras. 19 and 22.

enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

82. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[21]

[*Adopted on 24 November 2017*]

[21] See Human Rights Council resolution 33/30, paras. 3 and 7.