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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

#### Opinion No. 8/2017 concerning Hassan Zafar Arif (Pakistan)

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 1 February 2017 the Working Group transmitted to the Government of Pakistan a communication concerning Hassan Zafar Arif. The Government has not replied to the communication. The State is 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. Hassan Zafar Arif, born on 22 February 1945, is a Pakistani national, residing in Karachi, Pakistan. Mr. Arif is an academic and holds a postgraduate degree in philosophy from Harvard University (United States of America) and a PhD degree from Reading University (United Kingdom of Great Britain and Northern Ireland). He currently occupies a professorial post at University College, Karachi. Prior to assuming his current position, Mr. Arif worked as an assistant professor of philosophy at the University of Karachi and served as the Chair of the Karachi chapter of the Human Rights Commission of Pakistan.

5. The source notes that prior to his present arrest and detention, Mr. Arif also spent two years in prison during the period of martial law for his political activism and was qualified as a prisoner of conscience by reputable international non-governmental organizations. Mr. Arif is a member of the Muttahida Qaumi Movement political party. He joined its Central Coordination Committee on 15 October 2016. His role was to elaborate the party's ideology.

6. The source states that Mr. Arif was arrested at around 3.45 p.m. on 22 October 2016. At the time of his arrest Mr. Arif was on his way to address a press conference on behalf of the local faction of the Muttahida Qaumi Movement in his capacity as a member of its Central Coordination Committee. He was detained outside the Karachi Press Club by members of the Pakistan Rangers, a paramilitary group under the control of the Interior Ministry. At the time of his arrest Mr. Arif was not shown an arrest warrant, nor were the reasons for his detention explained. His family was not officially informed of his detention and found out about it through the media.

7. Mr. Arif was questioned for 10 hours by five different interrogators, representing separate agencies. He was then taken by the police to the Karachi central prison, where he was handed over to the prison authorities, together with a 30-day detention order signed by an officer of the Home Department of the Government of Sindh. The reason for the arrest imputed by the authorities was maintenance of public peace and order.

8. The source reports that the detention order stated that Mr. Arif was placed under detention under the Maintenance of Public Order Ordinance 1960. The source further states that the above-mentioned legislation dates to the previous period of martial law. Under the Ordinance, the detention order can be reissued for a total of 90 days. During that period detainees have no automatic rights to visitation or to legal representation, as special permission needs to be obtained from the Government of Sindh. There is no criminal charge associated with a detention order and thus no automatic reference to the courts or any stipulated legal due process until 90 days have elapsed.

9. The original detention order was reissued for another 30 days. Mr. Arif was not allowed to meet with his lawyers and as a result could not challenge his detention.

10. The source states that Mr. Arif was released on 20 December 2016, after the detention under the 1960 Ordinance was lifted. However, he was immediately rearrested by the Azizabad police inside the detention facility. Mr. Arif was charged with "facilitating incendiary speeches".

11. More specifically, the source maintains that Mr. Arif was charged with listening to a speech on the telephone, delivered from London on 5 July 2016 by the founder of the Muttahida Qaumi Movement, Altaf Hussain. Mr. Arif was also accused of facilitating the speech. The speech allegedly contained critical statements about the security agencies and their officials. The source explains that given that the audience agreed with the speaker, anyone who was part of the audience was perceived by the authorities as a "facilitator". Thus, anyone supposed to be part of the audience, even if not specifically named, could be charged with facilitating the speech.

12. The source maintains that the allegations against Mr. Arif are false, as he was not present on the date the speech was allegedly given and had no part in constructing or delivering it. The source also maintains that listening to a speech does not automatically imply agreeing with or facilitating it. The source further notes that individuals expressly

specified in the first information report prepared in connection with this event are currently at liberty whilst Mr. Arif, who was not expressly mentioned, was detained.

13. Mr. Arif was brought before the Sindh High Court in Karachi on 22 December 2016. The investigative officer requested that the judge grant a 14-day physical remand to allow interrogation. The court rejected that request and sent Mr. Arif to the Karachi central prison on judicial remand. As provided in subsection 173 of the Criminal Procedure Code, the court also directed the investigative officer to submit a report by 3 January 2017.

14. According to the source, the investigative officer did not appear in court on the day the hearing was scheduled to take place (3 January 2017). Mr. Arif was therefore not brought before the court. The judge issued a notice to the investigative officer to appear in court on 9 January 2017. It stated that should he fail to do so, proceedings would take place without him. The source also maintains that the judge remarked that the investigative officer appeared to be deliberately delaying the proceedings.

15. The source further reports that on 9 January 2017, Mr. Arif was not brought before the Sindh High Court. The investigative officer, however, did appear in court. The officer allegedly stated that although the existing evidence did not allow him to identify Mr. Arif in the audience at the time the speech was transmitted, he was certain that Mr. Arif was present.

16. The next hearing was scheduled to take place on 26 January 2017 when Mr. Arif was brought before the court. However, the trial proceedings did not take place as Mr. Arif's lawyer failed to produce an application for bail. The next hearing is scheduled to take place on 4 February 2017. The source claims that the trial of Mr. Arif is being deliberately delayed.

17. The source states that Mr. Arif remains in detention in the Central Karachi Prison. He has no adequate legal representation. The source specifies that Mr. Arif has not been given access to a State-appointed lawyer. Moreover, Mr. Arif's legal counsel did not take up the case, as he faced pressure from governmental security agencies. Mr. Arif's family could not persuade another lawyer to work on his case because of undue pressure exerted by the authorities. A lawyer from the Muttahida Qaumi Movement has only met him once and appeared in court on his behalf on one occasion. The source maintains that after his appearance in court, the authorities conducted a crackdown against Muttahida Qaumi Movement activists and as a result, the lawyer did not return to see Mr. Arif.

18. The source also reports that Mr. Arif receives family visits once a week. Such visits are not private, as he has to communicate with his visitors over a monitored telephone line through bulletproof glass.

19. The source argues that when Mr. Arif was detained, he was preparing to exercise his right of expression of political opinion. He was therefore deprived of that right. The source further maintains that the use of the Maintenance of Public Order Ordinance 1960 could curtail the rights to freedom of expression and assembly, as it allows the Government to arrest and detain suspected individuals for up to six months for a range of offences "with a view to preventing any person from acting in any manner prejudicial to public safety or the maintenance of public order." It is also noted that since the imposition of the state of emergency, a large number of lawyers and opponents of the Government have been detained.

20. The source therefore concludes that the deprivation of liberty of Mr. Arif is contrary to articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21, 25 and 26 of the International Covenant on Civil and Political Rights, ratified by the Government of Pakistan on 23 June 2010. The source maintains that these circumstances render Mr. Arif's detention arbitrary under category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

21. The source further argues that the international norms relating to the right to a fair trial have not been observed, contrary to articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, which is a basis for declaring Mr. Arif's detention arbitrary under category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

*Response from the Government*

22. On 1 February 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 3 April 2017, detailed information about the current situation of Mr. Arif and any comments on the source's allegations. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

*Further information from the source*

23. The Working Group was informed that Mr. Arif was released on bail on 18 April 2017.

**Discussion**

24. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

25. 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). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

26. The source has submitted that the arrest and subsequent detention of Mr. Arif fall within categories II and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it and the Government has not contested any of the submissions in that regard. The Working Group will examine the two categories invoked by the source in turn.

27. Mr. Arif was arrested for allegedly listening to a speech by a leader of the Muttahida Qaumi Movement, as the Pakistani authorities deemed this to mean that Mr. Arif was a facilitator of the said speech.

28. The Working Group firstly notes that freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.<sup>1</sup> According to the Human Rights Committee, no derogations can be made to article 19 simply because it can never become necessary to derogate from it during a state of emergency.<sup>2</sup>

29. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.<sup>3</sup> Moreover, article 19 (2) of the Covenant protects all forms of expression and the means of their dissemination, including all forms of audiovisual, as well as electronic and Internet-based modes of expression.<sup>4</sup>

30. In the present case, the Working Group notes that Mr. Arif denies having listened to the said speech on the telephone. However even if he did listen to it, Mr. Arif did nothing more than exercise his freedom of expression as envisaged in article 19 of the Covenant. Moreover, the Working Group must take note of the political activity of Mr. Arif and his previous arrests for political activism. On that basis, the Working Group concludes that the

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<sup>1</sup> See Human Rights Committee general comment No. 34 (2011) on the freedoms of opinion and expression, para. 2.

<sup>2</sup> Ibid., para. 5.

<sup>3</sup> Ibid., para. 11.

<sup>4</sup> Ibid., para. 12.

present arrest and subsequent detention of Mr. Arif resulted from the exercise of the rights or freedoms guaranteed by article 19 of the Covenant and therefore fall within category II.

31. The source also alleges that the arrest and subsequent detention of Mr. Arif fall within category III. The Government has not contested any of the submissions in this regard.

32. The Working Group notes that Mr. Arif was detained without a warrant and subsequently held in detention for 30 days on the basis of a detention order signed by an officer of the Home Department of the Government of Sindh, noting that the maximum permitted detention period was 90 days. That order was allegedly issued in accordance with the Maintenance of Public Order Ordinance 1960, which allows for detention for a total of 90 days without access to a lawyer and no review of the continued detention, and there is no criminal charge associated with that order.

33. The Working Group wishes to recall that according to 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, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.<sup>5</sup> That right, which constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty,<sup>6</sup> to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.<sup>7</sup> Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.<sup>8</sup>

34. The Working Group also notes that the issue of 90 days' preventive detention without an arrest warrant or review by a court is among the specific questions that the Human Rights Committee is raising with Pakistan, as it will consider its initial report later in 2017.<sup>9</sup> In its reply to the Human Rights Committee, dated 23 March 2017, the Government of Pakistan did not address this issue.<sup>10</sup>

35. The Working Group further notes that, in its general comment No. 35 (2014) on liberty and security of person, the Human Rights Committee stated that: "To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent

<sup>5</sup> A/HRC/30/37, paras. 2 and 3.

<sup>6</sup> Ibid., para. 11.

<sup>7</sup> Ibid., para. 47 (a).

<sup>8</sup> Ibid., para. 47 (b).

<sup>9</sup> See CCPR/C/PAK/Q/1, para. 10.

<sup>10</sup> See CCPR/C/PAK/Q/1/Add.1, paras. 34-36.

legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.”

36. In the present case, the Government has not shown that there was an existing, direct and imperative threat to justify the detention of Mr. Arif and there was no prompt and regular review of his continued detention. Furthermore, the Maintenance of Public Order Ordinance 1960, which was allegedly invoked to justify the detention of Mr. Arif, is in fact a derogation from the stipulations of article 9 of the Covenant. The Working Group, however, notes that derogations under article 9 leading to deprivation of liberty which is unreasonable or unnecessary, cannot be justified under article 4 of the Covenant.<sup>11</sup> The Ordinance is extremely vague and lacks the requisite degree of precision and legal certainty and in the view of the Working Group leads to deprivation of liberty which is unreasonable or unnecessary, as was the case of Mr. Arif.

37. The Working Group further notes that Mr. Arif was detained without an arrest warrant or any explanation as to the reasons for his detention. By detaining him without an arrest warrant, the Government in fact failed to invoke a legitimate reason for depriving Mr. Arif of his liberty and failed to follow the procedure prescribed by law. These are violations of article 9 (1) and (2) of the Covenant.

38. The Working Group therefore concludes that in view of the fact that Mr. Arif was arrested without a warrant and not informed promptly of any charges against him and that Maintenance of Public Order Ordinance 1960, which contravenes articles 4 and 9 of the Covenant, was invoked to justify his detention, the detention of Mr. Arif lacks any legal basis and therefore falls within category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

39. Moreover, the Working Group notes that Mr. Arif was denied proper legal representation and owing to the political connotations of his case, struggled to ensure legal representation of his own choice. In those circumstances, it was the duty of the authorities to ensure that Mr. Arif had proper legal assistance as required by article 14 (3) (d) of the Covenant. The denial of meaningful assistance by a lawyer also constituted a violation of principle 17.1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and of principle 9 of the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court. Given that Mr. Arif was held without any legal justification and denied legal representation, the Working Group is of the opinion that the case also falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

40. Finally, the Working Group cannot help but notice that the present case is one in a pattern of the attitude of the authorities towards Mr. Arif. Mr. Arif spent two years in prison during the period of martial law rule for his political activism and was qualified as a prisoner of conscience by reputable international non-governmental organizations prior to the events at the core of the present case. He is a member of the Muttahida Qaumi Movement political party, has joined its Central Coordination Committee and was on his way to address a press conference on behalf of the local faction of the Movement in his capacity as a member of the Central Coordination Committee when the detention at the heart of the present case took place. The Working Group is of the view that there is a pattern of discriminatory attitude on the part of the Government in relation to Mr. Arif spanning several years now and therefore concludes that it also falls within category V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

### **Disposition**

41. The Working Group was informed that Hassan Zafar Arif was released on bail on 18 April 2017. Despite this, the Working Group, in accordance with paragraph 17 (a) of its methods of work, reserves the right to render an opinion as to whether or not the

<sup>11</sup> See Human Rights Committee, general comment No. 35, para. 66.

deprivation of liberty was arbitrary, notwithstanding the release. In the present case the Working Group notes that Hassan Zafar Arif has only been released on bail and in light of this, the Working Group renders the following opinion:

The deprivation of liberty of Hassan Zafar Arif, being in contravention of articles 3, 7, 9, 10 and 19 of the Universal Declaration of Human Rights and of articles 4, 9, 14 (3) (d), 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

42. The Working Group requests the Government of Pakistan to take the steps necessary to remedy the situation of Hassan Zafar Arif without delay and bring it into conformity with relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

43. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to fully release Hassan Zafar Arif immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

44. The Working Group urges the Government to bring the Maintenance of Public Order Ordinance 1960 into conformity with the recommendations made in the present opinion and with the obligations undertaken by Pakistan under international human rights law and the Covenant specifically.

#### **Follow-up procedure**

45. 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 Mr. Arif has been fully released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Arif;
- (c) Whether an investigation has been conducted into the violation of Mr. Arif's rights and if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Pakistan with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

46. 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.

47. 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 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.

48. 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.<sup>12</sup>

*[Adopted on 19 April 2017]*

<sup>12</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.