

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Working Group on Arbitrary Detention and the Special Rapporteur on the situation of human rights defenders

REFERENCE:
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12 May 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Working Group on Arbitrary Detention and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 34/18, 42/22 and 42/10.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the criminalization by Indian authorities of the activities of journalists covering the situation in Jammu and Kashmir.

Naseer Ganai is a senior journalist based in Kashmir who works for a news magazine published in New Delhi.

Masrat Zahra is a freelance photojournalist from Srinagar, Kashmir. She has critically covered various facets of the consequences of the presence in the region of Indian authorities. She also covers regular life in Kashmir amid the heavy militarization.

Peerzada Ashiq is a senior journalist and special correspondent for a daily newspaper in India. His reporting has been focused on human rights issues that arise from the dense militarization of the region of Jammu & Kashmir

Gowher Geelani is a senior journalist, political commentator on the situation of Kashmir and author. He has been openly critical of the Indian government's policies with regard to Kashmir and has spoken and written extensively against the occupation and militarization of Kashmir.

According to the information received:

The situation of Naseer Ganai

On 8 February 2020, at around 3pm, Mr Naseer Ganai received a telephone call from the police requesting him to present himself at the Cargo police station (formerly an interrogation centre of the Special Operations Group and also of the Cyber Police) in Srinagar.

The Superintendent of Police (SP) and the Deputy Superintendent of Police (DySP) questioned Mr. Ganai about a story he had covered, published on 6 February 2020. The story concerned a call to a strike by the Jammu & Kashmir Liberation Front (JKLF). Mr Ganai explained that the news item reported was

simply part of his professional duties as a journalist and that he had been covering such stories for many years. The two police officers uttered disapproval of the story, and asked Mr. Ganai to refrain from writing such stories in the future.

During his stay at the Cargo police station, the police examined the mobile phone and laptop computer of Mr Ganai, and subsequently returned to him. The interrogating officers noted down personal details, including about Mr. Ganai's educational and work life as well as about his family.

Mr. Ganai was allowed to leave the station at 8pm, after fellow journalists advocated for his release.

The situation of Masrat Zahra

On 18 April 2020, at around 4 pm, Ms. Masrat Zahra received a call from the Cyber Police Station in Srinagar, requesting her immediate presence at the police station. The reasons for the request were not disclosed upon her request. Rather, she was informed that the SP would disclose the reasons for the request upon her arrival.

She could not reach the police station due to restrictions on the freedom of movement implemented to prevent the spread of the COVID-19 virus. When she informed the police of the situation, they insisted that she travel to the police station regardless. Despite being provided with a phone number to call in case she was stopped by law enforcement on the way, she was unable to reach the police station.

On 20 April, an acquaintance of Ms. Zahra informed that she has been charged under section 13 of India's Unlawful Activities Prevention Act (UAPA), which criminalises advocacy of any unlawful activity. The offence is punishable with fines and up to seven years imprisonment. She was informed that she was also charged under section 505 of the Indian Penal Code, which criminalizes statements, rumours or reports "if there is an intent to cause fear or alarm to the public or to any section of the public whereby a person may be induced to commit an offence against the state or against public tranquility".

Similarly, public media reported that Ms. Zahra had been charged for uploading anti-national posts with criminal intention to induce the youth and promote offence against public tranquility.

On 21 April, Ms. Zahra was interrogated at the Cyber Police Station, mostly on her work. Despite assurances given by police officials that the case against her would be withdrawn, no action to that effect has yet been taken by the authorities.

The situation of Peerzada Ashiq

On 19 April 2020, Mr. Ashiq was summoned to the Cyber Police Station in Srinagar and questioned about a news report that was published the same day.

The evening of 19 April, Mr. Ashiq was summoned to the Anantnag police station in South Kashmir. A First Information Report (FIR) was filed against him which stated that details in his news report were “factually incorrect and could cause fear or alarm in the minds of the public.” The copy of the FIR furnished to Peerzada does not mention his name and did not mention the allegations in the FIR.

It is reported that Mr. Ashiq has previously been subject to harassment by the authorities. On 1 September 2019, he was summoned to the Kothi Bagh police station in Srinagar where he was pressured to reveal the sources of a story published on detentions.

The situation of Gowher Geelani

On 21 April 2020, the Cyber Police filed an FIR against Mr. Geelani for his social media posts. The FIR was filed under section 13 of the Unlawful Activities Prevention Act and section 505 of the Indian Penal Code. It states that Mr. Geelani “has been indulging in writings on social media which threaten the territorial integrity of India”. He was not summoned to the police station and was informed about the FIR through a press release issued by the police on 21 April.

Mr. Geelani had filed a petition to quash the FIR issued against him. In a notice issued by the High Court of Jammu & Kashmir in Srinagar on 24 April 2020, the Court stated that “the entire matter is at its infancy stage” and that further investigations were necessary.

Mr. Geelani also previously been targeted by the Indian authorities. On 31 August and 1 September 2019, following the abrogation of article 370, he was prevented by the immigration authorities at the Indira Gandhi International Airport in New Delhi from travelling to Germany where he was to take up a position as an editor in a newspaper.

While we do not wish to prejudge the accuracy of the information made available to us, we express serious concern at the criminal proceedings and investigations initiated for what appears to be the four individuals’ journalistic activities on the situation in Jammu and Kashmir. In this regard, we recall that journalism constitutes a necessary service for any society, as it provides individuals and society as a whole with the necessary information to allow them to develop their own thoughts and to freely draw their own conclusions and opinions (A/HRC/20/17 para 3). A free, uncensored and unhindered press and other media constitutes one of the cornerstones of a democratic society (CCPR/C/GC/34 para.13).

The allegations suggest a pattern of silencing independent reporting on the situation in Jammu and Kashmir through the threat of criminal sanction. In this regard, we recall that the penalization of a journalist solely for being critical of the government or

the political social system espoused by the government is incompatible with the State's obligations under international human rights law (CCPR/C/GC/34 para. 42).

We take note of the use of section 13 of the Unlawful Activities Prevention Act and section 505 of the Indian Penal Code in the abovementioned cases, and express concern that their broad scope makes them easily amenable to abuse. This is particularly troubling given the severity of the punishment that anyone charged may suffer. In this regard, we refer to the requirements, in particular of legality and proportionality, under Article 19 (3) of the ICCPR. We further recall the 2017 joint declaration on fake news, disinformation and propaganda, in which UN and regional mechanisms of freedom of expression affirmed that "general prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression".

Moreover, we express concern at the apparent lack of regard by police authorities for the rights of those charged with a criminal offence or subject to investigation. We refer, in particular, to the right of everyone charged by a criminal offence to be informed promptly and in detail the nature and cause of the charge against him (ICCPR Art. 14 (3)(a)). In this regard, we refer to the allegation that neither Mr. Geelani nor Ms. Zahra were not informed of the charges against them, and of the allegation of discrepancies between the formulation of charges against Mr. Ashiq and in the copy which was provided to him by the authorities.

We also express concern at the apparent disregard for the prohibition on unlawful and arbitrary interference in the private life of individuals, and the journalistic privilege. We refer, in particular, to the allegation that Mr. Ganai's computer and mobile phone was searched without a warrant, and that, in the case of Mr. Ashiq, that he specifically was requested to reveal the sources for a news item published.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for the observations of your Excellency's Government on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information on the compatibility of the criminal charges against the individuals and the obligations of India to respect and ensure the freedom from arbitrary arrest or detention and the right to freedom of expression under international human rights law.

3. Please provide information on the measures taken to ensure the right to effective remedies, including the investigation of the alleged violations to the rights of the journalists mentioned in this letter.

We would appreciate receiving a response within 60 days. Thereafter, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their recurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We would like to inform your Excellency's Government that having transmitted an allegation letter to the Government, the Working Group on Arbitrary Detention may transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such letters in no way prejudice any opinion the Working Group may render. The Government is required to respond separately to the allegation letter and the regular procedure.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Leigh Toomey
Vice-Chair of the Working Group on Arbitrary Detention

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we refer to the obligations under the International Covenant on Civil and Political Rights (ICCPR/the Covenant), which India acceded to on 10 April 1979.

Article 2 of the ICCPR places a general obligation on the State to respect and ensure the rights enshrined in the Covenant to everyone within its jurisdiction without any distinction. The duty applies to all branches of government. Moreover, in accordance with customary international law, the fact that State agents act *ultra vires* has no influence on the attribution of conduct to the State.

Article 19 of the Covenant grants the right to freedom of opinion and expression. As stated by the Human Rights Committee, “Freedom 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”, CCPR/C/GC/34, para. 3. The protection of journalists is particularly strong. As further stated by the Human Rights Committee, “A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society”, *id.* para. 13. In accordance with Article 19 (3), any restriction on the right to freedom of expression must pursue one of the exhaustively enumerated aims of the provision, it must be provided by law, and it must be necessary and proportionate.

As stated by the Committee, “The penalization of a [...] 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” *id.* para. 42. Moreover, the criminalisation of speech based on notions of falsehood is in and of itself too vague to comply with the requirement of legality in Article 19 (3), see e.g. *id.* para. 25 and the 2017 joint declaration on freedom of expression and “fake news”, disinformation and propaganda, no. 2 litra a.

As stated by the Committee, the deprivation of liberty of an individual for exercising their freedom of expression constitutes an arbitrary deprivation of liberty contrary to Article 9 of the Covenant, see CCPR/C/GC/35 para. 17, and a concurrent violation of Article 19. Such attacks against individuals for exercising their rights to freedom of expression should be “vigorously investigated in a timely fashion, and the perpetrators prosecuted”, CCPR/C/GC/34 para. 23.

Any interference with the confidentiality of sources of journalists will constitute an interference with the rights under Article 19 (2), which must comply with the requirements of Article 19 (3). As stated by the Committee, “States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources”, CCPR/C/GC/34 para. 45. Likewise, any restriction on the freedom of movement of

journalists within or outside the territory of the State Party to the Covenant will constitute an interference with Article 19 (2), *id.*

Lastly, whether security measures or not, has no consequence for the application of the present principles under Article 19. To the contrary, as stated by the Human Rights Committee, “extreme care” must be taken that national security legislation is compatible with the strict requirements of Article 19 (3), see *id.* para. 30.

In particular we would like to draw to the attention of you Excellency’s Government the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. We would also like to refer to article 11 which states that everyone has the right to the lawful exercise of his or her occupation or profession.