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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-ninth session, 21-25 August 2017

Opinion No. 45/2017 concerning Hasnat Karim (Bangladesh)¹

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 19 May 2017 the Working Group transmitted to the Government of Bangladesh a communication concerning Hasnat Karim. The Government has not replied to the communication. Bangladesh 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).

¹ In accordance with paragraph 5 of the methods of work of the Working Group, Elina Steinerte did not participate in the discussion of the present case.

Submissions

Communication from the source

4. Hasnat Karim is a dual Bangladeshi and British citizen. He is married and has two children. He used to be a lecturer at North South University, in Dhaka, and subsequently became a director at his father's engineering firm.

5. According to the source, Mr. Karim and his family were at the Holey Artisan Bakery in Dhaka on 1 July 2016 to celebrate his daughter's thirteenth birthday. At approximately 9.20 p.m., a group of five armed gunmen attacked the restaurant. During the siege and its aftermath, 20 individuals were killed and several more were held hostage. The source states that Mr. Karim and his family survived the attack, as they had been able to prove that they were Muslim by reciting verses of the Koran. The attackers had stated that they would not hurt their fellow Muslims.

6. The source reports that Mr. Karim's uncle phoned him during the siege. The gunmen asked Mr. Karim to call back his uncle and instruct him to inform the police that they should not approach the bakery, otherwise the hostages would be killed. The source claims that the gunmen then made Mr. Karim walk in front of them as a body shield as they tried to secure the premises.

7. At around 7 a.m. on 2 July 2016, the security services initiated an operation to free the hostages. The gunmen and 2 police officers were killed and the remaining 13 hostages were rescued. All of the surviving hostages were taken for questioning. The source reports that all the hostages were released, except Mr. Karim and another individual who were accused of involvement in the alleged terrorist attack. Mr. Karim was detained by the Detective Branch, but the authorities initially refused to acknowledge that he was in their custody.

8. On 13 July 2016, the Detective Branch asked Mr. Karim's wife to come to its headquarters. After being interrogated for several hours, she was allowed a very short supervised visit with Mr. Karim, along with his mother.

9. On 3 August 2016, Mr. Karim's family was summoned to the police station where they were informed that Mr. Karim would be officially detained and brought before a court. According to the source, the family was also told that after a three- or four-day remand period, they could apply for bail and bring Mr. Karim home.

10. On 4 August 2016, Mr. Karim was officially detained pursuant to section 54 of the Code of Criminal Procedure and held on remand for a further eight days. Section 54 allows the police to detain an individual without a warrant in nine different sets of circumstances. The source refers to a landmark judgment of 24 May 2016 by the Appellate Division of the Supreme Court of Bangladesh that was highly critical of the use of section 54 and upheld a series of High Court guidelines aimed at ensuring that police powers of arrest without a warrant were consistent with constitutional safeguards.

11. On 13 August 2016, Mr. Karim was brought to court in connection with the attack on the Holey Artisan Bakery. According to the source, law enforcement officials misrepresented the circumstances of the arrest of Mr. Karim to the court. The source alleges that the authorities tried to make his detention appear to be lawful by presenting him before a magistrate and claiming that he had only been arrested on that day (13 August). Mr. Karim was again held on remand, for eight days.

12. According to the source, on 14 August 2016, the authorities froze the business bank accounts of Mr. Karim's father without any justification.

13. On 22 August 2016, Mr. Karim was brought to court at the end of his remand period and the police did not request a further period of remand for their investigations. The source claims that Mr. Karim was sent to Keraniganj Prison without any charge having been brought against him. On 24 August 2016, the magistrates' court denied his bail application without citing proper grounds.

14. On 2 September 2016, Mr. Karim was transferred from Keraniganj Prison to a level four high-security building in Kashimpur Prison. The source emphasizes that, on 4 October

2016, two months after Mr. Karim was first brought before a court, he was finally informed of the allegations against him, although no clear grounds were presented regarding his continued detention. On 30 October 2016, a new bail application was denied by a district court.

15. The source alleges that while Mr. Karim is in detention, he is being denied his right to have contact with his family and others:

(a) Mr. Karim has been denied regular contact with his family. At the beginning of his detention, he was held incommunicado for a few weeks and his family could not visit him during that period. Following his appearance before the magistrates' court, he was permitted to see his family for a short and supervised visit two times per month;

(b) Mr. Karim has not been allowed access to a lawyer since being detained on 2 July 2016. On 14 August 2016, a local lawyer went to the magistrates' court on behalf of Mr. Karim, but was pressured by the authorities to stop representing him;

(c) On 4 November 2016, Mr. Karim was refused temporary guarded parole to attend his father's funeral service, even though this is a right usually afforded to convicted prisoners, including those serving sentences for the most serious offences;

(d) Until 13 February 2017, Mr. Karim was denied access to British consular protection. He now has consular access, but it is being supervised by the Detective Branch. As a result, no open discussion can take place between Mr. Karim and the representatives of the British High Commission, for fear of repercussions;

(e) Mr. Karim suffers from a heart condition, following an emergency cardiac intervention in 2014, but is not receiving appropriate medication while in detention and has not been assessed by a cardiologist.

16. The source alleges that the authorities have issued false public statements regarding Mr. Karim. In particular, the police falsely linked him with one of the gunmen at the Holey Artisan Bakery, who was a student at the North South University in Dhaka. The police claimed that Mr. Karim had been fired from his post as a lecturer at the university because of his links to a "militant organization". However, the source claims that Mr. Karim left the position in order to work as a civil engineer with his father, and that the university confirmed that Mr. Karim left his job voluntarily.

17. The source emphasizes that the general situation in Bangladesh is dire with regard to the democratic space and human rights protection, and refers to the widespread practice of enforced disappearances and arbitrary detention. The source claims that the Government has a well-documented practice of arresting political opponents, refusing them access to lawyers or family and denying publicly that they have been arrested. According to the source, the Government eliminates these opponents in unlawful ways, namely by: (a) fabricating charges and "showing them as arrested" on the day of their appearance before the court; (b) dropping them across the Indian border, where they are arrested and charged for illegal entry or are simply not seen again; or (c) executing them in what is known as "crossfire" shooting.

18. The source submits that Mr. Karim has been denied fair trial guarantees and that his deprivation of liberty is arbitrary under category III of the categories applied by the Working Group. Specifically, the source submits that:

(a) The arrest of Mr. Karim after the attack was unlawful and without any legal basis. Mr. Karim was detained pursuant to section 54 of the Code of Criminal Procedure, which itself violates article 9 of the Covenant;

(b) Since 2 July 2016 Mr. Karim has been detained without any formal charges having been brought against him, and he has been denied access to a lawyer and is being denied regular contact with his family;

(c) There is no evidence pointing to the involvement of Mr. Karim in the alleged terrorist attack, and any evidence produced may have been fabricated.

Response from the Government

19. On 19 May 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 18 July 2017 regarding the current situation of Mr. Karim. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Bangladesh under international human rights law, particularly with regard to the treaties that it has ratified. Moreover, the Working Group called upon the Government to ensure Mr. Karim's physical and mental integrity.

20. The Working Group regrets that it did not receive a response from the Government to this communication. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

21. 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.

22. 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. The Working Group has received several cases concerning Bangladesh in recent years which involved allegations similar to those in the present case, that is, allegations of arbitrary and incommunicado detention, of lengthy pretrial detention without charges, and of denial of the right to legal assistance and access to family (see, for example, opinions Nos. 51/2013, 37/2013 and 66/2011). This pattern of conduct provides additional credibility to the source's claims in this case.

23. The Government has not provided any evidence or documentation in response to the Working Group's request for information that would demonstrate any link between Mr. Karim and the gunmen who committed the armed attack on the Holey Artisan Bakery on 1 July 2016. The Working Group therefore wishes to acknowledge that, when taken as a hostage in the overnight siege, Mr. Karim was deprived of his liberty by the armed gunmen. In addition, Mr. Karim was subsequently deprived of his liberty by government forces, namely by the Detective Branch. The allegations relating to the arbitrary deprivation of liberty committed by the Government are considered in turn below.

24. The Working Group considers that there have been several violations of article 9 of the Covenant during the arrest and detention of Mr. Karim. The source asserts, and the Government has not contested, that there have been no charges brought against Mr. Karim. Although Mr. Karim learned of the allegations against him on 4 October 2016, he has still not been informed whether there are official charges, and if so, what those charges are, even though it is now over a year since he was detained on 2 July 2016 after the hostage crisis. The Working Group considers that this is contrary to Mr. Karim's right under article 9 (2) of the Covenant to be promptly informed of the charges against him. By failing to promptly notify Mr. Karim of the charges against him, the authorities have failed to invoke a legal basis to justify his detention.²

25. Further, the Working Group considers that Mr. Karim's right to be brought promptly before a judge or other officer authorized by law to exercise judicial power under article 9 (3) of the Covenant, and to take proceedings before a court under article 9 (4) of the Covenant, have both been violated in the present case. The source reported that Mr. Karim was first brought before a court on 13 August 2016, six weeks after he was taken into custody on 2 July 2016. The Human Rights Committee has stated in relation to article 9 (3) of the Covenant that while the meaning of "promptly" may vary in each case, the delay in

² The Working Group considers that it does not have sufficient information to determine whether section 54 of the Bangladeshi Code of Criminal Procedure also violates article 9 of the Covenant.

bringing a detainee before a court should not exceed a few days from the time of arrest. The Committee has also stated that:

In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment.³

26. Moreover, as the source alleges and the Government has not denied, Mr. Karim has not had regular access to his family, nor has he had access to a lawyer since 2 July 2016. He has therefore had no practical means of challenging the legal basis of his detention under article 9 (4) of the Covenant, either through his own efforts or with assistance from his family or lawyer.

27. Thus, the Working Group considers that there was no legal basis invoked to justify the arrest and detention of Mr. Karim, and that his deprivation of liberty falls within category I of the categories applied by the Working Group.

28. In addition, the Working Group considers that the source's allegations disclose violations of Mr. Karim's right to a fair trial. Specifically, Mr. Karim has been held in pretrial detention for over a year, with applications for bail refused on at least two occasions. The Working Group recalls that according to article 9 (3) of the Covenant, pretrial detention should be the exception rather than the rule, and should be as short as possible. Pretrial detention must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Courts must examine whether alternatives to pretrial detention, such as bail, would render detention unnecessary.⁴ As the source points out, and the Government has not contested, Mr. Karim's bail application on 24 August 2016 was denied without adequate reasons being given by the magistrates' court, and this falls short of the individualized determination required under article 9 (3). According to article 9 (3), if Mr. Karim could not be tried within a reasonable time, he is entitled to release, which has clearly not been respected in this case. The alleged attempt by the authorities to present Mr. Karim as if he had only been arrested on the day he was brought before the court (i.e. on 13 August 2016), does not alter this finding, as it is clear from the unchallenged allegations by the source that Mr. Karim was in fact arrested on 2 July 2016.

29. The source alleges that Mr. Karim was detained incommunicado for the first few weeks of his detention, and has since been denied regular visits with his family as well as confidential consular assistance from the British High Commission that he is entitled to as a national of the United Kingdom of Great Britain and Northern Ireland. The Working Group has consistently argued that holding persons incommunicado is not permitted under international human rights law, because it breaches the right to challenge the lawfulness of detention before a judge (see, for example, opinions Nos. 53/2016 and 56/2016). Furthermore, the Committee against Torture has made it clear that prolonged incommunicado detention creates the conditions that may lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see, for example, A/54/44, para. 182 (a)), and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has argued that the use of incommunicado detention is prohibited under international law (see, for example, A/HRC/13/39/Add.5, para. 156).

30. The Working Group considers that the incommunicado detention of Mr. Karim violated articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. Further, the restrictions placed on Mr. Karim's contact with his family and on his consular access amount to a violation of the right to contact the outside world, under applicable standards such as rules 43 (3) and 58 of the United Nations Standard

³ See the Committee's general comment No. 35 (2014) on liberty and security of person, para. 33.

⁴ *Ibid.*, para. 38.

Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)⁵ and principles 15, 16 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

31. The Working Group also finds that Mr. Karim has been denied access to legal assistance since he was detained on 2 July 2016, in violation of his right to legal assistance under article 14 (3) (b) of the Covenant. As the Working Group stated in 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,⁶ all persons deprived of their liberty shall have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension (para. 12).

32. The Working Group is deeply concerned at the allegations that a local lawyer attempted to provide legal assistance to Mr. Karim on 14 August 2016 but was pressured by the authorities to stop representing him. The Working Group recalls that 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 provides that “legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment” (para. 15). The Working Group will refer this situation to the Special Rapporteur on the independence of judges and lawyers, for further consideration.

33. The Working Group therefore concludes that these violations of the right to a fair trial are of such gravity as to give the deprivation of liberty of Mr. Karim an arbitrary character according to category III of the categories applied by the Working Group.

34. The Working Group wishes to record its grave concern about Mr. Karim’s physical and mental integrity since his detention on 2 July 2016, particularly given that Mr. Karim was already a victim when he was taken hostage by armed gunmen. The source reports that Mr. Karim, who suffers from a serious heart condition, is not receiving appropriate medication while in detention and that he has not been assessed by a cardiologist. The risk of irreparable harm to Mr. Karim’s health, including his death in prison, is heightened as a result of his ongoing detention. This treatment violates Mr. Karim’s right under article 10 (1) of the Covenant to be treated with humanity and respect for his inherent dignity. The Working Group has decided to refer this case to the relevant special procedures of the Human Rights Council for further investigation, including to determine whether article 5 of the Universal Declaration of Human Rights and article 7 of the Covenant have been violated. The Working Group calls upon the Government to immediately and unconditionally release Mr. Karim.

35. The Working Group notes with concern the silence on the part of the Government in not availing itself of the opportunity to respond to the serious allegations made in this case, and in other opinions involving Bangladesh (see, for example, Working Group opinions Nos. 51/2013, 37/2013, 66/2012, 63/2012 and 66/2011 and decision No. 5/1995).

36. The Working Group would welcome an invitation from the Government to undertake its first country visit to Bangladesh so that it can work constructively with the Bangladeshi authorities in addressing serious concerns relating to the arbitrary deprivation of liberty. The human rights record of Bangladesh will be subject to review during the third cycle of the universal periodic review, in May 2018, and this is an opportunity for the Government to demonstrate its cooperation with the special procedures of the Human Rights Council and to bring its laws and practices into conformity with international human rights law.

⁵ See A/RES/70/175.

⁶ See A/HRC/30/37.

Disposition

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

The deprivation of liberty of Hasnat Karim, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and of articles 9, 10 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

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

39. The Working Group considers that, taking into account all the circumstances of the case, especially the risk of irreparable harm to Mr. Karim's health and to his physical and mental integrity, the appropriate remedy would be to release Mr. Karim immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

40. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Karim, and to take appropriate measures against those responsible for the violation of his rights.

41. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and to the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

Follow-up procedure

42. 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. Karim has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Karim;
- (c) Whether an investigation has been conducted into the violation of Mr. Karim'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 Bangladesh with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

43. 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.

44. 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.

45. 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.⁷

[Adopted on 22 August 2017]

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