

**Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Working Group on Arbitrary Detention; the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

Ref.: AL IND 21/2021  
(Please use this reference in your reply)

15 February 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on extrajudicial, summary or arbitrary executions; Working Group on Arbitrary Detention; Special Rapporteur on the human rights of migrants and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 44/5, 42/22, 43/6 and 43/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the alleged killing of Mr. **Zia Mustafa** in Indian-Administered Kashmir after he was removed from jail by the police and the alleged lack of investigation into his killing.

According to information received:

Mr. Zia Mustafa, from the Rawalakot area of Poonch district of Pakistan-Administered Kashmir, was arrested in 2003 after he reportedly crossed the Line of Control into Indian-Administered Kashmir. He was imprisoned from 2003 until his death on 23 October 2021.

*Killings in Nadimarg village and legal proceedings against Mr. Mustafa*

On the evening of 23 March 2003, 24 members of the Kashmiri Pandit community were killed in Nadimarg village, Shopian district. A First Information Report (FIR) was registered against 11 named individuals including Mr. Mustafa, seven police personnel who had been on duty in the village and three others.

On 19 April 2003, the police claimed the three other individuals allegedly involved in the incident were shot dead by the Border Security Force and Indian Army in Yaripora village, Kulgam district.

On 1 October 2003, the Court of Sessions at Pulwama dropped the charges of murder and criminal conspiracy, which had been brought against police personnel, with dereliction of duty the only charge that was retained. The court held there was some material to proceed with charges against Mr. Mustafa including for murder, attempted murder, voluntarily inflicting grievous hurt and breaching movement restrictions under Sections 302, 326 of the Ranbir Penal Code and Sections 2/3 of the Egress and Internal Movement Control Ordinance.

However, the court report also noted that witnesses indicated the security forces were involved in the incident and had carried out the killing and that Mr. Mustafa's counsel contended that the sequence of events, in which the

24 houses in the village had been simultaneously raided and looted, indicated the assailants appeared to be well organised and well equipped.

The Court order also observed that the authorities did not seize the arms and ammunition allegedly used in the killing for forensic examination. The gold ornaments alleged to have been looted from the homes of the victims were not identified by witnesses as being property of the victims. No link was established between the incident and the three militants alleged to have been involved and who were later killed.

In the period from 2003-2008, Mr. Mustafa's case was listed for 73 hearings before the Court. However, the police did not produce Mr. Mustafa in 49 hearings, hampering the proceedings. In 2006, the court warned the police that it may initiate contempt proceedings against them although did not actually do so. An order in 2009 noted that of 38 witnesses listed by the prosecution only 9 had been examined. All 7 material witnesses were never produced before the court and the prosecution were unable to provide reasonable ground for their failure to appear. On 25 August 2009, Mr. Mustafa's statement was recorded, the defence evidence was closed and the case was set for final arguments.

Between late 2009 and 2011, only four additional witnesses were examined and the evidence remained insufficient for the court to arrive at a decision. In 2011, the court closed the evidence of the prosecution. From 2011 to 2021, while Mr. Mustafa remained in pre-trial detention, several petitions from the prosecution were dismissed including on account of non-appearance and lack of interest shown by the prosecution. Another review petition was pending before the High Court at the time of Mr. Mustafa's death.

From his arrest in March 2003 until his killing in October 2021, Mr. Mustafa had been in pre-trial detention for more than 18 years. During this period, the prosecution had reportedly not been able to put on record any substantial evidence that would point to his involvement in the killings of members of the Kashmiri Pandit community. The trial was approaching its final stages and was highly likely to lead to the acquittal of Mr. Mustafa.

#### *Killing of Mr. Mustafa*

On 11 October 2021, a firefight took place between Indian security forces and persons belonging to armed groups in Bhata Durian, Nar Khas Forest area of Poonch district of Indian-Administered Kashmir.

On 23 October 2021, Mr. Mustafa was taken from Kot Bahlwal Jail to the Police Station Gursai in Mendhar, Poonch district in relation to a FIR lodged about the incident in Nar Khas Forest area. The police later told media that Mr. Mustafa had been in contact with "infiltrators" (persons from outside the area) from inside jail who sought Mr. Mustafa's help to identify the terrain of the area as he had used the same route in 2003.

On 24 October 2021, the police released a statement indicating Mr. Mustafa had been killed.

On 26 October 2021, the police released another statement. It indicated that a joint search party of the Indian Army and police had come under fire and Mr. Mustafa had sustained injuries. Reportedly, two policeman and a member of the army were also injured during the incident. The police reportedly indicated that Mr. Mustafa could not be evacuated due to heavy fighting and his body was later retrieved from the site. However, information received indicates that unlike Mr. Mustafa, the other individuals injured alongside him were evacuated on the same day.

The decision by the authorities to take Mr. Mustafa from jail to an active combat site at a time when his acquittal was highly likely raises questions as to the version of events reported by the authorities.

No formal investigation has taken place into the incident. No information has been disclosed on the conduct of any autopsy or his place of burial.

Mr Mustafa's family learned of his death through news reports. They have not received his remains.

While we do not wish to prejudge the accuracy of these allegations, we are seriously concerned by the death of Mr. Mustafa after he was removed by the police from Kot Bahlwal Jail, where he had spent more than 18 years in pre-trial detention, by the alleged failure to carry out an independent, impartial, prompt, thorough, effective, credible and transparent investigation into his killing and by the apparent failure to return his remains to his family. We are also concerned that prior to his death he spent eighteen years in detention without being convicted.

Should the facts alleged above be confirmed, they would amount to a violation of the right to life, the prohibition of torture and other cruel, inhuman or degrading treatment, the right to liberty and security of person as well as guarantees of fair trial set out in articles 6, 7, 9 and 14 of the International Covenant on Civil and Political Rights, which India acceded to on 10 April 1979.

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 mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide the factual and legal grounds for the arrest, detention and prosecution of Mr. Mustafa. Please explain the individualised assessment of the necessity to remand Mr. Mustafa in pre-trial detention and the periodic assessment that had been carried out to ascertain of the legality of continued pre-trial detention. Please include information on why Mr Mustafa was continuously held in pre-trial detention for 18 years, especially on the basis of what appears to be

very weak incriminating evidence; and indicate how this is consistent with India's international human rights obligations under the treaties it has ratified.

3. Please explain why from 2003-2008, Mr. Mustafa's case was listed for 73 hearings before the Court but the police reportedly did not produce him in 49 hearings, apparently hampering the proceedings and prolonging his pre-trial detention indefinitely; and how this is consistent with India's human rights obligations.
4. Please explain why over the period of 18 years that Mr. Mustafa's pretrial detention lasted, the prosecution was reportedly not able to produce substantial evidence of his imputed involvement in the killings of members of the Kashmiri Pandit community.
5. Please explain in detail why Mr. Mustafa was taken out of prison and brought to Nar Khas Forest area where his life and safety were at risk. Please also explain why Mr. Mustafa was unable to be evacuated promptly, while other individuals injured alongside him were reportedly evacuated the same day.
6. Please provide detailed information on any investigations and judicial or other inquiries into the killing of Mr. Mustafa. Please include information on their current status, the specific investigative steps taken and on compliance with the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016). Please include information on whether Mr. Mustafa's body was examined by a medical and forensic doctor to determine the cause and circumstances of his death and if so please provide information on the findings.
7. Please provide information on the current location of Mr. Mustafa's remains and why they have reportedly not been returned to his family.
8. Please provide information on the investigation into the killing of 24 members of the Kashmiri Pandit community in Nadimarg village, Shopian district. Please include information on the specific investigative steps taken and on compliance with the Minnesota Protocol on the Investigation of Potentially Unlawful Death.

We would appreciate receiving a response within 60 days. Passed this delay, 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.

We would like to inform your Excellency's Government that after having transmitted the information contained in the present communication to the Government, the Working Group on Arbitrary Detention may also transmit specific cases relating to the circumstances outlined in this communication through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately to the

present communication and to the regular procedure.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence 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 a copy of this communication is being sent to the Government of Pakistan.

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

Morris Tidball-Binz  
Special Rapporteur on extrajudicial, summary or arbitrary executions

Elina Steinerte  
Chair-Rapporteur of the Working Group on Arbitrary Detention

Felipe González Morales  
Special Rapporteur on the human rights of migrants

Nils Melzer  
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

We would like to refer your Excellency's Government to article 6 (1) of the International Covenant on Civil and Political Rights, which India acceded to on 10 April 1979 and which states that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

We would further like to refer to General Comment 36 of the Human Rights Committee, which requires States Parties to take all necessary measures to prevent arbitrary deprivation of life by their law enforcement officials. This includes procedures to ensure that law enforcement actions are properly planned consistent with the need to minimize the risk they pose to human life, mandatory reporting, review and investigation of lethal and other life-threatening incidents. (CCPR/C/GC/36, par. 13). It further states that loss of life occurring in custody, in unnatural circumstances, creates a presumption of arbitrary deprivation of life by State authorities, which can only be rebutted on the basis of a proper investigation that establishes the State's compliance with its obligations under article 6.

In this regard we would like to refer to the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, in particular principle 9 which indicates that that there must be thorough, prompt and impartial investigations of all suspected cases of extra-legal, arbitrary and summary executions.

Investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death, and must be aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations (CCPR/C/GC/36).

This duty to investigate continues to apply in situations of internal disturbances and tensions, and armed conflict (Minnesota Protocol par. 20). The authorities must "conduct an investigation as soon as possible and proceed without unreasonable delays... The failure of the State promptly to investigate does not relieve it of its duty to investigate at a later time: the duty does not cease even with the passing of significant time" (par. 32). The duty of promptness does not justify a rushed or unduly hurried investigation.

States parties need to take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time at which the deprivation occurred. States parties should also disclose relevant details about the investigation to the

victim's next of kin, allow the next of kin to present new evidence, afford the next of kin legal standing in the investigation, and make public information about the investigative steps taken and the findings, conclusions and recommendations emanating from the investigation, subject to absolutely necessary redactions justified by a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals (CCPR/C/GC/36).

The arbitrary deprivation of life of an individual may cause his or her relatives mental suffering, which could amount to a violation of their own rights under article 7 of the Covenant. Furthermore, even when the deprivation of life is not arbitrary, failure to provide relatives with information on the circumstances of the death of an individual may violate their rights under article 7, as could failure to inform them of the location of the body. Relatives of individuals deprived of their life by the State must be able to receive the remains, if they so wish (CCPR/C/GC/36).

Further, we would like to recall that, as per the Working Group on Arbitrary Detention's jurisprudence, pretrial detention is to be the exception and not the rule, and should be ordered for as short a time as possible and subject to a periodic review to ensure its continued necessity and proportionality.<sup>1</sup> Article 9 (3) of the Covenant provides that it is not to be the general rule that persons awaiting trial are to be detained, but release may be subject to guarantees to appear for trial and at any other stage of the judicial proceedings. It follows that liberty is recognized as a principle and detention as an exception in the interests of justice. Further, both articles 9 (3) and 14 (3) (c) of the Covenant guarantee the right of anyone arrested or detained on a criminal charge to be tried within a reasonable time and without undue delay.

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<sup>1</sup> See e.g. Opinions Nos. 1/2021, para. 80; 6/2021, para. 50; 34/2020, para. 51. See also A/HRC/19/57, paras 48-58.