

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on trafficking in persons, especially women and children; and the Special Rapporteur on violence against women, its causes and consequences

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on the human rights of migrants; Special Rapporteur on trafficking in persons, especially women and children; and Special Rapporteur on violence against women, its causes and consequences, pursuant to Human Rights Council resolutions 33/30, 34/21, 35/5 and 32/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the alleged arbitrary arrest and detention of Bangladeshi women and children in West Bengal, who may also be potential victims of trafficking in persons. In particular, we would like to raise our concerns in relation to the alleged arbitrary arrest and detention of the following **four Bangladeshi women and a 8 year-old girl**, namely: (i) Ms. **Reena Akhtar**, 30 years-old, from Bangladeshi village- Dakshin Kurupehar, (ii) Ms. **Taslima Begum**, 30 years-old, from Bangladeshi village & Post- Belfulia; (iii) Ms. **Beuti Begum**, 20 years-old, from Bangladeshi village Hogolpati, (iv) Ms. **Masuma Begum, allegedly arrested together with her 8 year-old girl**, 35 years old, from Bangladeshi village- Khuntakata, Post-Khuntakata Bazar.

According to the information received, Ms. Reena Akhtar was arrested on 17 November 2017 allegedly by the Indian police of Swarupnagar Police Station (**Case no.874/2017**). Likewise, Ms. Taslima Begum, Ms. Beuti Begum and Ms. Masuma Begum with her 8-year-old daughter were arrested on 23 November 2017, allegedly by the Indian police of Swarupnagar Police Station (**Case no.884/2017**), all pursuant to section 14 of *Foreigners Act 1946*. All were brought before the Additional Chief Judicial magistrate Court, Basirhat, District-North 24 Parganas the day following their arrest and the Court sent them to correctional homes as under-trial prisoners, awaiting a Court's judgment. As per information received, the women were separated from men and the 8 year-old girl child was also separated from her mother and placed in a juvenile home. Overall, detention facilities, including the correctional home, are described as being 'overcrowded and unhealthy' and the right of inmates to communicate with their legal representatives and be released after completion of their sentence do not seem to be effectively respected.

According to the information received, there are patterns of arrest and detention of Bangladeshi women and girls, including victims of trafficking, in West Bengal pursuant to section 14 of the *Foreigners Act 1946*. The arrest and detention of the above mentioned women and girl - and presumably a number of others - is also reportedly based

on section 14 of this Act, which states that: “any person who contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine and if such person has entered into a bond in pursuance of clause (f) of subsection (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.”

The application of this criminal law provision should be read in conjunction with the Ministry of Home Affairs (Foreigners Division) memorandum No. 14051/14/2011 ‘Advisory on preventing and combatting human trafficking in India – dealing with foreign nationals’ dated 1st May 2012, which clearly states that in case of foreign nationals apprehended in connection with human trafficking, the State has to: (1) *immediately carry out a detailed investigation to ascertain whether the person concerned is a victim or a trafficker;* (2) *if, after investigation, the person is found to be a victim, he or she should not be prosecuted under the Foreigners Act;* (3) *Immediate action may be taken to furnish the details of such victims to the Ministry of External Affairs, so as to ensure that the person concerned is repatriated to his or her country of origin through diplomatic channels and* (4) *During the interim period, pending repatriation, the victim should be taken care of in an appropriate shelter home.*

Notwithstanding, the above-mentioned women, including the girl child, have been allegedly arrested and detained for being undocumented migrants. In this regard, appropriate investigations have allegedly not been undertaken to determine whether their irregular migration status is the outcome of their free will or whether they have entered the Indian territory by means of coercion, abduction, fraud, deception, abuse of power or position of vulnerability with the purpose of exploitation.

While we welcome your Excellency’s Government commitments to combat human trafficking through the 2016 Draft Bill on ‘Trafficking in Persons (Prevention, Protection and Rehabilitation)’, which is currently under discussion in the country, we also wish to express grave concerns about the disregard in this specific case of risks and vulnerabilities to trafficking and the lack of effective implementation of the existing anti-trafficking framework, such as the above mentioned Ministry of Home Affairs’ Memorandum, by law enforcement officials and judicial authorities.

Finally, the arrest and detention of an 8 year-old girl falls short in complying with the UN Convention on the Rights of the Child (*see Annex on reference to international human rights law*), as detention can never be in the best interest of a child.

While we do not wish to prejudge the accuracy of these allegations, we express our grave concern about the allegations that (i) Ms. Reena Akhtar, (ii) Ms. Taslima Begum, (iii) Ms. Beuti Begum and (iv) Ms. Masuma Begum with her 8 year-old girl have been detained since November 2017. We are concerned that they may be victims of trafficking in persons who may not have been correctly identified as such but criminalised, instead of being provided with appropriate assistance and protection.

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 therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on measures taken to ensure an independent and impartial investigation to ascertain whether the persons in detention are victims of trafficking and, if so, whether they have been provided with appropriate protection and assistance, pursuant to the Ministry of Home Affairs' *Office Memorandum No. 14051/14/2011-F.VI* of 1 May 2012
3. What provisions are in place to develop alternatives to detention for migrants, including irregular migrants, which may be potential victims of trafficking?
4. What mechanisms aimed at early identification, referral, assistance and support for migrants, especially women and children, who may be victims of trafficking are implemented?
5. Please provide information regarding how the proper identification of all potential protection needs and respect for international and human rights law – particularly with regard to the principle of non-refoulement - are implemented?
6. Is any amendment envisaged to the *Indian Foreigners Act 1946* with a view to de-penalize the irregular entry and stay of migrants, specifically in relation to victims of trafficking, as provided under the Ministry of Home Affairs' *Office Memorandum No. 14051/14/2011-F.VI* of 1 May 2012?
7. What steps are taken to ensure the protection and assistance to victims and potential victims of trafficking, including in relation to the specific case raised in this communication, with a focus on services available for women and children?
8. How does your Excellency's Government ensure that bilateral agreements with neighbouring countries, such as Bangladesh, are implemented to prevent trafficking in persons and do not result in detention or any other form of criminalisation of victims or potential victims of trafficking in line with national and international law?

9. Please provide any update on the status of the Draft Anti-trafficking Bill and how it envisages to ensure protection and assistance of victims of trafficking.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge the release of the above-mentioned women and girl in detention and the reunification of the girl with her mother. We also urge your Excellency's Government to take all necessary interim measures to halt the alleged violations and prevent their re-occurrence by releasing any victim or potential victim of trafficking and re-direct them to appropriate assistance and protection facilities and in the event that the investigations support or suggest that trafficking in persons has taken place, to ensure the accountability of any person(s) responsible for the alleged violations.

We would like to inform your Excellency's Government that after 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 allegation letters in no way prejudice any opinion the Working Group may render. The Government is required to respond separately for the allegation letter procedure and the regular procedure.

Please accept, Excellency, the assurances of our highest consideration

Elina Steinerte

Vice-Chair of the Working Group on Arbitrary Detention
Felipe González Morales
Special Rapporteur on the human rights of migrants

Maria Grazia Giammarinaro
Special Rapporteur on trafficking in persons, especially women and children

Dubravka Šimonović
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Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your Excellency's Government attention to Article 6 of the UNODC Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, which has been ratified by Your Excellency on 5 May 2011, indicates States' obligations in relation to protection of victims of trafficking in persons, which include (1) provide information on relevant courts and administrative proceedings; (2) provide assistance to enable victims to express their views at appropriate stages of criminal proceedings (3) provide physical, psychological and social recovery of victims of trafficking in persons; (4) take into consideration the age, gender and special needs of victims of trafficking, in particular the special needs of children, including appropriate housing, education and care.

In addition Article 7 of the same Protocol regulates that States regulates the status of victims of trafficking in persons in receiving States: shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases, giving appropriate consideration to humanitarian and compassionate factors.

The *OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking* confirm that States are under "an obligation to ensure that identification of victims of trafficking can and does take place", as "failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights".

The same principles also reaffirm that trafficked persons should not be charged or prosecuted for "violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons". Where possible, this should be enshrined in law. The aim of such a provision is to safeguard the human rights of victims, to avoid further victimization and to encourage them to act as witnesses in criminal proceedings against the perpetrators. In this regard, the non-criminalisation principle reflects other basic principles recognized by most legal systems relating to responsibility and accountability for criminal offences.

Article 9.1 of the International Covenant on Civil and Political Rights (ICCPR), which Your Government has ratified in 1979, provides that everyone has the right to liberty and security of person. The enjoyment of the rights guaranteed in ICCPR is not limited to citizens of States parties but "must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (CCPR/C/21/Rev.1/Add. 13 (2004), para. 10). The detention of migrants and asylum seekers should thus be a measure of last resort. Article 9.4. further stipulates that 'anyone who is deprived of his liberty by arrest or detention shall be entitled to take

proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful’.

As per the provisions in the Revised Deliberation No. 5 on deprivation of liberty of Migrants from the Working Group on Arbitrary Detention, the detention of migrants in other situations of vulnerability or at risk, such as pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, or survivors of trafficking, torture and/or other serious violent crimes, must not take place.

Under article 14.7 of ICCPR, “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

With specific regard to detention of victims of trafficking, according to *OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking*, the risk of detention being characterized as unlawful or arbitrary is high if it can be shown that such detention meets one or more of the following criteria: (a) the detention is not specifically provided for in law or is imposed contrary to law; (b) the detention is provided for - or imposed in - a discriminatory manner (e.g. only applicable to women and girls/children); (c) the detention is imposed for a prolonged, unspecified or indefinite period; (d) the detention is unjust, unpredictable and/or disproportionate; (e) the detention is not subject to judicial or administrative review which can confirm its legality and that it continues to be necessary in the circumstances, allowing the possibility for release, where no grounds for its continuation exist.

It is also important to note that international law places additional obligations on States with regard to the **detention of children** – including child victims of trafficking. The rules are governed by the overriding principle of respect for the child’s best interests. The strictness of rules around juvenile detention recognizes the fact that detained children are highly vulnerable to abuse, victimization and violation of their rights.

According to the UN Convention on the Right of the Child, which Your Government has ratified in 1992, article 20 reads: “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.” Article 37 foresees that detention should always be used as a measure of last resort and we strongly urge your Excellency’s Government to consider alternatives to their deprivation of liberty and codify these provisions accordingly into national law.

As per the Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, children should never be detained for reasons related to their or their parents’ migration status and States should expeditiously and completely cease or

eradicate immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.

With regard to the conditions of detention, we would like to draw the attention of Your Excellency's Government to the Standard Minimum Rules for the Treatment of Prisoners (adopted by the Economic and Social Council by resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977). We would also like to draw Your Excellency's Government's attention to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly on 9 December 1988 (adopted by General Assembly resolution 43/173 of 9 December 1988). The Committee against Torture and the Human Rights Committee have consistently found that conditions of detention can amount to inhuman and degrading treatment.

As per article 3 of the UN Convention on Elimination of All Forms of Discrimination Against Women, which Your Government has ratified in 1993, States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Finally, with regards to India, the Committee on the Elimination of Discrimination against Women, in its *Concluding Observations* of 24 July 2014, while acknowledging "the establishment of anti-trafficking units, awareness-raising programmes and a task force on human trafficking", expressed concern over "the alarming persistence of trafficking, both internal and cross-border, the lack of protection and services available to women and girls who are victims of trafficking and sexual exploitation and the lack of efforts to tackle the root causes."