

**Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on minority issues; the Special Rapporteur on the situation of human rights in Myanmar and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance**

REFERENCE:  
AL IND 5/2019

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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 minority issues; Special Rapporteur on the situation of human rights in Myanmar and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, pursuant to Human Rights Council resolutions 33/30, 34/21, 34/6, 34/22 and 34/35.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the situation faced by ethnic Rohingya refugees and asylum-seekers in India, including alleged arbitrary arrests and detention, due to their absence of documentation. Furthermore, we have received information concerning decisions from your Excellency's Government to forcibly return Rohingya refugees to Rakhine state in Myanmar, which may result in the violations of their human rights

A previous communication (IND 22/2018) sent on 2 October 2018 addressed the forced return of persons belonging to the Rohingya ethnic group to Rakhine state in Myanmar by Indian authorities. We regret that we have not received a response from your Excellency's Government. We reiterate our concerns at the Indian authorities' decision to complete the deportation of the individuals referred to in communication IND 22/2018 and to forcibly return them to the Rakhine state, Myanmar, shortly after the reception of such communication.

According to the information received:

*Forced deportations of Rohingyas from India to Myanmar*

On 4 October 2018, the Supreme Court of India heard a petition to halt the deportation of seven Rohingya men that were the subject of the urgent appeal IND 22/2018 and grant UNHCR access to these men. The Supreme Court dismissed the application. As per the Government's affidavit, the Government of Myanmar identified the group of seven men as Myanmar nationals and agreed to issue them a "Certificate of Identity", which is an emergency travel document for return to Myanmar in the absence of valid passports or visas. On that same day, the seven

Rohingya men were returned to Myanmar via the Manipur border. These men were allegedly transported to their villages in central Rakhine state, Myanmar.

On 2 January 2019, a Rohingya man who had been detained in Haryana state in India, for allegedly entering the country irregularly, was forcibly returned to Myanmar. Latest reports mentioned that he was in Sittwe, Myanmar, awaiting to return to his village.

On 3 January 2019, five Rohingya asylum-seekers from Rakhine state and registered with UNHCR in India, were forcibly returned to Myanmar. They had been detained in the state of Assam, where they had been serving a prison term since 2013 for irregular entry in the country. The five asylum-seekers were part of a family of eight. Three family members, including two children, remain detained in India to date, allegedly awaiting travel permits. It is reported that the Indian authorities failed to grant UNHCR officers access to the Rohingya detainees to determine whether or not they were willing to return to Myanmar.

#### *Arrests and alleged arbitrary detentions of Rohingyas in India*

##### *Case of 14 Rohingyas detained in Habra, West Bengal:*

On 20 December 2018, the Habra police in West Bengal arrested fourteen Rohingya people, including three women and six children as young as nine months old. The group of fourteen Rohingyas had reportedly entered the territory through the India-Bangladesh border without valid documents. On the same day and after being arrested under section 14 of the 1946 Foreigners Act, the whole group was sent into judicial custody for fourteen days at Dum Dum correctional home in West Bengal. It is reported that to date, they have not been produced before a court as they should have been on 4 and 16 January 2019. While eight Rohingyas in the group are refugees registered with UNHCR, six detainees, all belonging to the same family and including two children, are not yet registered. They all remain in detention to date.

During the week of 14 January 2019 alone, the Indian authorities arrested 61 people of Rohingya ethnicity, allegedly for lack of travel documents and/or entering irregularly the country.

##### *Case of 31 Rohingya people stranded at the border between Bangladesh and India:*

On 18 January 2019, the Indian Border Security Force (BSF) prevented 31 Rohingya people, including 17 children, from entering the country, forcing the group to remain at the border between India's Tripura state and Bangladesh. The Border Guards of Bangladesh (BGB) reportedly had previously stopped the group. The group of 31 people stayed for four days in "no man's land" on the border between India and Bangladesh. The BSF reportedly provided food, water and

blankets to the group. On 22 January 2019, the BSF arrested all members of the group and handed them over to the Tripura state police. The group of 31 Rohingyas was presented before a local court within the 24 hour timeframe as stipulated by law and charged under sections 3 and 4 the Passports Act, for non-possession of travel documents.

The group reportedly explained that they had fled a military offensive in Rakhine state, Myanmar in 2012, and that they entered India via the border state of West Bengal, then made their way to the state of Jammu and Kashmir. In 2018, in the wake of threats and attacks towards Rohingya people by local groups and government authorities in Jammu city, the group of 31 people decided to leave the region and go to Bangladesh where they believed they would be safer.

On 4 and 6 February 2019, the court granted bail and released the adult women and men in the group. The court had earlier released 17 children. The 31 Rohingya refugees were all registered with UNHCR during their detention. On 11 February, the group safely returned to Jammu where UNHCR and partner organisations provided support including for their travel, food as well as medical and psycho-social assistance.

*Case of 30 Rohingyas arrested in Karimganj, Assam:*

On the evening of Monday 21 January 2019, Indian police arrested another group of 30 Rohingyas in the state of Assam, for irregular stay without a valid visa allegedly in violation of the Foreigners Act. This group also claimed they had left Jammu and were travelling to Agartala, the capital of Tripura state via Guwahati in Assam where they were stopped. Assam state police confirmed that the group had UNHCR refugee cards, with the exception of a one-year-old child, and that they arrested them to verify where the group had come from and where they were going. The group remain detained to date in Karimganj detention centre, in the state of Assam.

*Case of seven Rohingya children arrested in Dharmanagar, Tripura:*

On 3 February 2019, Indian Railway Protection Force arrested 7 Rohingya children at a railway station in Northern Tripura. It is reported that the children were placed at Dharmanagar Juvenile Home, which is a place for children in conflict with law. To date, the Juvenile Justice Board was hearing the matter and it is reported that there is no criminal charge against them. The girls of the group were allocated to a room in the girls' area and the boys were placed in the boys' home.

According to the Indian Ministry of External Affairs, there are currently about 40,000 Rohingya refugees and asylum-seekers in India. 18,000 of them are registered with UNHCR in India, mainly living across the states of Jammu and Kashmir, and Telangana.

We would like to raise our serious concern about the situation faced by refugees and asylum seekers of Rohingya ethnicity. We are deeply concerned at the reports of forced returns to Myanmar, especially to Rakhine state where conditions are not conducive for a safe, sustainable and dignified return. We wish to reiterate the grave concern we expressed in communication IND 22/2018 about Indian authorities' forced return of persons belonging to the Rohingya ethnic group back to Myanmar, where they might face attacks, reprisals and other forms of persecution because of their ethnic and religious identity.

We would like to reiterate the findings of the report of the United Nations International Independent Fact-Finding Mission on Myanmar published in September 2018. The report highlighted, inter alia, that the indiscriminate killing of Rohingya children, women and men amounted to the level of both war crimes and crimes against humanity. The Mission further found that the manner in which these crimes were perpetrated may allow for an inference of genocidal intent. These human rights violations and other violations of international law mainly occurred in Rakhine state where some of the abovementioned people are originated.

We are also concerned that the Indian legal process of refugee status determination seems to violate international human rights standards, as the group of five individuals returned to Myanmar on 3 January 2019 did not seem to have benefited from an adequate identification of their protection needs and verification of their refugee status. This forced return also resulted in the separation of the family, five of them having been returned to Myanmar while three others, including two children, remain in detention in India.

Furthermore, we express our concern regarding the use of alleged arbitrary detention as a punitive deterrent of irregular entry, contrary to international human rights norms and standards. In the majority of the abovementioned cases, the individuals have been subject to arbitrary detention, often for prolonged periods, often due to their inability to present valid identity documents to the authorities. We express our serious preoccupation about detention of children. We further express concern that the systematic use of indefinite detention of Rohingyas, followed in some cases by involuntary and forced deportation to Rakhine state, demonstrates a pattern of racism and intolerance against refugees and asylum-seekers of Rohingya ethnic minority.

Finally, we are concerned at the shortfall of process guarantees for asylum seekers and refugees who seek protection in India. This is a possible violation of the non-refoulement principle, lacking proper individual assessment, and at deportations which, in some cases, may result in family separations.

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/comment you may have on the above mentioned allegations.
2. Kindly provide information on measures taken to ensure the rights of protection and due process guarantees for Rohingya refugees and asylum-seekers who have been granted UNHCR protection status, including the right to be heard by relevant authorities, the right to legal representation, as well as access to an effective remedy to appeal a deportation decision. Kindly explain what, if any, measures have been undertaken to cease long immigration detention, prevent family separation and deportation without effective individual assessment, in light of international human rights standards.
3. Kindly provide information on the individual assessment that is being carried out in order to ascertain the necessity to detain aforementioned individuals.
4. Kindly provide information on the measures in place to ensure that children are not detained in given context.
5. Kindly provide information on whether Rohingya subject to deportation were fully informed of the situation in their place of origin.
6. Kindly provide information about the Government's protection need assessments concerning persons of Rohingya ethnicity, especially in light of the September 2018 conclusions of the United Nations International Independent Fact-Finding Mission on Myanmar.
7. Kindly provide detailed information on any agreement made between the Governments of India and Myanmar that led to the deportations of Rohingya people back to Rakhine state in Myanmar.
8. Please provide information on the factual and legal basis for the ongoing immigration detention of Rohingya people in the state of Assam.
9. Kindly explain what mechanisms are available to ensure that persons belonging to the Rohingya ethnic group are able to exercise their right to seek asylum and determine whether they are in need of international protection.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within

60 days. 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 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 may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issues in question.

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

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Vice-Chair of the Working Group on Arbitrary Detention

Felipe González Morales  
Special Rapporteur on the human rights of migrants

Fernand de Varennes  
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Yanghee Lee  
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Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia  
and related intolerance

## **Annex**

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

In connection with the above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the following international legal norms and standard:

With regard to the above mentioned situation of Rohingya people in India, we would like to remind your Excellency's Government of its obligations under the International Convention on the Elimination of All forms of Racial Discrimination (ICERD), ratified by India on 3 December 1968. In particular, we recall article 1 on the prohibition of racial discrimination; article 2 on the obligation of the States to eliminate any act or practice of racial discrimination against persons and/or groups of persons; article 5 on the right of everyone, without any distinction, to equality before the law; and article 6 on the right of everyone to effective protection against and remedy for acts of racial discrimination.

We further wish to bring to the attention of your Excellency's Government Recommendation XXX on Discrimination against Non-Citizens (2004) of the Committee on the Elimination of Racial Discrimination (CERD Committee). In this General Recommendation, the CERD Committee clarifies that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim" (para. 4). In this context, the CERD Committee calls upon States Parties to ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status and that laws and policies relating to immigration, deportation, or other forms of removal of non-citizens do not discriminate—in purpose or effect—on the basis of race, colour or ethnic or national origin (paras. 7, 9 and 25). States should ensure that all non-citizens "[...] have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies" (para. 25).

With regard to the expulsion and forced return of non-citizens, the CERD Committee reiterates the principle of non-refoulement and the international human rights law prohibition of collective expulsions (para. 27). It further notes that expulsions of non-citizens should be avoided if this would result in disproportionate interference with the right to family life (para. 28). In addition, the CERD Committee urges States to take resolute action against the tendency to target, stigmatize, stereotype or profile members of "non-citizen" population groups on the basis of race, colour, descent, and national or ethnic origin (para. 12) and to guarantee the security of non-citizens, especially with regards to arbitrary detention (para. 19).

With regard to the expulsion of non-nationals, we would like to remind your Excellency's Government of the right to seek and enjoy asylum as enshrined in article 14 of the Universal Declaration of Human Rights (UDHR). In this context, we further reiterate that India has undertaken an international human rights law commitment not to

deport individuals to States where those individuals are at substantial risk to face torture, ill-treatment or arbitrary deprivation of life. Under ICCPR articles 6 and 7, India is obliged not to deport individuals, regardless of refugee status, to arbitrary deprivation of life or to cruel, inhuman or degrading treatment. In its General Comment No. 20, the Human Rights Committee states that in order to fulfil the obligations under article 7 of ICCPR, “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”

Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) signed by India on 14 October 1997, the principle of non-refoulement and prohibition of a return to a place where individuals are at risk of torture and other ill-treatment is enshrined in article 3 of CAT. It stipulates that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Accordingly, non-refoulement under the CAT must be assessed independently of refugee or asylum status determinations, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed. Because non-refoulement is a peremptory international law norm, India cannot use its decision not to ratify CAT or the Refugee Conventions to limit human rights law obligations never to refoul individuals. India’s commitments under the ICCPR also prevent such a justification. Similar to prohibitions under CAT, India’s obligations under the ICCPR prohibit India from engaging in any practices that result in refoulement of an individual to torture or other cruel, inhuman and degrading treatment.

Concerning the use of long and indefinite detention, we remind your Excellency’s Government of the right not to be deprived arbitrarily of liberty and the right to fair proceedings before an independent and impartial tribunal as enshrined in articles 9 and 10 of the UDHR and articles 9 and 14 of the ICCPR. International human rights law prohibits the use of detention as a deterrent or punitive measure against refugees and asylum-seekers. We also recall that the enjoyment of the rights guaranteed in the ICCPR are not limited to citizens of States parties but “must also be available to all individuals, regardless of their 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). In addition, we would like to remind your Excellency’s Government of the guarantees concerning persons held in custody as defined in Deliberation No. 5 on situation regarding immigrants and asylum-seekers of the Working Group on Arbitrary Detention.

We also remind your Excellency’s Government that, in accordance with Principle 18 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, children may only be deprived of their liberty as a measure of last resort and for the shortest possible period of time. The right of the child to have his or her best interests taken as a primary consideration shall be paramount in any decision-making and action taken in



relation to children deprived of their liberty time. The exercise of the right to challenge the arbitrariness and lawfulness of the detention of children shall be prioritized and be rendered accessible, age appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.

Finally, with regard to the protection and promotion of the rights of persons belonging to minorities, we bring to the attention of your Excellency's Government Article 27 of the ICCPR, and the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, Linguistic Minorities. Article 1 of the Declaration refers to the obligation of States to protect the existence and identity of minorities within their territories and to adopt measures to that end, whereas article 4.1 establishes that "States will take measures where required, to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law."