

**LOCKED IN AND LOCKED OUT:
THE IMPACT OF DIGITAL IDENTITY
SYSTEMS ON ROHINGYA POPULATIONS**

THE INSTITUTE ON STATELESSNESS AND INCLUSION

IN ASSOCIATION WITH THE UN SPECIAL RAPPORTEUR
ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION,
XENOPHOBIA AND RELATED INTOLERANCE

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About the Institutes on Statelessness and Inclusion and this initiative.

The [*Institute on Statelessness and Inclusion \(ISI\)*](#) is the first and the only human rights NGO dedicated to working on statelessness at the global level. Its Mission is to promote inclusive societies by realising and protecting the right to a nationality.

The root causes of the deprivations and marginalisation endured by the Rohingya community over multiple decades, are based on racist, discriminatory and xenophobic ideologies, laws and policies. While Myanmar is the source of these deprivations, other countries have also failed to provide meaningful protection, status or rights to Rohingya, whether they fled to their country or were born there. In this context, a principled and sustained human rights framing of the challenges, which is rooted in the information, expertise and solutions put forward by Rohingya activists, and which challenges and shapes responses to the crisis by states, UN agencies, humanitarian actors and others, is much needed. This initiative aims to provide such a framing, through the production of briefing papers and other interventions on different human rights challenges.

This is the second paper to be produced under this initiative. The first paper, published in August 2020, looked at the impact of the COVID-19 pandemic on Rohingya communities.

INTRODUCTION AND METHODOLOGY

Rohingya communities have been arbitrarily deprived of their nationality and persecuted in Myanmar, while also being denied adequate protection as refugees and stateless persons in neighbouring countries. At the centre of their insecurities and vulnerabilities, is a lack of legal status as citizens in Myanmar, and as residents, refugees and stateless persons elsewhere. For over 30 years, Rohingya in Myanmar have been subject to one of the world's most oppressive registration and surveillance systems, the ultimate aim of which has been to exclude and persecute. In other countries, they have been left out of civil documentation procedures in order to deny them a legal status and thus avoid state responsibility. In more recent times, national personal identification systems are increasingly moving from the paper-based to digital; bringing opportunities to protect, but also potential to entrench exclusion, denial and persecution.

This Briefing Paper contextualises Rohingya human rights and protection concerns within the global trajectory towards legal identities for all and the increased digitisation of identification systems. The paper relates Rohingya experiences of registration systems to wider human rights challenges around racial and xenophobic discrimination,¹ digital technologies and borders, as articulated in a recent report by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (hereinafter referred to as the 'Special Rapporteur on Racism'):²

“

*Governments and non-state actors are developing and deploying emerging digital technologies in ways that are uniquely experimental, dangerous, and discriminatory in the border and immigration enforcement context. By so doing, they are subjecting refugees, migrants, stateless persons and others to human rights violations, and extracting large quantities of data from them on exploitative terms that strip these groups of fundamental human agency and dignity.*³

TENDAYI ACHIUME

The central message of this paper is the urgent imperative to learn from the past and from other contexts, before it is too late. The lessons flowing from previous failures of the international community to protect the Rohingya, and the warning signs emerging from premature attempts to roll out digital ID elsewhere, without first ensuring that the right law and policy framework is in place, must be listened to. The political, economic, institutional and pragmatic reasons to downplay or dismiss such warnings can be immense, but the cost of doing so is likely to be greater still. The Rohingya have endured unthinkable atrocities over many decades, and the world owes it to them to at least now, put a premium on their safety, security, dignity and equality.

Methodology and Approach

The paper, which focuses primarily on the situation in India, Bangladesh and Myanmar, also draws on the consultations related to the thematic report on Race, Borders and Digital Technologies presented to the United Nation's General Assembly 2020 by the UN Special Rapporteur on Racism.⁴ ISI assisted the Special Rapporteur on Racism to organise consultations with experts by experience, academics and practitioners in the statelessness, refugee rights and migrant rights fields. Two of the authors of this report directly participated in the Special Rapporteur on Racism's consultation process, while others made submissions to it. These consultations drew attention to how bordering technologies can compound statelessness and impact the human rights of stateless persons by furthering exclusion and discrimination and extending state surveillance capacities. Drawing on some of the issues highlighted during the consultation, this paper considers in more detail the use of digitised registration and biometric ID cards as bordering technologies and how these technologies impact stateless communities.⁵ In doing so, it considers the experiences and concerns of Rohingya, as one stateless community, in different national contexts which are at various different stages of digitising ID cards and national and refugee registration.

¹ Under international human rights law, prohibited racial discrimination is defined broadly to include discrimination on the basis of "race, colour, descent, or national or ethnic origin[.]" International Convention on the Elimination of Racial Discrimination Article 1.1.

² Ms. E. Tendayi Achiume, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/75/590 (November 2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020] ³ This paper is based on the information provided during the webinar and focus groups. It does not include desk-based research.

⁴ Ibid

⁵ Ibid

This paper is part of a wider collaboration on the human rights of Rohingya living in Myanmar and in refugee situations elsewhere. The paper recognises the need for Rohingyas to drive solutions for their own futures, and for international organisations and NGOs to be accountable to the Rohingya and to value Rohingya knowledge and analysis by placing it at the centre of projects and initiatives. As such it reflects and incorporates not just the experiences, but also the views, concerns and analyses of Rohingyas impacted by human rights issues.

This paper comprises five main parts. This Introduction, also provides below, an overview and background of the Rohingya and their legal status. Chapter 1 provides an overview of the concept of ‘legal identity’ and explores the drive towards greater digitisation of identity. Chapters 2, 3 and 4 look more closely at the prevailing situation related to digital identities and the Rohingya in India, Bangladesh and Myanmar respectively. These chapters also provide country specific recommendations. Finally, chapter 5 offers some general concluding reflections and recommendations.

The paper is co-authored by researchers and practitioners with in-depth knowledge and experience of the different country contexts, as well as the international and cross-border context of how statelessness and persecution impact Rohingya communities. In drafting the paper, the researchers have drawn on their own existing field work, experience, research findings and analysis of the country contexts to contribute to an understanding of the cross-border and intersecting issues. The paper is also supplemented by additional interviews and analysis with Rohingyas in Myanmar, Bangladesh, India and beyond.

Background: Rohingya and their Legal Status

Rohingya are a predominantly Muslim ethnic community from Rakhine State Myanmar, whose histories in Rakhine, by far pre-date modern nation states and borders. The arbitrary deprivation of nationality by Myanmar, which was initiated under military rule, is a key element in the decades-long persecution of Rohingya. Myanmar’s genocide of the Rohingya and their lack of pro

tection as refugees outside Myanmar are strongly linked to Myanmar’s systematic production and perpetuation of Rohingya statelessness. The arbitrary deprivation of nationality and related systemic violations of numerous fundamental human rights, was part of a wider strategy aimed at “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”.⁶

Myanmar’s ethno-centric and exclusionary 1982 Citizenship Law, together with the arbitrary implementation of citizenship rules, provided a domestic framework that sanctioned discrimination, persecution and expulsion. Denial of citizenship - and importantly, the groups claim to citizenship by right - reinforced state narratives that Rohingyas were foreigners – ‘illegal immigrants’ – unworthy of state protection. This in turn, reinforced narratives which undermined the very identity of the Rohingya. Powerful voices dictated that ‘there is no ethnic group called Rohingya’ and ‘they are Bengali’, contributing to the stripping of identity, dignity and rights of the group.⁷

Within the context of citizenship stripping and the denial of their ethnic identity, Rohingya have reported that since the 1970s, state authorities have systematically confiscated and cancelled identity documents and other evidence that could be used as proof of their (former) citizenship and inter-generational residency; while simultaneously maintaining detailed records of Rohingya in Myanmar that are used predominantly for surveillance and population control purposes.⁸ Abuses by state authorities relating to household registration have been reported across decades including extortion, arbitrary arrest and torture. In 2015, Myanmar authorities cancelled the “white cards” or “Temporary Registration Cards (TRCs)” that Rohingya had held for twenty years, thus stripping them of voting rights ahead of the 2015 elections. Since then, Myanmar has attempted to roll out new ID cards to Rohingya in Rakhine State that identify the holders as non-citizens who require their nationality to be verified. These ID cards are known as National Verification Cards (NVCs). Whilst Myanmar insisted that the national verification process could lead to citizenship for some, many Rohingya resisted the implementation of this scheme on the basis that it erased their group identity and locked in a status of non-citizenship for the group. Within this con-

⁵ Borders, for the purpose of this paper, are understood not only to relate to physical boundaries between countries, but also: “The rise of digital borders”—which, according to the UN Special Rapporteur on Racism, “refers to borders whose infrastructure and processes increasingly rely on machine learning, automated algorithmic decision-making systems, predictive analytics and related digital technologies. These technologies are integrated into identification documents, facial recognition systems, ground sensors, aerial video surveillance drones, biometric databases, asylum decision-making processes and many other facets of border and immigration enforcement”. Ibid.

⁶ UN Convention on the Prevention and Punishment of the Crime of Genocide, Article 2 (1948) available at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

⁷ ISI, ‘Human Rights and Covid-19: What now for the Rohingya?’ (2020) available at: <https://www.institutesi.org/resources/human-rights-and-covid-19-what-now-for-the-rohingya> [accessed 13/11/2020]

⁸ This includes the data from the “family lists” which lists every individual resident in Rohingya areas along with former ID card numbers and other biographic data. This data has been regularly and thoroughly checked by both village level administration and state authorities.

text, attempts were made to pilot the collection of biometric data from some Rohingya in Rakhine, with a view to developing e-ID cards in future.⁹ Rohingya reported the increasing use of coercion and force by government officials and armed security forces in attempting to issue the NVCs.¹⁰ In 2016 and 2017, the forced issuance of the NVCs coincided with the waves of genocidal violence by security forces as part of their ‘security operations’ against Rohingya.¹¹ This resulted in the expulsion of 725,000 Rohingya into Bangladesh.¹²

Rohingya have fled to Bangladesh across many decades, with mass expulsions also occurring in 1978 and 1991-1992, followed by two mass forced repatriations which proved unsustainable. More than 200,000 Rohingya made their way back into Bangladesh in the years in between, driven by an increasingly precarious legal status in Myanmar and a lack of state protection.¹³ In 2016, Bangladesh began to digitise the national ID system with a view to prevent forgery and improve service access for citizens. After the 2017 Rohingya arrivals, the refugee registration system was also digitised. Digitised registration was viewed as supporting evidence of Rohingyas’ right to return to Myanmar, whereby proof of residence in Rakhine was not contingent on Myanmar’s paper-based registration system that was open to abuse.

The digitisation of refugee registration was also needed to improve the efficiency of aid delivery and access to basic services for refugees, as well as other protections and benefits. However, the collection and storage of biometric and biographic information comes with risks and concerns, in particular Rohingyas in the camps are concerned about how this data will be used in relation to future repatriations back to Myanmar.¹⁴

In 2012, a campaign of state-led violence drove at least 130,000 Rohingya and Muslims from their homes in Rakhine. Most remain detained in internment camps in Rakhine state and are subjected to restrictions of movement and restrictions of their rights.¹⁵ With restrictions and a lack of protection available in Bangladesh, between 2012 and 2015, an estimated 170,000 Rohingya boarded boats from Rakhine and Bangladesh and made perilous journeys across the sea to southeast Asia.¹⁶ Tens of thousands also made their way on the slightly less dangerous overland routes to join other Rohingyas in India. In India, biometric IDs or Aadhaar cards provided holders with access to a wide range of services. Rohingyas’ legal status in the country became increasingly precarious in 2017 and the Aadhaar system together with citizenship and population registers has produced further exclusions and insecurities for Rohingya. In particular, Rohingyas have highlighted the increased risk of refoulement to Myanmar, and concerns about the sharing of biographic and biometric data and surveillance information between India and Myanmar. They remain concerned about the risk of the forced implementation of Myanmar’s national verification processes on return.

Across the decades, without legal status and state protection in either Myanmar or Bangladesh, many Rohingya moved onwards to Saudi Arabia, Malaysia, and elsewhere in the Middle East, South and Southeast Asia. In most of these settings, Rohingya do not have access to a secure legal status and either live in refugee camps dependent on aid, or work in the informal and unorganised sectors of the economy. Without legal status, their lives are precarious, and they experience intergenerational statelessness.

⁹ A forthcoming briefing from Privacy International sets out what is known to date about the new digital ID proposal in Myanmar and raises some specific concerns based on Myanmar’s current citizenship regime and ID system.

¹⁰ N. Brinham, ‘Looking Beyond Invisibility: Rohingyas’ Dangerous Encounters with Papers and Cards’ (2019) 24 *Tilburg Law Review* 2, available at: <https://tilburglawreview.com/articles/10.5334/tilr.151/#> [accessed 13/11/2020]

Fortify Rights, ‘“Tools of Genocide”: National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar’ (2019) available at: <https://www.fortifyrights.org/downloads/Tools%20of%20Genocide%20-%20Fortify%20Rights%20-%20September-03-2019-EN.pdf> [accessed 13/11/2020]; See also, R. Potter, and Kyaw Win, ‘National Verification Cards - a barrier to Rohingya repatriation’, Burma Human Rights Network (2019) available at: <http://www.bhrn.org.uk/en/report/1090-national-verification-cards-a-barrier-to-rohingya-repatriation-full-report.html> [accessed 13/11/2020]

¹¹ P. Green, T. McManus, & A. de la Cour Venning, ‘Genocide achieved, genocide continues: Myanmar’s annihilation of the Rohingya’ (2018) available at: <http://statecrime.org/data/2018/04/ISCI-Rohingya-Report-II-PUBLISHED-VERSION-revised-compressed.pdf> [accessed 13/11/2020]; See also UNHCR, ‘Report of the independent international fact-finding mission on Myanmar’ (2018) available at: <https://www.ohchr.org/en/hrbodies/hrc/myanmarFFM/Pages/ReportoftheMyanmarFFM.aspx> [accessed 13/11/2020]

¹² The UN Independent Fact-Finding Commission on Myanmar: The Human Rights Catastrophe in Northern Rakhine State 2017 (2018), available at: <https://www.ohchr.org/SiteCollectionImages/Bodies/HRCouncil/MyanmarFFM/Report2018/Rakhine.jpg> [accessed 11/11/2020]

¹³ ‘UNHCR Global Appeal 2012-2013’ (2012) available at: <https://www.unhcr.org/ga12/index.xml> [accessed 13/11/2020]

¹⁴ N. Brinham, ‘“Genocide cards”: Rohingya refugees on why they risked their lives to refuse ID cards’, Open Democracy (2018) available at: <https://www.opendemocracy.net/natalie-brinham/genocide-cards-why-rohingya-refugees-are-resisting-id-cards> [accessed 11/11/2020]; See also, The Engine Room, ‘Understanding the Lived Effects of Digital ID: A Multi-Country Study’ (2020) available at: https://digitalid.theengineroom.org/assets/pdfs/200123_FINAL_TER_Digital_ID_Report+Annexes_English_Interactive.pdf [accessed 13/11/2020]

¹⁵ Human Rights Watch, ‘“An open prison without end”: Myanmar’s mass detention of Rohingya in Rakhine State’ (2020) available at: <https://www.hrw.org/report/2020/10/08/open-prison-without-end/myanmars-mass-detention-rohingya-rakhine-state> [accessed 13/11/2020]

¹⁶ UNHCR, ‘Mixed Maritime Movements in South-East Asia in 2015’ (2016) available at: <https://reporting.unhcr.org/sites/default/files/UNHCR%20-%20Mixed%20Maritime%20Movements%20in%20South-East%20Asia%20-%202015.pdf> [accessed 13/11/2020]

This severely impacts their access to rights and services and leaves them vulnerable to external social and economic shocks. As Co-founder of the Free Rohingya Coalition, **Nay San Lwin**, explains:

“

The global push for digitised and biometric IDs and borders can only benefit Rohingya once Myanmar restores the citizenship and ethnic rights of Rohingya. No countries except western countries want to legalise the status of the Rohingya. All these countries believe that Rohingya belong to Myanmar and they should have legal status in Myanmar. So, none of them considered legalising the status of hundreds of thousands of people who need proper education, livelihood, etc. All the Rohingya except in western countries will suffer until Myanmar restores all due rights.

1. LEGAL IDENTITY FOR ALL AND DIGITISATION OF ID

One facet of the digital border is the expansive use of biometrics or the “automated recognition of individuals based on their biological and behavioural characteristics[.]” Biometrics can include fingerprint data, retinal scans, and facial recognition, as well as less well-known methods such as the recognition of a person’s vein and blood vessel patterns, ear shape, and gait, among others. Biometrics are used to establish, record and verify the identity of migrants and refugees... Researchers have documented the racialized origins of biometric technologies, as well as their contemporary discriminatory operation on the basis of race, ethnicity and gender... The frequent results of this differential treatment include perpetuation of negative stereotypes, and even prohibited discrimination that for asylum seekers might lead to refoulement.¹⁷

Recent years have seen more countries introduce and roll out digital identification systems, which store biometric data and have become gateways to access other rights and services. This global push for digital identification systems can be understood within the context of the UN Sustainable Development Goals (SDGs) target to

achieve “legal identity for all” by 2030.¹⁸ The aim of the SDGs is to “leave no one behind”, and there can be strong arguments made, that the push for digital identity can be an equaliser, through which previously undocumented and unseen groups are counted and thereby factored into development planning. This push may even provide an opportunity to ensure that stateless or undocumented persons are included in the mainstream development agenda.¹⁹ Digital identities can be utilised towards social protection and poverty alleviation, enabling marginalised or hard to reach communities to access services²⁰ more easily, including health, social and financial services. Within this context, large development actors, including private tech companies, have prioritised digital solutions to these issues. The most significant of these drives is the World Bank Group’s ID for Development programme (ID4D).

The goal of the ID4D is for all people to be able to access services and exercise their rights, enabled by digital identification. ID4D directly supports countries to achieve Sustainable Development Target 16.9 and in making progress towards dozens of other targets such as poverty elimination, reduced inequalities, gender equality and women’s empowerment, safe and orderly migration, universal health coverage, and financial inclusion, among others.²¹ for Development programme (ID4D).

Agencies working with refugee and stateless populations such as UNHCR and IOM have also utilised biometric

¹⁷ Ms. E. Tendayi Achiume, ‘Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance’, A/75/590 (2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020]

¹⁸ UN Legal Identity Expert Group, ‘United Nations Strategy for Legal Identity for All’ (2019), paras 12 & 13, available at: <https://unstats.un.org/legal-identity-agenda/documents/UN-Strategy-for-LIA-draft.pdf> [accessed 13/11/2020]. While the SDG’s did not define the term ‘legal identity’, a subsequent operational definition was agreed by UN Legal Identity Expert Group. Accordingly: “Legal identity is defined as the basic characteristics of an individual’s identity. e.g. name, sex, place and date of birth conferred through registration and the issuance of a certificate by an authorized civil registration authority following the occurrence of birth... In the case of refugees, Member States are primarily responsible for issuing proof of legal identity. The issuance of proof of legal identity to refugees may also be administered by an internationally recognized and mandated authority”. This definition, while providing useful insight into how UN entities will be approaching SDG 16.9, is not necessarily reflective of a wider human rights based position, according to which key human rights principles (legal personhood, equality before the law, the right to a name, nationality and to know one’s parents etc.) should centrally inform understandings of legal identity. For a deeper critique, see Institute on Statelessness and Inclusion, “Statelessness, Human Rights and the Sustainable Development Agenda: A Working Paper” (2017), available at: https://files.institutesi.org/SDG_working-paper2017.pdf [accessed 13/11/2020]

¹⁹ A. Gelb and B. Manby, ‘Has Development Converged with Human Rights? Implications for the Legal Identity SDG’ (2016) available at: <https://www.cgdev.org/blog/has-development-converged-human-rights-implications-legal-identity-sdg> [accessed 11/11/2020]; See also, Institute on Statelessness and Inclusion, ‘Making SDG 16.9 work for the wider Sustainable Development Agenda: Lessons from the citizenship, statelessness and legal identity community’ (2019) available at: https://files.institutesi.org/legal_identity_policy_brief.pdf [accessed 13/11/2020]

²⁰ Internet Health Report, ‘A global push to identify everyone everywhere, digitally’ (2019) available at: <https://internethealthreport.org/2019/a-global-push-to-identify-everyone-digitally/> [accessed 13/11/2020]; See also P. Rawat and J. C. Morris, ‘The Global and the Local: Tracing the Trajectory of the Largest Biometric Identity Program’ (2019) 47 Politics & Policy 6, available at: <https://onlinelibrary.wiley.com/doi/epdf/10.1111/polp.12334> [accessed 13/11/2020] W. Ben-Hassine, ‘Digital identity programs: what could go wrong? Our contribution at UNCTAD’s E-Commerce Week’, Access Now Blog (2018) available at: <https://www.accessnow.org/digital-identity-programs-what-could-go-wrong-our-contribution-at-unctads-e-commerce-week/> [accessed 13/11/2020]

technologies in their registration processes with the dual aims of streamlining humanitarian assistance and providing more efficient social protection to vulnerable populations.²² In some contexts, digitisation efforts have been tested on migrants and refugees.²³

Nonetheless, the negative impacts involved in the push for digital identities are increasingly coming to light. For general populations, these effects may predominantly relate to intrusive state surveillance and the right to privacy.²⁴ For stateless and undocumented persons, digitised systems in some situations can also entrench exclusions. As stated by the **UN Special Rapporteur on Racism:**

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*Governmental and humanitarian biometric data collection from refugees and migrants has been linked to severe human rights violations against these groups, notwithstanding the bureaucratic and humanitarian justifications behind the collection of this data. Furthermore, it is unclear what happens to this collected biometric data and whether affected groups have access to their own data.*²⁵

At the 2019 World Conference on Statelessness, researchers and policy experts noted a number of risks associated with statelessness in the implementation of digital identity and citizenship registration schemes.²⁶

- Firstly, they underlined the importance of having legislative and policy structures in place prior to digitisation, to ensure that the provision of legal identity is not discriminatory or arbitrary. They warned without these structures, “even a well-designed digital solution will replicate exclusionary

practices already in place, not only leaving those unable to obtain documentation even further behind but effectively locking them out from the system for good.”²⁷

- Secondly, it was noted that centralised databases were linked to one unique identifier, number or a Single Source of Truth (SSOT). When access to all service and rights is contingent on one source, it can make the lives of the stateless or undocumented increasingly precarious. Errors in data entry or being logged under a category of “foreign” can have the devastating effect of locking people out of socio-economic and political participation. This can reduce the coping and survival strategies available to persons with precarious legal status.
- A third risk identified was that the digital ID sector is dominated by unsupervised private companies with “no normative structure, appropriate legal framework, centralised supervisory body and no civil society participation.” Without a regulatory framework, it is difficult to ensure that systems are accountable to populations on the ground, particularly marginalised communities. Thus, it is more difficult to ensure the “do no harm” approach that should guide all international development initiatives.

There are several examples of where digital identity systems have produced and entrenched exclusions, rather than enhanced social protections and alleviated poverty.²⁸ In the Dominican Republic, for example, against the backdrop of the deprivation of citizenship of Dominicans of Haitian descent, providing legal identities for all resulted in birth records for Dominicans of Haitian descent being transferred to a ‘foreign’ register. This undermined their citizenship claims, thereby barring them from equal access to education, employment and social welfare.²⁹ These issues have also been brought to light in Kenya, where a National Integrated Identity Management System (NIIMS) registration was to be

²¹ Institute on Statelessness and Inclusion, ‘Making SDG 16.9 work for the wider Sustainable Development Agenda: Lessons from the citizenship, statelessness and legal identity community’, (2019) available at: https://files.institutesi.org/legal_identity_policy_brief.pdf [accessed 13/11/2020]

²² IOM, ‘IOM and Biometrics’ (2018) available at: https://www.iom.int/sites/default/files/our_work/DMM/IBM/iom_and_biometrics_external_info_sheet_november_2018.pdf [accessed 13/11/2020]

The Engine Room, ‘Understanding the Lived Effects of Digital ID: A Multi-Country Study’, (2020) available at: https://digitalid.theengineroom.org/assets/pdfs/200123_FINAL_TER_Digital_ID_Report+Annexes_English_Interactive.pdf [accessed 13/11/2020]; See also, UNHCR, ‘More than half a million Rohingya refugees receive identity documents, most for the first time’ (2019) available at: <https://www.unhcr.org/news/briefing/2019/8/5d4d24cf4/half-million-rohingya-refugees-receive-identity-documents-first-time.html> [accessed 13/11/2020]

²³ Ms. E. Tendayi Achiume, ‘Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance,’ A/75/590 (2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020]

²⁴ A. Gelb and A. Diófasi Metz, ‘Identification Revolution: Can Digital ID Be Harnessed for Development?’ Centre for Global Development, (2018) available at: <https://www.cgdev.org/sites/default/files/identification-revolution-can-digital-id-be-harnessed-for-development-brief.pdf> [accessed 13/11/2020]; See also, M. G. Milone, ‘Biometric Surveillance: Searching for Identity’ (2001) 57 Business Lawyer 1, pages 497 – 512, available at: https://www.jstor.org/stable/40688067?seq=1#metadata_info_tab_contents [accessed 13/11/2020]. For comprehensive coverage see: Privacy International, ‘A Guide to Litigating Identity Systems’ (2020) available at: https://privacyinternational.org/sites/default/files/2020-09/PI_A%20Guide%20to%20Litigating%20Identity%20Systems_Biometrics.pdf [accessed 13/11/2020]

²⁵ Ms. E. Tendayi Achiume, ‘Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance,’ A/75/590 (November 2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020]

required to access universal healthcare, get a passport, register as a voter, apply for a driving licence, register a mobile phone number, pay taxes, open a bank account and more. Communities warned that this system, popularly known as 'Huduma Namba', could have a devastating impact on those who had struggled to secure citizenship documentation. In January 2020, following a legal challenge by Kenyan civil society groups, the court ruled to stop the implementation of the scheme until a regulatory framework was in place to address data privacy and exclusions.³⁰

As this paper evidences, the experiences of Rohingyas with the roll out of digital ID systems in India and Bangladesh provide further reasons for a cautious and rights-based approach, which must protect against discrimination and address underlying structural problems, before implementing digital identification systems. These warnings are especially pertinent for international and domestic actors involved in Myanmar's move towards a digitisation. At all stages in designing and implementing the new system, Myanmar's marginalised and disenfranchised communities must play a part.

²⁶ Institute on Statelessness and Inclusion, 'Making SDG 16.9 work for the wider Sustainable Development Agenda: Lessons from the citizenship, statelessness and legal identity community' (2019) available at: https://files.institutesi.org/legal_identity_policy_brief.pdf [accessed 13/11/2020]immigration enforcement".

²⁷ Ibid.

²⁸ There are further examples of Roma in Serbia and populations in Assam, India provided in the ISI briefing paper referenced above.

²⁹ E. Hayes de Kalaf, 'Making foreign: Legal identity, Social Policy and the Contours of Belonging in the Contemporary Dominican Republic' (2018) available at: <https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.774013> [accessed 13/11/2020]

³⁰ Open Society Justice Initiative, 'Kenyan Court Puts Hold on Digital Identity Scheme' (2020) available at: <https://www.justiceinitiative.org/newsroom/kenyan-court-puts-hold-on-digital-identity-scheme> [accessed 13/11/2020]; See also, Privacy International, 'A Guide to Litigating Identity Systems' (2020) available at: https://privacyinternational.org/sites/default/files/2020-09/PI_A%20Guide%20to%20Litigating%20Identity%20Systems_Biometrics.pdf [accessed 13/11/2020]

2. ROHINGYA AND DIGITALISATION IN INDIA: LOCKING IN A PRECARIOUS LEGAL STATUS ³¹

In India, there are around 17,000 Rohingya refugees registered with UNHCR³² and potentially tens of thousands more unregistered and living anonymously. Exact numbers are non-existent, partly as entry is not systematically recorded across India's extensive land border crossings. There is also no protection guarantee for Rohingyas who declare themselves to the state. UNHCR India has limited authority, reach and capacity in the country. Moreover, in August 2017, the Government of India declared the Rohingyas to be 'illegal migrants', so many may feel it safer to keep a low profile.

The legal position for Rohingyas in India has long been precarious, much like most other refugee communities. The political environment has worsened in recent years. The country does not have a domestic legal framework that recognises or protects refugees, nor is it signatory to the 1951 Refugee Convention (and its 1967 Protocol). A handful of immigration laws apply: the Foreigners Act (1946), the Passports (Entry into India) Act (1920), and the Registration of Foreigners Act (1939), as well as various related Rules and Orders.³³ These laws apply to all foreigners and make it an offence for anyone to be in India without a valid passport and visa. This puts most refugees and asylum seekers residing in India, including Rohingyas, at risk of arrest and deportation.

In December 2019, the Government passed the Citizenship (Amendment) Act (CAA), which amends the Citizenship Act of 1955 to grant an expedited path to Indian citizenship for certain minority 'refugee' groups under the assumption that they have faced religious persecution in their home country. The CAA only applies to individuals belonging to non-Muslim minorities from neighbouring Afghanistan, Bangladesh and Pakistan. Excluded from the CAA's protections are persecuted Muslims from the listed countries, as well as refugees from other states — for example, Muslim and Hindu Rohingya refugees from Myanmar, Hindu and Christian Tamil refugees from Sri Lanka, Buddhist refugees from Tibet, etc.

While not protected by the state as refugees, Rohingyas are entitled to UNHCR Refugee Cards after undergoing Refugee Status Determination. The Refugee Card, however, is often not recognised as a valid form of identification in a country where document identification is essential for accessing even the most basic of health and education services. In August 2017, just days before the Myanmar military launched its most recent act of genocide against the Rohingya, the former Indian Minister of State for Home Affairs, Kiren Rijiju, stated, 'the UNHCR registration means nothing. For us, all of them [Rohingyas] remain illegal migrants'.³⁴

Rohingyas have experienced difficulty in finding jobs, securing housing and accessing education across the country because these cards are not viewed to be valid. In Delhi, a **male Rohingya refugee** shared:

“

*I was working in a factory in Aligarh, where after a while maybe the owner realised that I am not Indian. He called me and asked for my documents. I showed him the Refugee Card, he said this is not valid and he fired me.*³⁵

For refugees in India who do not have 'valid documents', the immigration law framework provides for the issuance of Long-Term Visas (LTVs) or a similar residence permit. The LTV emerged out of India's history of Partition as a document given to people to authorise their settlement in India while the laws around citizenship were being finalised, between 1948 and 1955.³⁶ LTVs were later issued within India for wider purposes — for instance, when a short-term visa expires for applicants and they have to remain in India for longer (for reasons of origin country persecution, for example).³⁷ It is not exclusively a refugee-protection document however, as a legacy of its Partition origins, it can be issued on the basis of 'humanitarian concerns'.

³¹ Funding note: Research in Hyderabad was funded by the British Academy as part of the project, "Rohingya Journeys of Violence and Resilience in Bangladesh and its Neighbours: Historical and Contemporary Perspectives" (Award Reference: SDP2\100094), supported under the UK Government's Global Challenges Research Fund.

³² UNHCR Global Focus, 'India' (2019) available at: <https://reporting.unhcr.org/node/10314?y=2019#year> [accessed 13/11/2020]

³³ A. Syam, 'Patchwork of archaic regulations and policies in India: A breeding ground for discriminatory practice against refugees' (2019) 51 N.Y.U. Journal of International Law & Politics 1381-1382 available at: <https://nyujilp.org/wp-content/uploads/2019/09/NYI411.pdf> [accessed 13/11/2020]

³⁴ Subir Bhaumik, 'Why is India threatening to deport its Rohingya population?' BBC (5 September 2017) available at: <https://www.bbc.co.uk/news/world-asia-india-41144884> [accessed 13/11/2020]

³⁵ Rohingya refugee interview cited in J. Field, A. Tiwari and Y. Mookherjee, 'Urban refugees in Delhi: identity, entitlements and well-being' (2017) IIED Urban Humanitarian Crises Series Working Paper, p.19, IIED, London, available at: <https://pubs.iied.org/10852IIED/> [accessed 13/11/2020]²⁴ Observations by Sabrina Chowdhury Mona and Razia Sultana.

The Government of India granted LTVs to Rohingyas from 2012 onwards, based on their UNHCR Refugee Cards.³⁸ The granting of an LTV offered some protection against detention and deportation as ‘illegal migrants’. It also enabled Rohingyas to obtain other key identity documents and access certain basic rights and services. However, since 2016-17, existing LTVs have not been renewed and new ones have not been granted, with no official explanation as to why.³⁹ As the LTV has become essential for all refugees in India to gain access to an Aadhaar identity card, which in turn is a key piece of identification necessary to gain access to other basic rights and services,⁴⁰ the denial of the LTV has had a cascading effect.

Service-access IDs

Aadhaar is a single identity card linked to various benefits, services and facilities in India. It is the latest government iteration of the proposed ‘Multipurpose National Identity Card’, and a reflection of the state’s attempt to use technology to define citizenship and shape governance relations between the State and the individual.⁴¹ Enrolment numbers are the highest in relation to any other digital identity card in the world, and, as such, it has become an increasingly critical digital identity tool in India.⁴²

Aadhaar records an individual’s iris scan, fingerprint scan, facial photograph, date of birth, sex, and address details, and provides the holder with a unique identification

number.⁴³ It is a proof of residence and does not denote citizenship or grant any rights per se, and so can be held by non-citizen residents who can furnish the required application identification. Aadhaar is also purported to be used as a non-mandatory verification marker for accessing benefits, services and facilities. However, this digital identification is increasingly required by private and public organisations for access to basic services, including higher education, jobs and personal or business banking.⁴⁴

The level of personal data *Aadhaar* requires has raised concerns around privacy, discrimination and profiling, particularly in relation to its recording, storing, end-usage and sharing of data.⁴⁵ Demands have emerged for a law addressing personal data protection.⁴⁶ However, missing from these critiques are considerations of its implications for refugees and so-called “illegal migrants”.

Since *Aadhaar* has become a primary identification document in India, it has also become an essential lifeline for refugees who often lack other identity documentation.⁴⁷ Initially, refugees holding LTVs and the UNHCR Refugee Cards were issued *Aadhaar* cards.⁴⁸ It was only in October 2018 that the Union Government’s Ministry of Home Affairs (MHA) changed the policy and excluded Refugee Cards as valid documentation to obtain *Aadhaar*, which adversely affected those, such as the Rohingyas, whose LTVs were kept in abeyance and not renewed, or who were only granted UNHCR Refugee Cards and not LTVs.⁴⁹

³⁶ A. Roy, *Mapping Citizenship in India* (Oxford University Press 2010) 61

³⁷ Y. Khan, *The Great Partition: The making of Indian and Pakistan* (Yale University 2017) 193-196.

³⁸ M. Morand and J. Crisp, ‘Destination Delhi: A review of the implementation of UNHCR’s urban refugee policy in India’s capital city’ (2013) available at: <https://www.refworld.org/docid/520a419a4.html> [accessed 13/11/2020]

³⁹ Interview with Rohingya in Delhi, India, April 2017. (Name withheld); Interview with Rohingya, Hyderabad, India, August 2019 (name withheld). Research conducted by J. Field, A. Tiwari and Y. Mookherjee in Delhi in 2017 was funded by the International Institute for Environment and Development under the Urban Humanitarian Crisis theme. Research conducted by J. Field, A. Dutt Tiwari and M. Rajdev in Hyderabad in 2019 was funded by the British Academy, Award Reference: SDP2\100094, under the UK Government’s Global Challenges Research Fund.

⁴⁰ Ministry of Home Affairs (Foreigners Division), ‘Long Term Visas’, MHA Doc No. 25022/62/2020-F-1 (13 Aug 2020) 10, available at: https://www.mha.gov.in/sites/default/files/AnnexVILongTermvisas_20082020.pdf [accessed 23 Aug 2020].

⁴¹ T. Mehmood, ‘India’s new ID card: Fuzzy logics, double meanings and ethnic ambiguities’ (2008), in C. Bennett & D. Lyon (eds.) *Playing the Identity Card: Surveillance, security and identification in global perspective*, Routledge.

⁴² D. Dhillon, ‘Over 1.21 billion people are enrolled in the world’s largest biometric identification system’ (2016) available at: <https://www.businessinsider.in/over-1-21-billion-people-are-enrolled-in-the-worlds-largest-biometric-identification-system/articleshow/65009409.cms> [accessed 13/11/2020]

⁴³ UIDAI Website, available at: <https://uidai.gov.in/what-is-aadhaar.html> [accessed 13/11/2020]

⁴⁴ A. Bhatia & J. Bhabha, ‘India’s Aadhaar scheme and the promise of inclusive social protection’ (2017) 45 *Oxford Development Studies* 1, available at: <https://www.tandfonline.com/doi/abs/10.1080/13600818.2016.1263726> [accessed 13/11/2020]

⁴⁵ K. Breckenridge, ‘Lineaments of Biopower: The Bureaucratic and Technological Paradoxes of Aadhaar’, (2019) 42 *Journal of South Asian Studies* 3, available at: <https://www.tandfonline.com/doi/abs/10.1080/00856401.2019.1613080> [accessed 13/11/2020]

⁴⁶ See, Personal Data Protection Bill, 2019 (Bill No. 373 of 2019) available at: http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf [accessed 13/11/2020]

⁴⁷ M. Morand and J. Crisp, ‘Destination Delhi: A review of the implementation of UNHCR’s urban refugee policy in India’s capital city’, (2013) available at: <https://www.unhcr.org/uk/research/evalreports/51f66e7d9/destination-delhi-review-implementation-unhcrs-urban-refugee-policy-indias.html> [accessed 13/11/2020]

⁴⁸ J. Field, A. Tiwari and Y. Mookherjee, ‘Urban refugees in Delhi: identity, entitlements and well-being’ (2017) available at: <https://pubs.iied.org/pdfs/10852IIED.pdf> [accessed 13/11/2020]

⁴⁹ R. Kumar, ‘UNHCR card holders not entitled for Aadhaar: MHA’, *Daily Pioneer* (2018), available at <https://www.dailypioneer.com/2018/india/unhcr-card-holders-not-entitled-for-aadhaar-mha.html> [accessed 13/11/2020]

The Retraction of Rights and Exclusions

Even before the policy change, from 2017, public and political discourse regarding refugee rights deteriorated and refugees were increasingly refused Aadhaar by issuing officials. Without these cards, many Rohingyas have consequently been refused access to basic education, health, banking and other essential services — despite Aadhaar not having a legal mandatory status, and despite basic services being protected as a human right in India and internationally. Some Rohingyas have also been arrested or harassed by police authorities for apparently ‘fraudulently’ obtaining Aadhaar. A Delhi-based **Rohingya refugee** recounted his experience in 2017:

“

People who have got Aadhaar without refugee card or LTV, police can catch them for fraud and even UNHCR can't help... Once the police stopped me and asked for the refugee card and when I was taking out the card, the Aadhaar card also came out. He said that you aren't allowed to get Aadhaar. He also said it's not written here that you can get Aadhaar but eventually I showed him that it's not for citizenship. So he let me go.⁵¹

Aadhaar also delegates identity documentation checking responsibilities to landlords, employers and local bureaucrats — leaving refugees exposed to arbitrary exclusions and harassment by private companies and individuals, based on discriminatory profiling.⁵² There is also anecdotal evidence of the denial of primary education access to exams for refugee children, based on the parents not having Aadhaar (or having Aadhaar but not being accepted as valid holders). A Rohingya community leader has been trying to bring this to the attention of the authorities and noted that ‘for students, delay in clarification means losing precious time and academic year’.⁵³

A wide range of opportunities have been impacted by the growing precedence of Aadhaar as an access document. A **young Rohingya** in Hyderabad who aspired to play professional football, explained:

“

[In 2017] I got selected, after a trial, in a big local football club here in Hyderabad but since I don't have Aadhaar I couldn't join them. ... [D]uring the time of taking our details, they asked me whether I have Aadhaar or a passport. When I replied that I only have a refugee card – they still tried by reaching out to the Indian Football Federation, which eventually rejected the request.⁵⁴

Without a chance of ever having ‘valid documents’ under the law, Rohingyas are at the mercy of local officials’ humanitarian support to escape harassment and detention.⁵⁵ As a **Rohingya woman** in Hyderabad explained:

“

[M]y husband was caught by a policeman who was going to take him away since we did not have any documents that time. It was only when I went there and pleaded with the policeman showing him my small children that he let us go.⁵⁶

It is important to note in this context, that Objective 4(f) of the Global Compact on Safe, Orderly and Regular Migration calls on states to:

Review and revise requirements to prove nationality at service delivery centres to ensure that migrants without proof of nationality or legal identity are not precluded from accessing basic services nor denied their human rights.⁵⁷

⁵⁰ For instance, Rohingyas have been arrested for ‘fraudulently’ acquiring identification documents such as AADHAAR, PAN, etc., on the basis of their LTV. See O. Mojumdar, Rohingyas in Telangana ready to surrender ‘fake’ Aadhaar cards, *The New Indian Express*, (21 February 2020), available at <https://www.newindianexpress.com/states/telangana/2020/feb/21/rohingyas-in-telangana-ready-to-surrender-fake-aadhaar-cards-2106501.html> [accessed 13/11/2020]

⁵¹ Rohingya refugee interview cited in J. Field, A. Tiwari and Y. Mookherjee, ‘Urban refugees in Delhi: identity, entitlements and well-being’ (2017) available at: <https://pubs.iied.org/pdfs/10852IIED.pdf> [accessed 13/11/2020]

⁵² J. Field, A. Tiwari and Y. Mookherjee, ‘Self-reliance as a Concept and Spatial Practice for Urban Refugees: Reflections from Delhi, India’ (2020) 33 *Journal of Refugee Studies* 1, available at: <https://academic.oup.com/jrs/article/33/1/167/5620397> [accessed 13/11/2020]

⁵³ Interview with Rohingya, Hyderabad, India, July 2019 (name withheld); See also on health schemes: F. Abdali, ‘A Comparative Analysis of the Global Compact on Refugees and the Constitution of India’ (2020) in, J. Field and S. Burra, (eds.) *The Global Compact on Refugees: Indian Perspectives and Experiences*, Academic Working Group and UNHCR India available at: https://www.academia.edu/41865782/The_Global_Compact_on_Refugees_Indian_Perspectives_and_Experiences [accessed 13/11/2020]

⁵⁴ Interview with Rohingya, Hyderabad, India, August 2019 (name withheld); See also: J. Field, A. Tiwari and Y. Mookherjee, ‘Self-reliance as a Concept and Spatial Practice for Urban Refugees’ (2019) 33 *Journal of Refugee Studies* 1 available at: <https://academic.oup.com/jrs/article/33/1/167/5620397> [accessed 13/11/2020]; A. Tiwari, J. Field and Y. Mookherjee, ‘Urban refugees in Delhi: Refugee networks, faith and well-being’ (2017) IIED Urban Humanitarian Crises Working Paper available at: https://www.jstor.org/stable/resrep16605?seq=1#metadata_info_tab_contents [accessed 01/08/2020].

⁵⁵ S. Majumder, ‘The jailed Rohingya in West Bengal’ in S. Basu, R. Chaudhury and R. Samaddar (eds.) *The Rohingya in South Asia: People without a State* (Routledge 2018); On the role of UNHCR refugee cards in India, see, J. Field, A. Tiwari and Y. Mookherjee, ‘Urban refugees in Delhi: identity, entitlements and well-being’ (2017) available at: https://www.academia.edu/34777885/Urban_refugees_in_Delhi_Identity_entitlements_and_well_being [accessed 13/11/2020]

⁵⁶ Interview with a Rohingya, Hyderabad, India, August 2019 (name withheld)

Biometrics and Rohingyas at Risk

In Addition to being excluded from Aadhaar, refugees have been subject to enhanced biometric data collection. Despite the government already having biometric data for registered Rohingya refugees, a new drive began in 2017 following an internal letter by the MHA, addressed to Chief Secretaries of all state governments and union territories.⁵⁸ Rohingyas in India noted that this drive has been more aggressive than past collection experiences, and are fearful that the biometric data will be used to forcibly return them back to Myanmar.

Such fear might have justification. The MHA letter (dated 8 August 2017) stated as follows:⁵⁹

Detection and deportation of such illegal migrants from Rakhine state, also known as Rohingyas is a continuous process. Therefore, it is essential to identify such illegal migrants/ persons and also keep a watch on their activities for preventing any untoward incident that can take place. All States/UT Administrations are, therefore, advised to sensitize all the law enforcement and intelligence agencies for taking prompt steps in identifying the illegal migrants and initiate the deportation processes expeditiously and without delay. (emphasis added)

“National security” justifications are often employed to record the details of non-citizens, including refugees. Immigration laws permit collection of this data, although it is unclear the extent of the biometric details allowed to be collected. The Joint Parliamentary Committee (JPC), in presenting its report on the Citizenship Amendment Bill in January 2019, concluded as follows:

The Committee are of the firm opinion that national security precedes all other considerations including the humanitarian aspect and as such rampant infiltration into the Country from foreign lands on one plea or the other has to be stopped. The Committee

accordingly reiterate that the Government should intensify the border fencing/patrolling/ surveillance and introduce/strengthen the biometric system at all the places so as to apprehend, detain and deport the infiltrators in the larger national interest.⁶⁰ (emphasis added)

Fundamental issues with the biometric data collection of refugees and other ‘non-citizens’ include: i) the process has been mired in non-transparency and lack of information regarding the end-use of the data; ii) data collection comes with no discernible protections or access to services for refugees (unlike Aadhaar); iii) it is framed as a tool for eventual deportation and (iv) it is clearly couched in the language of surveillance.⁶¹ This places Rohingyas in a position of acute risk,⁶² as it may promote refoulement to Myanmar. Conversely, it may deter Rohingyas from seeking necessary refuge in India in the first place. The UN Special Rapporteur on Racism’s recent report addresses some of these issues:

States are increasingly mandating extensive biometric data collection from non-citizens, where the collection and use of this data raise concerns of direct and indirect forms of discrimination on the basis of race, ethnicity, national origin, descent and even religion. ... in most cases, refugees, migrants and stateless persons have no control over how the data collected from them are shared. ... India requires mandatory biometric data collection from non-citizens with a discriminatory use of this data being detention and deportation even for refugees such as Rohingya... Another concern ... is the ... de facto exclusion from vital basic services which rely on automated systems from which non-citizens are excluded entirely. Because refugees without residency permits are prohibited from holding Aadhaar cards, they are discriminated against and excluded from access to basic services and enjoyment of “rights that ensure a dignified refuge in India.”⁶³

⁵⁷ UN General Assembly Resolution 73/195, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195, available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195 [accessed 13/11/2020]

⁵⁸ MHA website, available at https://mha.gov.in/sites/default/files/advisoryonillegalmigrant_10092017_2.PDF [accessed 13/11/2020]

⁵⁹ A. Syam, ‘Patchwork of archaic regulations and policies in India: A breeding ground for discriminatory practice against refugees’ (2019) 51 N.Y.U. Journal of International Law & Politics 1381-1382 available at: <https://nyujilp.org/wp-content/uploads/2019/09/NYI411.pdf> [accessed 13/11/2020]

⁶⁰ Ibid. at p.81.

⁶¹ The Times of India ‘States asked to identify Rohingyas, collect biometric details: Rajnath Singh’ (October 2018), available at, <https://timesofindia.indiatimes.com/india/states-asked-to-identify-rohingyas-collect-biometric-details-rajnath-singh/articleshow/66028121.cms> [accessed 13/11/2020]

⁶² A. Kapoor, ‘Digital Identity for Refugees in India: Empowerment or Surveillance?’, Global Policy, (2018), available at <https://www.globalpolicyjournal.com/blog/01/08/2018/digital-identity-refugees-india-empowerment-or-surveillance> [accessed 13/11/2020]

⁶³ Ms. E. Tendayi Achiume, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/75/590 (November 2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020]

Rohingya data protection risks do not only flow from government biometric drives. An audit of UNHCR India's operations in 2016 revealed that there were concerns that the agency was sharing refugee information with the government.⁶⁴ This is concerning given the Indian Government's efforts to expel the Rohingyas from the country. In October 2018 and January 2019, the Indian government forcibly deported a total of twelve Rohingya refugees to Myanmar, denying UNHCR access to these refugee detainees before they were *refouled*.⁶⁵

Efforts to remove stateless persons often lead to situations of arbitrary indefinite detention in immigration detention centres and prisons.⁶⁶ In this case, Myanmar accepted these Rohingyas back under formal return arrangements. However, they have not accepted them back as citizens, but as residents who had to go through a national verification process. On return, they were issued with NVC cards,⁶⁷ which are predominantly viewed by Rohingyas as locking in long-term non-citizenship both for individuals and for Rohingyas as a group.⁶⁸

Intervening in a subsequent Supreme Court case on the intended mass forcible deportation of Rohingyas to Myanmar, the **Special Rapporteur on Racism** stated as follows:

“

*The implementation of this order would amount to discrimination on the basis of race, ethnicity, national origin, or descent and would rely on distinctions that have racially disparate effects. This order further contravenes India's human rights obligations to protect vulnerable non-citizen populations from refoulement. Further, any migration decision of the Government should incorporate individualized due process protections. Until Myanmar ceases its violations of Rohingyas' rights and undertakes acts sufficient to guarantee the safety and racial equality of the Rohingya people, return of Rohingyas to Myanmar will violate the principles of non-refoulement.*⁶⁹

⁶⁴ Office of the Internal Oversight Services (Internal Audit Division), 'Audit of the Biometric Identity Management System at the Office of the United Nations High Commissioner for Refugees', Report 2016/181 (22 Dec 2016) 11 [downloadable online] accessed 13/11/2020]

⁶⁵ UNHCR, 'UNHCR deep concern at return of Myanmar nationals from India to Myanmar' (2018) available at: <https://www.unhcr.org/ph/14519-unhcr-deep-concern-at-return-of-myanmar-nationals-from-india-to-myanmar.html> [accessed 13/11/2020]

⁶⁶ For more information about indefinite detentions in India see: Institute on Statelessness and Inclusion, 'Human Rights and Covid-19: What now for the Rohingya?' (2020) available at: <https://www.institutesi.org/resources/human-rights-and-covid-19-what-now-for-the-rohingya> [accessed 13/11/2020]

⁶⁷ Information provided by Rohingya activists based in India (names withheld). Copies of the NVCs issued to the refouled Rohingyas were circulated on social media, resulting in alarm about the future legal status of Rohingyas in Myanmar, and their protection status of Rohingyas refugees outside Myanmar.

⁶⁸ For more information on the NVC, see Chapter 4 of this paper, on Myanmar.

⁶⁹ The UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, 'Legal Opinion on India's obligations under International Law to not deport Rohingyas', (2019) Para 6, available at: <https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/AmicusBrieftoIndianSupremeCourt.pdf> [accessed 13/11/2020]

⁷⁰ L. Kingston, 'Biometric Identification, Displacement, and Protection Gaps' (2019) in, C. Maitland, *Digital Lifeline? ICTs for Refugees and Displaced Persons*, MIT Press 2018; See also, L. Moore 'Governing by identity' (2008) in, C. Bennett and D. Lyon (eds.), *Playing the Identity Card: Surveillance, security and identification in global perspective*, Routledge 2008.

Sharing biometric data with the Myanmar government would be a violation of several of India's international obligations. Use of biometrics should be in compliance with international human rights standards on issues such as discrimination, privacy, legality and proportionality.⁷⁰ There must be no diversion from these core standards due to the potential adverse impact on these vulnerable communities.

Recommendations

The Indian government has created an unequal document regime that has once more turned identity documentation for the Rohingyas into a tool of exclusion and repression. As the government has already collected biometric data of vulnerable refugee groups in the country and Aadhaar is expected to remain a key service-access ID technology well into the future, we make the following recommendations:

All refugees must be provided with Long-Term Visas and the Aadhaar. Failing that, the government of India must recognise UNHCR Refugee Cards as eligible documents for refugees to access essential services and as key identification documents. These are fundamental steps for refugees to be able to access and claim basic facilities, services and rights in India.

The government must reform its biometrics collection policy applicable to ‘non-citizens’, including refugees, stateless persons and migrants, to ensure that it is based on consent, transparency and underwritten by international human rights and protection standards. The proposed Personal Data Protection Bill must also regulate the collection of data for non-citizens, including refugees, stateless persons and migrants, and India should implement comprehensive data protection standards in line with international norms.

In the context of India’s recent negative shifts in law and policy towards refugees, there is an urgent need for a humane, inclusive and progressive law for refugee recognition and protection, which is based on international standards.

There must be wider education and sensitisation about digital IDs and fundamental human rights, to ensure that private citizens, corporations and government authorities, do not wrongly penalise Rohingya and other non-citizens, due to their incorrect understanding of the legal status attached to Aadhaar cards or perceptions that access to rights and essential services are linked to having an Aadhaar card.

3. THE DIGITISATION OF REFUGEE REGISTRATION IN BANGLADESH: THE HOPES AND FEARS OF RETURN

In 2016, Bangladesh began digitising national ID cards (NIDs) as part of the “Digital Bangladesh” initiative. The cards replaced laminated ones and contained biometric details including iris scans and fingerprints. Citizenship data was linked to an embedded microchip. The cards were intended to prevent election fraud but also provided access to 22 other services including banking, passports, driving licenses, trade licenses and tax payments.⁷¹ With limited access to education in the refugee camps, Rohingya who attempted to access schooling in Bangladesh without the correct documents were also exposed to hate campaigns in the local press compounding the drive to link IDs to education and other services.⁷² E-passports to replace the current machine-readable passports are also due to be distributed. These were also introduced with reference to reducing the issuance of fraudulent passports.⁷³ Of particular concern to Bangladesh are the claims that Bangladeshi travel documents have in the past been issued to some Rohingya who work amongst the many Bangladeshi migrant workers in Saudi Arabia and elsewhere in the Middle East. With the Bangladeshi economy reliant on remissions from migrant workers, Saudi Arabia has pressured Bangladesh to issue Rohingya in Saudi Arabia with Bangladeshi passports.⁷⁴ Solutions must be found for Rohingya in multiple country contexts, to regularise their legal status and enable them to access safe and decent work.

In Bangladesh, approximately 861,500 Rohingya now live in the world’s largest refugee camp close to Cox’s Bazar, separated from Bangladeshi populations.⁷⁵ The majority arrived following the genocidal violence in Myanmar in 2017. Others have lived as both registered and unregistered refugees in Bangladesh since the

1990s or before. Many were born into the protracted refugee situation. Bangladesh is not a signatory to the 1951 Refugee Convention and considers Rohingya to be irregular migrants. Nonetheless, they have access to international humanitarian assistance and UNHCR. Under the joint UNHCR/Government of Bangladesh registration process, they are registered not as refugees, but as “Forcibly Displaced Myanmar Nationals”. As such, they are able to access some protections, but their status is precarious. There are no durable solutions to the protracted refugee situation. The human rights situation in Myanmar is not currently conducive to return;⁷⁶ there is neither a legal framework within Bangladesh that enables them to regularise their legal status, nor any pathways to citizenship;⁷⁷ there are also currently no options for resettlement to third safe countries. Resettlement options were blocked by Bangladesh in 2010.⁷⁸

Some refugees now living in Bangladesh have been forcibly returned to Myanmar on multiple occasions. In 1978-1979, approximately 180,000 Rohingya were forcibly repatriated from Bangladesh to Myanmar, either through the denial of food aid or at gun point. 10,000 Rohingya are estimated to have died in Bangladesh during this period due to a lack of access to food. Between 1993-1995, approximately 200,000 Rohingya were returned to Myanmar. Again, many of them were forced or coerced to return either at gunpoint or under the threat of cuts to rations or arrest.⁷⁹ Since their expulsion from Myanmar in 2017, a repatriation agreement has been drawn up between Bangladesh and Myanmar, and an MOU on repatriation has been signed between Myanmar, UNHCR and UNDP. The precarious nature of their protection in Bangladesh combined with

⁷¹ Z. Rahman, ‘Bangladesh introduces ‘Smart’ National Identity Cards’ (2016), available at: <https://advox.globalvoices.org/2016/10/07/bangladesh-introduces-smart-national-identity-cards/> [accessed 13/11/2020]

⁷² S. Kumar, ‘Akter, 20, expelled from university for being Rohingya’, Al Jazeera, (September 2019) available at: <https://www.aljazeera.com/news/2019/9/17/akter-20-expelled-from-university-for-being-rohingya> [accessed 13/11/2020]

The Rohingya Post, ‘Refugee girl expelled from university for being Rohingya in Bangladesh’ (September 2019) available at: <https://www.rohingyapost.com/refugee-girl-expelled-from-university-for-being-rohingya-in-bangladesh/> [accessed 13/11/2020]

⁷³ BDNews24, ‘E-passport era begins in Bangladesh’, (January 2020) available at: <https://bdnews24.com/bangladesh/2020/01/22/e-passport-era-begins-in-bangladesh> [accessed 13/11/2020]

⁷⁴ A. Ullah, ‘Rohingya fear deportation after Saudi Arabia calls on Bangladesh to give minority passports’, Middle East Eye (October 2020) available at: <https://www.middleeasteye.net/news/saudi-arabia-rohingya-bangladesh-deportation-passports> [accessed 13/11/2020]

⁷⁵ Up-to-date figures available on UNHCR’s operational portal on refugee situations, available at: https://data2.unhcr.org/en/situations/myanmar_refugees [accessed 26/10/2020]

⁷⁶ UN News Story, ‘Greater progress needed to ensure safe return of displaced Rohingya’ (March 2020) available at: <https://news.un.org/en/story/2020/03/1058521> [accessed 11/11/2020]

⁷⁷ R. Hoque, ‘Report on Citizenship Law: Bangladesh’ European University Institute (2016) available at: https://cadmus.eui.eu/bitstream/handle/1814/44545/EudoCit_2016_14Bangladesh.pdf [accessed 11/11/2020]

⁷⁸ R. Paul, K. N. Das, ‘As other doors close, some Rohingya cling to hope of resettlement’ (2020) available at: <https://uk.reuters.com/article/uk-myanmar-rohingya-bangladesh/as-other-doors-close-some-rohingya-cling-to-hope-of-resettlement-idUKKBN25H0DB> [accessed 13/11/2020]

⁷⁹ J. Crisp, ‘Primitive people: the untold story of UNHCR’s historical engagement with Rohingya refugees’, Humanitarian Peace Network (October 2018) available at: <https://odihpn.org/magazine/primitive-people-the-untold-story-of-unhcrs-historical-engagement-with-rohingya-refugees/> [accessed 13/11/2020]

historic experiences of forced displacement and returns combine to produce considerable insecurities for Rohingyas in the camps of Bangladesh. In a study by X-Borders Local Research Initiative, 97% of camp residents surveyed stated that they were “very worried” about potential forcible return to Myanmar. This was ranked highest of the concerns about camp life, above lack of work and livelihood opportunities.⁸⁰ A further concern for Rohingyas is the potential for them to be moved against their will to the remote and unstable island, Bhasan Char, which has been purpose built for accommodating refugees.⁸¹

Smart Cards: Disempowerment and Fears of Forced Returns

The registration of Rohingya refugees was closed between 1993 and 2017 to discourage further arrivals from Myanmar. As such, fewer than 30,000 Rohingya, who arrived in the early 1990s were registered by UNHCR, and hundreds of thousands of unregistered Rohingya lived in the surrounding areas without access to the right to live or work in Bangladesh. As hundreds of thousands of Rohingya fled across the border in 2017, the government of Bangladesh agreed to host the refugees and open registration. In conjunction with IOM, Rohingya arrivals were registered and provided with ID cards. They were also given ration books. These documents enabled the state and NGOs to organise emergency aid and humanitarian assistance. Given Bangladesh’s historic experience of hosting and the difficulties involved in returning Rohingya refugees, the efficient registration of these populations was also seen as important in ensuring that Myanmar accept the refugees back into Myanmar in the future.⁸² Registration, then, served the dual purpose of providing access to vital rations and services, and evidencing Rohingyas right of return.

As camp infrastructure grew, and repatriations were discussed, UNHCR’s role in coordinating humanitarian support and protecting camp-based refugees grew. Meanwhile, in 2018, UNHCR, UNDP and the Government of Myanmar signed an MOU relating to future repatriations. Rohingya refugees in Bangladesh objected on the basis that they were neither consulted, nor allowed to see the contents of the agreement. Leaked drafts of the MOU circulated in the camps.⁸³ In particular, refugees worried that according to the leaked agreement, Myanmar’s Ministry of Labour, Immigration and Population (MoLIP) was responsible for verifying and issuing identity cards to Rohingya on return.⁸⁴ The primary concern was that returnees would be forced to undergo national verification and potentially be forced to accept the deeply divisive NVC cards, that they associated with Myanmar’s genocide.⁸⁵ Legitimate fears and concerns circulated about the international community’s past inability to both prevent refoulement and ensure the safety of returned Rohingya. Since UNHCR had a presence in Northern Rakhine monitoring previous repatriations, many of the worries centred around its role.⁸⁶

Within this context in 2018, UNHCR and the Government of Bangladesh began to roll out a new ID card system, popularly known as the “smart card”. It required Rohingya refugees to submit fingerprints, iris scans and biographic information which were then linked to the card. According to UNHCR, the smart card was “for the purposes of protection, identity management, documentation, provision of assistance, population statistics and ultimately solutions for an estimated 900,000 refugees.”⁸⁷ However, according to The Engine Room, government officials of the Office of the Refugee Relief and Repatriation Commissioner (RRRC), who were directly involved in implementing the ID system, also described the smart cards as being used for the purposes of “separating” refugees from Bangladeshi populations and for “repatriations”.⁸⁸

⁸⁰ The Asia Foundation and BRAC University, ‘Navigating at the Margins: Family, Mobility and Livelihoods Amongst Rohingya Refugees in Bangladesh’ (2020) available at: https://asiafoundation.org/wp-content/uploads/2020/09/Navigating-the-Margins_Family-Mobility-and-Livelihoods-Amongst-Rohingya-in-Bangladesh.pdf [accessed 11/11/2020]

⁸¹ B. Adams, ‘For Rohingya, Bangladesh’s Bhasan Char ‘Will Be Like a Prison’ Human Rights Watch (March 2019) available at: <https://www.hrw.org/news/2019/03/15/rohingya-bangladesh-bhasan-char-will-be-prison> [accessed 11/11/2020]

⁸² This is also noted in the Memorandum of Understanding between Bangladesh and Myanmar which notes that refugee registration cards can be used as proof of residency in Myanmar for the purpose of implementing returns.

‘Arrangement on Return of Displaced Persons from Rakhine State between the Government of the People’s Republic of Bangladesh and the Government of the Republic of the Union of Myanmar’, (November 2017) available at: http://www.theindependentbd.com/assets/images/banner/linked_file/20171125094240.pdf [accessed 13/11/2020]

⁸³ ‘Memorandum of Understanding between GoM and UNDP and UNHCR (June 2018) A copy of the leaked MOU (dated a few days before it was signed) is available at: <https://freerohingyacoalition.org/en/the-mou-between-myanmar-government-and-undp-and-unhcr/> [accessed 11/11/2020].

⁸⁴ *Ibid*, Principle 15.

⁸⁵ N. Brinham, ‘“Genocide cards”: Rohingya refugees on why they risked their lives to refuse ID cards’, Open Democracy (October 2018) available at: <https://www.opendemocracy.net/natalie-brinham/genocide-cards-why-rohingya-refugees-are-resisting-id-cards>, [accessed 11/11/2020]

⁸⁶ The Engine Room, ‘Understanding the Lived Effects of Digital ID: A Multi-Country Study’, (2020) available at: https://digitalid.theengineroom.org/assets/pdfs/200123_FINAL_TER_Digital_ID_Report+Annexes_English_Interactive.pdf [accessed 13/11/2020]

⁸⁷ UNHCR, ‘Joint Bangladesh/UNHCR verification of Rohingya refugees gets underway’ (2018) available at: <https://www.unhcr.org/en-us/news/briefing/2018/7/5b3f2794ac/joint-bangladesh-unhcr-verification-rohingya-refugees-gets-underway.html> [accessed 13/11/2020]

⁸⁸ N. Brinham, ‘“Genocide cards”: Rohingya refugees on why they risked their lives to refuse ID cards’, Open Democracy (October 2018) available at: <https://www.opendemocracy.net/natalie-brinham/genocide-cards-why-rohingya-refugees-are-resisting-id-cards> [accessed 11/11/2020]; The Engine Room, ‘Understanding the Lived Effects of Digital ID: A Multi-Country Study’ (2020) available at: https://digitalid.theengineroom.org/assets/pdfs/200123_FINAL_TER_Digital_ID_Report+Annexes_English_Interactive.pdf [accessed 13/11/2020]

Rohingya refugees had not participated or been consulted in the design or use of the ID scheme, and again raised objections about the lack of transparency and consultation.⁸⁹

Many were initially concerned that the data may be passed to Myanmar raising safety concerns; or that the cards, if tied to aid delivery, could be used to enforce future repatriations just as the withholding of food aid to refugees had been used in the past. Rohingya community groups in the camps further objected to the way in which their biographic data was recorded – specifically to the absence of the terms “refugee” and “Rohingya” on the IDs.⁹⁰ Both these issues also related to safety and protection concerns, as well as worries that their identity as a group belonging to Myanmar maybe undermined. The term “refugee” was understood to both bring protection from refoulement and to identify their origins in Myanmar in the absence of documentation issued by the Myanmar state. The term Rohingya, within the context of the erasure of their group identity in Myanmar, identified them as an ethnic group belonging to the Rakhine region of Myanmar. The absence of the term Rohingya was associated with the deliberate production and imposition of statelessness.⁹¹ Within the context of these insecurities, scuffles and beatings reportedly took place close to the UNHCR office, and rumours circulated that bribes were being offered to refugees who agreed to enrol in the ID card programme.⁹² Rohingya organisations in the camps launched a strike action to highlight their concerns about the smart cards.⁹³ RRRC and UNHCR improved their approach in disseminating information to the refugee community groups. Following this, the strikes were cancelled, and registration proceeded more smoothly.

The use of such identification technologies, when utilised responsibly can be effective in improving the lives of vulnerable and hard to reach communities. There is growing awareness within the humanitarian and international development sectors that in the absence of effective regulation, approaches to digital identification systems should incorporate key human rights and sustainable development principles in their design and architecture. Such approaches seek to ensure the meaningful participation of beneficiaries and balance unequal power relations. Larry Dohrs, writing for the

‘Good ID’ project, for example recommends designers of identification systems engage in privacy protections “in every step of process”; ensure that individuals have control over which data can be shared; enable individuals to decline participation without losing access to services and benefits; take power relations into account, including by giving preference to the individual end-user over large organisations; and ensure data collection and use is limited to a specific purpose to prevent function creep (e.g. limited to aid delivery and not used to implement repatriations).⁹⁴

Following the resistance to issuing smart cards to Rohingya refugees, recommendations have been made to improve the informed consent process for the collection of biometric information in refugee settings. It has been noted that illiteracy, education levels and trauma should be taken into account before collecting biometric data.⁹⁵ There are specific concerns regarding the extraction of biometric data for refugees and genocide survivors, which need to be taken into account in the design of informed consent processes. As Rohingya activist, **Jaivet Ealom**, explains:

“

Rohingya are institutionalised not to question authorities and people in uniform. This concept has been reinforced by the Burmese regime with harsh punishment if anyone ever questioned documentation processes. For many of them, the only prior experience of fingerprint collections for any sort of documentation is by the Myanmar security forces. Thus, they are inclined to give them away without questioning even when they wouldn't agree. In the worst-case scenario, this process could re-surface traumas back from Myanmar.

In this regard, the following observation in the report of the Special Rapporteur on Racism is pertinent:

⁸⁹ Radio Free Asia, ‘Rohingya refugees protest, strike against smart ID cards issued in Bangladesh camps’ (November 2018) available at: <https://www.refworld.org/docid/5c2cc3b011.html> [accessed 04/11/2020]

⁹⁰ E. Prasse-Freeman, ‘Data Subjectivity in What State?’ (2020) available at: <https://harvardilj.org/2020/03/data-subjectivity-in-what-state/> [accessed 11/11/2020]

⁹¹ Findings from field work conducted by Natalie Brinham between November 2017 and October 2018 in Bangladesh. This research was conducted as part of a PhD research project and was funded by Queen Mary University of London and the Economic and Social Research Council, UK.

⁹² J. Carroll, ‘Violence stalks UN’s identity card scheme in Rohingya camps’, Al Jazeera (November 2018) available at: <https://www.aljazeera.com/news/2018/11/23/violence-stalks-uns-identity-card-scheme-in-rohingya-camps> [accessed 11/11/2020]

⁹³ Strike notice on file with ISI.

⁹⁴ L. Dohrs, ‘It’s High Time to Distinguish Between Biometric Systems and Technologies’, Good ID (September 2019) available at: <https://www.good-id.org/en/articles/its-high-time-to-distinguish-between-biometric-systems-and-technologies/> [accessed 11/11/2020]

⁹⁵ The Engine Room, ‘Understanding the Lived Effects of Digital ID: A Multi-Country Study’, (2020) available at: https://digitalid.theengineroom.org/assets/pdfs/200123_FINAL_TER_Digital_ID_Report+Annexes_English_Interactive.pdf [accessed 13/11/2020]

Collection of vast amounts of data on migrants and refugees creates serious issues and possible human rights violations related to data sharing and access, particularly in settings such as refugee camps where power differentials between UN agencies, international NGOs and the affected communities are already stark. Although exchanging data on humanitarian crises or biometric identification is often presented as a way to increase efficiency and inter-agency and inter-state cooperation, benefits from the collection do not accrue equally. Data collection and the use of new technologies, particularly in contexts characterized by steep power differentials, raise issues of informed consent and the ability to opt-out.⁹⁶

the enhancement of the security process such that every person processed through the Centres is recorded and accounted for.⁹⁷

Biometric IDs issued involuntarily under Myanmar's national verification process have thus become one of the major obstacles to repatriation, standing to undermine the voluntariness of return. As Rohingya refugee, **Khin Maung**, of the Rohingya Youth Association explained:



Going back to our homelands is always in our thoughts. We want to go home in safety. NVCs make us unsafe. NVC is for foreigners in Myanmar, but Rohingya are not foreigners – we are citizens. Myanmar government has intent to make Rohingya into foreigners by accepting the NVC. We call NVCs as “genocide cards” because they will destroy our whole generation.

Despite improved understanding among refugees of the benefits of digital identification systems in terms of humanitarian delivery, data protection arrangements remain unclear. Concerns remain as to whether data may, in future, be shared with the Government of Myanmar without consent, or leaked through cross-border intelligence networks.

A major sticking point for Rohingyas in repatriation agreements, is the legitimate fear that they will be required to undergo national verification or be issued with NVC cards on return. This worry has been compounded by Myanmar's intention to combine the issuance of NVCs, which are currently paper based, with biometric registration. In a needs assessment report on repatriations in 2019, the ASEAN-ERAT described how returnees immediately on arrival would:

receive an NVC with a barcode and will further proceed to Biometric Registration. The NVC serves as a guarantee by the Government of Myanmar for the returnees to be able to access livelihood opportunities and basic needs such as health and education services in Maungdaw and serves as evidence that the person is a resident of Myanmar...The recording of personal information of returnees 18 years old and above and the immediate issuance of their NVCs at the Reception Centre also supports

⁹⁶ Ms. E. Tendayi Achiume, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/75/590 (November 2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020]

⁹⁷ ASEAN-ERAT report, 'The preliminary needs assessment for repatriation' (2019) available at: <https://asean.org/storage/2020/03/13.-June-2019-Preliminary-Needs-Assessment-for-Repatriation-in-Rakhine-State-Myanmar-ad-hoc-AHA-Ctr.pdf> [accessed 13/11/2020]

Recommendations

The Bangladesh government has historically approached the documentation of Rohingya in an instrumental manner, not as an exercise which must be carried out comprehensively and with proper safeguards in place, but rather, as something to be offered, withheld and conditioned on the basis of other criteria and priorities. This is why for example, Rohingya were not registered between 1993 and 2017, and why the current registration and digital ID drive has raised deep concerns of coerced repatriation and data-sharing with the Myanmar government. The role played by UNHCR and other UN agencies has also added to the concerns of the community. In this context, we make the following recommendations:

Rohingya should be registered and protected as refugees in Bangladesh. They must be meaningfully consulted on repatriation arrangements between Bangladesh, Myanmar and UN agencies. In particular, Rohingyas experiences and opinions on Myanmar's national verification process and the forced issuance of NVCs must be taken into account in repatriation arrangements. Without these consultations taking place, the voluntariness of return is undermined.

Refugees must have better control over the use of their data. The uses of digital registration and “smart cards” for Rohingya refugees must be specified within clearly set out parameters that are communicated effectively to refugees. These uses should be limited to providing access to humanitarian assistance in Bangladesh to ensure they are not used to implement future repatriations or for other purposes.

Rohingya refugees must be meaningfully consulted by state authorities and UN agencies, in order to ensure their informed and non-coerced consent to their data being taken and stored in digital ID and registration processes. These processes should take past traumas into account as well as gender-sensitivities. Awareness raising drives, to educate Rohingya of the benefits as well as implications of digital IDs, must be implemented in ways that address the concerns of the whole refugee community.

There must be better transparency and clarity related to data privacy, and in particular, the sharing of data with third parties. Under no circumstances should refugees' biographic or biometric data be shared with the Myanmar government without individual consent.

Rohingya should benefit from the full protection of comprehensive privacy laws that adhere to international standards. Such laws should apply to all persons on Bangladesh territory, and not just to citizens.

4. THE MOVE TOWARD DIGITISATION IN MYANMAR: HEEDING THE WARNINGS AND RESPONDING TO THE RISKS

Whilst more than 1.5 million Rohingya now live outside Myanmar, only an estimated 600,000 Rohingya still remain in Rakhine state, Myanmar.⁹⁸ The majority live in an area known as North Rakhine State, in three townships – Maungdaw, Buthidaung and parts of Rathedaung. Rohingya have always made up the majority in these areas. Since the early 1990s, a series of local and national policies and practices that only apply to Muslim populations in North Rakhine State, have severely restricted their freedom of movement, their right to marry and have children, and access education and livelihoods. They are effectively segregated in these areas, unable to travel to the rest of the country. The discriminatory framework is held in place by state registration and identity cards systems, which single Rohingya out as non-citizens. The vast majority of Rohingya in North Rakhine State have been denied citizenship documents since the 1982 Citizenship Law and associated rules were implemented. Instead their personal identities have been recorded on household registration documents as well as individual identity cards which enable the state to ethnically profile, monitor and implement a deeply oppressive surveillance regime. State surveillance and pervasive local informer systems, first implemented under the NaSaKa in the 1990s,⁹⁹ have been notoriously effective in these areas, with Rohingya routinely detained, harassed, extorted and beaten for minor infringements relating to permission to travel and household registration. Further, staying outside the family home, could result in being struck off the household registration documents, effectively cancelling residency in Myanmar.¹⁰⁰

Rohingyas also live in Buddhist majority areas elsewhere in Rakhine State, where until more recently they were able to function relatively effectively within broader society. In 2012, state-led violence displaced around 130,000 Rohingya and other Muslims. Most have been contained in 24 camps around Rakhine, where severe restrictions of movement are in place.¹⁰¹ Since this time, they have not been able to access their homes or lands. Though officially termed Internally Displaced Persons camps, the terms “internment” or “detention” camps better capture their true nature.¹⁰² Many people in these camps report that their documents were destroyed, removed or confiscated in 2012. Many have not been able to obtain replacements or have needed to pay prohibitively large bribes to do so.¹⁰³ The removal and destruction of identity cards and the barriers to replacing them are often described as a set of deliberate state strategies to expel Rohingya.¹⁰⁴ Whilst a digital archive of civil documentation is welcomed in order to protect legal status in Myanmar, without proper safeguards in place and without individual’s control over personal data, it is unclear how such records in the hands of the perpetrating state could help prevent or reduce Rohingya statelessness.

Rohingyas and Muslims from Rakhine state also live elsewhere in Myanmar including Yangon, where they are mostly required to hide or play down their ethnic identity and origins.¹⁰⁵ Access to work, education and services is currently not, in practice, completely tied to possession of citizenship cards. People who lack valid citizenship cards have been able to utilise a variety of other documents in order to live in relative security. There are deep concerns

⁹⁸ UNHCR, ‘Global Focus Statistics’ (2019) available at: <https://reporting.unhcr.org/node/2541> [accessed 11/10/2020]

⁹⁹ “NaSaKa” was a hybrid security force designed solely for Rohingya by General Khin Nyunt and assigned with implementation of this system. They operated with impunity.

¹⁰⁰ Amnesty International, ‘Caged without a Roof: Apartheid in Myanmar’s Rakhine State’ (2017) available at: <https://www.amnesty.org/en/documents/asa16/7484/2017/en/> [accessed 13/11/2020]

Burma Human Rights Network, ‘Nowhere to run in Burma: Rohingya trapped between an open-air prison and jail’ (2020) available at: <http://www.bhrn.org.uk/en/report/1128-nowhere-to-run-in-burma.html> [accessed 13/11/2020]; See also Fortify Rights, ‘Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar’ (2014) available at: https://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf [accessed 13/11/2020]

¹⁰¹ UNHCR, ‘UNHCR Fact sheet: Myanmar’ (September 2019) available at: <https://reporting.unhcr.org/sites/default/files/UNHCR%20Myanmar%20Fact%20Sheet%20-%20September%202019.pdf> [accessed 26/10/2020]

¹⁰² Fortify Rights used the term “internment camp” in Fortify Rights, “Tools of Genocide”: National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar’ (2019) available at: <https://www.fortifyrights.org/downloads/Tools%20of%20Genocide%20-%20Fortify%20Rights%20-%20September-03-2019-EN.pdf> [accessed 13/11/2020]; Human Rights Watch used the term “detention camps” in Human Rights Watch, “An Open Prison without End”: Myanmar’s Mass Detention of Rohingya in Rakhine State’ (2020) available at: <https://www.hrw.org/report/2020/10/08/open-prison-without-end/myanmars-mass-detention-rohingya-rakhine-state> [accessed 13/11/2020]

¹⁰³ Interview with Rohingya researcher on his findings, Dar Paing IDP camp, September 2020 (name withheld).

¹⁰⁴ Findings from field work conducted by Natalie Brinham between August 2017 and June 2019 in Bangladesh, India, Malaysia and Europe. This research was conducted as part of a PhD research project and was funded by Queen Mary University of London and the Economic and Social Research Council, UK.

¹⁰⁵ Submissions from the co-authors for the ISI consultation with the UNSR’s report on race, borders and technology. Also Interview with Rohingya researchers, Yangon, September 2020 (name withheld).

for Rohingya and many others who lack evidence of their citizenship about a digital identity card system linked to services and rights access. Aadhaar in India, has shown that the combination of service-access digital IDs and exclusionary systems of citizenship registration can have a devastating impact on the survival mechanisms of those who are left out.

Citizenship Registration and Identity Cards in Myanmar

The current personal identification system is paper based. Since 1989, it has followed the discriminatory framework set out by the 1982 Citizenship Law. Citizenship cards are colour coded according to a tiered hierarchy of citizenship.

“Pink cards” or Citizenship Scrutiny Cards (CSCs):

- Issued to “full citizens” (primarily those who belong to an arbitrary list of ethnic groups considered by the state to be “national”.)¹⁰⁶
- This list of groups is decided by the state without consultation.¹⁰⁷ Rohingya (and various other groups) are excluded.

“Green cards” or Naturalised Citizenship Scrutiny Cards (NCSCs):

- Issued to those recognised under the law as “naturalised citizens”.
- ‘Naturalisation’ is the pathway to citizenship for those who do not belong to one of the 135 recognised national ethnic groups but have evidence of residency since before Myanmar’s independence in 1948 and those who have parents to whom the lower categories of citizenship apply.¹⁰⁸
- Naturalisation is not available to foreigners through marriage, residence, etc.

A small number of Rohingya in Myanmar hold green cards. It is not possible to obtain these cards using the ethnic category of Rohingya. Instead they are recorded under the imposed and contextually derogatory term “Bengali”. Further, naturalised status is not automatically acquired as of right, but instead, is subject to the extensive discretion (and abuse) of decision makers. Even if such citizenship is acquired, it is less secure and has fewer

rights attached to it.¹⁰⁹ For these reasons, the expansion of naturalised citizenship provisions without addressing the exclusion of Rohingya as a recognised national group, or overhauling the 1982 Citizenship Law, is often opposed by Rohingya. Many Rohingya are concerned that this would contribute to the erasure and destruction of their identity as a group belonging to Myanmar, with an equal right to Myanmar citizenship.

Citizenship cards currently record both ethnicity and religion, whereas identity cards issued prior to the implementation of the 1982 Citizenship Law did not. Both the colour coding and the recording of ethnicity and religion on identity cards entrenches systems of discrimination through stigmatising and “othering” ethnic and religious minorities. Carrying ethnicity or race on identity cards has, in various international contexts most notably Rwanda, enabled persecution or genocide.¹¹⁰

“White cards or Temporary Registration Cards (TRCs)”¹¹¹:

- From 1995 to 2015, the vast majority of Rohingya in Rakhine state were issued these cards.
- In the rest of the country, white cards were issued as a stop-gap measure for citizens who needed replacement citizenship cards, but for Rohingya they became a mandatory and long-term form of identification which singled them out as non-citizens.
- They most often carried the derogatory term “Bengali” to refer to Rohingya.
- They were nullified in 2015, preventing Rohingya from voting.

National Verification Cards (NVCs):

- For individuals who are not recognised as citizens, and whose nationality must be verified. In practice they are mostly issued to Rohingya and other Muslims in Rakhine State
- From 2015, Myanmar has attempted to issue Rohingya with NVCs, despite large-scale resistance in Rakhine State.
- The cards have changed colour and are currently blue.
- They no longer carry an ethnic category. However, it is understood that the term “Bengali” is either recorded or implied by omission in state databases.

¹⁰⁶ Burma Citizenship Law, Chapter II Article 3 (October 1982) available at: <https://www.refworld.org/docid/3ae6b471b.html> [accessed 13/11/2020]

¹⁰⁷ Ibid, Article 4. NB: It is possible, though in practice very difficult to obtain full citizenship over multiple generations for those with parents who have “naturalised” or “associate” citizenship” (Article 7).

¹⁰⁸ Ibid, Chapter IV. There is also a third category of citizenship, “Associate citizenship” for which a blue card is issued. This is reserved for those who applied for but were not granted citizenship before the law the changed in 1982 and is not widely applicable in the contemporary Rohingya context.

¹⁰⁹ Ibid, Chapter II, Article 8.

¹¹⁰ G. Stanton, ‘The Ten Stages of Genocide’, see Stage 1: Classification and Stage 2: Symbolization (2016) available at: <http://genocidewatch.net/genocide-2/8-stages-of-genocide/> [accessed 11/11/2020]; See also Ms. E. Tendayi Achiume, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/75/590 (November 2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020]

¹¹¹ These were issued according to the 1951 Residents of Burma Registration Rules, unofficial translation available at: https://www.burmalibrary.org/docs12/Residents_of_Burma_Registration_Rules-1951.pdf [accessed 13/11/2020]

The primary proof of residency and birth for Rohingya in Myanmar is not through an individual identity card system but through the paper-based household registration or “family lists”, which are regularly checked and updated as part of immigration enforcement and state surveillance activities. These lists also record identity card numbers, religion and ethnicity.

Myanmar. The lack of proper facilities, poor ventilation and humidity puts these hard to use databases and its millions of aging paper files at a permanent risk of damage, manipulation or theft.

It is not only Rohingya who face documentation challenges. Around 30% of the population lacks adequate documentation.¹¹² Accessing citizenship documents is hardest for those excluded from the 135 recognised national ethnic groups, particularly impacting those of South Asian or Chinese descent. Members of nationally recognised minorities can also face difficulty accessing documentation. Returning refugees, those from conflict zones, persons of mixed ethnic or religious heritage, those from impoverished or remote rural locations, women, persons living with disabilities, elderly persons with limited mobility and persons with low levels of literacy or limited Burmese language skills can all face greater obstacles in obtaining citizenship documents.¹¹³

Barriers to obtaining citizenship documents include: arbitrary decision-making, discriminatory practices, excessive evidentiary requirements, inaccessibility relating to appointments, lack of administrative or judicial remedies for bad decisions, undue delays, excessive costs and routine bribery.¹¹⁴

The documentation supporting the current identification, travel documentation and civil registration system is stored in government filing cabinets throughout

Digitalising Citizenship Registration and Personal Identification Systems

Within the context of nation-wide administrative reform, and the rapid digitisation and modernisation of communications and governance under the slogan of “Digital Myanmar”,¹¹⁵ the government has publicly committed to digitising the citizenship registration system. This system would replace paper files with a centralised digital database. Paper ID cards would be replaced with “e-IDs” which would contain both biographic and biometric information. Since 2014, MoLIP has approached donors and international organisations with the goal of introducing this digital system, which according to Minister U Thein Swe, will assist both “national security” and “digital economy development”.¹¹⁶ In May 2020, Myanmar parliament approved a loan for this purpose of 33 Million Euros from Austrian bank Unicredit, for the project projected to complete within two years.¹¹⁷ Austrian company, OeSD, is currently collaborating with MoLIP on the project. The French multinational company, Thales, which specialises in digital identity systems has also organised workshops and engaged with MoLIP at these preliminary stages.¹¹⁸ Pilot projects collecting biometrics for use in national ID card systems have been conducted in Nay Pyi Taw and Mandalay since 2016 and also with overseas migrant workers.¹¹⁹ More alarming is the collection of biometrics from Rohingya populations in Rakhine State in conjunction with the national verification processes, which has been associated with state violence.¹²⁰

¹¹² The Republic of the Union of Myanmar, 2014 Housing and Population Census, The Union Report, 207–208, available at <https://myanmar.unfpa.org/en/publications/union-report-volume-2-main-census-report> [accessed 13/11/2020]

¹¹³ For an overview of existing challenges see UN Women, Norwegian Refugee Council, ISI, SNAP and UNHCR, ‘A Gender Analysis of the Right to a Nationality in Myanmar’ (2018) available at: <https://www.nrc.no/globalassets/pdf/reports/myanmar/cedaw-report-web-7-march-2018.pdf> [accessed 13/11/2020]; See also C. Beaugrand, ‘Statelessness and Administrative Violence: Biduns’ Survival Strategies in Kuwait’ (2011) 101 *The Muslim World* 2, 228–250. Available at: https://www.academia.edu/1224546/Statelessness_and_Administrative_Violence_Biduns_Survival_Strategies_in_Kuwait [accessed 13/11/2020]

¹¹⁴ ISI has a forthcoming report covering the barriers to obtaining citizenship documents, which will be published in 2021.

¹¹⁵ The World Bank, ‘Project Information Document/Integrated Safeguards Data Sheet (PID/ISDS) MM: Digital Myanmar Project (P167978)’ (2018) available at: <http://documents1.worldbank.org/curated/pt/393851542862936421/pdf/Concept-Project-Information-Documents-Integrated-Safeguards-Data-Sheet-MM-Digital-Myanmar-Project-P167978.pdf> [accessed 13/11/2020]

Within this context The World Bank has also engaged with Myanmar at the diagnostic stage in identity cards systems for development or ID4D. See World Bank Group, ‘ID4D, 2018 Annual Report’, available at: https://id4d.worldbank.org/sites/id4d.worldbank.org/files/2018_ID4D_Annual_Report.pdf [accessed 13/11/2020]

¹¹⁶ Ministry of Information (Myanmar), ‘E-IDs fundamental to e-governance : U Thein Shwe (23 January 2020) available at: <https://www.moi.gov.mm/moi:eng/news/362> [accessed 11/11/2020]

¹¹⁷ Myanmar International Radio, ‘Briefing of 2nd Pyidaungsu Hluttaw’s 16th regular session (25 June 2020) available at: <http://miradio.com.mm/news/briefing-2nd-pyidaungsu-hluttaw%E2%80%99s-16th-regular-session> [accessed 11/11/2020]

¹¹⁸ Ministry of Information (Myanmar), ‘E-IDs fundamental to e-governance : U Thein Shwe (23 January 2020) available at: <https://www.moi.gov.mm/moi:eng/news/362> [accessed 11/11/2020]

¹¹⁹ Planet Biometrics, ‘Myanmar launches biometric eID pilots’ (2016) available at: <https://www.planetbiometrics.com/article-details/i/5341/desc/myanmar-launches-biometric-eid-pilots/> [accessed 13/11/2020]

Little is known about the broader approach to the proposed ID system. The lack of transparency around such reform, is of concern particularly given the potential for digital registration to adversely impact socially and economically marginalised groups.¹²¹ At the planning and development stages of all digital identity systems, it is imperative to conduct meaningful consultations with a variety of stakeholders in order to establish whether the benefits outweigh the risks and to ensure a “do no harm” approach.¹²² According to guidance produced by the Engine Room, consent processes should be designed with the input of vulnerable groups, and risk assessments should also take into account those who will be left out due to a lack of the correct documents.¹²³ Myanmar has a long history of using state surveillance activities to oppress political and ethnic opposition. Privacy International has highlighted the dangers associated with plans to make mandatory the collection of biometric information for mobile phone SIM card registration in Myanmar. They have pointed out that the alarming lack of legal safeguards in Myanmar would enable surveillance to be used to “arbitrarily target individuals and minorities”. They refer to the “legal void” in the regulation of data processing in Myanmar. Myanmar “does not have a data protection law in place” and broad scope to access information from telecommunications companies.¹²⁴ In the case of digital identity systems, it is imperative that good data protection laws are in place that cover both data sharing and data retention.¹²⁵ Of particular concern regarding the risks of state surveillance related to digital registration, is that Muslim communities throughout Myanmar have reported increased state surveillance, disproportionate scrutiny and harassment by state authorities after submitting passport applications.¹²⁶

Given the lack of efficiency in the administrative systems in Myanmar, updating and improving filing systems relating to registration has potential to improve

cumbersome civil documentation processes. If harnessed effectively towards social protection, it could also potentially streamline and improve access to services for those included in citizenship registration.¹²⁷ With the right legal protections in place, where replacements of destroyed, confiscated, lost and stolen documents are hard to come by, it could potentially help to protect records of civil documents thus protecting citizenship and easing the evidentiary requirements of citizenship applications.¹²⁸

According to MoLIP, the e-ID system would be rolled out in accordance with the 1982 Citizenship Law and one of the expressed purposes would be the national verification of Rohingya populations in Rakhine state.¹²⁹ Without the Citizenship Law being brought into line with international standards, and without tackling arbitrary, corrupt and discriminatory administrative processes, the risks for marginalised communities, especially Rohingya, are very high.¹³⁰

The recent past holds several warnings to international agencies and private companies.

Data collection for the national census in 2014, also required Rohingyas to identify as Bengali. In this respect, Myanmar went against the advice of the UNFPA, which was providing technical and financial support.¹³¹ Due to this requirement, a large proportion of Rohingya refused to participate and were thus left out of national census data. As such, the census, which was widely understood as an attempt to erase Rohingya from national data sets, was widely criticised. Financial and logistical support was also provided by the UK, Australia, multiple European governments and the United States.¹³²

¹²⁰ P. Green, T. McManus & A. de la Cour Venning, ‘Genocide achieved, genocide continues: Myanmar’s annihilation of the Rohingya’ (2018) available at: <http://statecrime.org/data/2018/04/ISCI-Rohingya-Report-II-PUBLISHED-VERSION-revised-compressed.pdf> [accessed 13/11/2020]

¹²¹ M. Gilman, ‘Poverty Lawgorithms: A Poverty Lawyer’s Guide to Fighting Automated Decision-Making Harms on Low-Income Communities’ Data & Society (2020) available at: <https://datasociety.net/wp-content/uploads/2020/09/Poverty-Lawgorithms-20200915.pdf> [accessed 13/11/2020]

¹²² N. Brinham, ‘When Identity Documents and Registration Produce Exclusion: Lessons from Rohingya Experiences in Myanmar’ (2019) available at: <https://blogs.lse.ac.uk/mec/2019/05/10/when-identity-documents-and-registration-produce-exclusion-lessons-from-rohingya-experiences-in-myanmar/> [accessed 11/11/2020].

¹²³ The Engine Room, ‘What to look for in Digital Identity Systems: A Typology of Stages’ (2019) available at: <https://www.theengineerroom.org/wp-content/uploads/2019/10/Digital-ID-Typology-The-Engine-Room-2019.pdf> [accessed 13/11/2020]

¹²⁴ Privacy International, ‘Myanmar: Dangerous Plans for Biometric SIM Card Registration Must be Scrapped’ (2019) available at: <https://privacyinternational.org/news-analysis/3303/myanmar-dangerous-plans-biometric-sim-card-registration-must-be-scrapped> [accessed 11/11/2020]. Myanmar does, however, have a 2017 law protecting the privacy and security of citizens, which to some degree, regulates private individuals acquisition and use of data (as opposed to the state).

¹²⁵ The Engine Room, ‘What to look for in Digital Identity Systems: A Typology of Stages’ (2019) available at: <https://www.theengineerroom.org/wp-content/uploads/2019/10/Digital-ID-Typology-The-Engine-Room-2019.pdf> [accessed 13/11/2020]

¹²⁶ Burma Human Rights Network, ‘BHRN Releases Report on Discrimination Against Muslim Passport Applicants’ (2018) available at: <http://www.bhrn.org.uk/en/report/1051-bhrn-releases-report-on-discrimination-against-muslim-passport-applicants.html> [accessed 13/11/2020]

¹²⁷ M. Panguestu, ‘Harnessing the power of digital ID’, World Bank Blogs (August 2020), available at: <https://blogs.worldbank.org/voices/harnessing-power-digital-id> [accessed 11/11/2020]

¹²⁸ UNHCR, ‘Strategy on Digital Identity and Inclusion’ (2018) available at: https://www.unhcr.org/blogs/wp-content/uploads/sites/48/2018/03/2018-02-Digital-Identity_02.pdf [accessed 11/11/2020]

¹²⁹ Khin Yadanar and Zin Oo, ‘Fourth-Year Performances of the Ministry of Labour, Immigration and Population’ Myanmar Digital News (April 2020) available at: <http://www.mdn.gov.mm/en/fourth-year-performances-ministry-labour-immigration-and-population> [accessed 13/11/2020]

¹³⁰ ISI and European Network on Statelessness, ‘Country Position Paper: Statelessness in Myanmar’ (2019) available at <https://statelessjourneys.org/wp-content/uploads/StatelessJourneys-Myanmar-final.pdf> [accessed 13/11/2020]

¹³¹ Although ethnic data was collected, it was not included in the public census report and have not yet been made public.

¹³² The Republic of the Union of Myanmar, The 2014 Myanmar Population and Housing Census: The Union Report, Census Report Volume 2: page ii, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Census%20Main%20Report%20%28UNION%29%20-%20ENGLISH_1.pdf [accessed 13/11/2020]

Further, a smart phone application used in the lead up to the 2020 general election, to provide voters with information about candidates, was widely criticised internationally for using ethnic identifiers that listed Rohingya candidates as "Bengali".

The app was developed by Swedish organisation, International IDEA, which provides support to electoral processes and was funded by the EU, Asia Foundation and STEP Democracy. Human Rights group, Justice for Myanmar, described these organisations as "complicit in the erasure of Rohingya identity".¹³³

Perhaps the clearest warning, is administrative violence and genocide risks associated with Myanmar's National Verification Cards, which at different stages of their evolution, have been endorsed by various international actors, including the EU and the UN Special Envoy on Myanmar.¹³⁴ Data collection and the issuance of NVCs, have been closely associated with mass expulsions and the deliberate infliction of statelessness on Rohingya since 2016. Firstly, NVCs are understood by many Rohingya to lock in and entrench a foreign and stateless status for Rohingya in Myanmar, thus further producing and legitimising exclusions. Secondly, NVCs have been enforced by inflicting conditions of life on Rohingya that make survival in Myanmar without them almost impossible – whereby they cannot access livelihoods, nutrition, or healthcare without them. With paper NVCs, the Myanmar government was able to control most of the necessary livelihood activities, a digital version would allow the government to further extend these capabilities. Thirdly, the enforcement of NVCs and national verification has been directly associated with the devastating genocidal violence of 2016-2017.¹³⁵ All these factors should raise alarm bells for the international agencies and

corporations planning to invest or provide financial or technical support to digital identification systems in Myanmar.

Digitised Identification Systems in Myanmar: Another Tool of Persecution and Exclusion?

Within the context of the divisive national verification process, the collection of biometric data was piloted in Rohingya areas of Rakhine in 2015. In many cases NVCs are issued but they do not lead to applications for citizenship verification. The cards are instead used by holders since they are required to move within the area and access work, markets, healthcare and family life. Biometric data was collected as part of the broader national verification project, but was not linked to ID cards or utilised in other ways.¹³⁶ Reports from Maungdaw district are that currently biometric data is not collected for the purpose of issuing NVC cards, which are still paper-based. However, those who attempt to apply for citizenship including submitting supporting documents, are reportedly asked to provide fingerprints and iris scans for use in future citizenship cards, but not NVCs.¹³⁷

Rohingya have expressed concerns that country-wide implementation of biometric IDs under the existing laws may further enable Myanmar's discriminatory and persecutory policies that target them. It may lock in an imposed foreign or stateless identity, make access to lands and livelihoods even harder, and further lock in the structures of segregation and apartheid.¹³⁸

A centralised and permanent database that registers citizenship and retains biographic and biometric information could erase Rohingyas' ethnic identity, mark them as foreigners, or undermine their claims to belong the Rakhine region of Myanmar, which is understood to be a key element of the ongoing situation of genocide in Myanmar.¹³⁹

¹³³ The Independent, 'Ethnic identifiers in Myanmar election app criticized', (October 2020) available at: <https://www.independent.co.uk/news/ethnic-identifiers-myanmar-election-app-criticized-myanmar-rohingya-democracy-bengali-controversy-b740573.html> [accessed 11/11/2020]

¹³⁴ Burma Campaign UK, 'UN Special Envoy should drop 'appalling' support for NVC Process' (2019) available at: <https://burmacampaign.org.uk/rohingya-crisis-un-special-envoy-should-drop-appalling-support-for-nvc-process/> [accessed 11/11/2020]; Burma Human Rights Network, 'National Verification Cards: A Barrier to Repatriations,' (2019) available at: <http://www.bhrn.org.uk/en/report/1090-national-verification-cards-a-barrier-to-rohingya-repatriation-full-report.html> [accessed 13/11/2020]

¹³⁵ For more information on how NVCs were associated with genocidal violence in 2016-7, see N. Brinham, "Genocide cards": Rohingya refugees on why they risked their lives to refuse ID cards' Open Democracy (October 2018) available at: <https://www.opendemocracy.net/natalie-brinham/genocide-cards-why-rohingya-refugees-are-resisting-id-cards> [accessed 13/11/2020];

See also Fortify Rights, "Tools of Genocide": National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar' (2019) available at: <https://www.fortifyrights.org/downloads/Tools%20of%20Genocide%20-%20Fortify%20Rights%20-%20September-03-2019-EN.pdf> [accessed 13/11/2020]

¹³⁶ A forthcoming briefing from Privacy International sets out what is known to date about the new digital ID proposal in Myanmar and raises some specific concerns based on Myanmar's current citizenship regime and ID system.

¹³⁷ Information provided by Rohingya researchers in North Rakhine State (names withheld)

¹³⁸ Amnesty International, 'Caged without a Roof: Apartheid in Myanmar's Rakhine State' (2017) available at: <https://www.amnesty.org/en/documents/asa16/7484/2017/en/> [accessed 13/11/2020]

¹³⁹ UN News, 'Genocide threat for Myanmar's Rohingya greater than ever, investigators warn Human Rights Council' (September 2019) available at: <https://news.un.org/en/story/2019/09/1046442> [accessed 13/11/2020]

Unless digital IDs are identical to those issued to other ethnic groups or Burmese, and unless our ethnicity is not directly or indirectly identifiable from the ID card and database, we will continue to suffer discrimination.¹⁴⁰

Rohingya living in areas of Myanmar outside Rakhine State, are also concerned. Even those with identity documents live with a precarious status. If identified through a birthplace in Rakhine, or a Muslim name, they risk coming under increased state surveillance and scrutiny. They often feel at risk of being “deported” to the closed areas of North Rakhine State. In the absence of effective protection measures, digitalisation could flag up factors that highlight Rohingyas’ and others’ geographic, religious and ethnic origins, thus increasing the insecurity of their status and leaving them exposed to further discrimination or persecution.

Currently the way our people survive is either by avoiding any activities where they need to encounter any government institutions (e.g. business or professional license, any legal applications, etc) or by simply hiding their links to Rakhine State, or Rohingya. A digitalized version of ID system with features like geolocation filtering or similar capabilities will easily give authorities the ability to single Rohingya out and possibly deport back to Rakhine State.¹⁴¹

Additionally, while Rohingyas and others currently may be able to access education, health, banking and other key services without a citizenship card using a range of identification documents, including outdated and unofficial IDs, one service-access identity card may reduce the informal coping and survival mechanisms available to them. One **Rohingya based in Yangon**, summed the situation up as follows:

“

In Myanmar, in the offices, they are buried under a mountain of paper files, so they want a digital system. There are millions of people in Myanmar, especially in the ethnic minority areas, who don't have citizenship cards and the government is trying to increase the number of ID documents. This is good for some people,

but others who have lived for generations in Myanmar will find it even harder to get citizenship cards. Getting a citizenship card can be so hard for people of Indian, or Nepal origin, or for Rohingya and other minorities not recognised by the government. At the moment there are a lot of conversations happening amongst us in Yangon about the biometric system coming. Life is difficult without citizenship cards. They are saying it is going to get harder and harder for people like us.¹⁴²

¹⁴⁰ Comment by Jaivet Ealom. On file with ISI (November 2020).

¹⁴¹ Interviews conducted with two Rohingya researchers for ISI, September 2020 (names withheld).

¹⁴² Comment by Jaivet Ealom. On file with ISI (November 2020).

¹⁴³ Interview with a Rohingya by phone from Yangon, Myanmar, for ISI, September 2020 (name withheld).

Recommendations

Even as the genocide of the Rohingya is ongoing, as Rohingya IDPs continue to be housed in internment camps in Rakhine state, as Rohingya are denied the right to vote or seek election, and as Myanmar refuses to acknowledge, take responsibility for and pursue accountability and restitution in relation to the 2017 atrocities; the country is moving forward to building a digital ID system on the foundations of its discriminatory and arbitrary 1982 Citizenship Law. Myanmar's historical approach to erasing the Rohingya national and ethnic identity marker and imposing the foreign identity marker of "Bengali" on Rohingya and other Muslim populations in data collection processes, serves as a warning of the dangers inherent in providing technical and financial support to such projects in Myanmar, without ensuring fundamental reforms beforehand. In this context, we make the following recommendations:

Myanmar, private companies and international organisations providing support for digital identification systems in Myanmar, must engage in meaningful consultation with all relevant stakeholders at all stages of its design and implementation. This must include Myanmar civil society and marginalised groups such as Rohingya. They must ensure that exclusions and discrimination do not become entrenched as a result. Transparency and accountability must be ensured throughout.

Private companies, international organisations and donors should ensure a human rights approach is central to the design and architecture of a digital transformation system. A "do not harm" approach must be employed to ensure the system is aligned with the wider Sustainable Development Agenda and human rights standards.

A legislative framework based on the principles of non-discrimination must be in place prior to the implementation of digital identification system. As a minimum, the discriminatory and arbitrary 1982 Citizenship Law should be reformed and replaced with a citizenship law and policy framework which complies with international standards.

Additionally, the administrative and legal underpinnings that result in discrimination in personal documentation systems, including evidentiary requirements, voluntariness, arbitrary decision-making and the lack of judicial overview or appeal process, must be factored in and addressed prior to implementation.

Myanmar must remove markers from all identity cards relating to ethnicity, religion, place of birth and other personal information that serves to identify protected characteristics and can lead to discrimination and other human rights deprivations.

Myanmar must enact and implement comprehensive data protection laws, which comply with international standards and cover data sharing and data retention. This law and policy framework must equally apply to non-citizens, including stateless persons.

Myanmar must take a comprehensive approach to addressing statelessness in the country, by ensuring everyone's right to acquire and retain their nationality, on the basis of non-discriminatory and non-arbitrary criteria that adheres to international norms. This approach must include the Rohingya who have been arbitrarily deprived of their nationality, as well as other groups.

The risks of genocide related to ID systems should be factored into the design and implementation of Myanmar's digital system. The early warning systems developed by genocide prevention experts, should inform this including the potential for ID systems to stigmatise and identify members of protected groups for persecution, and the potential for citizenship and identification frameworks to deny fundamental human rights to these groups.

5. CONCLUDING REFLECTIONS AND RECOMMENDATIONS

Digital identity systems impact people's lives in many ways. Without legislative frameworks that protect human rights and equality, they can compound vulnerabilities and entrench discrimination. As Privacy International's Director of Policy, **Lucy Purdon**, shared with ISI:

“

It's essential to have a proper legislative framework in place before a system is implemented. Data protection is an essential element of this, to cover the data in the system but also issues like how identity numbers are used. There has to be effective data protection legislation, providing responsibilities and obligations for processing activities and limited to that strictly and demonstrably necessary to achieve a legitimate aim. It should be implemented through an independent data protection authority. The law must be accessible to the public and sufficiently clear and precise to enable persons to foresee its application and the extent of the intrusion with someone's privacy. All this should be established before deployment of the system. But, the scope and reach of an identity system means that data protection alone is not enough. To be sure that a system does not exclude or exploit, and respects human rights, there also has to be an effective legal framework on issues including gender, citizenship, equality, and more. A digital identity system itself does not provide a solution to these issues, but rather risks making these problem worse.¹⁴⁴

For stateless persons in particular, participants in consultations reported that the expansion of digital identification systems is destroying the informal means of survival that these groups have developed in the absence of proper documentation and recognition by the states in which they reside. Stateless persons, who are predominantly racial and ethnic minorities are systematically excluded from digital identity databases and documentation. Centralized biometric ID systems challenge the internationally recognized framework of nationality and citizenship in multiple ways.¹⁴⁵

The use of biometrics and the digitisation of registration in both Bangladesh and India highlights the fundamental importance of ensuring that refugee, stateless and other marginalised populations participate in consultations on the design and implementation of digitised personal identification systems. They reveal how digitisation can lock-in a foreign or stateless status and lock populations out of access to services and state protections, making the lives of marginalised populations increasingly precarious. As stated in the report of the Special Rapporteur on Racism:

The global push for legal identities for all within the human rights and development sectors together with the push towards administrative efficiency as part of the reform process in Myanmar, leaves international development actors and private tech companies poised to provide technical and financial assistance to Myanmar to digitise registration data and roll out biometric IDs.¹⁴⁶ Whilst inefficient administrative and legal systems in Myanmar contribute to the barriers many people in Myanmar face in proving their legal status and accessing rights and services,¹⁴⁷ there are multiple concerns regarding the roll-out of such ID and registration schemes under the existing legal framework. With the 1982 Citizenship Law which discriminates on the grounds of race and fails to comply with international law in multiple other ways including in preventing statelessness,¹⁴⁸ and an absence of laws protecting privacy and limiting state surveillance, the roll-out of digitised identity cards has the potential to cause further harm. A digitised system could entrench Rohingya statelessness in Myanmar, lock-in an imposed “foreignness”, and increase Myanmar's capacity to further discriminate against Rohingya populations in Rakhine and elsewhere in Myanmar. Additionally, without changes to policies and practices in Myanmar that are applied to non-nationals in Rakhine state and

¹⁴⁴ Interview with Lucy Purdon, Privacy International, November 2020. On file with ISI.

¹⁴⁵ Ms. E. Tendayi Achiume, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/75/590 (November 2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020]

¹⁴⁶ Ministry of Information (Myanmar), 'E-IDs fundamental to e-governance : U Thein Shwe (23 January 2020) available at: <https://www.moi.gov.mm/moi:eng/news/362> [accessed 11/11/2020]

¹⁴⁷ Institute on Statelessness and Inclusion and European Network on Statelessness, 'Country Position Paper: Statelessness in Myanmar' (2019), available at <https://statelessjourneys.org/wp-content/uploads/StatelessJourneys-Myanmar-final.pdf> [accessed 13/11/2020]

¹⁴⁸ J. M. Arraiza and O. Vonk, 'Report on Citizenship Law: Myanmar' (2017) available at: https://cadmus.eui.eu/bitstream/handle/1814/48284/RSCAS_GLOBALCIT_CR_2017_14.pdf?sequence=1 [accessed 13/11/2020]

beyond, an e-ID scheme could further facilitate the infliction of conditions of life which destroy Rohingya communities, including cutting off livelihoods, food supplies, and access to essential services. Referring to the Principles on Deprivation of Nationality as a National Security Measure,¹⁴⁹ the **Special Rapporteur** further asserts:

“

The same key considerations that must flow into every nationality deprivation decision, including non-discrimination, avoidance of statelessness, prohibition of arbitrariness, proportionality, necessity and legality, must also be present when considering the introduction of centralized biometric ID systems. The introduction of digital governance structures risks deprivation of nationality by proxy measures, without due process – both intentionally and as a result of incomplete or flawed civil registration systems.¹⁵⁰

¹⁴⁹ Institute on Statelessness and Inclusion et al, ‘Principles on Deprivation of Nationality as a National Security Measure’, (2020), available at: <https://files.institutesi.org/PRINCIPLES.pdf> [accessed 13/11/2020]

¹⁵⁰ Ms. E. Tendayi Achiume, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/75/590 (November 2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020]

Recommendations

This Briefing Paper, in considering ongoing efforts and future plans in relation to digital ID and the Rohingya, has spotlighted numerous concerns. These concerns emanate primarily from the deeply unequal, insecure and marginal position that Rohingya hold in Myanmar, Bangladesh and Indian societies. Arbitrarily deprived of their nationality, stateless and (outside Myanmar) refugees, the Rohingya have little political voice within these countries, and cannot withstand the imposition of discriminatory and unfair systems on them, which will serve to further entrench their exclusion and marginalisation. Unless UN agencies, states, the private sector, civil society and other actors stand with the Rohingya, listen to them, remain accountable to them and apply pressure on the states in question to act in compliance with their international obligations; there is a real risk that policies of digitisation will further policies of genocide (within Myanmar) and of structural discrimination and exclusion (in Bangladesh and India).

The warning signs have been many – from the expulsions and forced repatriations of the 1970s and 1990s, the 2014 census, the 2015 and 2020 elections, and genocidal violence of 2017. Despite all the warning signs, NVCs have been, at various stages welcomed by international actors, and repatriation remains a primary pursuit. Rohingyas have paid the ultimate price for past failures, and stand to lose again, if digitalisation is rolled out on top of discriminatory law and policy frameworks, and with ulterior motives.

While the march towards modernisation and digitalisation is inevitable and has potential to bring great benefits, the harm that stands to be done if mistakes are made, yet again, must not be ignored or underplayed. It is crucially important to go back to basics, the fundamental principles of human rights, the core SDG principle of ‘leave no one behind’, and the duty to protect refugees and stateless persons.

In this context, and in addition to the country-specific recommendations made above, we make the following recommendations to members of the international community:

We reiterate to states, UN agencies, development and humanitarian organisations, the recommendations made by the UN Special Rapporteur on Racism, in her November 2020 report to the UN General Assembly.¹⁵¹

All actors are urged to always engage the Rohingya community in a transparent and constructive manner; to consult with Rohingya leaders before developing positions and policies related to the Rohingya, and to be accountable to the Rohingya in how these policy objectives are pursued and negotiated.

Development, humanitarian, private sector and human rights actors should learn lessons from the past, as well as contemporary lessons from other contexts, to ensure that the future pursuit of digital ID for the Rohingya and for other stateless, refugee and migrant communities, is preconditioned upon necessary law and policy reform in relation to nationality rights, privacy and data-protection, equality and non-discrimination and due process.

All initiatives related to registration, documentation and digital ID for the Rohingya must be viewed in the wider context of genocide within Myanmar; Bangladesh and India’s historical and ongoing failure to protect and efforts to forcibly repatriate Rohingya to Myanmar. In this context, UN and other actors have a duty to protect the Rohingya and to stand against their refoulement, while searching for durable solutions based on basic human rights. Digital ID initiatives must complement, not hinder, such protection and rights-based approaches.

¹⁵¹ Ms. E. Tendayi Achiume, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/75/590 (November 2020) available at: <https://www.ohchr.org/en/issues/racism/srracism/pages/indexsrracism.aspx> [accessed 13/11/2020]



This paper sheds urgent light on how the digitization of identity stands to worsen the human rights situation for the Rohingya, who the global community has failed time and time again. It also centres Rohingya perspectives on the action necessary to ensure that technological innovation does not become a cover for severe discriminatory exclusion on the basis of ethnicity and religion.

**TENDAYI ACHIUME,
THE UN SPECIAL RAPPORTEUR
ON CONTEMPORARY FORMS OF RACISM,
RACIAL DISCRIMINATION, XENOPHOBIA
AND RELATED INTOLERANCE**

Rohingya communities have been arbitrarily deprived of their nationality and persecuted in Myanmar, while also being denied adequate protection as refugees and stateless persons in neighbouring countries. At the centre of their insecurities and vulnerabilities, is a lack of legal status as citizens in Myanmar, and as residents, refugees and stateless persons elsewhere. For over 30 years, Rohingya in Myanmar have been subject to one of the world's most oppressive registration and surveillance systems, the ultimate aim of which has been to exclude and persecute. In other countries, they have been left out of civil documentation procedures in order to deny them a legal status and thus avoid state responsibility. In more recent times, national personal identification systems are increasingly moving from the paper-based to digital; bringing opportunities to protect, but also potential to entrench exclusion, denial and persecution.

This Briefing Paper contextualises Rohingya human rights and protection concerns within the global trajectory towards legal identities for all and the increased digitisation of identification systems. The paper relates Rohingya experiences of registration systems, to wider human rights challenges around racial and xenophobic discrimination, digital technologies and borders, as articulated in a recent report by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance.