

Joint Submission to the
UN Special Rapporteur on
Trafficking in Persons, especially
Women and Children

For the Report to the UN
To inform the SR's report to
be presented to the 47th
session of the Human
Rights Council, June 2021

1 June 2020



Joint Submission to the UN Special Rapporteur on Trafficking in Persons, especially Women and Children*

1. The Institute on Statelessness and Inclusion (ISI)¹ and Free Rohingya Coalition (FRC)² welcome the opportunity to make this joint submission to the Special Rapporteur on “*the implementation of the non-punishment principle in the context of trafficking in persons*”.³ This submission focuses on the nexus between statelessness/nationality deprivation and trafficking. As such, the submission builds on concluding observations and recommendations made by various UN treaty bodies, which have acknowledged and responded to the nexus between statelessness trafficking,⁴ and looks at:
 - a. Punishment of Rohingya victims of trafficking; and
 - b. The application of nationality deprivation as a counter-terrorism measure to victims of trafficking.

Issue 1: Punishment of Rohingya victims of trafficking

2. This section refers to the 2020 position paper on non-punishment by the Special Rapporteur⁵ and outlines the human rights situation for Rohingya caught in the intersections of trafficking, statelessness and persecution. Rohingya in the region are routinely detained, prosecuted and punished for immigration offenses and the use of “false” documents. In some contexts, they are also forcibly relocated.
3. Rohingya have been arbitrarily deprived of their nationality in their country of origin, Myanmar. They have suffered chronic persecution and conditions of life that make survival increasingly less viable in Myanmar. The deliberate infliction of these conditions by the Myanmar military regime may amount to an act of genocide.⁶ This has caused more than 1 million Rohingya to flee over decades in search of safety, security and income to support their families in Myanmar and beyond. The vast majority of Rohingya live in countries where they have a precarious legal status, no access

* For more information, please contact: Sangita.Bajulaiye@institutesi.org

¹ ISI (www.institutesi.org) is an independent non-profit organisation committed to an integrated, human rights based response to the injustice of statelessness and exclusion through a combination of research, education, partnerships and advocacy. Established in August 2014, it is the first and only global centre committed to promoting the human rights of stateless persons and ending statelessness.

² Free Rohingya Coalition (www.freerohingyacoalition.org) is a global network of Rohingya activists and friends of Rohingyas who share common concerns about Myanmar’s on-going genocide and the need for Rohingya survivors to play an active role in seeking a viable future for their group.

³ Special Rapporteur on Trafficking in Persons, Call for written submissions: Report of the United Nations Special Rapporteur on trafficking in persons, especially women and children, p. 1.

⁴ See for example, CEDAW/C/TTO/CO/4-7, CEDAW/C/URY/CO/8-9, CRC/C/PAK/CO/5 and CRC/C/KHM/CO/2-3.

⁵ Maria Grazia Giammarinaro, ‘The importance of implementing the non-punishment provision: the obligation to protect victims’ (2020), <https://www.ohchr.org/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf>

⁶ The IFFM documented state acts in Myanmar that may amount to the following act of genocide “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” ‘Detailed Findings of the IFFM’, A/HRC/42/CRP.5, (Sept 2019) https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/20190916/A_HRC_42_CRP.5.pdf

to lawful work and limited refugee protections.⁷ As such, many refugees move onwards to third or fourth countries in search of security and livelihoods. Most Rohingya live in situations of protracted displacement and intergenerational statelessness unable to regularise their status.⁸ Without travel documents and work permits, the *only* way for stateless Rohingya to move across international borders, and often internally within countries, is through irregular means.⁹ They are compelled to use networks of brokers to facilitate both travel and access to livelihoods. Such facilitation can be a lifeline to those escaping persecution.

4. These land and maritime movements are often characterised by exploitation, violence and extreme risk.¹⁰ Extortion and exorbitant costs, which can cripple household finances, are commonplace, as are abductions and detention in “trafficking camps” and private houses. Torture, killings, threats, and harassment of family members both during and after the journey are used to extract payment. This includes demands for additional and rising payments beyond the agreed terms. Rape and sexual exploitation of Rohingya women and girls, and sometimes men, in transit is reportedly widespread. Some Rohingya end up in situations of bonded labour and other forms of forced labour. Rohingya women are trafficked for early and forced marriage, and sexual exploitation,¹¹ a phenomenon which has also been documented in Pakistan.¹²
5. Rohingya intercepted by state authorities in India, Thailand, Malaysia and elsewhere, are routinely detained as “illegal migrants”. In Thailand, Rohingya victims of trafficking “*are treated as illegal immigrants and are subject to indefinite detention in squalid immigration and police lockups.*”¹³ Where detainees were intercepted in transit, family members and relatives can be held liable by brokers for the costs. This can result in threats of violence and impact food security for Rohingya households. With limited access to refugee registration, no processes to identify them as stateless, and no steps taken to identify and protect them as victims of trafficking, detention can be prolonged and indefinite.¹⁴ Importantly, MoUs between Myanmar and states like Thailand and Malaysia to support the return and rehabilitation of victims of trafficking are not applicable to Rohingya since Myanmar does not accept them as its nationals.¹⁵ Victims of trafficking are rarely identified and thus the principals of non-punishment are not applied. Rohingya who have been compelled to move in search of safety and security, are often prosecuted

⁷ None of the countries hosting large Rohingya refugee populations are party to the 1952 Refugee Convention. As such Rohingya are considered by states to be irregular migrants, even where UNHCR has a an RSD process. These countries include Bangladesh, Malaysia, Thailand, India and Indonesia.

⁸ There are limited resettlement programmes from Malaysia and Thailand. No resettlement options are available in Bangladesh or India. Refugees are not have the right to work in any of these countries.

⁹ Rohingya in Myanmar and Bangladesh are subject to internal restrictions of movement applied to refugees and non-citizens.

¹⁰ See Kangkung and Quinley, Mass atrocities and human trafficking: Rohingya Muslims on the move, 2018 <https://odihpn.org/magazine/mass-atrocities-human-trafficking-rohingya-muslims-move/>

¹¹ Information provided by Rohingya FRC members working with survivors in Malaysia, Bangladesh and India.

¹² Paria Saika, ‘Rohingya brides thought they were fleeing violence. Then they met their grooms’, Vice World News, 25.01.2021, available at: <https://www.vice.com/en/article/jgqa3d/rohingya-brides-thought-they-were-fleeing-violence-then-they-met-their-grooms>.

¹³ Sreeparna Banerjee, ‘Myanmar: trafficking issues, plight of Rohingyas in Thailand’, Observer Research Foundation, 21.01.2021, available at: <https://www.orfonline.org/expert-speak/myanmar-trafficking-issues-plight-rohingyas-thailand/>

¹⁴ For example, Rohingya FRC members note that there are unknown hundreds of Rohingya in detention in India including men, women and children. Families are often separated in detention. Most are prosecuted under the immigration act. The maximum sentence is 9 months, but many who cannot be returned to Myanmar are not released. Some have been in detained for over 8 years. Rohingya are also detained in Thailand, Malaysia, Bangladesh and Saudi Arabia and elsewhere. In India, Malaysia and Thailand, there are multiple barriers to accessing UNHCR registration for detainees. This prolongs detention.

¹⁵ For a list of bilateral agreements on trafficking in the region see <http://un-act.org/laws-agreements-download/>

under immigration offenses and, sometimes, for using fraudulent documents.¹⁶ Due to a lack of victim identification processes, there is a strong possibility that some of those prosecuted are trafficked. Additionally, the use of false or irregularly obtained documents, can prejudice refugee determination processes or result in life-time visa bans in Australia, Europe and North America.¹⁷

6. In establishing a more robust protection regime with fewer punitive measures, it is vital to improve refugee and statelessness determination procedures and related protections. Additionally, the identification of victims of trafficking must be improved, even where criminal prosecutions of traffickers are not pursued. In order to prevent further exploitation and trafficking, it is vital that sustainable solutions to trafficking, labour exploitation and intergenerational statelessness are put in place, through which Rohingya can regularise their immigration and legal status and gain access to safe, decent and regular work.

Case study: Bhasan Char, Bangladesh

7. In 2020, Rohingya refugees attempting to make the journey across the sea from Bangladesh and Myanmar to Southeast Asia were prevented from disembarking in Southeast Asia, where Covid-19-related border restrictions were in place. They were pushed back into the sea by state authorities in Thailand, Malaysia and Indonesia, resulting in hundreds of deaths.¹⁸ Whilst still at sea, brokers increased the costs of the journey up to seven-fold. They threatened relatives of those on the boats, extorting money in exchange for the promise of disembarking them. Threats to life were used.¹⁹ In May 2020, more than 300 of these Rohingya were returned to Bangladesh. Survivors were not returned to their homes and families in the refugee camps. Instead, they were disembarked and detained on Bhasan Char island, a remote and unstable silt island 37 miles off the coast of the mainland. The survivors were ostensibly quarantined on the island. However, they were not allowed to return to their families in the refugee camps after the isolation period. They remain on the island, despite protests, hunger strikes and reports of suicide ideation.²⁰ Detained and forcibly relocated, this is in violation of the principles of non-punishment of trafficking victims.

Case study: prosecutions and internal “deportations” in Myanmar

8. Rohingya in Myanmar have severe restrictions placed on their movements and are contained in North Rakhine State in apartheid-like conditions, unable to travel to the rest of the country.²¹ With the sea routes increasingly monitored for human trafficking and smuggling, land routes across Myanmar to Southeast Asia are increasingly used by smuggling and trafficking networks. In 2020, Rohingya intercepted on route by Myanmar authorities were prosecuted under the immigration act and detained.²² In 2021 this practice changed. Rohingya were quarantined for 14 days and

¹⁶ There were prosecutions for false documents in Bangladesh in 2019.

¹⁷ Information provided by FRC.

¹⁸ See ISI, ‘Human Rights and Covid-19: What now for the Rohingya?’ (2020)

https://files.institutesi.org/Covid19_The_Rohingya_Briefing_Paper.pdf

¹⁹ Video testimony from relatives on file with FRC. Also Suza Uddin & Poppy McPherson, ‘Traffickers demand payments for Rohingya stranded at sea’ (June 2020), <https://www.reuters.com/article/us-myanmar-rohingyaidUSKBN23M2BT>

²⁰ Fortify Rights, ‘Detained on Bhasan Char island’ (2020), <https://www.fortifyrights.org/bgd-inv-2020-08-05/>

²¹ Amnesty International, ‘Caged without a Roof: Apartheid in Myanmar’s Rakhine State’ (2017)

<https://www.amnesty.org/en/latest/news/2017/11/myanmar-apartheid-in-rakhine-state/>

²² See: Burma Human Rights Network, ‘Nowhere to run in Burma: Rohingya trapped between an open-air prison and jail’ (2020) <http://www.bhrn.org.uk/en/report/1128-nowhere-to-run-in-burma.html>

then “deported”²³ to North Rakhine State regardless of whether they were registered as residents of the refugee camps in Bangladesh or not. In January of 2021 alone, 7 Rohingya were internally “deported” from Irrawaddy division, 99 from Yangon and 34 from Mawlamyine. In order to return, they are forcibly registered and issued with National Verification Cards which identify them as foreigners. The genocidal violence of 2016-7 was associated with the forced issuance of these cards.²⁴ This practice amounts to forcible return/relocation to a situation of “ongoing genocide”.²⁵ Both prosecutions and internal “deportations” are forms of punishment and highlight the need to integrate the protection of trafficking victims with human rights solutions to nationality deprivation.

Issue 2: Arbitrary Deprivation of Nationality

9. In the 21st Century, a small but growing number of States have resorted to deprivation of nationality as a counterterrorism and national security measure. While portrayed as an administrative measure, in reality, citizenship stripping is as a form of punishment,²⁶ which is likely to contravene international law. The Principles on Deprivation of Nationality as a National Security Measure,²⁷ provide important guidance on the question of deprivation of nationality. Accordingly, state discretion in this area is subject to the individual right to nationality,²⁸ the prohibition of

²³ “Deported” is a term used by Rohingya in Myanmar to describe the State’s forcible relocation of them other parts of Myanmar to northern Rakhine.

²⁴ For more info: ISI in association with UN Special Rap on contemporary forms of racism, ‘Locked in and Locked out: The impact of digital identity systems on Rohingya populations’ (2020), https://files.institutesi.org/Locked_In_Locked_Out_The_Rohingya_Briefing_Paper.pdf

²⁵ UN News, ‘Genocide threat for Myanmar’s Rohingya greater than ever, investigators warn Human Rights Council’ (September 2019), <https://news.un.org/en/story/2019/09/1046442>

²⁶ van Waas, L and Paulussen, C (2014) UK Measures Rendering Terror Suspects Stateless: A Punishment More Primitive Than Torture, available at: <https://icct.nl/publication/uk-measures-rendering-terror-suspects-stateless-a-punishment-more-primitive-than-torture/>

²⁷ Principles on Deprivation of Nationality as a National Security Measure, March 2020. Available at: <https://files.institutesi.org/PRINCIPLES.pdf>. The Principles were drafted by ISI in collaboration with the Open Society Justice Initiative and with support from the Asser Institute and Ashurst LLP. They were developed over a 30-month research and consultation period, with input from more than 60 leading experts in the fields of human rights, nationality and statelessness, counter-terrorism, refugee protection, child rights, migration and other related areas. At the time of submission, they have been endorsed by over 100 individual experts and organisations, including leading academics, UN Special Rapporteurs and Treaty Body members, litigators, judges, parliamentarians and diplomats. The Principles restate or reflect international law and legal standards under the UN Charter, treaty law, customary international law, general principles of law, judicial decisions and legal scholarship, regional and national law and practice. They articulate the international law obligations of States and apply to all situations in which States take or consider taking steps to deprive a person of nationality as a national security measure. More information is available here: <https://www.institutesi.org/year-of-action-resources/principles-on-deprivation-of-nationality>.

²⁸ *Human Rights Council Resolution 7/10, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/7/10 (27 March 2008); *Human Rights Council Resolution 10/13, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/10/13 (26 March 2009); *Human Rights Council Resolution 13/2, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/13/2 (24 April 2010); *Human Rights Council Resolution 20/4, The right to a nationality: women and children*, UN Doc A/HRC/RES/20/4 (16 July 2012); *Human Rights Council Resolution 20/5, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/20/5 (16 July 2012); *Human Rights Council Resolution 26/14, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/26/14 (11 July 2014); *Human Rights Council Resolution 32/5, Human rights and arbitrary deprivation of nationality*, UN Doc A/HRC/RES/32/5 (15 July 2016).

arbitrary deprivation of nationality,²⁹ the prohibition of discrimination³⁰ and the obligation to avoid statelessness.³¹ Furthermore, the impact of nationality deprivation on the enjoyment of other human rights, humanitarian and refugee law obligations and standards must be taken into consideration when assessing the legality of citizenship deprivation.³² Any measures to deprive nationality must also comply with due process safeguards and the right to a fair trial.³³

10. Despite such strong standards, the national security and counter-terrorism paradigm has dominated the policy discourse in this space, resulting in vulnerable individuals – including victims of trafficking - who should be protected, being instead subject the harsh punishment of citizenship deprivation. As the Counter-Terrorism Committee Executive Directorate (CTED) has stated, it is important to:

*“[e]nsure that victims of sexual violence associated with human trafficking perpetrated by armed or terrorist groups are recognized as legitimate victims of conflict and/or terrorism and that measures to address their situation are considered to be an integral part of counter-terrorism strategies”.*³⁴

Victims of trafficking should be protected and not victimised further by depriving them of their nationality, which could make them even more vulnerable to human rights abuses.

11. The case of Shamima Begum is exemplary of such a situation: as a child, Ms Begum was a victim of online grooming, resulting in her joining ISIS. A victim of child trafficking, she endured numerous serious rights violations including child marriage and statutory rape. However, her status as a victim of trafficking has not been recognised or addressed by UK authorities who instead treat her as a terrorist and took measures to deprive her of her nationality and deny her the right to return to the UK. These measures are currently being challenged in the courts, with the UN Special Rapporteur on human rights and counter-terrorism having intervened.³⁵

*“Rather than addressing Begum as a victim of online grooming; exploitation; international trafficking; underage ‘marriage’; statutory rape; trauma; and potentially a child soldier; the government unflinchingly defined her as ‘a real threat’.”*³⁶

12. In the context of this submission, it is important to highlight the punitive nature of citizenship deprivation. There are two elements; 1) that citizenship deprivation itself is punitive, and 2) that citizenship deprivation results in cruel, inhuman or degrading treatment or punishment.

²⁹ Principles on Deprivation of Nationality as a National Security Measure, March 2020. Available at: <https://files.institutesi.org/PRINCIPLES.pdf>, Principle 7. See also, the Draft Commentary to the Principles, available at: files.institutesi.org/PRINCIPLES_Draft_Commentary.pdf.

³⁰ Ibid Principle 6.

³¹ Ibid Principle 5.

³² Ibid Principle 9.

³³ Ibid Principle 8

³⁴ CTED (2019) Identifying and Exploring the Nexus between Human Trafficking, Terrorism, and Terrorism Financing, p. 52, available at: <https://www.un.org/sc/ctc/wp-content/uploads/2019/02/HT-terrorism-nexus-CTED-report.pdf>.

³⁵ The Special Rapporteur’s intervention can be found here:

<https://www.ohchr.org/Documents/Issues/Terrorism/SR/Submissions26Oct2020.pdf>

³⁶ Masters, M and Santino F. Regilme Jr, S (2020) Human Rights and British Citizenship: The Case of Shamima Begum as Citizen to Homo Sacer, p. 352, available at: <https://academic.oup.com/jhrp/article/12/2/341/5910762>

The punitive nature of citizenship deprivation

13. In most instances, deprivation of nationality is pursued as an administrative measure. However, *'administering sanction or punishment'* cannot constitute a legitimate administrative purpose for citizenship deprivation.³⁷ Further, neither the European Convention on Nationality (ECN) nor the 1961 Convention on the Reduction of Statelessness allow States to deprive a person of nationality in response to crime,³⁸ however serious the offence may be.³⁹ Indeed, the Inter-American Commission on Human Rights has held that nationality is an *"inherent attribute of every person and should never be withdrawn as a punishment or reprisal."*⁴⁰

Cruel, inhuman or degrading treatment or punishment as a result of citizenship deprivation

14. By depriving persons of their nationality, States risk violating the prohibition of torture, cruel, inhuman or degrading treatment or punishment. In and of itself, deprivation of nationality may cause severe mental suffering, as the identity of the person concerned has been taken away and that person is left in a state of uncertainty. In *Trop v. Dulles*, the United States Supreme Court found that denaturalization was cruel and unusual because *"the punishment strips the citizen of his status in the national and international political community. [...] In short, the expatriate has lost the right to have rights."*⁴¹
15. Citizenship deprivation can also lead to or justify cruel, inhuman or degrading treatment or punishment in other guises. These include the non-repatriation of foreign fighters, leaving them in conflict zones, in inhumane and dangerous conditions; the arbitrary and indefinite detention of persons stripped of their citizenship – often in inhumane conditions – pending their removal; and the *refoulement* of persons stripped of their citizenship, to countries in which their life and security is at threat. The Principles on Deprivation of Nationality, reinforce that citizenship deprivation should not lead to violations to the prohibition of *refoulement*,⁴² torture, or cruel, inhuman or degrading treatment or punishment,⁴³ or the liberty and security of the person.⁴⁴

³⁷ Principles on Deprivation of Nationality as a National Security Measure, March 2020. Available at: <https://files.institutesi.org/PRINCIPLES.pdf>, Principle 7.2.1.1. See also: UN Economic and Social Council, A Study of Statelessness (August 1949) UN Docs E/1112; E/1112/Add.1, p 146 "Deprivation of nationality should not be applied as a punishment."

³⁸ UN Human Rights Council, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', A/HRC/25/28 (2013), para 20.

³⁹ Explanatory Report to the ECN, para 67.

⁴⁰ Inter-American Commission on Human Rights, 'Third Report on the Situation of Human Rights in Chile' (1977) OEA/Ser.L/V/II.40, Chapter 9, para. 10.

⁴¹ United States Supreme Court, *Trop v Dulles*, 356 US 86 (1958), available at: <https://supreme.justia.com/cases/federal/us/356/86/>.

⁴² Principles on Deprivation of Nationality as a National Security Measure, March 2020. Available at: <https://files.institutesi.org/PRINCIPLES.pdf>, Principle 9.2.

⁴³ *Ibid.* Principle 9.3.

⁴⁴ *Ibid.* Principle 9.4.