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**Biometric recording of ‘illegal migrant’ refugee identity: The road towards discrimination<sup>1</sup>**

**To inform the Special Rapporteur’s 2020 report to the United Nations General Assembly, this submission offers a case study of two interrelated technologies: i) the Government of India’s collection of refugee biometric data for border security purposes and ii) AADHAAR – a multi-purpose, biometric national identity card in India. These technologies are being deployed as de-facto border enforcement tools, resulting in ongoing discrimination against refugees and creating a heightened risk of their detention and/or deportation. These technologies undermine refugee rights and raise concerns about data and personal security relevant to other contexts.**

**Summary**

The AADHAAR scheme began in India as a non-mandatory form of identification that has fast become essential for access to schools, health facilities, employment, sim cards, and other vital services. The Government of India has recently changed the rules around AADHAAR eligibility for non-citizens, excluding certain groups. As a result, it has essentially become a *de-facto* marker of citizenship. Refugees without residency permits are explicitly forbidden from holding it—resulting in discrimination based on profiling and precluding refugee access to essential basic services and rights that ensure dignified refuge in India. Outside the AADHAAR framework, the Indian Government has also mandated the recording of biometric data for many non-citizens, and they have particularly targeted Rohingya refugees in this data collection drive. There are no laws regulating the protection of personal biometric data in India, heightening the risk refugees face of deportation/*refoulement* as “illegal migrants”.

As the Indian Government has already collected biometric data on vulnerable refugee groups in the country and AADHAAR is expected to remain a key service-access ID technology well into the future, this submission insists:

- All refugees must be provided with AADHAAR. Failing that, the Government of India must recognise United Nations Refugee Cards and Long-Term Visas as eligible documents for refugee access to essential services. Refugees must be able to claim basic rights.
- Further, the Indian government must reform its biometrics collection policy applicable to ‘non-citizens’, such as the refugees, to ensure that it is based on consent, transparency and underwritten by international human rights standards, including protection.

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<sup>1</sup> This is a modified version of an unpublished submission titled, ‘Shifting exclusivity of AADHAAR: Lines drawn in the sand between refugee and “illegal migrant”, made to the Peoples’ Tribunal on AADHAAR-related issues organised in February, 2020.

## Introduction

In India, issues around the recording of biometric details have recently emerged with the national project, *AADHAAR*, which is a single identity card linked to various benefits, services and facilities. It is the latest government iteration of the proposed 'Multipurpose National Identity Card', and a reflection of the Indian State's attempt to use technology to define material and immaterial aspects of citizenship and shape governance relations between the State and the individual.<sup>2</sup> *AADHAAR* presents a 'new citizenship regime' that potentially reshapes the fault-lines of state-citizen relations.<sup>3</sup> Enrolment numbers are increasing and, as such, it has become an increasingly critical digital identity tool in India.

*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.<sup>4</sup> It is a proof of residence and does not denote citizenship or grant any rights *per se*, and is purported to be used as a non-mandatory verification marker for accessing benefits, services and facilities. Nonetheless, it has attracted concerns around privacy, discrimination and profiling, particularly in relation to its recording, end-usage and sharing of data.<sup>5</sup> These concerns have invigorated demands for a law addressing personal data protection. One offering, the pending Personal Data Protection Bill, 2019, encapsulates some of the issues around personal biometric data—though it is arguable how much the Bill addresses the data protection concerns put forth in the Justice B.N. Srikrishna Committee Report, among others.<sup>6</sup> Moreover, the Supreme Court has recognised the right to privacy as an inherent human right under Article 21 of the Indian Constitution, i.e., the right to life. The occasion to interpret right to life in such a manner arose from the constitutional challenge to the parent legislation of the *AADHAAR* project, which was nevertheless held to be constitutional.<sup>7</sup> However, the Supreme Court missed the opportunity to address *AADHAAR*'s biometric assemblage; in other words, the model of recording, storing, sharing and using biometric data of individuals, that the *AADHAAR* project incorporates.

Justice Chandrachud's offered a dissenting opinion, offering a rights-based critique of the biometric data aspect of *AADHAAR*.<sup>8</sup> He relied, amongst others, on an insightful report by Privacy International that emphasises the necessity of giving adequate attention to the privacy

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<sup>2</sup> Mehmood, Taha (2008) 'India's new ID card: Fuzzy logics, double meanings and ethnic ambiguities', in, Colin J. Bennett & David Lyon (eds.) *Playing the Identity Card: Surveillance, security and identification in global perspective*, Routledge.

<sup>3</sup> Chaudhuri, Bidisha & Konig, Leon (2018) 'The *AADHAAR* scheme: a cornerstone of a new citizenship regime in India?', *Contemporary South Asia*, Vol.26, No.2. Nair, Vijayanka (2018) 'An eye for an I: recording biometrics and reconsidering identity in postcolonial India', *Contemporary South Asia*, Vol.26, No.2.

<sup>4</sup> UIDAI Website, <https://uidai.gov.in/what-is-aadhaar.html>.

<sup>5</sup> Breckenridge, Keith (2019) 'Lineaments of Biopower: The Bureaucratic and Technological Paradoxes of Aadhaar', *Journal of South Asian Studies*, Vol.42, No.3.

<sup>6</sup> A copy is available at [http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373\\_2019\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/373_2019_LS_Eng.pdf) (last accessed on May 14, 2020). The report can be accessed at

[https://www.prsindia.org/sites/default/files/bill\\_files/Committee%20Report%20on%20Draft%20Personal%20Data%20Protection%20Bill%2C%202018.pdf](https://www.prsindia.org/sites/default/files/bill_files/Committee%20Report%20on%20Draft%20Personal%20Data%20Protection%20Bill%2C%202018.pdf) (last accessed on May 14, 2020). See also, brief by the Observer Research Foundation (March, 2020), available at <https://www.orfonline.org/research/the-personal-data-protection-bill-2019-61915/> (last accessed on May 14, 2020).

<sup>7</sup> Judgment dated Aug, 24, 2017, in *Justice K.S. Puttuswamy (retd.) v. Union of India*, W.P. (Civil) 494 of 2012.

<sup>8</sup> Judgment dated Sept, 26, 2018, in *Justice K.S. Puttuswamy (retd.) v. Union of India*, W.P. (Civil) 494 of 2012.

concerns inherent in biometric technologies keeping in mind the asymmetric relationship between the collector and the supplier of the information.<sup>9</sup>

Nonetheless, missing from these critiques of AADHAAR are calls to consider its implications for refugees and so-called “illegal migrants” designated under law. This submission seeks to highlight the importance of focussing on biometric data collection in relation to non-citizens, including refugees, since any discriminatory impacts caused by biometric data misuse can have life-threatening consequences. Moreover, the variable discriminations non-citizens are subject to as a result of the state’s (mis)use of their biometric data, can act as indicators of the potential misuse and violations of privacy that citizens might face from a State biometric project.<sup>10</sup> Thus, the purpose of this submission is to highlight the potential impact of biometric data recording, within AADHAAR and otherwise, in perpetuating discrimination and adverse social profiling.

The particular focus of the submission is on a recent development concerning the recording of the biometric details of Rohingyas across India from 2017 after the Ministry of Home Affairs (MHA) issued an advisory effectively designating Rohingyas in India as “illegal migrants”.

### **Mandatory biometric data collection but no AADHAAR: the predicament facing Rohingyas in India**

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.<sup>11</sup> Initially, refugees holding Long Term Visas (LTVs) and United Nations Refugee Cards were issued AADHAAR cards.<sup>12</sup> It was only in October 2018 that the Union Government’s Ministry of Home Affairs (MHA) changed the policy and excluded UN 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 UN refugee cards and not LTVs.<sup>13</sup>

Around the same time, the public and political discourse regarding refugee rights, particularly against the Rohingyas, in India began deteriorating. Refugees were being refused AADHAAR cards and, consequently, refused access to basic education, health, banking and other essential services. Some were also arrested for ‘fraudulently’ obtaining AADHAAR

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<sup>9</sup> Privacy International, ‘Biometrics: Friend or Foe’, available at [https://privacyinternational.org/sites/default/files/2017-11/Biometrics\\_Friend\\_or\\_foe.pdf](https://privacyinternational.org/sites/default/files/2017-11/Biometrics_Friend_or_foe.pdf) (last accessed on May 10, 2020).

<sup>10</sup> Madianou, Maria (2019) ‘The biometric assemblage: surveillance, experimentation, profit and the measuring of refugee bodies’, *Television and New Media*, Vol. 20.

<sup>11</sup> Moraband, Mary Beth & Crisp, Jeff (July, 2013) ‘Destination Delhi: Review of the implementation of UNHCR’s urban refugee policy in India’s capital city’, *UNHCR*, available at <https://www.unhcr.org/51f66e7d9.pdf>.

<sup>12</sup> Field, J, Tiwari, AD and Mookherjee, Y (2017) ‘Urban refugees in Delhi: identity, entitlements and well-being’, IIED Working Paper, p.19, IIED, London.

<sup>13</sup> Kumar, R., *UNHCR card holders not entitled for Aadhaar: MHA*, Daily Pioneer, Oct 9, 2018, available at <https://www.dailypioneer.com/2018/india/unhcr-card-holders-not-entitled-for-aadhaar--mha.html>.

cards.<sup>14</sup> Concerningly, the arbiters of these access restrictions are not just the State functionaries but also private companies and individuals making their own interpretations of the law and human rights of refugees. In our study on refugee self-reliance in Delhi, we have recently highlighted how AADHAAR delegates identity documentation checking responsibilities to landlords, employers and so on—leaving refugees exposed to arbitrary exclusions and harassment based on discriminatory profiling.<sup>15</sup> There were also instances in our field research where we have seen evidence of denial of primary education or to appear in class X and XII exams for refugee children, based on not having AADHAAR (or having AADHAAR but not being accepted as valid holders of it). These are only some examples of critical gaps preventing refugees from surviving with dignity, and many other aspects of daily life are being increasingly subsumed under the AADHAAR scanner.<sup>16</sup>

Running parallel with the increasing AADHAAR exclusions for refugees is a recent biometric data collection drive conducted for Rohingya refugees in India. The genesis of the drive is in an internal letter by the MHA, dated 8<sup>th</sup> August, 2017, addressed to all state governments and union territories.<sup>17</sup> The letter marked the first official instance of the Indian government's changed policy towards Rohingyas from Rakhine state in Myanmar, who are in India.<sup>18</sup> While describing generally the reasons for the adverse effect of illegal migrants on the country and its citizens, paragraph 4 stated:

“[d]etection 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.” (own emphasis)

“National security” justifications are often employed to record the details of non-citizens, including refugees. Evidence of such an interpretation is the view of the Joint Parliamentary Committee (“JPC”) which presented its report on the Citizenship Amendment

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<sup>14</sup> For instance, Rohingyas have been arrested for ‘fraudulently’ acquiring identification documents such as AADHAAR, PAN, etc., on the basis of their LTV. See Mojumdar, O., *Rohingyas in Telangana ready to surrender ‘fake’ Aadhaar cards*, The New Indian Express, Feb 21, 2020, available at <https://www.newindianexpress.com/states/telangana/2020/feb/21/rohingyas-in-telangana-ready-to-surrender-fake-aadhaar-cards-2106501.html>.

<sup>15</sup> Field, J., Tiwari AD., & Mookherjee, Y. (Nov, 2019) ‘Self-reliance as a Concept and Spatial Practice for Urban Refugees: Reflections from Delhi, India’, Advance Article, *Journal of Refugee Studies*, OUP.

<sup>16</sup> For instance, Abdali has highlighted how linking critical health schemes to AADHAAR has adversely impacted refugees in India. Abdali, Fazal, (2020) ‘A Comparative Analysis of the Global Compact on Refugees and the Constitution of India’, in, Field, J., & Burra, S. (eds.) *The Global Compact on Refugees: Indian Perspectives and Experiences*, Academic Working Group and UNHCR India, available at <https://www.unhcr.org/en-in/publications/books/5e3174c54/global-compact-on-refugees-indian-perspectives-and-experiences.html?query=global%20compact%20on%20refugees:%20indian%20perspectives%20and%20experiences>.

<sup>17</sup> MHA website, available at [https://mha.gov.in/sites/default/files/advisoryonillegalmigrant\\_10092017\\_2.PDF](https://mha.gov.in/sites/default/files/advisoryonillegalmigrant_10092017_2.PDF)

<sup>18</sup> See also, Syam, Anasuya, *Patchwork of Archaic Regulations and Policies in India: A breeding ground for discriminatory practice against refugees*, Jul 29, 2019, available at <http://nyujilp.org/wp-content/uploads/2019/09/NYI411.pdf>.

Bill in January, 2019 (“JPC Report”). The Director of the Intelligence Bureau had deposed before the JPC and stated:

*“For the security of this nation, it is a must that every person staying in this country must have biometrics so that suppose I claim myself as something, it can be checked immediately from records whether I am so and so or I am telling a lie and, if so, what is my record. I think, India is far behind in this documentation about its citizens and persons staying here. It is high time we did it. This is required not only for security purposes but various other requirements.”*<sup>19</sup>

In its recommendations, the JPC accepted the contention in the following words:

*“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.”*<sup>20</sup>

The basic issues with the parallel biometric data collection of refugees (and other ‘non-citizens’) are that: i) it has been mired in non-transparency and lack of information regarding the end-use of the data, ii) it comes with no discernible protections or access to services for refugees (unlike AADHAAR), iii) is framed as a tool for eventual deportation, and (iv) it is clearly couched in the surveillance language with a multitude of repercussions.<sup>21</sup> This is especially placing Rohingyas in a position of acute risk,<sup>22</sup> as it may promote forced *refoulement* to Myanmar when the Rohingya community are at extreme risk of persecution, or, conversely, may deter Rohingyas from seeking necessary refuge in India in the first place. Further, sharing of biometric data with the Myanmar government will also be in violation of several international human rights conventions and standards which apply to India. In this context, it has been warned time and again that the use of biometrics should be in compliance with international human rights standards where issues of privacy, legality and proportionality are strictly adhered to.<sup>23</sup> No diversion from these core standards must be effected due to the potential adverse impact for these vulnerable communities.

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<sup>19</sup> JPC Report, p.77. The report can be accessed here, [http://prsindia.org/sites/default/files/bill\\_files/Joint%20committee%20report%20on%20citizenship%20%28A%29%20bill.pdf](http://prsindia.org/sites/default/files/bill_files/Joint%20committee%20report%20on%20citizenship%20%28A%29%20bill.pdf).

<sup>20</sup> Ibid. at p.81.

<sup>21</sup> *States asked to identify Rohingyas, collect biometric details: Rajnath Singh*, The Times of India, Oct 1, 2018, available at, <https://timesofindia.indiatimes.com/india/states-asked-to-identify-rohingyas-collect-biometric-details-rajnath-singh/articleshow/66028121.cms>.

<sup>22</sup> Kapoor, A, *Digital Identity for Refugees in India: Empowerment or Surveillance?*, Global Policy, (1 Aug, 2018), available at <https://www.globalpolicyjournal.com/blog/01/08/2018/digital-identity-refugees-india-empowerment-or-surveillance>.

<sup>23</sup> Kingston, Lindsey (2019) ‘Biometric Identification, Displacement, and Protection Gaps’, in, Carleen F. Maitland, *Digital Lifeline? ICTs for Refugees and Displaced Persons*, MIT Press. See also, Amoore, Louise, (2008) ‘Governing by identity’, in, Colin J. Bennett & David Lyon (eds.), *Playing the Identity Card: Surveillance, security and identification in global perspective*, Routledge.

## **Biometric data: a tool for operationalising discrimination**

The AADHAAR scheme, with its biometric foundation, of course presents similar risks. Our submission is as much about the potential of the AADHAAR scheme for manipulation as it is about the problem with refugee biometric data collection more generally. Enabling refugee access to the AADHAAR scheme would not preclude refugees from having their biometric data collected by the State – but the (theoretical) differences in purpose, process and outcome are of key importance. Indeed, the AADHAAR scheme was challenged before the Indian Supreme Court due to, *inter alia*, concerns about biometric data collection and privacy. While the Supreme Court upheld the AADHAAR scheme, it laid down that the data collected cannot be shared even in the interests of national security, subject to certain caveats.<sup>24</sup> Therefore, it overturned the blanket primacy of ‘national security’ over other considerations, including right to privacy. In fact, in that case, the Supreme Court has upheld the right to privacy under Article 21 of the Indian Constitution, a fundamental right which also applies to non-citizens.<sup>25</sup>

The government’s insistence on the need for biometric data for surveillance signals that the Supreme Court’s AADHAAR judgment (around the paramountcy of data privacy) is being viewed by the government as being only applicable to Indian citizens and not to certain foreigners, including refugees in India. Importantly, the category of eligible “foreigner”, particularly in the case of refugees, is determined by lines drawn in the sand. Where UN Refugee Cards were previously also recognised as valid documents to gain AADHAAR and access basic services, now—for refugees—it is exclusively the LTV. Moreover, if certain refugees do not qualify for the LTV under the government’s revised policy, they run a risk of being designated as “illegal migrants”, at the behest of arbitrary government classifications.

The revised policy of the Indian government on facilities associated with LTVs is significant. Under internal instructions issued by the MHA on 19<sup>th</sup> August, 2016, only Hindus, Sikhs, Christians, Jains, Parsis and Buddhists from Afghanistan, Pakistan and Bangladesh staying in India on LTVs have been granted certain essential facilities important for their well-being. The LTV has become an essential “feeder” document, necessary to acquire other identification cards, including: the AADHAAR card, a driver’s license and Personal Account Number (PAN) card (important to receive income in bank accounts).<sup>26</sup> LTV is also necessary to open a Non-Resident Ordinary (NRO) bank account,<sup>27</sup> engage in private employment, self-employment and avail educational facilities. Notably, prior to this date, Rohingya refugees

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<sup>24</sup> *Justice K.S. Puttuswamy v. Union of India*, Writ Petition (Civil) no. 494 of 2012.

<sup>25</sup> *NHRC v. State of Arunachal Pradesh*, 1996 1 SCC 724.

<sup>26</sup> The concept of ‘feeder document’ has been used by Sadiq, but in a different context, where he describes ‘illegal migrants’ acquiring an ID document illegally which lets them acquire other documents on its basis. Sadiq, Kamal, (2009) *Paper Citizens: How Illegal Immigrants Acquire Citizenship in Developing Countries*, pp.79-80, OUP.

<sup>27</sup> Those with a valid visa and residential permit may even open a NRO bank account during the pendency of their LTV applications. The Reserve Bank of India (“RBI”), the central banking regulatory authority, has included this in its amended relevant rules under the Foreign Exchange Management Act, 1999, which regulates financial activities by foreigners in India. RBI has also released notifications allowing such beneficiaries, who have been granted LTV, to buy one property for residential or commercial purposes, although they cannot sell the same without prior permission, till they acquire Indian citizenship. See RBI Notification No. FEMA 21(R)/2018-RB, dated 26<sup>th</sup> March, 2018, and RBI Notification No. FEMA 5(R)(1)/2018-RB, dated 9<sup>th</sup> November, 2018.



were granted LTVs—before the government changed their designation to “illegal migrants” and refused renewal of LTVs.<sup>28</sup>

Such shifting policies suggests that the rules around *AADHAAR* could be refashioned (again in the future) to further discriminate against other refugee groups. This can be through the creation of differential categories (such as “citizen” and “non-citizen”), or the re-designation of communities between categories (such as from recognised “refugee” entitled to LTV and *AADHAAR*, to “illegal migrant” from whom biometric data must be taken for national security). The Indian State recognises and reinforces the importance of LTVs and *AADHAAR* for all refugees to live a dignified refugee life in India but continues to shift the rules to exclude certain refugee communities, such as the Rohingya. Other refugee communities, currently entitled to LTVs, may be at risk of such future exclusions and there has been a general lack of clarity in this regard. Finally, all refugees coming to India after 31 December 2014, including those belonging to Hindu, Sikh, Buddhists, Jain, Parsi, and Christians religions, from Afghanistan, Bangladesh and Pakistan, may be affected; the temporal requirements within the Citizenship Amendment Act, 2019 (and MHA’s notifications dated 7<sup>th</sup> September, 2015, and 18<sup>th</sup> July, 2016) state that they would continue to be classified as “illegal migrants” if they come to India without valid documents or overstay the period specified in their visa. *AADHAAR* is not mandatory and the access of refugees to basic services is protected under various domestic and international laws. Ambiguity of *AADHAAR*’s mandatory-ness in basic service provision must not be to the detriment of refugees or any persons, and efforts must be made to reconcile these anomalies at the level of private citizens and companies who are at the front line of service gatekeeping.

## Conclusions

In light of these arguments, we recommend that all refugees—irrespective of religion, nationality, gender, race, ethnicity, and other identity classifications—be provided *AADHAAR* on the basis of their UN Refugee Cards. Failing that, the Government of India must recognise United Nations Refugee Cards as eligible documents for refugee access to essential services. Non-grant of *AADHAAR* must be on justified and verifiable grounds, open to judicial scrutiny and accessible under the Right to Information Act, 2005. The Indian Government must reform its biometrics collection policy, not just for the refugees, but also in relation to other category of persons who may be adjudged as “illegal migrants” under the law to ensure it is based on consent, transparency, data privacy and is underwritten by the principle of *non-refoulement*. Finally, we also reiterate the demand for a progressive and humane national law dealing with refugee issues, where the points highlighted in this submission are addressed.

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<sup>28</sup> Basavapatna, S., *A question at the doorstep*, Indian Express, Feb 6, 2018, available at <https://indianexpress.com/article/opinion/columns/a-question-at-the-doorstep-indias-stand-on-the-rohingya-5052751/>.