CIVIL ORIGINAL JURISDICTION

I. A No. ___________ of 2020

IN

WP (Civil) No. 1474 OF 2019

AND IN THE MATTER OF:

Deb Mukharji, IFS (Retd.) & Ors. **... Petitioner(s)**

VERSUS

Union of India & Ors. **... Respondent(s)**

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APPLICATION FOR INTERNVETION

To

Hon'ble the Chief Justice of India
And his Companion Justices of the
Supreme Court of India at New Delhi

Most Respectfully Showeth:

I. Statement of interest

1. The applicant is filing the present application seeking to intervene in Writ Petition (Civil) No. 1474 of 2019 and praying that she be allowed to make submissions before this Honourable Court in the instant case as per Order XVII, Rule 3 of the Supreme Court Rules, 2013.[1]

2. The applicant is Ms. Michelle Bachelet Jeria, United Nations High Commissioner for Human Rights (the High Commissioner). The High Commissioner seeks to intervene as *amicus curiae* (third-party) in this case, by virtue of her mandate to *inter alia* protect and promote all human rights and to conduct necessary advocacy in that regard, established pursuant to the United Nations General Assembly resolution 48/141. The High Commissioner is the principal human rights official of the

[1] This intervention application (amicus curiae) is made on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

United Nations. The High Commissioner's role is thus to promote adherence to international human rights law and, with this purpose in mind, to support domestic courts, with their constitutional or judicial function, in ensuring the implementation of international legal obligations. The current High Commissioner and her predecessors have filed *amicus curiae* briefs on issues of particular public importance within proceedings before a diverse range of international and national jurisdictions, including at the international level, the European Court of Human Rights, the Inter-American Court of Human Rights, the International Criminal Court, and at the national level, the United States Supreme Court and final appeal courts of States in Asia and Latin America.

3. In the present case, the Honourable Court is called to examine the compatibility of Sections 2 to 6 of the Citizenship (Amendment) Act 2019 (hereafter "CAA")[2] with India's Constitution. The Office of the High Commissioner of Human Rights (OHCHR) welcomes the CAA's stated purpose, namely the protection of some persons from persecution on religious grounds, simplifying procedures and requirements and facilitating the granting of citizenship to such persons, including migrants in an irregular situation, as well as refugees, from certain neighbouring countries.[3] The CAA can potentially benefit thousands of migrants in an irregular situation, including refugees, who might otherwise face obstacles in obtaining protection from persecution in their countries of origin including through the grant of citizenship. This is a commendable purpose.[4]

4. OHCHR further acknowledges the history of openness and welcome that India has exhibited to persons seeking to find a safer, more dignified life within its borders for themselves and their families, including in the case of religious persecution in neighbouring countries. In this regard, India has indeed been a powerful symbol to the wider world.

5. Nevertheless, the examination of the CAA in the present case raises important issues with respect to international human rights law and its application to migrants, including refugees. The examination by the Honourable Court of the CAA is of substantial interest to the High Commissioner, considering its potential implications for the application and interpretation of India's international human rights obligations, including the right to equality before the law and the prohibition of discrimination as well as the CAA's impact on the protection of human rights of migrants,[5] including refugees in India.

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6. Special attention is given to the core international human rights treaties to which India is a State party, including the International Covenant on Civil and Political Rights (ICCPR),[6] the International Covenant on Economic Social, and Cultural Rights (ICESCR),[7] the International Covenant on the Elimination of Racial Discrimination (ICERD),[8] the Convention on the Rights of the Child (CRC)[9] and the Convention on the Elimination of Discrimination against Women (CEDAW).[10]

[2] Citizenship (Amendment) Bill 2019, Sections 2, 3,4,5,6.
[3] See Citizenship (Amendment) Bill 2019, Statement of Objects and Reasons.
[4] See OHCHR, 'Press Briefing On India' (2019) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25425&LangID=E>.
[5] There is no universal and legal definition of a "migrant". In accordance with the mandate of the High Commissioner to promote and protect the human rights of all persons, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has described an international migrant as "any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence" (*OHCHR, Recommended Principles and Guidelines on human rights at international borders, p. 4*). "Migrant" is thereby used as a neutral term to describe a group of people who have in common a lack of citizenship attachment to their host country. It is without prejudice to the protection regimes that exist under international law for specific legal categories of people, such as refugees, stateless persons, trafficked persons and migrant workers.
[6] India acceded to the ICCPR on 10 April 1979.
[7] India acceded to the ICESCR in 10 April 1979.
[8] India ratified ICERD on 3 December 1968.
[9] India acceded to the CRC on 11 December 1992.
[10] India ratified CEDAW on 9 July 1993.

7. The present intervention application is a non-exhaustive deliberation on issues raised by the CAA and its application. It seeks to provide this Honourable Court with an overview of the international human rights norms and standards with respect to States' obligations to provide international protection to persons at risk of persecution in their countries of origin; the enjoyment of human rights by all migrants; and the right to equality before the law, equal protection of the law and the right to non-discrimination, as applied to migrants.[11] The CAA also raises other equally important human rights issues, including its compatibility in relation to the right to equality before the law and non-discrimination on nationality grounds under India's human rights obligations. While the issue of non-discrimination on nationality grounds falls outside the scope of this intervention, this in no way implies that there are not human rights concerns in this respect.

8. The intervention application reflects exclusively the views and positions of the High Commissioner. It is filed in Writ Petition (Civil) No. 1474 of 2019 in accordance to procedural requirements of the Honourable Court and it should not be considered an endorsement or association with the allegations expressed by any other party to these proceedings, including those challenging the constitutionality of the CAA before the Honourable Court.

II. Introduction: The Citizenship (Amendment) Act 2019 and its impact on some migrants

9. On 11 December 2019, the Indian Parliament passed the Citizenship (Amendment) Act (hereafter "CAA").[12] The CAA amends the Citizenship Act of 1955, specifically with regard to Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan who arrived in India before 31 December 2014. Under the CAA, the aforementioned people are; (i) no longer considered "illegal migrants" as per Section 2(b) of the Citizenship Act even if they entered India without a valid passport or travel documents and (ii) provided an expedited pathway to naturalised Indian citizenship, by reducing the required number of years of residence from 12 to 5.[13]

10. As a basis for the introduction of the Citizenship Amendment Bill, the Statement of Objects and Reasons of the Act recalls *inter alia* that "*the constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries.*"[14] Accordingly, "*many such persons have fled to India to seek shelter and continued to stay in India even if their travel documents have expired or they have incomplete or no documents.*"[15]

11. Under the provisions of the Citizenship Act, migrants from Buddhist, Christian, Hindu, Jain, Parsi or Sikh communities from Afghanistan, Bangladesh or Pakistan who entered into India without valid travel documents or if the validity of their documents has expired are regarded as "illegal migrants" and ineligible to apply for Indian citizenship under sections 5 and 6 of the Citizenship Act. Under section 6 of the Act, applicants are required to prove twelve years residency as a qualification for naturalisation. According to the Statement of Objects and Reasons of the Citizenship Amendment Bill, this situation "*denies these communities many opportunities and advantages that may accrue only*

[11] This intervention brief does not seek to examine the implications of the CAA alone or in conjunction with other national processes on citizen registration or otherwise, on certain groups or parts of India's population. It is however sufficient to highlight that part of the population affected by this law may be either *de facto* or *de jure* stateless. See for example UNHCR, 'UN High Commissioner For Refugees Expresses Alarm At Statelessness Risk In India's Assam' (2019) <https://www.unhcr.org/news/press/2019/9/5d6a24ba4/un-high-commissioner-refugees-expresses-alarm-statelessness-risk-indias.html>.

[12] Citizenship (Amendment) Bill 2019.

[13] The CAA introduces a reduced timeline of five years in the proviso. This is applicable to the general proviso of a person applying for naturalisation to be resident 12 months preceding the application, see Citizenship Act, schedule III.

[14] See Statement of Objects and Reasons, Citizenship (Amendment) Bill, 2019, para. 2

[15] See Statement of Objects and Reasons, Citizenship (Amendment) Bill, 2019, para. 2

to citizens of India, even though they are likely to stay in India permanently."[16] The objective of the Act appears to be to simplify and expedite the procedures for irregular migrants from the afore-mentioned countries on specific ethno-religious grounds.

12. It is noted, and emphasised by the Government of India, that the CAA does not itself introduce any new legislated bar to the granting of citizenship to migrants of other faiths, including Muslims.[17] As a result, the naturalisation process in such cases will be based on the more stringent criteria set out in the original Citizenship Act, which requires (i) residency in India for at least 12 years and (ii) not having entered the country "illegally", unless the requirement for valid travel documentation has been waived.[18]

13. Excluded from the important benefits of the CAA, are the following two categories of migrants: (i) those from Afghanistan, Bangladesh and Pakistan who are not of Buddhist, Christian, Hindu, Jain, Parsi or Sikh faith, including persons without a religion and (ii) those, of any religion, from countries other than the three stated in the law, including persons without a religion.[19] The present intervention application primarily provides international human rights standards relevant for the Honourable Court's examination of the CAA with respect to the first category, namely, migrants from Afghanistan, Bangladesh or Pakistan who fall outside of the scope of the CAA.

14. According to the 2011 population census, India has a population of 5.87 million migrants from outside the country.[20] The same census concluded that over fifty per cent of those migrants by last residence were from Afghanistan, Bangladesh and Pakistan. Of those migrants, 6,600 were from Afghanistan, 2,3 million were from Bangladesh, and 707,000 were from Pakistan. The 2011 census found that out of the 5,87 million migrants from outside the country, 475,910 had arrived in India between five and nine years prior to 2011.[21] It is unclear from these figures, whether the migrants are irregular migrants, or what proportion of the migrants are of a religion not prescribed as benefitting from the provisions in the CAA. There are no reliable figures regarding actual migration to India, particularly in respect of irregular migration.[22]

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III. The enjoyment of human rights by all migrants and the rights of all migrants *(non-citizens)* to equality before the law, equal protection of the law and the right to non-discrimination

15. All migrants regardless of their race, ethnicity, religion, nationality and/or immigration status enjoy human rights and are entitled to protection. The principle of non-discrimination as well as that of equality before the law and equal protection before the law without discrimination are firmly anchored in international human rights instruments and form the foundation of the rule of law. In

[16] See Statement of Objects and Reasons, Citizenship (Amendment) Bill, 2019, para. 7

[17] Note verbale from the Permanent Mission of India to the United Nations Offices at Geneva to the Office of the High Commissioner for Human Rights, 12 December 2019.

[18] The Citizenship Act 1955, Section 6 Citizenship by Naturalisation.

[19] The CAA also poses a temporal limit, as only those who have entered India prior to December 2014 are eligible for this expedited process.

[20] 'Census Of India: Migration' (2011) http://censusindia.gov.in/2011census/d-series/d-2.html

[21] 'Census Of India: Migration' (2011) http://censusindia.gov.in/2011census/d-series/d-2.html

[22] Within the South and South-West Asia sub-region, most irregular migration is to India. See Members of the Asia-Pacific RCM Thematic Working Group on International Migration including Human Trafficking, 'Asia-Pacific Migration Report 2015 - Migrants' Contributions To Development' (2015) page 30 <https://www.unescap.org/sites/default/files/SDD%20AP%20Migration%20Report%20report%20v6-1-E.pdf>; UNODC, 'Migrant Smuggling In Asia And The Pacific: Current Trends And Challenges Volume II' (2018) page 47 <https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/2018-2019/SOM_in_Asia_and_the_Pacific_II_July_2018.pdf>; Chinmay Tumbe, 'India Is Not Being Overrun By Immigrants' (Livemint, 28 July 2019) <https://www.livemint.com/news/india/india-is-not-being-overrun-by-immigrants-1564334407925.html>.

accordance with these principles, it is an essential obligation of the States to eradicate discrimination in the public and private spheres. The right to equality before the law is to protect from arbitrary and unjustified differential treatment by the authorities. [23] The ICCPR, ICESCR and the CRC all include important non-discrimination clauses, including on the ground of religion.[24]

16. The principle of equality also requires that States adopt special measures to eliminate the conditions that cause or help perpetuate various forms of discrimination. Both principles are included in the Universal Declaration of Human Rights and human rights treaties.[25]

17. Indeed, international human rights law does not distinguish between citizens and non-citizens or between different groups of non-citizens, within the jurisdiction of a State party in their equal right to enjoy protection from discrimination and be equal before the law,[26] including in respect of their migration status.[27] In this connection, the Human Rights Committee, the authoritative body overseeing the interpretation of the ICCPR,[28] has stated that "*the general rule is that each one of the rights of the ICCPR must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike;*[29] and that "*aliens are entitled to equal protection by the law.*"[30] Moreover, it noted that the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.[31]

18. Similarly, under the ICESCR, a State may not discriminate on any prohibited ground including legal status. In this regard, the Committee on Economic, Social and Cultural Rights has noted that protection from discrimination cannot be made conditional upon an individual having a regular status in the host country.[32] Moreover, it stated that "*All people under the jurisdiction of the State concerned should enjoy Covenant rights. That includes asylum seekers and refugees, as well as other migrants, even when their situation in the country concerned is irregular.*"[33]

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[23] The Inter-American Court of Human Rights in *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 (19 January 1984) para. 55 stated "*The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights, which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.*"

[24] See Articles 2(1) and 26 ICCPR; Article 2 (2) ICESCR; Article 2 (1) of the CRC.

[25] See, UDHR, Article 7 and UN Human Rights Committee, *General Comment 18: Non-discrimination*, 10 November 1989, para. 10.

[26] There are only limited exceptions under which the ICCPR is only applicable to citizens. These are Article 25 of the ICCPR which reserves to citizens the right to vote and take part in public affairs; while article 12 ICCPR reserves the right to freedom of movement within a country to foreigners who are lawfully present within the country. These exceptions are narrowly drawn and must be applied in accordance with international human rights obligations for example with respect to the principle of non-refoulement under article 12.

[27] UN Human Rights Committee, *communication No. 2348/2014*, *Toussaint v. Canada*, Views adopted on 7 August 2018, CCPR/C/123/D/2348/2014.

[28] India is preparing to be reviewed by the Human Rights Committee.

[29] UN Human Rights Committee, *General Comment 15: Position of aliens under the Covenant*, 11 April 1986, paras. 1 and 2. See also UN Human Rights Committee, *communication No. 2273/2013*, *Vandom v. The Republic of Korea*, Views adopted on 10 August 2018, CCPR/C/123/D/2273/2013, para.8.4.

[30] ibid. (UN Human Rights Committee, *General Comment 15: Position of aliens under the Covenant*) para.7.

[31] See UN Human Rights Committee, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10.

[32] CESCR, *The duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, 13 March 2017, E/C.12/2017/1, para. 6.

[33] ibid, para. 3; See also UN Human Rights Committee, *Communication No. 1563/2007, Jünglingová v Czech Republic*, Views adopted on 24 October 2011, CCPR/C/103/D/1563/2007.

19. Therefore, under international human rights law, States must respect and ensure that migrants in their territory or under their jurisdiction or effective control receive equal and non-discriminatory treatment, regardless of their legal status and the documentation they possess.[34]

Rights to equality before the law, equal protection of the law and the right to non-discrimination and States' power to grant citizenship

20. The Human Rights Committee has recalled on several occasions that neither the Covenant nor international law in general spell out specific criteria for the granting of citizenship through naturalization and that States are free to decide on such criteria[35] and enjoy broad discretion in this area.[36] Nonetheless, such sovereign power is not unfettered and must be exercised in conformity with applicable human rights obligations. International human rights law, in this regard, requires the granting of citizenship under law to conform to the right of all persons to equality before the law and to be free from prohibited discrimination. Furthermore, in the *Nottebohm* case, the International Court of Justice stated that "international law leaves it to each State to lay down the rules governing the grant of its own nationality", such rules "shall be recognized by other States in so far as it is consistent with … international custom, and the principles of law generally recognized with regard to nationality."[37]

21. The Human Rights Committee has pointed out that the right to equality before the law "*prohibits discrimination in law or in fact in any field regulated and protected by public authorities*" and that "*Article 26 of the ICCPR is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights, which are provided for in the Covenant.*"[38]

22. Against this background, the Human Rights Committee has examined the compatibility of States' actions and omissions, including their legislation, with respect to a number of issues, including citizenship.[39] Moreover, in the context of a case related to the denial of naturalization, the Committee has stated that when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.[40] With regard to access to citizenship in particular, the Human Rights Committee has stated that States should respect the rights enshrined in article 26 when adopting and implementing legislation.[41]

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[34] ibid (*The duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*); CESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, paras. 27 and 30; CRC, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 12; CEDAW, *General Recommendation No. XXX on discrimination against non-citizens*, 65th session (2005), para. 7. See also UN Human Rights Committee, *Communication No. 1563/2007, Jünglingová v Czech Republic*, CCPR/C/103/D/1563/2007.

[35] See UN Human Rights Committee, *Communication No. 2001/2010, Q v. Denmark*, Views adopted on 1 April 2015, CCPR/C/113/D/2001/2010, para. 7.2; UN Human Rights Committee, *Communication No. 1136/2002, Borzov v. Estonia*, Views adopted on 26 July 2004, CCPR/C/81/D/1136/2002, para. 7.4.

[36] UN Human Rights Committee, *Communication No. 172/1984Broeks v. the Netherlands*, Views adopted on 9 April 1987, CCPR/C/OP/2, para. 12.4.

[37] International Court of Justice, *Nottebohm* case, (*(Liechtenstein v. Guatemala): Second Phase*, judgment of 6 April 1955, p. 23.

[38] See UN Human Rights Committee, *General Comment 18: Non-discrimination*, 10 November 1989, para. 12.

[39] See UN Human Rights Committee, *Communication No. 2001/2010, Q v. Denmark*, CCPR/C/113/D/2001/2010, para. 7.2.

[40] See ibid; UN Human Rights Committee, *Communication No. 172/1984, Broeks v. Netherlands*, CCPR/C/OP/2, para. 12.4.

[41] UN Human Rights Committee, *Communication No. 2001/2010, Q v. Denmark*, CCPR/C/113/D/2001/2010, para. 7.3. For further reference to how regional human rights bodies have interpreted this obligation, see also The Inter-American Court of Human Rights in *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 (19 January 1984) paras.57 and 67. In this case, the proposed Constitutional amendment required native born Central Americans, Ibero-Americans, and Spaniards to reside in Costa Rica for five years before naturalization. It also required that non-native born Central Americans, Ibero-Americans, and Spaniards, as well as all other aliens reside in Costa Rica for seven years before naturalization. It then provided that foreign women who had lost their nationality by marriage to a Costa Rican or had been married for two years and resided in the country for the same period could obtain the Costa Rican nationality by

23. The Committee on the Elimination of Racial Discrimination has specifically called on States to "*Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization* ...".[42] It has additionally found discriminatory immigration laws and policies "*incompatible with the very principle of non-discrimination*".[43]

24. The Committee on the Rights of the Child has also stated that "*Nationality laws that discriminate with regard to the transmission or acquisition of nationality on the basis of prohibited grounds, including in relation to the child and/or his or her parents' race, ethnicity, religion, gender, disability and migration status, should be repealed. Furthermore, all nationality laws should be implemented in a non-discriminatory manner, including with regard to residence status in relation to the length of residency requirements, to ensure that every child's right to a nationality is respected, protected and fulfilled.*"[44]

25. The United Nations General Assembly has also been concerned that States avoid invidious discrimination in the immigration context. It has accordingly, "*urged all States to review and where necessary revise their immigration laws, policies and practices to ensure that they are free of racial discrimination and compatible with their obligations under international human rights instruments.*"[45] This guidance has been reaffirmed most recently in the Global Compact for Safe, Regular and Orderly Migration,[46] ("Global Compact on Migration") endorsed by 152 UN Member States on 19 December 2018, including India. The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, States ensure effective respect for, and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. They also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance, against migrants and their families.[47] Similarly, the Global Compact on Refugees, affirmed by the General Assembly on

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naturalization. The amendments increased the number of years of residence required to obtain naturalization in Costa Rica. In examining the proposed amendment the Inter-American Court said that "no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations, which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind." It found that the provision stipulating preferential treatment in the acquisition of Costa Rican nationality through naturalization, favouring Central Americans, Ibero-Americans, and Spaniards was not discriminatory and did not violate Article 24 of the ACHR (right to equal protection) because it was not unreasonable to expedite the naturalization procedures to those who shared closer historical, cultural, and spiritual bonds with Costa Rica. However, the Court went on to find a violation of equality before the law, with regard to the provision regarding foreign women who had lost their nationality by marriage to a Costa Rican or had been married for two years and resided in the country for the same period could obtain the Costa Rican nationality by naturalization, noting that the fact that the law did not apply equally to foreign spouses "cannot be justified and must be considered to be discriminatory."

[42] CERD, *General Recommendation XXX on discrimination against non-citizens*, 2005 para.13.

[43] CERD, *Consideration of Reports Submitted By States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination United Kingdom of Great Britain and Northern Irelanad*, 10 December 2003, CERD/C/63/CO/11, para. 16. See *Regina v. Immigration Officer at Prague Airport and Another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55.

[44] See CMW and CRC, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 25.

[45] UNGA Res 66/144, 22 March 2012, A/Res/66/144 para. 13. See also UNGA Res 58/160, 23 December 2003, A/RES/58/160 para. 7. India voted in favour of the resolutions both years.

[46] General assembly, 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants' (United Nations, 19 December 2018) <https://www.un.org/press/en/2018/ga12113.doc.htm>.

[47] See Global Compact for Safe, Regular and Orderly Migration, para. 15(f).

17 December 2018, also refers to commitments to uphold the right to non-discrimination in the context of tackling root causes of large refugee situations.[48]

26. Accordingly, States must ensure that their legislation, policies, and practice regulating access to citizenship and its application comply with the obligations enshrined in article 26 of the ICCPR, by providing migrants in the same situation equal protection as well as protection from discrimination, including on the basis of religion.

Permissible differentiation: the question of reasonable and objective criteria with a legitimate purpose under the Covenant.

27. Not all differentiation, exclusion, restriction or preference of treatment constitutes discrimination or lack of equal treatment or protection before the law. States may adopt policies or regulations regarding the governance of migration in the exercise of their sovereignty. However, States must ensure that any measures adopted that constitute a difference in treatment: i) conform to the law; ii) pursue a legitimate objective, and iii) are proportional to the objective pursued.[49]

28. Indeed, the right to non-discrimination may require positive State measures, such as measures of protection, when they are considered particularly necessary for certain groups of persons, who traditionally have been seriously discriminated against in the practice by State officials or non-State actors.[50] In case of traditional, structural discrimination, protection against discrimination also includes temporary special measures aimed at accelerating the attainment of *de facto* equality.[51] Against this background, differences in treatment based on religion or immigration status would constitute discrimination if the criteria for establishing that difference, judged in the light of the objectives and purposes of the rights enshrined in human rights treaties, do not apply to achieve a legitimate objective and are not proportionate to the achievement of that objective.

29. The CERD Committee has adopted useful guidance in this regard. It has stated that "*differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate.*" It further stated that *"To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.*"[52]

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[48] See Global Compact on Refugees. Article 9. https://www.unhcr.org/gcr/GCR_English.pdf

[49] See UN Human Rights Committee, *General Comment 18: Non-discrimination*, 10 November 1989, para. 13; Statement by the CESCR, *The duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, 13 March 2017, E/C.12/2017/1, para.5; CESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para. 13; and CERD, *General recommendation No. 32 The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 24 September 2009, CERD/C/GC/32, para. 8; UN Human Rights Committee, *Communication No. 819/1998, Joseph Kavanagh v. Ireland*, Views adopted on 4 April 2001, CCPR/C/71/D/819/1998. With respect to access to citizenship specifically, the Committee on the Elimination of Racial Discrimination has stated that establishing different criteria for the granting of citizenship on ethnic grounds, amounts to a violation of the ICERD and that States parties need to ensure that both laws and their application are not discriminatory. See for example, CERD Concluding observations on Croatia, CERD, *Consideration of Reports Submitted by State Parties under Article 9 of the Convention: Concluding Observations on the Elimination of Racial Discrimination Croatia*, 10 February 1999, CERD/C/304/Add.55, paras. 11 and 17 and fn. 23.

[50] UN Human Rights Committee, *General Comment 18: Non-discrimination*, 10 November 1989, para. 10; and UN Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, para 3; CESCR, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)* 11 August 2005, E/C.12/2005/4, para. 36.

[51] CESCR, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20; CEDAW, *General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)* 2004; CESCR, *Views adopted by the Committee under the Optional Protocol to the Covenant concerning communication No. 10/2015, Trujillo Calero v. Ecuador*, Views adopted on 26 March 2018, E/C.12/63/D/10/2015, paras. 13.3-13.4.

[52] CERD, *General recommendation No. 32 The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 24 September 2009, CERD/C/GC/32, para. 8.

30. For the purpose of this intervention application, in the present case, the question is therefore not a matter of the general purpose of the law, but whether the differentiations drawn within the law (CAA), namely the exclusion of persons from the scope of the law, on the basis of their religion is sufficiently objective and reasonable.

31. The Statement of Objects and Reasons of the Citizenship Amendment Bill sets out justifications for providing Buddhists, Christians, Hindus, Jains, Parsis and Sikhs, from Afghanistan, Bangladesh or Pakistan with preferential treatment under India's citizenship naturalization procedures.[53] These include references to historic ties with the three named countries, issues related to religion-based persecution or difficulties with freedom of religion or belief in the three named countries, a lack of documentation or other proof of identity among the persons named, as well as legal obstacles under Indian law.[54] Moreover, the Government claims that the CAA is a form of affirmative action for groups that would otherwise face religious persecution in their countries of origin.[55]

32. The factual basis for the arguments provided in the Statement of Objects and Reasons for the introduction of the Citizenship Amendment Bill for such preferential treatment, also find support in pronouncements by the UN human rights mechanisms regarding the situation of religious minorities in Afghanistan, Bangladesh and Pakistan.[56]

33. Furthermore, in its correspondence with my Office, the Government of India also maintains that, unlike those faiths prescribed by the CAA, Islam is the state religion in all three countries as per their constitution and law.[57] The implication is that this Constitutional recognition affords persons of the Muslim faith, regardless of denomination or ethnicity, protection in Afghanistan, Bangladesh and Pakistan. However, recent reports by UN human rights treaty bodies, special procedures and other mechanism ascertain that there exist a number of religious groups considered religious minorities in these countries, especially of the Muslim faith, including Ahmadi, Hazara and Shia Muslims whose situations would warrant protection on the same basis as that provided in the preferential treatment proposed by the CAA.[58]

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34. The question also arises as to whether the differentiation made with regard to persecution on religious grounds, as opposed to other grounds, is sufficiently objective and reasonable, in particular taking into account the prohibition of *refoulement* and India's obligations under international human rights law as per below.

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[53] Citizenship (Amendment) Bill 2019, pages. 4-5.

[54] ibid.

[55] Note verbale from the Permanent Mission of India to the United Nations in Geneva, 19 December 2019 (GEN/PMI/353/39/2018).

[56] See for example, UN Human Rights Committee, *Concluding observations on the initial report of Pakistan*, 23 August 2017, CCPR/C/PAK/CO/1; CAT, *Concluding observations on the initial report of Bangladesh*, 26 August 2019, CAT/C/BGD/CO/1; Joint communication of the Special Rapporteur on minority issues and the Special Rapporteur on freedom of religion or belief, 17 July 2018, OL PAK 3/2018 <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23945>.

[57] Note verbale from the Permanent Mission of India to the United Nations in Geneva, 12 December 2019, (GEN/PMI/353/39/2018).

[58] For Afghanistan, see for example: UNAMA, 'Afghanistan Protection Of Civilians In Armed Conflict Annual Report 2017' (2017) page 3; For Bangladesh, see for example: UN Human Rights Council, *Joint report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Cardona, and the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque*, 22 July 2010, A/HRC/15/55, para 28; CRC, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention Concluding Observations of the Committee on the Rights of the Child: Bangladesh*, 26 June 2009, CRC/C/BDG/CO/4, para. 78; For Pakistan, see for example, Joint communication of the Special Rapporteur on minority issues and the Special Rapporteur on freedom of religion or belief, 17 July 2018, OL PAK 3/2018 <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23945>; See also, CERD, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Pakistan*, 3 October 2016, CERD/C/PAK/CO/21-23, paras. 15-16, CAT, Concluding observations on the initial report of Pakistan, 1 June 2017, CAT/C/PAK/CO/1, para. 36.

IV. The principle of *non-refoulement* under international human rights law and the obligation to carry out an individualized assessment.

35. The CAA protects Afghan, Bangladeshi and Pakistani Buddhist, Christian, Hindu, Jain, Parsi and Sikh migrants who meet the conditions set out in the CAA from being returned to a country where they would face persecution on religious grounds, by addressing their irregular migration status by providing them with an expedited pathway to citizenship. While this is a worthy and commendable objective, it raises a number of issues related to India's wider human rights obligations in the context of the fundamental principle of *non-refoulement*.[59]

36. The principle of *non-refoulement* is enshrined in international human rights law, international refugee law, international humanitarian law and customary international law. Since it was formally codified in the 1951 Convention on the Status of Refugees, it has been developed and integrated into international human rights instruments. Among other treaties, this principle is enshrined in the Convention on the Rights of the Child (CRC) and implicitly established in the International Covenant on Civil and Political Rights (ICCPR).[60]

37. The principle of *non-refoulement* under international refugee law prohibits return in any manner whatsoever to threats to life or freedom on account of five grounds, including but not restricted to religion.[61] Under international human rights law return is prohibited where there is a real risk of the individual suffering "irreparable harm", which is a concept broader than persecution and does not require that the risk of harm be linked to specific grounds.

38. Under international human rights law, the principle of *non-refoulement* prohibits the expulsion, return or extradition of a person in the territory of a State or under its jurisdiction or effective control to another State when there are substantial grounds for believing that the person would be in danger of being subjected to irreparable harm, such as violations of the right to life, torture, ill-treatment and enforced disappearance, among others. This principle applies to all forms of expulsion or return of persons, regardless of their nationality, legal status, immigration status, statelessness or citizenship. It is an absolute principle from which no derogation is possible.[62]

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[59] This intervention application does not include an overview of India's domestic laws and policies that may include alternative procedures for individualised assessment outside of the limited scope, envisaged by the CAA. This intervention simply seeks to provide an overview of India's *non-refoulement* obligations under human rights law, which extend beyond what is envisaged in the context of the CAA.

[60] The Human Rights Committee has indicated that the obligation stipulated in article 2 of the ICCPR, requires that States Parties respect and ensure the ICCPR rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. See UN Human Rights Committee, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant,* 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 12. Likewise, the Committee on the Rights of the Child has stated that States shall not reject a child at a border or return him or her to a country where there are substantial grounds for believing that he or she is at real risk of irreparable harm, such as, but by no means limited to, those contemplated under articles 6 (1) and 37 of the CRC, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the CRC originate from non-State actors or whether such violations are directly intended or are the indirect consequence of States parties' action or inaction. See CMW and CRC, *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para. 46. See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 3 and the International Convention for the Protection of All Persons Against Enforced Disappearances Article 16.

[61] These are race, religion, nationality, membership of a particular social group or political opinion. *See* 1951 Convention Relating to the Status of Refugees, article 33(1).

[62] In this regard, the Human Rights Committee has stated that no justification or extenuating circumstances may be invoked to excuse a violation of the State party's non-refoulement obligations. These obligations accordingly cannot be overridden by any threat the author allegedly may have posed. Any such a threat would have to be addressed, if necessary, through other means that are compatible with the State party's obligations under the Covenant. See UN Human Rights Committee,

39. The UN human rights treaty bodies have considered a number of situations to amount to a risk of irreparable harm related *inter alia* to risks of sexual and gender-based violence[63], female genital mutilation,[64] and risks related to persecution on account of sexual orientation,[65] the imposition of the death penalty and prolonged isolation. Further, in certain circumstances, the Human Rights Committee has indicated that the requisite individual assessment of possible personal and real risk of irreparable harm needs to take into account among other elements, access or level of enjoyment of economic and social rights, in particular when there is no access to the essential levels of these rights.[66] These factors, require consideration under human rights law in the context of *non-refoulement* obligations, and are not limited to circumstances involving potential risks of religious persecution.

40. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has maintained that States must interpret and apply the principle of *non-refoulement* in good faith and, therefore, cannot *inter alia* lawfully pass any law or regulation, engage in any policy or practice, which would undermine or defeat its object and purpose, which is to ensure that States refrain from any conduct or arrangement which they know, or ought to know in the circumstances, would subject or expose migrants to acts or risks of torture or ill-treatment by perpetrators beyond their jurisdiction and control.[67]

41. Therefore, in accordance with the obligations contained in the principle of *non-refoulement*, migrants should not be expelled or returned to another country without an individual, impartial and independent assessment of the real and personal risk of irreparable harm, by the administrative and / or judicial authorities. States should design and establish fair and effective frameworks to comply with their obligation to carry out an individualised assessment and therefore ensure that all migrants are protected from return to countries in which they face irreparable harm. Evidence around the world demonstrates that migrants can find themselves in severe human rights protection gaps along migratory routes and in countries of transit and destination, not least due to a lack of human rights-based systems of migration governance at the local, national, regional and global levels.[68]

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42. While reducing the risk of *refoulement* for certain communities, the CAA unequally places other communities at such risk. Accordingly, the narrow scope of the CAA, which extends protection

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communication No. 2613/2015, Monge Contreras v. Canada, Views adopted on 27 March 2017, CCPR/C/119/D/2613/2015, para. 8.4. See also UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 November 2018, A/HRC/37/50, para. 13; OHCHR, 'The principle of non-refoulement under international human rights law' <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.

[63] CEDAW, *Communication No. 56/2013, M.C. v. Denmark,* Decision on admissibility adopted on 9 November 2015, CEDAW/C/62/D/56/2013, para 9.3; CEDAW, *Communication No. 51/2013, Y.W. v. Denmark,* Decision adopted on 2 April 2015, CEDAW/C/60/D/51/2013, para. 8.5; CEDAW, General recommendation No. 32 on *the gender-related dimensions of refugee status, asylum, nationality and statelessness of women,* 14 November 2014, CEDAW/C/GC/32, para. 23, and CEDAW, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 26 July 2017, CEDAW/C/GC/35, para. 31(b).

[64] UN Human Rights Committee, *Communication No. 1465/2006, Kaba v. Canada,* Views adopted on 25 March 2010, CCPR/C/98/D/1465/2006, para. 10.2.

[65] UN Human Rights Committee, *communication No. 2462/2014M. K. H. v. Denmark,* Views adopted on 12 July 2016, CCPR/C/117/D/2462/2014, para 8.8; UN Human Rights Committee, *Communication No. 2149/2012, M.I. v. Sweden,* Views adopted on 25 July 2013, CCPR/C/108/D/2149/2012.

[66] UN Human Rights Committee, *communication No. 2470/2014, Hibaq Said Hashi. v. Denmark,* Views adopted on 28 July 2017, CCPR/C/120/D/2470/2014, para. 9.9-9.10; *communication No 2770/2016, O.A. v. Denmark*, Views adopted on 7 November 2017, CCPR/C/121/D/2770/2016, paras. 8.10-8.12; and *communication No. 2060/2011, W.M.G. v. Canada*, Views adopted on 11 March 2016, CCPR/C/116/D/2060/2011, para. 7.4.

[67] UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 23 November 2018, A/HRC/37/50, para. 44.

[68] Human Rights Council, Report on the compendium of principles, good practices and policies on safe, orderly and regular migration in line with international human rights law, 4 September 2017, A/HRC/36/42, para. 5.

from return only on religious grounds and limited to the specific ethnoreligious groups, may not be sufficiently objective and reasonable in light of the broad prohibition of *refoulement* under international human rights law.

Conclusion

43. The *travaux préparatoires* of the International Covenant on Civil and Political Rights, reveal that India championed the right to "equal protection of the law", in 1949, insisting on its inclusion alongside the right to equality before the law.[69] It is remarkable that sixty years later, this very issue lies at the heart of this Honourable Court's deliberations as it examines the Citizenship Amendment Act. This presents the Honourable Court with a historic and unique opportunity to give practical meaning to this fundamental right at the domestic level.

44. Without prejudice to the power of States to establish migration policies as a manifestation of their sovereignty, including measures in favour of migrants that may be subject to persecution and other serious human rights violations/irreparable harm in their countries of origin or previous residence, States must ensure migration governance measures are in accordance with international human rights law, including the right to equality before the law, equal protection of the law and the right to non-discrimination and the absolute and non-derogable principle of *non-refoulement*. Measures adopted that constitute a difference in treatment ought to be in conformity with the law, pursue a legitimate objective, and be proportional to the objective pursued. The views of the High Commissioner and of the United Nations human rights mechanisms, set out in the present brief, seek to assist the Honourable Court, in examining the compatibility of the CAA with India's Constitution, in light of India's obligations under international human rights law. The High Commissioner therefore respectfully invites the Honourable Court to take due account of the collective experience of the United Nations and its human rights mechanisms.

45. Finally, I respectfully draw the attention of the Honourable Court to the Global Compact for Safe, Regular and Orderly Migration.[70] The Global Compact on Migration, suggests a range of actions that States can take to enhance availability and flexibility of pathways for regular migration (Objective 5) and address and reduce vulnerabilities in migration (Objective 7). States can take actions to adapt options and pathways for regular migration "in a manner that upholds the right to family life and responds to the needs of migrant in a situation of vulnerability" (Objective 5). Policy options may include developing or building on existing national and regional practices for admission and stay of appropriate duration based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin, due to the sudden-onset of natural disasters and other precarious situations, such as by providing humanitarian visas, private sponsorships, access to education for children, and temporary work permits, while adaptation in or return to their country of origin is not possible (Objective 5g).

46. In light of the above, the High Commissioner therefore respectfully invites the Honourable Court to take into account international human rights law, norms and standards, in these proceedings related to the CAA, so important for India and the diverse communities it has welcomed.

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[69] See A/C.3/L.945. REF. William Schabas, *Commentary on the UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd edn, N P Engel, Publisher 2019) p. 748.

[70] General assembly, 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants' (United Nations, 19 December 2018) <https://www.un.org/press/en/2018/ga12113.doc.htm>.