

Subject:

**Legal Opinion on India's obligations under International Law to not deport Rohingyas.**

Presented by:

**The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance**

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## I. INTRODUCTION

This submission by the Special Rapporteur is provided 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 missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with her independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

## II. THE INTEREST OF THE SPECIAL RAPPORTEUR IN THE RESOLUTION OF THIS MATTER

1. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which India ratified on 3 December 1968, establishes the obligations of State parties to respect and ensure racial equality and the right to be free from racial discrimination. Several other human rights treaties also contain prohibitions on racial discrimination and other forms of discrimination, including the International Covenant on Civil and Political Rights (ICCPR), to which India acceded on 10 April 1979.
2. The Human Rights Council, the central human rights institution of the United Nations (“UN”), has affirmed that “racism, racial discrimination, xenophobia and related intolerance condoned by governmental policies violate human rights, as established in the relevant international and regional human rights instruments, and are incompatible with democracy, the rule of law and transparent and accountable governance.”<sup>1</sup> The Human Rights Council has also urged “[g]overnments to summon the necessary political will to take decisive steps to combat racism in all its forms and manifestations.”<sup>2</sup>
3. As a State party, India has committed to upholding its human rights obligations under ICERD, ICCPR, and other international human rights law treaties “in good faith,”<sup>3</sup> and may not invoke “the provisions of its internal law as justification for its failure to perform a treaty.”<sup>4</sup>
4. With regard to all issues and alleged violations falling within the purview of her mandate, UN Human Rights Council resolution 7/34 mandates the Special Rapporteur “to investigate and make concrete recommendations, to be implemented at the national, regional and international levels, with a view to preventing and eliminating all forms and manifestations of racism, racial discrimination, xenophobia and related intolerance.”<sup>5</sup> Under the mandate, these recommendations build upon an analysis of international human rights law, including relevant jurisprudence, standards, and international practice, as well as relevant regional and national laws, standards, and practices.

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<sup>1</sup> Human Rights Council Resolution 38/19 (2018), U.N. Doc. A/HRC/RES/38/19, preamble.

<sup>2</sup> Human Rights Council Resolution 7/33 (2008), U.N. Doc. A/HRC/RES/7/33, para. 4.

<sup>3</sup> Vienna Convention on the Law of Treaties, art. 26.

<sup>4</sup> Vienna Convention on the Law of Treaties, art. 27.

<sup>5</sup> Human Rights Council Resolution 7/34 (2008), U.N. Doc. A/HRC/RES/7/34, para. 2.

5. The collective deportation order raises critical issues as to its compatibility with international human rights law and the degree to which it infringes upon fundamental rights to racial equality and to be free from racial discrimination. Since assuming the mandate, the Special Rapporteur has reported on numerous manifestations of xenophobia and racial discrimination against migrants, refugees, racial, ethnic and religious minorities, and populations otherwise perceived as “foreign.”<sup>6</sup> Previous mandate holders and the current Special Rapporteur have documented racial discrimination that States have perpetrated or tolerated through reliance on distinctions based on citizenship status and other allegedly neutral distinctions.<sup>7</sup> The present case raises concerns in this general vein.
6. In this legal opinion, the Special Rapporteur explains that the decision to collectively expel some 40,000 Rohingyas is inconsistent with India’s international human rights law obligations. The implementation of this order would amount to discrimination on the basis of race, ethnicity, national origin, or descent and would rely on distinctions that have racially disparate effects. This order further contravenes India’s human rights obligations to protect vulnerable non-citizen populations from refoulement. Further, any migration decision of the Government should incorporate individualized due process protections. Until Myanmar ceases its violations of Rohingyas’ rights and undertakes acts sufficient to guarantee the safety and racial equality of the Rohingya people, return of Rohingyas to Myanmar will violate the principles of non-refoulement.<sup>8</sup>
7. The Special Rapporteur also wishes to call attention to UN findings on Myanmar’s treatment of the Rohingyas, including the UN’s extensive evidence that Myanmar Government has perpetrated crimes against humanity. Myanmar’s treatment of the Rohingya ethnoreligious minority represents a racially discriminatory, systematic project carried out with clear evidence of genocidal intent.<sup>9</sup> In this context, India is obligated to fulfil its commitments and extend protection to the Rohingya community under international human rights law, the UN Charter, and the Convention on the Prevention and Punishment of the Crime of Genocide.
8. States, including India, have under international human rights law committed to eliminate racial discrimination in whatever forms it may take. Judicial and administrative tribunals have an important role to play in the fulfilment of these obligations, including by upholding racial equality and non-discrimination principles and protecting vulnerable non-citizen populations.

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<sup>6</sup> See generally U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/HRC/38/52; U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/73/305.

<sup>7</sup> See, e.g., U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/HRC/38/52; U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/HRC/32/50.

<sup>8</sup> Report of the independent international fact-finding mission on Myanmar, U.N. Doc. A/HRC/39/64, para. 112; OHCHR, *Bachelet: Returning Rohingya refugees to Myanmar would place them at serious risk of human rights violations* (Nov. 13, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23865&LangID=E>.

<sup>9</sup> Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64, paras. 83-94.

## II. EVIDENCE COMPILED BY THE UN AND CIVIL SOCIETY INDICATES THAT THE MYANMAR GOVERNMENT IS ENGAGED IN ONGOING, CRIMES AGAINST HUMANITY AND OTHER ACTS INTENDING THE EXTERMINATION OF THE ROHINGYA POPULATION

9. Numerous United Nations reports<sup>10</sup> confirm that Myanmar has subjected its Rohingya peoples to gross violations of international law and international human rights law. Myanmar's systematic, racist campaign that has demonized, denationalized, murdered, tortured, raped, and forcibly displaced the Rohingyas.<sup>11</sup> Myanmar's racist project has sought to instill "deep and widespread fear and trauma – physical, emotional and psychological, in the Rohingyas victims via acts of brutality."<sup>12</sup> Myanmar has engaged in arbitrary arrests, cultural and religious destruction, deprivation of Rohingyas' "access to food, livelihoods and other means of conducting daily activities and life,"<sup>13</sup> and has undertaken repeated acts of humiliation and violence with the intention to drive out Rohingya villagers *en masse*.<sup>14</sup> Myanmar has demonized and otherwise incited non-Rohingya Myanmar residents to hate, kill, and commit other acts of violence against Rohingyas, "including by declaring the Rohingyas as Bengalis and illegal settlers in Myanmar."<sup>15</sup>
  
10. The United Nations has called these acts "a textbook example of ethnic cleansing,"<sup>16</sup> "crimes against humanity and possibly even genocide."<sup>17</sup> A recent UN report concluded that evidence exists sufficient for a finding of Myanmar's genocide, genocidal intent, and responsibility for other international crimes in its gross violations of Rohingya peoples'

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<sup>10</sup> The most recent full report by OHCHR is its September 2018 Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2. Several other reports are easily accessible via OHCHR webpages, including at <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx> and at <https://www.ohchr.org/en/countries/asiaregion/pages/mmindex.aspx>.

<sup>11</sup> *See generally* Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64; Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017, <https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf>.

<sup>12</sup> Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017, <https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf>, p. 1.

<sup>13</sup> Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017, <https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf>, p. 1; *see also* Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64, paras. 15-82.

<sup>14</sup> Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017, <https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf>, p. 1; *see also* Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64, paras. 15-82.

<sup>15</sup> Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017, <https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf>, p. 1; *see also* Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64, paras. 15-82.

<sup>16</sup> OHCHR, *Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report* (Oct. 11, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=22221>.

<sup>17</sup> OHCHR, *Bachelet: Returning Rohingya refugees to Myanmar would place them at serious risk of human rights violations* (Nov. 13, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23865&LangID=E>.

rights, dignity, and humanity.<sup>18</sup> The United Nations has also emphasized that impunity for these violations continues.<sup>19</sup>

11. Best estimates indicate that Myanmar has killed at least 24,000 Rohingyas over the past two years.<sup>20</sup> Many Rohingyas have attempted to flee the certainty of death, rape, torture, cruel and inhuman treatment, and other forms of violence. The UN's most recent figures strongly indicate that more than a million Rohingya refugees have fled Myanmar.<sup>21</sup> The vast majority of these refugees, in excess of 900,000 are currently in Bangladesh.<sup>22</sup>

12. Myanmar has not ceased its crimes against humanity and other violations of Rohingya rights,<sup>23</sup> including violations of rights of Rohingyas who have returned to Myanmar.<sup>24</sup> Various UN organs have confirmed that conditions are not yet safe for any Rohingya,<sup>25</sup> which has thwarted any near-term hope for voluntary return of Rohingyas to Myanmar.<sup>26</sup>

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<sup>18</sup> Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64, paras. 83-94.

<sup>19</sup> Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64, paras. 82, 95-99. Note, however, that an eventual International Criminal Court case against Myanmar seems increasingly likely. Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, Decision of Pre-Trial Chamber I on Sept. 6, 2018, ICC Doc. No. ICC-RoC46(3)-01/18-37, paras. , 73-79, [https://www.icc-cpi.int/CourtRecords/CR2018\\_04203.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF) (determining, as a preliminary matter, that the International Criminal Court has jurisdiction over Myanmar's alleged forcible deportation of Rohingyas to Bangladesh, as well as other other crimes).

<sup>20</sup> Mohshin Habib et al., *Forced Migration of the Rohingya: The Untold Experience*, ONTARIO INT'L DEV. AGENCY 70 (2018); see also INTERNATIONAL-STATE CRIME INITIATIVE (ISCI), *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (May 19, 2018), p.14.

<sup>21</sup> OHCHR, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, para. 1174.

<sup>22</sup> *Situation Report Data Summary Rohingya Refugee Crisis, Cox's Bazar, July 2018*, INTER SECTOR COORDINATION GROUP, [https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/iscg\\_situation\\_report\\_19\\_july\\_2018\\_data\\_summary.pdf](https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/iscg_situation_report_19_july_2018_data_summary.pdf).

<sup>23</sup> OHCHR, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, para. 1180-1204.

<sup>24</sup> OHCHR, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, para. 1204 ("There have been credible reports that a very small number of Rohingyas have voluntarily returned to Myanmar to assess the conditions there for the possible return of others. They have been detained, charged and convicted with crimes of illegal border crossing. Information indicates that some men who voluntarily returned were arrested and ill-treated while in detention. They were reportedly convicted in absentia, imprisoned but subsequently pardoned. Upon their release, they were reportedly forced to accept the NVC and then taken to a securitized detention centre, where they were again threatened. Many managed to escape, or were permitted to escape, and to return to Bangladesh.").

<sup>25</sup> See Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64, para. 51 ("While the Government has, in principle, made a commitment to Rohingya repatriation, nothing indicates to date that this will be in a manner that ensures respect for human rights, which is essential for a safe, dignified and sustainable return of those displaced."); OHCHR, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, para. 1180-1204.

<sup>26</sup> Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64, para. 112; OHCHR, *Bachelet: Returning Rohingya refugees to Myanmar would place them at serious risk of human rights violations* (Nov. 13, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23865&LangID=E>; OHCHR, *Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report* (Oct. 11, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=22221>.

Furthermore, Myanmar has yet to adopt the necessary structural reforms identified by the the UN,<sup>27</sup> civil society,<sup>28</sup> and the Rohingyas<sup>29</sup> as necessary to make conditions in Myanmar conducive to return. Until Myanmar ceases its crimes against humanity and other violations of Rohingya rights and undertakes acts sufficient to guarantee the safety, racial equality, and full citizenship of the Rohingya peoples, return of Rohingyas to Myanmar will violate the principles of non-refoulement.<sup>30</sup>

### **III. IN ORDER TO UPHOLD ITS HUMAN RIGHTS COMMITMENTS TO RACIAL EQUALITY AND NON-DISCRIMINATION INDIA MUST NOT EXPEL ROHINGYAS TO MYANMAR**

#### ***India's Human Rights Obligations to Ensure Racial Equality and to Protect Vulnerable Individuals from Racialized Violence and Crimes Against Humanity***

13. India has laudably joined several international human rights law agreements. India is State Party to foundational human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic and Social Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>31</sup> India has also signed, but not ratified, the Convention Against Torture (CAT) and the Convention for the Protection of All Persons from Forced Disappearance (CED).<sup>32</sup>
  
14. India's broad international human rights law commitments include an obligation to ensure racial equality and to eliminate racial discrimination. This obligation not only arises from its commitment to ICERD, but also from its other human rights treaty commitments; nearly every human rights treaty contains a provision on non-discrimination.<sup>33</sup> The UN

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<sup>27</sup> Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64; Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017, pp. 10-11, <https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf>.

<sup>28</sup> See, e.g., *Repatriation, Statelessness and Refugee Status: Three Crucial Issues in the Unfolding Rohingya Crisis*, INSTITUTE ON STATELESSNESS & INCLUSION (Oct. 10, 2017), [www.institutesi.org/repatriation\\_statelessness\\_and\\_refugee\\_status\\_2017.pdf](http://www.institutesi.org/repatriation_statelessness_and_refugee_status_2017.pdf)

<sup>29</sup> Mohshin Habib et al., *Forced Migration of the Rohingya: The Untold Experience*, ONTARIO INT'L DEV. AGENCY 81 (2018).

<sup>30</sup> Report of the independent international fact-finding mission on Myanmar, U.N. Doc. A/HRC/39/64, para. 112; OHCHR, Bachelet: *Returning Rohingya refugees to Myanmar would place them at serious risk of human rights violations* (Nov. 13, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23865&LangID=E>.

<sup>31</sup> See OHCHR, Ratification Status for India, [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN) (last visited 21 January 2019).

<sup>32</sup> See OHCHR, Ratification Status for India, [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN) (last visited 21 January 2019).

<sup>33</sup> Convention on the Elimination of Racial Discrimination, art. 2; International Covenant on Civil and Political Rights, art. 2(1); International Covenant on Economic, Social and Cultural Rights, arts. 2(2) & 3; Convention on the Elimination of Discrimination against Women, art. 2; Convention on the Rights of the Child, art. 2(1).

Charter and several regional human rights treaties similarly enshrine this obligation.<sup>34</sup> As a foundational element of international human rights law, the prohibition on racial discrimination has also achieved the status of peremptory norms of international law<sup>35</sup> and as an obligation *erga omnes*.<sup>36</sup> States cannot derogate from these obligations—including during times of emergency—without violating international law.<sup>37</sup>

15. The most comprehensive prohibition of racial discrimination can be found in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). As Article 1(1) illustrates, States drafted ICERD to encompass a prohibition on all types and forms of racial discrimination.

In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>38</sup>

16. The Committee on the Elimination of Racial Discrimination has explained that discrimination on grounds that are not strictly listed in article 1(1) may still be considered as impermissible discrimination in contravention of ICERD. In their discussions of State obligations to ensure equality and non-discrimination, United Nations treaty bodies have frequently stated that the rights enshrined in international human rights treaties must generally be guaranteed to everyone, including persons belonging to national, religious, racial and ethnic minorities.<sup>39</sup> With very few exceptions, States must also ensure that non-nationals receive equal and non-discriminatory treatment.<sup>40</sup>
17. Under ICERD, State parties, including India, have committed to pursuing the realization of a domestic and international community free of all forms of racism.<sup>41</sup> To facilitate the substantive realization of racial equality, they must ensure that they neither take part in any act of racial discrimination nor further programs that lead to racial inequality.<sup>42</sup> Where

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<sup>34</sup> UN Charter, art. 1(3); European Convention on Human Rights, art. 14; American Convention on Human Rights, art. 1(1); African Charter on Human and Peoples’ Rights, art. 2.

<sup>35</sup> Human Rights Committee general comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, paras. 8, 13(c).

<sup>36</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), at 32, para. 34.

<sup>37</sup> Human Rights Committee general comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.1, paras. 8-9, 13, 15-16.

<sup>38</sup> ICERD art. 1(1).

<sup>39</sup> Treaty bodies have emphasized repeatedly this element of human rights law. See, for example, Human Rights Committee general comment No. 18; Committee on Economic, Social and Cultural Rights general comment No. 20; Committee on the Elimination of Racial Discrimination general recommendations Nos. XX, XXII, XXIII, XXIV, XXVII, XXIX, XXX & XXXIV. These general comments are available in U.N. Docs. HRI/GEN/1/Rev.9(Vol.I) & HRI/GEN/1/Rev.9(Vol.II).

<sup>40</sup> For further discussion, see generally Committee on Economic, Social and Cultural Rights general comment No. 20, U.N. Doc. E/C.12/GC/20; Committee on the Elimination of Racial Discrimination general recommendation No. XXII, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II); Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II); and Human Rights Committee general comment No. 18, HRI/GEN/1/Rev.9(Vol.I).

<sup>41</sup> ICERD preamble para. 10 & arts. 2-3; U.N. Charter arts. 55(c) & 56; ICCPR arts. 2, 26; Human Rights Committee general comment No. 18, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I), para. 1.

<sup>42</sup> ICERD art. 2.

racism, racial inequality, or racial discrimination exist, they have an obligation to take effective and immediate action.<sup>43</sup> This obligation to act is absolute. Therefore, as a State party, India must take immediate action to eliminate both purposeful and incidental racial inequality and discrimination.<sup>44</sup>

18. Obligations to achieve racial equality and ensure non-discrimination extend to all areas of governmental policy and influence.<sup>45</sup> States must ensure that racialized groups enjoy the full scope of their human rights, as encompassed in ICERD article 5<sup>46</sup> and in each human rights treaty.<sup>47</sup> Accordingly, India must ensure that racialized minorities within its territory enjoy the full scope of, *inter alia*, their rights to life, to the enjoyment of security of person, and to equal treatment by the courts.<sup>48</sup>
19. State parties' obligations to prevent racial inequality and racial discrimination require them not only to undertake remedial action,<sup>49</sup> but also preventive action.<sup>50</sup> Furthermore, as a State party, India has committed to attending to the extraterritorial racialized effects of its policies, acts, and laws.<sup>51</sup> These obligations require India to refrain from any act supporting or helping to maintain other nations' racialized projects, such as apartheid or genocide.<sup>52</sup>
20. India's general obligations to prevent genocide, crimes against humanity, and other gross violations of human rights and international law intertwine with its racial equality obligations. State parties, including India, are obliged under the Convention on the Prevention and Punishment of the Crime of Genocide<sup>53</sup> and generally under international

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<sup>43</sup> See ICERD art. 2 (“States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.”).

<sup>44</sup> ICERD art.1(1); Committee on the Elimination of Racial Discrimination general recommendation No. XXXII, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 6-10.

<sup>45</sup> ICERD art. 2(a), (c); ICCPR arts. 2, 26; Human Rights Committee general comment No. 18, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I); para. 12.

<sup>46</sup> See generally Committee on the Elimination of Racial Discrimination, general recommendation No. XX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II).

<sup>47</sup> See, e.g., Human Rights Committee general comment No. 18, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I), paras. 6, 12; Committee on Economic Social and Cultural Rights general comment No. 20, U.N. Doc. E/C.12/GC/20, paras. 7-14.

<sup>48</sup> See, e.g., Human Rights Committee general comment No. 18, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I), para. 6, 12; Human Rights Committee general comment No. 36, U.N. Doc. CCPR/C/GC/36, paras. 30-31.

<sup>49</sup> ICERD arts. 2, 3, 5, 6.

<sup>50</sup> ICERD art. 2, 3, 5(a), 5(b).

<sup>51</sup> Obligations of States to combat all forms of racial discrimination includes obligations extending beyond their borders. The ICJ has concluded that territoriality does not defeat or limit States' obligations under ICERD. Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, para. 353. Similarly, States hold numerous cross-border ICCPR obligations. See Human Rights Committee general comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, paras. 3, 10, 12.

<sup>52</sup> ICERD arts. 3 & 4; see also Committee on the Elimination of Racial Discrimination general recommendation no. III, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 1-4 (calling on States to understand the interrelatedness of domestic and international measures and emphasizing the need of States to abstain from actions that encourage apartheid in South Africa).

<sup>53</sup> Convention on the Prevention and Punishment of the Crime of Genocide, G.A. res. 260 A (III), U.N. Doc A/RES/260(III) (ratified by India on Aug. 27, 1959).

law<sup>54</sup> to undertake acts that are likely to<sup>55</sup> prevent crimes against humanity,<sup>56</sup> including through international cooperation.<sup>57</sup> This obligation requires them to undertake<sup>58</sup> all reasonable acts to prevent these crimes,<sup>59</sup> even if those crimes will occur outside of their own territories.<sup>60</sup> State capacity is the decisive element: Where a State has “the capacity to influence effectively the action of persons likely to commit, or already committing, genocide,” it must undertake all legally available means to prevent such crimes.<sup>61</sup>

21. India’s commitments under international human rights law also require it to protect individuals from these crimes.<sup>62</sup> The Committee on the Elimination of Racial Discrimination has emphasized States’ obligations to prevent and protect individuals from racialized violence,<sup>63</sup> to prevent and dismantle conditions associated with genocide and other grave, racialized crimes,<sup>64</sup> and to defeat impunity for those responsible.<sup>65</sup> Neither

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<sup>54</sup> See OHCHR, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, para. 1557.

<sup>55</sup> “A State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), Judgment, I.C.J. Reports 2007, para. 431.

<sup>56</sup> See Draft (May 2017) Crimes Against Humanity Convention, U.N. Doc. A/CN.4/L.892, arts. 1-2, 4; Human Rights Committee general comment No. 36, U.N. Doc. CCPR/C/GC/36, paras. 31-32.

<sup>57</sup> G.A. Res. 3074 (XXVIII), para. 3 (1973); G.A. Res. 60/147, Annex, para. 3(a) (Dec. 16, 2005).

<sup>58</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), Judgment, I.C.J. Reports 2007, para. 162.

<sup>59</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), Judgment, I.C.J. Reports 2007, paras. 183, 430.

<sup>60</sup> Art. 4 of the present draft of the Crimes Against Humanity Convention does not limit obligations to a State’s territory. Draft (May 2017) Crimes Against Humanity Convention, U.N. Doc. A/CN.4/L.892, art. 4; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), Judgment, I.C.J. Reports 2007, paras. 183, 430.

<sup>61</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*), Judgment, I.C.J. Reports 2007, para. 430; Human Rights Committee general comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, paras. 10, 12.

<sup>62</sup> *See, e.g.*, Human Rights Council Resolution 7/25 (2008), U.N. Doc. A/HRC/RES/7/25, para. 4; Convention on the Rights of the Child, art. 22; Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), para. 27; Human Rights Committee general comment No. 36, U.N. Doc. CCPR/C/GC/36, paras. 31-32; U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 60-63.

<sup>63</sup> ICERD arts. 5(b); Committee on the Elimination of Racial Discrimination general recommendation No. XXVII, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 12, 16; Committee on the Elimination of Racial Discrimination general recommendation No. XXIX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), para. ee; Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 11-12; Committee on the Elimination of Racial Discrimination general recommendation No. XXXIV, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 27-29.

<sup>64</sup> ICERD arts. 2-4; Committee on the Elimination of Racial Discrimination general recommendation No. XXXV, U.N. Doc. CERD/C/GC/35, para. 3; Committee on the Elimination of Racial Discrimination general recommendation No. XIX, U.N. Doc. CERD/C/GC/19, para. 2.

<sup>65</sup> *See* Report of the Committee on the Elimination of Racial Discrimination, U.N. Doc. A/48/18, para. 471 (“The Committee reaffirmed that those responsible for massive, gross and systematic human rights violations and crimes against international humanitarian law should be held responsible and prosecuted.”); Committee on the Elimination of Racial Discrimination, Concluding Observations on Colombia, U.N. Doc. CERD/C/304/Add.76, para. 11 (“[T]he Committee expresses concern that this climate of impunity may severely impact the rights of indigenous and

migration status nor a State's lack of discriminatory animus or intent can excuse a State's failures to uphold these obligations.<sup>66</sup> The Human Rights Committee has held that even a State's insufficient assessment of the harms a non-national likely will face upon deportation can result in that State's responsibility for resulting human rights violations.<sup>67</sup> The UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment has also noted that, even when animus and intent are absent, gross violations of migrants' rights can nevertheless engender a State's international criminal responsibility.<sup>68</sup> This international responsibility would fall on all parties who participate or enable in the violations, including those who physically carry out deportations.<sup>69</sup>

***India's Human Rights Commitments Require the Government Not to Engage in Acts That Enable Myanmar's Ongoing, Racialized Crimes Against Humanity***

22. As noted by the UN Secretary-General, OHCHR, and other human rights experts, Myanmar continues to be engaged in gross human rights violations, crimes against humanity, and, on all evidence, genocide of the Rohingyas. Therefore, India's return of Rohingyas likely will enable further violations of international law and international human rights law.
  
23. India's obligations to ensure racial equality, to protect vulnerable populations, and to refrain from contributing to racialized rights violations require it not to expel Rohingya within Indian territory to Myanmar. India's mass expulsion of Rohingyas to Myanmar will necessarily result in these individuals' decreased protection from human rights violations. To return Rohingyas to Myanmar is to place vulnerable individuals in a jurisdiction where they will again face the systematic and racialized violation of their human rights and the security of their person.<sup>70</sup> In order not to enable Myanmar's gross violations of human rights law and international law, India must refrain from any act that renders Rohingyas vulnerable to further violations. India must grant its Rohingya population effective protection from crimes against humanity and other gross human rights violations in Myanmar. Ensuring that the mass deportation order of Rohingyas does not take effect will go towards securing this protection and upholding India's international human rights law obligations to racial equality.

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Afro-Colombian communities, as these minority communities are subjected disproportionately to violations of international human rights and humanitarian norms.”).

<sup>66</sup> Laurent Gabre Gabaroum v. France, Communication No. 52/2012, U.N. Doc. CERD/C/89/D/52/2012, para. 7(2).

<sup>67</sup> See Mansour Ahani v. Canada, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002, para. 10.7.

<sup>68</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 60-63.

<sup>69</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 60-63.

<sup>70</sup> OHCHR, *Bachelet: Returning Rohingya refugees to Myanmar would place them at serious risk of human rights violations* (Nov. 13, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23865&LangID=E> (“With an almost complete lack of accountability – indeed with ongoing violations – returning Rohingya refugees to Myanmar at this point effectively means throwing them back into the cycle of human rights violations that this community has been suffering for decades.”).

#### **IV. IN ORDER TO UPHOLD ITS HUMAN RIGHTS COMMITMENTS NOT TO REFOUL INDIVIDUALS TO TORTURE AND LIKELY DEPRIVATION OF LIFE, INDIA MUST NOT EXPEL ROHINGYAS TO MYANMAR**

##### *India's Human Rights Obligations Not to Refoul*

24. Since the adoption of the Universal Declaration of Human Rights, the international human rights law system has recognized rights to racial equality;<sup>71</sup> “to life, liberty and security of person”;<sup>72</sup> to be free from torture and cruel, inhuman or degrading treatment or punishment;<sup>73</sup> and the “right to seek and enjoy in other countries asylum from persecution.”<sup>74</sup> These and other Universal Declaration rights comprise common elements of international human rights law treaties, customary international law,<sup>75</sup> and refugee law,<sup>76</sup> and jointly inform contemporary understandings of States’ non-refoulement obligations.
25. India has undertaken an international human rights law commitment not to deport individuals to States where those individuals will face torture, ill-treatment, or arbitrary deprivation of life. India’s commitment not to refoul individuals arises under its ICCPR article 6 and article 7 obligations, which prohibit the deportation of individuals to arbitrary deprivation of life and to cruel, inhuman or degrading treatment.<sup>77</sup>
26. India’s human rights law commitments under ICERD also prohibit the State from engaging in any practice of refoulement. The Committee on the Elimination of Racial Discrimination has emphasized that States’ obligations toward racially equal enjoyment of security of their person encompasses a ban on refoulement.<sup>78</sup>
27. The International Court of Justice has added further weight to these human rights law commitments, explaining that the prohibition on refoulement to torture or other cruel, inhuman, or degrading treatment (CIDT) or deprivation of life has achieved peremptory norm status.<sup>79</sup> Accordingly, States may never derogate from their commitments not to refoul individuals.<sup>80</sup> The violation of non-refoulement represents a gross violation of human rights law and settled international law,<sup>81</sup> such that international criminal

<sup>71</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71, paras. 2, 7.

<sup>72</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71, para. 3.

<sup>73</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71, para. 5.

<sup>74</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71, para. 14.

<sup>75</sup> See, for example, Prosecutor v. Anto Furundzija, Judgment of 10 December 1998, International Criminal Tribunal for the former Yugoslavia (ICTY), paras. 134–164.

<sup>76</sup> See, for example, 1951 Convention on the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

<sup>77</sup> ICCPR arts. 6 & 7; Human Rights Committee general comment No. 20, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I), para. 9; Human Rights Committee general comment No. 36, U.N. Doc. CCPR/C/GC/36, paras. 31, 55.

<sup>78</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 25-28.

<sup>79</sup> Questions Relating to the Obligation To Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012, para. 99.

<sup>80</sup> See Human Rights Committee, general comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 7; U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 11-16.

<sup>81</sup> See Draft (May 2017) Crimes Against Humanity Convention, U.N. Doc. A/CN.4/L.892, art. 5 (including non-refoulement in Draft Convention on Crimes Against Humanity).

responsibility may attain for any party who enables or participates in refoulement of an individual.<sup>82</sup>

28. Because non-refoulement is a peremptory international law norm, India continues to be bound to uphold this principle despite not having ratified the Convention Against Torture (CAT)<sup>83</sup> or the Refugee Conventions. India's commitments under the ICCPR also reinforces this commitment and prohibits India from engaging in any practice that results in refoulement of an individual to torture or CIDT.<sup>84</sup>
  
29. Furthermore, because the principle of non-refoulement under ICCPR is more expansive and absolute than non-refoulement commitments under the Refugee Convention,<sup>85</sup> India's decision not to yet join the Refugee Convention does not modify its international human rights law obligations. Under the ICCPR, India has committed not to engage in *any* form of refoulement, irrespective of refugee status<sup>86</sup> or refoulement on the basis of "security" or anti-terrorism laws.<sup>87</sup> Furthermore, as the UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment explains, international human rights and customary law's non-refoulement protection specifically against the risk of torture and ill-treatment is absolute and non-derogable. It applies in all situations, including war and states of emergency, to all human beings without discrimination of any kind and, in particular, regardless of their entitlement to refugee status. While refugee law limits non-refoulement protection to persons entitled to refugee status and allows for exceptions based on considerations of national or public security, no limitation or exception whatsoever is permissible where deportation would expose the person in question to a real risk of torture or ill-treatment. As an intrinsic component of the peremptory prohibition of torture, the prohibition of refoulement trumps not only national immigration laws, but also contradicting international obligations, such as under extradition treaties.<sup>88</sup>

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<sup>82</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 60-63.

<sup>83</sup> India has signed, but has not ratified, the Convention Against Torture. In keeping with standards for interpretation of treaty obligations, India has committed to refraining from taking any act that undermines the object and purpose of the CAT. *See* Vienna Convention on the Law of Treaties, art. 18.

<sup>84</sup> Human Rights Committee general comment No. 20, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I), para. 9.

<sup>85</sup> The principle of non-refoulement in the Refugee Conventions only protects some categories of persons and carves out exceptions for expanded State discretion. However, non-refoulement under the ICCPR (and under CAT) is a broader and absolute obligation. *See* Human Rights Committee general comment No. 36, U.N. Doc. CCPR/C/GC/36, para. 31; *see also* U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 39 ("While refugee law limits non-refoulement protection to persons entitled to refugee status and allows for exceptions based on considerations of national or public security, no limitation or exception whatsoever is permissible where deportation would expose the person in question to a real risk of torture or ill-treatment.").

<sup>86</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 40-44.

<sup>87</sup> *See* Merhdad Mohammad Jamshidian v Belarus, Communication No. 2471/2014, U.N. Doc. CCPR/C/121/D/2471/2014, para. 9.5 ("The Committee notes that article 7 of the Covenant and the principle of non-refoulement arising therefrom are absolute in nature and that no one should be excluded from its protection, even if that person poses a risk to national security"); *see also* U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, para. 38-39.

<sup>88</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, para. 39.

30. To realize effective protection against non-refoulement, India must carry out those due process obligations necessary to protect each individual's enjoyment of human rights.<sup>89</sup> To comply with these obligations, India must evaluate the likelihood an individual, if deported, will face CIDT or deprivation of life in the receiving State.<sup>90</sup> To ensure that each individual receives adequate protection from refoulement, India's human rights obligations prohibit it from ever engaging in mass expulsion or subjecting someone to summary expulsion.<sup>91</sup>
31. The Human Rights Committee has emphasized that States must account for how deportation will affect other ICCPR rights;<sup>92</sup> for example, States must examine how deportation would affect individuals' rights to noninterference in family life.<sup>93</sup> India's commitments under the Convention on the Rights of the Child not only duplicate India's non-refoulement obligations toward children, but also require India to extend necessary protection to vulnerable children<sup>94</sup> and to examine whether deportation of a child or their parents will be in the best interests of a child.<sup>95</sup>
32. The international human rights standard for non-refoulement that binds India is "substantial grounds/real risk."<sup>96</sup> India has an obligation under ICCPR articles 6 and 7—as well as under ICERD<sup>97</sup> and the CRC<sup>98</sup>—not to deport or expel any individual to a State where there are substantial grounds for believing that the individual faces a real risk of CIDT or deprivation of their lives.<sup>99</sup> Known, objective conditions in the receiving State,

<sup>89</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 40-44.

<sup>90</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 40-44.

<sup>91</sup> See Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 25-28.

<sup>92</sup> See *Kinsler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991, para.13.2; *C. v. Australia*, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/990/1999, para. 8.5; Human Rights Committee, Concluding Observations, The Netherlands, U.N. Doc. CCPR/CO/72/NET, para.11.

<sup>93</sup> See Human Rights Committee general comment No. 15, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I), para.5; *Madafferi v. Australia*, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001, para.9.8; *Winata v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000, para.7.1.

<sup>94</sup> See CRC art. 22.

<sup>95</sup> CRC arts. 6(1) & 37(a); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 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, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22, paras. 45-47.

<sup>96</sup> See Human Rights Committee general comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, para. 12; *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991, para. 14.1; see also International Law Commission, Special Rapporteur's third report on crimes against humanity, U.N. Doc. A/CN.4/704, paras. 100-103 (discussing standards throughout human rights law).

<sup>97</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 25-28; Committee on the Elimination of Racial Discrimination general recommendation No. XXII, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), para. 2.

<sup>98</sup> CRC arts. 6(1) & 37(a); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 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, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22, paras. 45-47.

<sup>99</sup> See Human Rights Committee general comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, para. 12; *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991., para. 14.1.

as well as the intent of a State's authorities and pattern of conduct in similar cases, should guide an expelling State's evaluation of risk.<sup>100</sup> This "substantial grounds/real risk" standard is not particularly high, requiring more than mere speculation but not a conclusion of "more likely than not."<sup>101</sup> The Human Rights Committee has held that implementing a higher burden of proof in non-refoulement evaluations is inconsistent with States' human rights law obligations.<sup>102</sup>

33. In attempting to deport individuals, expelling States have often sought guarantees from receiving States. In these guarantees, receiving States claim that an individual will be safe from torture, CIDT, and deprivation of life. International human rights bodies have repeatedly found these agreements to be insufficient to dispose of a State's obligation not to refoul individuals.<sup>103</sup> Especially where there exists widespread patterns of persecution or violence against certain populations,<sup>104</sup> human rights law prohibits an expelling State from relying on a receiving State's guarantee.
34. India's non-refoulement obligations applies in the context of involuntary returns, such as deportation, expulsion, or other forms of coerced removal from its territory. India does not have a human rights obligation to prevent an individual from voluntarily leaving India's territory and returning to a State where that individual likely faces forms of torture, CIDT, or deprivation of life. However, to comply with international human rights law, a non-citizen's voluntary decision to leave a country must be truly voluntary in nature;<sup>105</sup> no State may coerce an individual into leaving to face torture, CIDT, or deprivation of life upon return.<sup>106</sup> Impermissible coercion includes subjecting non-nationals to arbitrary or interminable detention, or otherwise attempting to make life for non-nationals unbearable (e.g., depriving them of sufficient food, water, or other human rights).<sup>107</sup>

***Continued Evidence That Conditions in Myanmar Are Not Safe or Conducive to Return Obligates India Not to Expel Rohingyas***

35. Despite UN and multinational efforts to ensure Rohingyas may safely return to Myanmar, Rohingyas deported from India and returned to Myanmar face a real risk of torture, cruel, inhuman or degrading treatment, and likely arbitrary deprivation of life. Violence and other

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<sup>100</sup> Human Rights Committee general comment No. 36, U.N. Doc. CCPR/C/GC/36, paras. 30-31.

<sup>101</sup> *Maksudov and others v. Kyrgyzstan*, Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, U.N. Doc. CCPR/C/93/D/1461, 1462, 1476 & 1477/2006, para. 12.4.

<sup>102</sup> *See Mansour Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002, para. 10.7.

<sup>103</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 47-50.

<sup>104</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 40-44.

<sup>105</sup> *See* OHCHR et al., *Principles and Guidelines, Supported by Practical Guidance on the Human Rights Protection of Migrants in Vulnerable Situations*, principle 6 (2017), <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>.

<sup>106</sup> *See, e.g.*, U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 20-29.

<sup>107</sup> U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, para. 45.

violations of Rohingya rights remains widespread.<sup>108</sup> And, upon return, Rohingyas will again face grave violations of their human rights, including forced displacement, rape, genocide and crimes against humanity.<sup>109</sup>

36. The UN has repeatedly concluded that the situation in Myanmar has not sufficiently improved to ensure the effective protection of returned Rohingyas.<sup>110</sup> More critically, Myanmar has not yet effected the structural changes and policies that Rohingyas have identified as necessary for their voluntary return.<sup>111</sup>
37. Although news in April and June 2018 suggested progress for eventual voluntary returns,<sup>112</sup> these multistakeholder frameworks have been insufficient to secure safe and conducive on-the-ground conditions in Myanmar. As a spokesperson for UN Secretary-General António Guterres stated in October 2018, “[f]or UNHCR, the conditions in Rakhine State are not yet conducive for a return to Myanmar. And, at the same time, we’re seeing Rohingya refugees continue to arrive from Rakhine State into [Bangladesh], which should give you an indication of the situation on the ground.”<sup>113</sup>
38. In November, UN High Commissioner for Human Rights Michelle Bachelet concluded that

Forcibly expelling or returning refugees and asylum seekers to their home country would be a clear violation of the core legal principle of non-refoulement, which forbids repatriation where there are threats of persecution or serious risks to the life and physical integrity or liberty of the individuals. . . . The human rights violations committed against the Rohingyas in Myanmar amount to the worst atrocities, including crimes against humanity and possibly even genocide. With an

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<sup>108</sup> See generally Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64.

<sup>109</sup> OHCHR, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, para. 1180-1204.

<sup>110</sup> See Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64, para. 51 (“While the Government has, in principle, made a commitment to Rohingya repatriation, nothing indicates to date that this will be in a manner that ensures respect for human rights, which is essential for a safe, dignified and sustainable return of those displaced.”); see also OHCHR, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, para. 1180-1204; OHCHR, *Bachelet: Returning Rohingya refugees to Myanmar would place them at serious risk of human rights violations*, Nov. 13, 2018, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23865&LangID=E>.

<sup>111</sup> See Report of the independent international fact-finding mission on Myanmar (Principal findings and recommendations), U.N. Doc. A/HRC/39/64; Mission report of OHCHR rapid response mission to Cox’s Bazar, Bangladesh, 13-24 September 2017, pp. 10-11, <https://www.ohchr.org/Documents/Countries/MM/CXBMissionSummaryFindingsOctober2017.pdf> (listing Rohingya-identified requirements for return); Mohshin Habib et al., *Forced Migration of the Rohingya: The Untold Experience*, ONTARIO INT’L DEV. AGENCY 81 (2018) (surveying Rohingya requirements for return).

<sup>112</sup> See, e.g., UNHCR, *Bangladesh and UNHCR agree on voluntary returns framework for when refugees decide conditions are right* (Apr. 13, 2018), <https://www.unhcr.org/news/press/2018/4/5ad061d54/bangladesh-unhcr-agree-voluntary-returns-framework-refugees-decide-conditions.html>; UNHCR & UNDP, *UNHCR and UNDP sign a Memorandum of Understanding (MOU) with Myanmar to support the creation of conditions for the return of refugees from Bangladesh* (June 6, 2018), <https://www.unhcr.org/en-lk/news/press/2018/6/5b1787e64/unhcr-undp-sign-memorandum-understanding-mou-myanmar-support-creation-conditions.html>.

<sup>113</sup> UN, *Daily Press Briefing by the Office of the Spokesperson for the Secretary-General* (Oct. 30, 2018), <https://www.un.org/press/en/2018/db181030.doc.htm>.

almost complete lack of accountability – indeed with ongoing violations – returning Rohingya refugees to Myanmar at this point effectively means throwing them back into the cycle of human rights violations that this community has been suffering for decades.<sup>114</sup>

39. Because this real and likely risk of torture and deprivation of life continues and because Myanmar is not yet in a position to guarantee the safety of returned Rohingyas, it cannot be reasonably concluded that India's deportation of Rohingyas would not violate principles of non-refoulement. India's human rights commitments therefore require it to not to expel and return Rohingyas to Myanmar.

**V. IN ORDER TO UPHOLD ITS HUMAN RIGHTS COMMITMENTS NOT TO ENGAGE IN RACIAL DISCRIMINATION, INDIA SHOULD NOT SUBJECT ROHINGYAS TO A LESS FAVORABLE RESIDENCE AND ASYLUM SCHEME**

***India's Human Rights Obligations Not to Discriminate in Residency and Asylum Decisions***

40. India has committed to maintaining racial equality for all populations. Although State parties' human rights obligations do allow them slightly more discretion in policies toward non-citizens,<sup>115</sup> this discretion is both limited and narrow.<sup>116</sup> With few exceptions, States must guarantee non-nationals equal enjoyment of civil, political, social, and economic rights.<sup>117</sup> For example, under its ICCPR commitments, India may only treat non-citizens differently in policies pertaining to voting rights and holding political office.<sup>118</sup>
41. ICERD similarly limits States' discretion to subject non-citizens to unequal or differential treatment.<sup>119</sup> Although India may have some expanded discretion in its policies toward non-nationals, the Committee on the Elimination of Racial Discrimination has clarified the narrow bounds of permissible differential treatment.<sup>120</sup> Whatever discretion exists, India must protect racial equality for all and break down any racial barriers within the State.<sup>121</sup> These obligations further require India not to discriminate on the basis of national

<sup>114</sup> OHCHR, *Bachelet: Returning Rohingya refugees to Myanmar would place them at serious risk of human rights violations*, Nov. 13, 2018, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23865&LangID=E>.

<sup>115</sup> See generally ICERD, art. 1.

<sup>116</sup> See Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 1-5.

<sup>117</sup> See Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), para. 3; Human Rights Committee general comment No. 15, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I), paras. 1-3; Committee on Economic, Social and Cultural Rights general comment No. 20, U.N. Doc. E/C.12/GC/20, paras. 5, 15, 30.

<sup>118</sup> See Human Rights Committee general comment No. 15, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I), paras. 1-3.

<sup>119</sup> See generally Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II).

<sup>120</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 1-5.

<sup>121</sup> ICERD arts. 2(1) & 7; Committee on the Elimination of Racial Discrimination general recommendation No. XXXI, U.N. Doc. HRI/GEN/1/Rev.7/Add.1, paras. 5(a) & 5(i).

origin,<sup>122</sup> and to guarantee that all non-nationals enjoy equality before the law,<sup>123</sup> including equality with other non-nationals.<sup>124</sup>

42. In the context of residency, citizenship, asylum, refugee status, and deportation, India's ICERD, ICCPR, and CRC commitments require it to ensure its policies satisfy principles of racial equality.<sup>125</sup> Where India adopts or maintains asylum, residency, or refugee protections, or adopts citizenship policies, India must ensure that these policies do not result in racial inequality or discriminate against subsets of non-nationals.<sup>126</sup> Excluding some non-nationals from protections against deportation or maintaining unequal access to asylum, refugee status, residency, or citizenship is per se incompatible with India's commitments under human rights law.<sup>127</sup>
43. Racial equality-based human rights obligations further require India to ensure that all non-nationals, regardless of their national origin or migration status, enjoy equal due process in residency, citizenship, asylum, and deportation decision-making.<sup>128</sup> India must ensure that its non-refoulement evaluations are free from racial discrimination,<sup>129</sup> and that its decisionmaking does not directly or indirectly give rise to racial inequalities.<sup>130</sup> India must

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<sup>122</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.7/Add.1, paras. 9-10, 12, 14, 24-25, 31, 38.

<sup>123</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 3, 18, 25.

<sup>124</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 6-10, 25, 13-14, 18.

<sup>125</sup> ICERD art. 2; ICCPR arts. 2, 26; CRC art. 2; Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 9, 13-17, 25-28; Human Rights Committee general comment No. 18, HRI/GEN/1/Rev.9(Vol.I), para. 12 (“[A]rticle 26 does not merely duplicate the guarantee already provided for in art. 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”); U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 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, U.N. Doc. CMW/C/GC/3-CRC/C/GC/22, paras. 21-26.

<sup>126</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 6-10, 13-17, 35-28; Committee on the Elimination of Racial Discrimination general recommendation No. XXXI, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), para. 4(b); Committee on the Elimination of Racial Discrimination general recommendation No. XXII, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 1-2; Committee on the Elimination of Racial Discrimination general recommendation No. XXVII, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 4-5.

<sup>127</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 6-10, 13-17, 25-28; Committee on the Elimination of Racial Discrimination general recommendation No. XXXI, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), para. 4(b); Committee on the Elimination of Racial Discrimination general recommendation No. XXII, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 1-2; Committee on the Elimination of Racial Discrimination general recommendation No. XXVII, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 4-5; Committee Against Torture general comment No. 2, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 20-24.

<sup>128</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 7, 9, 13-17, 25-28.

<sup>129</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 25-28; U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, para. 39.

<sup>130</sup> In its general recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee expresses concern about the “potential indirect

also ensure that it provides an effective remedy for any direct or indirect forms of discrimination that result from its residency, citizenship, asylum, and deportation decisions.<sup>131</sup>

44. International human rights law does not permit States to use “security” or “antiterrorism” concerns as a justification to implement laws that discriminate or otherwise impede upon racial equality.<sup>132</sup> Relatedly, States cannot undertake policies more harshly punish non-nationals for similar crimes<sup>133</sup> or subject non-nationals to arbitrary detention.<sup>134</sup>
45. Human rights bodies have also emphasized that criminalization of an individual’s irregular entry into a State is incompatible with ICCPR, ICERD and other human rights instruments.<sup>135</sup> “Criminal entry” policies stigmatize non-nationals and increase the likelihood that they will face racial and religious discrimination.<sup>136</sup> Furthermore, criminalization policies result in violations of obligations not to subject non-nationals to forms of arbitrary detention.<sup>137</sup>

***India’s Human Rights Commitments Requires That It Cease Subjecting Rohingyas To A Differential, Discriminatory Residency and Asylum Decision-Making System***

46. India’s mass deportation order of Rohingyas, like all mass deportation orders, is impermissible under international human rights law.<sup>138</sup> The order further contravenes

discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration, nationality, banning or deportation of non-citizens from a country as well as legislation that has the effect of penalizing without legitimate grounds certain groups or membership of certain communities.” Committee on the Elimination of Racial Discrimination general recommendation No. XXXI, HRI/GEN/1/Rev.9(Vol.II), para. 4(b).

<sup>131</sup> ICERD arts. 5 & 6; Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), para. 25; ICCPR arts. 2, 26, 13 & 14; Human Rights Committee general comment No. 18, HRI/GEN/1/Rev.9(Vol.I), para. 12 (“[A]rticle 26 does not merely duplicate the guarantee already provided for in art. 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”).

<sup>132</sup> See Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 9-12; U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc. A/HRC/38/52, paras. 21, 55-59; U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc. A/HRC/35/41, paras. 47-96.

<sup>133</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXXI, HRI/GEN/1/Rev.9(Vol.II), para. 34.

<sup>134</sup> See Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 18-20; U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 18-29.

<sup>135</sup> See U.N. Special Rapporteur on the Human Rights of Migrants, U.N. Doc. A/HRC/20/24, paras. 13-14; U.N. Working Group on Arbitrary Detention, U.N. Doc. A/HRC/7/4, para. 53 (concluding “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration”).

<sup>136</sup> See U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc. A/65/295, paras. 28-32 (stressing the particularly extreme vulnerability of irregular migrants and emphasizing States’ obligations to enact legal frameworks and policies that respect migrants’ human rights to racial equality).

<sup>137</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 18-20.

<sup>138</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras. 26; U.N. Special Rapporteur on Torture and Other Cruel, Inhuman and

India's human rights commitments because of its role in maintaining a differential and racially discriminatory decision-making system for Rohingyas in India. By implementing this mass deportation, India will be undermining its residency and asylum decision-making systems and denying the human rights and due process rights of Rohingyas. This order violates India's obligations to provide individualized review of the "real risk" of torture and/or CIDT, undermines racial equality and the right to security of person, and frustrates the Rohingya community's access to effective remedies.

47. Comparing India's treatment of its non-national populations also reveals how India's treatment of Rohingyas is racially discriminatory. India has treated Rohingyas less favourably than several other refugee populations in India.<sup>139</sup> India has also subjected many Rohingyas to arbitrary and prolonged detention for criminalized entry and suspected terrorism, reportedly detaining some Rohingyas in excess of six years.<sup>140</sup> These prolonged detentions may have coerced Rohingyas into "voluntarily" returning to Myanmar.<sup>141</sup>
48. Furthermore, India has selectively granted some groups of non-nationals legal status or citizenship.<sup>142</sup> India declined to extend such status to the Rohingyas within its territory,<sup>143</sup> instead maintaining the Rohingyas' status as "illegal foreign nationals"<sup>144</sup> or "illegal migrants."<sup>145</sup> India has also declined to treat the Rohingyas in a manner consistent with its established principles and precedents on refugee protections and non-refoulement. These policies are incompatible with India's international human rights law obligations. India's approach to its Rohingya population's status in the country, as well as its demonization of Rohingyas as criminals or terrorists, undermines India's obligation to ensure Rohingyas'

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Degrading Treatment or Punishment, U.N. Doc. A/HRC/37/50, paras. 17-29; Committee Against Torture general comment No. 4, U.N. Doc. CAT/C/GC/4, paras. 13, 18(a).

<sup>139</sup> Mudasir Amin, 'Nobody's Children, Owners of Nothing?': Analysing the Indian State's Policy Response to the Rohingya Refugee Crisis (Policy Report No. 24), THE HINDU CENTRE FOR POLITICS & PUBLIC POLICY 70 (May 2018), <https://www.thehinducentre.com/publications/policy-report/article24828825.ece/BINARY/Policy%20Report%20No.24> ("When compared with other refugee groups in India, the Rohingyas have faced discrimination and neglect at the hands of the government, with no initiatives undertaken to address even their basic survival needs.").

<sup>140</sup> UN Special Rapporteurs on U.N. Doc JUA IND 22/2018, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24122>

<sup>141</sup> UN Special Rapporteurs on U.N. Doc JUA IND 22/2018, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24122>

<sup>142</sup> UN Special Rapporteurs on U.N. Doc OL IND 11/2019, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24614>

<sup>143</sup> See Ditlekha Sharma, *Determination of Citizenship through Lineage in the Assam NRC Is Inherently Exclusionary*, 54 Econ. & Pol. Weekly (8 Apr. 2019), <https://www.epw.in/engage/article/determination-citizenship-through-lineage-assam-nrc-exclusionary> (noting that although the Citizenship Amendment Bill would protect several vulnerable or persecuted religious minorities—namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians—Rohingya refugees would not enjoy these same protections); see also Lauren Frayer & Furkan Latif Khan, *Millions In India Face Uncertain Future After Being Left Off Citizenship List*, NPR (10 May 2019), <https://www.npr.org/2019/05/10/721188838/millions-in-india-face-uncertain-future-after-being-left-off-citizenship-list?t=1562572420159> (same).

<sup>144</sup> Human Rights Watch, *India: Don't Forcibly Return Rohingya Refugees* (17 Aug. 2017), <https://www.hrw.org/news/2017/08/17/india-dont-forcibly-return-rohingya-refugees> (quoting Minister Kiren Rijiju: "[T]he government has issued detailed instructions for deportation of illegal foreign nationals including Rohingyas.").

<sup>145</sup> Minister Kiren Rijiju, Statement Referred to in the Reply to Parts (a) to (d) of the Lok Sabha Starred Question No. \*181 for 31st July, 2018 Regarding Rohingya Refugees/Migrants, <https://mha.gov.in/mha1/par2017/pdfs/par2018-pdfs/ls-31072018-english/181.pdf>.

equal enjoyment of human rights,<sup>146</sup> and likely constitutes multiple discrimination on the basis of race and religion.<sup>147</sup>

49. In order to fulfil its intentional human rights law obligations, India first must rescind its mass deportation order of Rohingyas. India must then take immediate steps to ensure that all Rohingyas in India enjoy their right to asylum and racial equality. India must guarantee that all Rohingyas within Indian territory enjoy the same substantive rights as other non-citizens, including their full enjoyment of political, social, economic, and cultural rights. Furthermore, India's voluntary commitments require it to ensure that Rohingyas in India enjoy equality before the law and equal access to judicial remedies and individualized forms of due process. India must also refrain from subjecting Rohingyas to arbitrary detentions and deportations.

## **VI. CONCLUSION: TO ENSURE INDIA'S COMPLIANCE WITH ITS HUMAN RIGHTS OBLIGATIONS TO ACHIEVE RACIAL EQUALITY INDIA SHOULD RESCIND THE ORDER EXPELLING ROHINGYAS TO MYANMAR**

50. India's voluntary commitments to racial equality and nondiscrimination and its international law obligations require it not to participate, enable, or be complicit in any form of racialized discrimination, gross human rights violations, crimes against humanity, or genocide. To ensure this, India has an obligation to undertake all legally available acts that are reasonably likely to prevent crimes against humanity. India must also refrain from all actions that render a racial group vulnerable to rights violations, that frustrate a racial group's equal enjoyment of their human rights, or that discriminate against a group of non-nationals. Accordingly, India is obligated not to refool individuals, including racial minorities, to a real risk of torture, cruel, inhuman or degrading treatment, or arbitrary deprivation of life. India is similarly obligated to ensure that its domestic residency, immigration detainment, and deportation decisions comply with its human rights law commitments to racial equality.
51. India cannot reconcile its pending mass expulsion of Rohingyas to Myanmar with its international law and voluntary human rights law obligations. This collective expulsion and the likely harms to Rohingyas that will follow this expulsion violate racial equality principles, jus cogens law, and human rights treaty law. Furthermore, the mechanisms that enable mass deportation fail to comply with India's human rights law obligations not to refool individuals, to ensure individualized due process, and to ensure racial equality throughout its domestic residency, immigration detainment, and deportation decision-making policies.

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<sup>146</sup> Committee on the Elimination of Racial Discrimination general recommendation No. XXX, U.N. Doc. HRI/GEN/1/Rev.9(Vol.II), paras.9-12; *see also* U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc. A/HRC/38/52 (discussing racial discrimination in the context of nationality, citizenship and immigration); U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc. A/65/295, paras. 28-32 (same).

<sup>147</sup> Although ICERD does not mention discrimination on the basis of religion, the Committee on the Elimination of Racial Discrimination has found that the Convention may apply in cases where discrimination on religious grounds intersects with other forms of discrimination specifically prohibited under art. 1(1). *See, e.g.*, Committee on the Elimination of Racial Discrimination, general recommendation No. XXXII, HRI/GEN/1/Rev.9(Vol.II), para. 7; P.S.N. v. Denmark, Communication No. 36/2006, U.N. Doc. CERD/C/71/D/36/2006, para. 6.3.

52. In accordance with principles of international law, individuals participating or enabling gross human rights violations may face international responsibility for their acts. International and human rights law responsibility falls not only on those who order mass deportation of non-nationals to a real risk of torture, but also on those who carry it out.
53. India has a human rights obligation to protect Rohingyas from racial discrimination and the threat of return to crimes against humanity. Under ICCPR and ICERD, all public bodies have an obligation to ensure racial equality before the law.<sup>148</sup> Thus, all organs of the State have a shared obligation to ensure effective relief from human rights violations and to remedy governmental noncompliance with international human rights law commitments.
54. In light of the above, India must take immediate steps to protect Rohingyas from non-refoulement, arbitrary immigration detention, coerced deportations, and mass expulsions, and ensure their enjoyment of racial equality and other substantive human rights.

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<sup>148</sup> ICCPR art. 26; ICERD arts. 5(a) & 6.