

SYNOPSIS

That the present Writ Petition under Article 32 of the Constitution of India is being filed, to secure and protect, the right against deportation, of the petitioner refugees in India, in keeping with the Constitutional guarantees under Article 14 and Article 21, read with Article 51(c) of the Constitution of India, which protects against arbitrary deportation of Rohingya refugees who have taken refuge in India after escaping their home country Myanmar due to the widespread discrimination, violence and bloodshed against this community in their home State. The petitioners have been registered and recognised by the UNHCR in India in 2016 and have been granted refugee I-cards.

That according to the Reuters report dated 14th August 2017, Union Minister of State for Home Affairs, Kiren Rijju, told parliament in early August that the central government had directed State authorities to identify and deport illegal immigrants including Rohingya, who face persecution in Buddhist-majority Myanmar. An estimated 40,000 Rohingya are living in India and like the Petitioners many others, are even registered with the UN refugee agency in India.

The petitioners submit that this proposed deportation is contrary to the Constitutional protections of Article 14, Article 21 and Article 51(c) of the Constitution of India, which provides equal rights and liberty to every 'person'. This act would also be in contradiction with the principle of 'Non-Refoulement', which has been widely recognised as a principle of Customary International Law.

In the case of *NHRC v. Arunachal Pradesh* (AIR 1996 SC 1234), the Court held that-

"Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus, the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise"

The petitioners claim that India has ratified and is a signatory to, various Conventions that recognise the Principle of 'Non-

Refoulement', that prohibits the deportation of refugees to a country where they face threat to their life. Further, the Constitution of India under Article 51(c), a Directive Principle of State Policy, also requires fostering respect for International Law and Treaty Obligations. That the petitioners claim that despite these Constitutional and Statutory requirements, the Respondent No. 1 has failed to carry out their obligations to ensure protection to the Rohingya Community by proposing to deport the Community to their home country of Myanmar, where they face serious persecution.

That the Petitioners, Rohingya Muslims, escaped their home country of Myanmar as a result of the violent and widespread discrimination against the Rohingya Community there, that according to various news reports, still continues unabated. That the UNHRC Report of 2016 on the Human Rights violations and abuses against Rohingya Muslims and other minorities in Myanmar has noted successive patterns of serious human rights violations to the right to life, liberty and security of the Rohingyas by State security forces and other officials in Myanmar. Violations include summary executions, enforced disappearance, arbitrary arrest and detention, torture and ill-treatment, forced labour, arbitrary arrest and detention of hundreds of Rohingya, including women and children, and consistent allegations of torture and ill-treatment, including cases of severe beating, burning by cigarettes, burning of beards, forced labour, sexual humiliation and abuse, the denial of medical treatment, degrading conditions of detention and deaths in custody. Many from the Rohingya community fled their home country of Myanmar because of grave threat to their lives, and sought refuge in India. Their return would expose them to a serious threat of severe bodily harm.

The Convention Relating to the Status of Refugees, 1951 lays down guidelines and rules regarding the treatment of refugees. It put forward the '*Principle of Non-Refoulement*' as the right of refugees to be protected from the violence in their own country. It states that refugees should not be returned to a country where they face serious threats to their life or freedom. India has not ratified the Refugee Convention. But this is now considered a rule of

Customary International Law. Further India has also ratified, or is signatory to, various Conventions and Treaties that advocate the 'Principle of Non-Refoulement'. These include important Treaties and Conventions like the Universal Declaration of Human Rights, International Convention on the Elimination of all Forms of Racial Discrimination, International Covenant on Civil and Political Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and International Convention on Protection of all Persons Against Enforced Disappearances.

Article 51(c) of the Indian Constitution, a Directive Principle of State Policy, casts a duty on the State to endeavour to foster respect for international law.

The Indian Judiciary has also recognised this principle as right that is to be provided to the Refugees under various rights enumerated under Article 21 in the case of *Dongh Lian Kham v. Union of India*, (226(2016) DLT 208).

In the case of *Ktaer Abbas Habib Al Qutaifi v. Union Of India* (1999 CriLJ 919), the Gujarat High Court held that-

"This principle prevents expulsion of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Its application protects life and liberty of a human being irrespective of his nationality. It is encompassed in Article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of India."

In these above stated circumstances, the Petitioner is approaching this Hon'ble Court seeking appropriate directions to the Respondents to protect and safeguard the rights of refugees in India under Article 14 and Article 21, along with Article 51(c) of the Constitution of India and in keeping with the principle of non refoulment as well as appropriate directions to the respondent Government not to deport the Petitioners and other refugees of the Rohingya community back to Myanmar.

LIST OF DATES

1948	India ratified the Universal Declaration of Human Rights
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1951	International Convention on Status of Refugees adopted by the United Nations
1968	India ratified the International Convention on the Elimination of all Forms of Racial Discrimination
1979	India ratified the International Covenant on Civil and Political Rights
1997	India became signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
2007	India became signatory to the International Convention on Protection of all Persons Against Enforced Disappearances
2016	Petitioner no. 2 registered with the United Nations High Commission for Refugees on 18 th December 2016. Petitioner No. 1 registered with the United Nations High Commission of Refugees (UNHCR) on 28 th December 2016.
11.08.2017	Reuters publishes report stating that the Union Minister of State for Home Affairs, Kiren Rijiju, told the Parliament that the central Government had directed the State Governments to “constitute task forces at district levels to identify and deport the illegally staying foreign nationals”
14.08.2017	NHRC Press release regarding the notice to the Union Home Ministry, regarding the media reports about the government’s decision to deport Rohingya refugees.

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)
WRIT PETITION (CIVIL) NO. _____ OF 2017

IN THE MATTER OF:

1. MOHAMMAD SALIMULLAH

R/o, ANAGAUNG, BUTHIDAUG

RAKHINE, MYANMAR

(Presently residing at)

PLOT NO. G-15, GALI NO. 2,

KANCHAN KUNJ, NEAR

KALANDIKUNJ, MADNAPUR KHADAR

DELHI - 110025

....PETITIONER NO. 1

2. MOHAMMAD SHAQIR

R/o, TEMUNHALI, BUTHIDAUNG

(Presently residing at)

PLOT NO. G-15, GALI NO. 2,

KANCHAN KUNJ, NEAR

KALANDIKUNJ, MADNAPUR KHADAR

DELHI - 110025

....PETITIONER NO. 2

VERSUS

1. UNION OF INDIA,

THROUGH ITS SECRETARY

MINISTRY OF HOME AFFAIRS

NORTH BLOCK, CENTRAL SECRETARIAT

NEW DELHI-110001

....RESPONDENT NO.1

2. NATIONAL HUMAN RIGHTS COMMISSION

THROUGH ITS CHAIRMAN

MANAV ADHIKAR BHAWAN

BLOCK C, GPO COMPLEX

INA, NEW DELHI – 110023

.....RESPONDENT NO.2

3 UNITED NATIONS HIGH COMMISSION FOR REFUGEES

THROUGH ITS CHIEF OF MISSION

B-2/16, VASANT VIHAR

NEW DELHI – 110057

.....RESPONDENT NO. 3

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA FOR ISSUING DIRECTIONS TO RESPONDENT NO. 1 TO PREVENT THE DEPORTATION OF THE PETITIONERS AND OTHER ROHINGYA REFUGEES IN INDIA AND TO TAKE STEPS FOR THE RECOGNITION OF THESE REFUGEES IN INDIA IN KEEPING WITH THE CONSTITUTIONAL GUARANTEES UNDER ARTICLE 14 AND ARTICLE 21, READ WITH ARTICLE 51(C) OF THE CONSTITUTION OF INDIA.

To

THE HON'BLE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUDGES OF THE SUPREME COURT OF INDIA

The humble Petition of the Petitioners above named

MOST RESPECTFULLY SHOWETH:

1. That the present Writ Petition under Article 32 of the Constitution of India is being filed to secure and protect right against deportation of the petitioner refugees in India and the Constitutional guarantees under Article 14 and Article 21, read with Article 51(c) of the Constitution of India, against the deportation of Rohingya refugees who have taken refuge in India after escaping their home country Myanmar due to the widespread discrimination, violence and bloodshed against this community in their home State. That according to a Reuters Report, the Union Minister of State for Home Affairs, Kiren Rijiju, told parliament in early August that the Central Government had directed State authorities to identify and deport estimated 40,000 Rohingya Muslims living in India, despite the threat they face in their home country, even though about 16,500 Rohingyas have registered with the United National High Commissioner for Refugees (UNHCR) in India. The petitioners submit that this proposed deportation is contrary to the Constitutional protections of Article 14, Article 21 and Article 51(c) of the Constitution of India, which provides equal rights and liberty to every 'person'. This act would also be in contradiction with the principle of 'Non-Refoulement', which has been widely recognised as a principle

of Customary International Law. The petitioners claim that India has ratified and is a signatory to, various Conventions that recognise the Principle of 'Non-Refoulement' that prohibits the deportation of refugees to a country where they face threat to their life. Further, the Constitution of India under Article 51(c), a Directive Principle of State Policy, also requires fostering respect for International Law and Treaty Obligations. That the petitioners claim that despite these Constitutional guarantees, the Respondent No. 1 has failed to carry out their obligations to ensure protection to the Rohingya Community by proposing to deport the Community to their home country of Myanmar, where they face serious persecution.

2. That the Petitioner No. 1 is Mr. Mohammad Salimullah, a Registered refugee under United Nations High Commission of Refugees (UNHCR). His Individual Number is 305-00086070. The Petitioner came to India in 2012 through Calcutta, mainly by foot, due to the discrimination faced in Myanmar. The Petitioner fears for his life if he is deported, and fears he would be exposed to the atrocities faced by the Rohingya Community in Myanmar, if he is to be sent back to Myanmar. A copy of the UNHCR identity card of petitioner no. 1 is annexed as **Annexure P 1** (Page _____)
3. Petitioner No. 2 is Mr. Mohammad Shaqir, a Registered refugee with UNHCR. His Individual Number is 305-00083965. The Petitioner came to India on 1st October 2011, due to the discrimination faced in Myanmar. The Petitioner fears for his life if he is deported, and fears he would be exposed to the atrocities faced by the Rohingya Community in Myanmar, if he is to be sent back to Myanmar. A copy of the UNHCR identity card of petitioner no. 2 is annexed as **Annexure P2** (Page _____)

Facts of the case

India's statement on the proposed deportation of Rohingyas from India and India's obligations to protect the Rohingya community under International Treaty obligations and Constitutional guarantees

4. That according to the Reuters report dated 14th August 2017, Union Minister of State for Home Affairs, Kiren Rijiju, told parliament in early August that the central government had directed State authorities to identify and deport illegal immigrants including Rohingya, who face persecution in Buddhist-majority Myanmar. An estimated 40,000 Rohingya are living in India and like the Petitioners many others, are even registered with the UN refugee agency in India. UNHCR has issued identity cards to the petitioners and about 16,500 Rohingyas in India are registered with UNHCR. Mr. Rijiju is reported to have said in an interview in early August that UNHCR registration was irrelevant because India was not a signatory to the refugee convention. *"As far as we are concerned they are all illegal immigrants. They have no basis to live here. Anybody who is illegal migrant will be deported"*, the Minister is reported to have said. A copy of the Reuters news report carrying the ministers statement is annexed as **Annexure P 3** (Page ____ to ____)

5. That the petitioners are aggrieved by the Hon'ble ministers statements and proposed orders of deportation, that goes against the Constitutional guarantees to refugees in India, under Article 14 and Article 21 as well as Article 51 (c) of the Constitution that obligates India to respect international law, as well as the international principle of non refoulement or not sending back refugees to a place where they face danger, which has been considered a part of customary international law.

6. That the petitioners face the danger of persecution, violence and bloodshed, if they are deported back to Myanmar and

must be accorded protection of the Indian State in keeping with customary international law principle of non refoulement and Constitutional provisions under Articles 14 and 21 that offer a framework for the protection of refugees in India.

National Human Rights Commission notice to the Ministry of Home Affairs on proposed deportation of Rohingyas

7. That the National Human Rights Commission (NHRC) has issued notice to the Ministry of Home Affairs, taking suo motu cognizance of media reports regarding the plans of the government of India to deport about 40,000 illegal Rohingya immigrants from Myanmar, who are residing in various parts of India. The NHRC press release dated 18th August, 2017, states:

“The Commission has observed that refugees are no doubt foreign nationals but they are human beings and before taking a big step the Government of India has to look into every aspect of the situation, keeping the fact into focus that the members of the Rohingya community have crossed into India borders are residing here for long, have a fear of persecution once they are pushed back to their native country...The Commission has also observed that the Supreme Court of India has consistently held that the Fundamental Right enshrined under Article 21 of the Constitution regarding Right to Life and Personal Liberty, applies to all, irrespective of the fact whether they are citizens of India or not”. A copy of the NHRC press release dated 18th August 2017 is annexed as **Annexure P 4** (Page _____)

That NHRC has asked the Ministry of Home Affairs to submit their response within 4 weeks. The NHRC notice further strengthens the case of the petitioners against arbitrary deportation to their home country where they face a serious threat to their life.

On the Status and persecution of Rohingya community in Myanmar

8. That in the Annual Report of the United Nations High Commissioner for Human Rights dated, 28th June 2016, on the '*Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar*', the United National High Commissioner for Human Rights examines the patterns of human rights violations and abuses against the Rohingyas, particularly widespread discrimination against this community in their home country of Myanmar. A copy of the Annual Report of the United Nations High Commissioner for Human Rights on "*Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar*", is annexed as **Annexure P 5** (Page ____to____)
9. That the Rohingya community are largely living in Rakhine State, Myanmar. They self-identify as a distinct ethnic group, with their own language and culture, and claim a long-standing connection to Rakhine State. Successive Governments in Myanmar have rejected these claims, and the Rohingya were not included in the list of recognised ethnic groups. Most Rohingya are stateless. After the military seized power in 1962, ethnic minorities were increasingly excluded from positions of authority, facing restrictions in, education, the use of minority languages and religious freedom.
10. That the outbreak of violence against this community, especially in June-October 2012, led to hundreds of cases of injury, death, destruction of property and displacement of 1,40,000 people and around 1,20,000 individuals remain in internally displaced camps in central Rakhine State. Since the 1990s, however, extremist or ultra-nationalist Buddhist organizations in Myanmar have actively promoted messages of hatred and intolerance against Muslims and other religious minorities especially the Rohingyas. Such is the climate of fear which has led many Rohingyas to flee.

11. That Myanmar has one of the largest stateless populations in the world: some 10,90,000 stateless persons, predominately Rohingya in Rakhine State. The lack of citizenship of the Rohingya community heightens their vulnerability to a range of human rights violations.
12. That successive Special Rapporteurs have reported patterns of serious human rights violations of the rights to life, liberty and security of the Rohingya by State security forces and other officials. Violations include summary executions, enforced disappearance, arbitrary arrest and detention, torture and ill-treatment, and forced labour, in violation of Universal Declaration of Human Rights Articles 3, 4, 5 and 9. Following the outbreak of violence in 2012, Office of the High Commissioner (OHCHR) received credible reports of the arbitrary arrest and detention of hundreds of Rohingya, including women and children, and consistent allegations of torture and ill-treatment, including cases of severe beating, burning by cigarettes, burning of beards, forced labour, sexual humiliation and abuse, the denial of medical treatment, degrading conditions of detention and deaths in custody. The Rohingya community has faced other restrictions based on local orders that are arbitrarily weighted against them such as restrictions on marriage and permits for marriages, restrictions on the number of children and a requirement to use contraception. Non compliance is a criminal offence, punishable by up to 10 years of imprisonment.

That protracted displacement in deteriorating shelters, limited access to basic services and the inability to move freely make for particularly oppressive living conditions for those in the camps. Besides violating the right to freedom of movement, the conditions also affect the enjoyment of several economic and social rights, including the rights to education, to the highest attainable standard of health and to an adequate standard of living.

That in northern Rakhine State, the arbitrary arrest and detention of Rohingya remains widespread. Their statelessness leaves them particularly vulnerable and a target for extortion. Arbitrary arrest and detention often lay the ground for other violations, such as torture and extrajudicial killings. OHCHR received credible reports of torture and death in custody of individuals arrested and detained on charges related to arson or alleged links to terrorist groups. That access to justice for victims of human rights violations and abuses has been lacking. The military and other security forces have generally enjoyed impunity. Endemic corruption and limited capacity and will to conduct effective investigations and prosecutions add to a general lack of public trust in the administration of justice for this community.

New Reports on the recent crackdown on Rohingya in Myanmar

13. That various recent news reports further highlight that the current conditions of the Rohingya community in Myanmar is precarious, as thousands escape from the persecution and bloodshed and flee to the neighbouring countries.

The 28th August, 2017, BBC report, *Myanmar Rakhine: Thousands flee to Bangladesh border*, states, that thousands of Rohingya people have fled their homes following two days of violence in a deepening crisis in the state of Rakhine Myanmar. More than 100 people, are reported to be killed in this recent violence. A copy of the BBC news report is annexed as **Annexure P 6** (Page ____to____)

The New York Times report, dated 3rd February 2017, “*Rohingya Face Campaign of Terror in Myanmar*”, based on the UNHCR report, states that members of the Myanmar Army and police have slaughtered hundreds of men, women and children, gang-raped women and girls and forced as many as 90,000 Rohingya Muslims from their homes,

according to the UN report. A copy of the New York Times report is annexed as **Annexure P 7** (Page ____to____).

Another New York Times story dated 10th January, 2017, '*There are no Homes Left: Rohingya tell of Rape, Fire and Death in Myanmar*' reports stories of how the Myanmar military has entered Rohingya villages and shot people at random, razed houses and systematically raped girls and women. The report further states that hundreds of Rohingya live in squalid refugee camps in Bangladesh. A copy of the New York Times report is annexed as **Annexure P 8** (Page ____to ____).

The Guardian reports on 9th February 2017, that more than 1000 Rohingya feared killed in Myanmar army crackdown, say UN officials. The report also states that about 1.1million Rohingya Muslims live in apartheid like conditions in north-western Myanmar where they are denied citizenship. A copy of The Guardian report is annexed as **Annexure P 9** (Page ____to ____)

That systematic human rights violations and lack of opportunities have triggered irregular migration flows of Rohingya from Rakhine State to neighbouring countries, including India.

Application of Customary International Law and the Principle of non refoulement

14. That the principle of non-refoulement – or not sending back refugees to a place where they face danger – is considered part of customary international law and binding on all states whether they have signed the Refugee Convention or not.

That the principle of Non Refoulement has been enunciated explicitly under Article 33(1) of the 1951 *United Nations Convention on the Status of Refugees* -

“No contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of

territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.” A copy of the Convention relation to the Status of Refugees, 1951, is annexed as **Annexure P 10** (Page_____to _____)

That this principle prevents expulsion of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Its application protects life and liberty of a human being irrespective of his nationality. That this principle in International law would extend protection to the lives of the petitioners and other members from the Rohingya community who have fled the bloodshed, persecution and violence they have faced in Myanmar and would prevent India from deporting them.

15. That the UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol states, the protection against refoulement under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the “inclusion” criteria) and does not come within the scope of one of its exclusion provisions. Under this provision which is also incorporated into Article 1 of the 1967 Protocol, the term “refugee”, shall apply to any person who “*owing to a well-founded fear of being persecuted, for reasons of race, religions, nationality, membership of a particular social group or political opinion, is outside the country of his (or her) habitual residence is unable or, owing to such fear, unwilling to return to it*”. A copy of the UNHCR “Advisory Opinion on the Extraterritorial Application of non-refoulement Obligations under the 1951 Convention relation to the Status of Refugees and its 1961 Protocol” is annexed as **Annexure P 11** (Page _____to _____)

That it is submitted that the petitioners who belong to the Rohingya community and have sought refuge in India, fit this definition of Refugee as contained in Article 1A (2) of the 1951 Convention, as produced above.

16. That, given a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee. It follows that the principle of non- refoulement applies not only to recognized refugees, but also to those who have not had their status formally declared. As such petitioners are recognised as refugees and it is an established principle of international refugee law that they should not be returned or expelled to a State where they fear for their life and safety.

17. That it is submitted by the petitioners that the prohibition of refoulement to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, and would apply to their deportation that is being proposed by the Central government.

18. That the Advisory opinion of the UNHCR further obligates as under:

“The principle of non-refoulement as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State. It does mean, however, that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion. As a general rule, in

order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures....

The fundamental and non-derogable character of the principle of non-refoulement has also been reaffirmed by the Executive Committee of UNHCR in numerous Conclusions since 1977. Similarly, the General Assembly has called upon States “to respect the fundamental principle of nonrefoulement, which is not subject to derogation.”

Annexure P 11

Application of International Customary law of non re foulment to the case of the petitioners

19. Article 38(1)(b) of the Statute of the International Court of Justice lists “international custom, as evidence of a general practice accepted as law”, as one of the sources of law which it applies when deciding disputes in accordance with international law. For a rule to become part of customary international law, two elements are required: consistent State practice and *opinio juris*, that is, the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it.

20. That the UNHCR advisory opinion, states

“That the UNHCR has been of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non- refoulement obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law. As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol. In this regard, UNHCR notes, inter alia, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations. Moreover, exercising its supervisory function, UNHCR has closely followed the

practice of Governments in relation to the application of the principle of non-refoulement, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR's experience, States have overwhelmingly indicated that they accept the principle of non-refoulement as binding, as demonstrated, inter alia, in numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended refoulement, thus implicitly confirming their acceptance of the principle." Annexure P 11

21. That, as noted by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. U.S.*), Merits, 1986 ICJ Reports, page 14, para. 186
"[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."
22. That the above submissions on re foulment being recognised as a part of customary international law and obligatory also on States like India that has not ratified the 1951 convention, further strengthen the case of the petitioners against deportation to Myanmar where they will face untold persecution, violence and threat to their lives.

23. Though India has not ratified the UNCHR Convention on Refugees, India has ratified the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Convention on the Elimination of All Forms of Racial Discrimination. Further, India is also a signatory to the Protection of All Persons Against Enforced Disappearances, Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment. All the above mentioned International Treaties and Conventions, explicitly or otherwise, lay down the Principle of Non-Refoulement.

The relevant Provisions of these conventions are mentioned below:

- *Universal Declaration of Human Rights*

India ratified the Universal Declaration of Human Rights on 10th December 1948. UDHR, while laying down the basic foundation for Human Rights, protects the Refugees by explicitly recognising the Principle of Non-Refoulement.

- Article 14:

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

International Covenant on Civil and Political Rights

India ratified the ICCPR in 1979. The United Nations High Commission on Refugees in their Advisory Opinion on Non-Refoulement stated that the ICCPR also “encompass the 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 [Right to life] and 7 [Right to be free from torture or other cruel, inhuman or degrading treatment or punishment] 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.” Annexure P 11

International Convention on Protection of All Persons against Enforced Disappearances

India became a signatory to the convention in 2007. The Convention seeks to protect people extreme seriousness of enforced disappearance and protects the right of any person, to not to be subjected to enforced disappearance. Article 16 of the Convention explicitly lays down the Principle of Non-Refoulement.

- Article 16

- i. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
- ii. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

India became a signatory to the Torture Convention in 1997. The Convention puts an obligation on States to take all necessary measures to prevent acts of torture. This includes legislative, administrative and judicial measures, as well as any other measures that may be appropriate. States are also obliged to prevent other cruel, inhuman or degrading treatment or punishment. Article 3 of the Convention explicitly recognises the Principle of Non-Refoulement.

- Article 3:

- i. No State Party shall expel, return ("Refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

- ii. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

24. That in a recent judgement the Delhi High Court, *In Dongh Lian Kham v. Union of India*, 226(2016) DLT 208, stated, *“The principle of “non-refoulement”, which prohibits expulsion of a refugee, who apprehends threat in his native country on account of his race, religion and political opinion, is required to be taken as part of the guarantee under Article 21 of the Constitution of India, as “non-refoulement” affects/protects the life and liberty of a human being, irrespective of his nationality. This protection is available to a refugee but it must not be at the expense of national security...*

Since the petitioners apprehend danger to their lives on return to their country, which fact finds support from the mere grant of refugee status to the petitioners by the UNHCR, it would only be in keeping with the golden traditions of this country in respecting international comity and according good treatment to refugees that the respondent FRRO hears the petitioners and consults UNHCR regarding the option of deportation to a third country, and then decide regarding the deportation of the petitioners and seek approval thereafter, of the MHA (Foreigners Division).”

25. The Gujarat High Court in *Ktaer Abbas Habib Al Qutaifi v. Union Of India*, 1999 CriLJ 919, held, *“ This principle prevents expulsion of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Its application protects life and liberty of a human being irrespective of his nationality. It is encompassed in Article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of*

India. All member nations of United Nation including our country are expected to respect for international treaties and conventions concerning Humanitarian law. In fact, Article 51(c) of the Constitution also cast a duty on the State to endeavour to "foster respect for international law and treaty obligations in the dealing of organized people with one another".

UNHCR and its granting refugee status to the petitioners

26. UNHCR has been charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other persons within its mandate and of seeking permanent solutions to the problem of refugees by assisting governments and private organizations. The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. It provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations and also conducts such determinations under its own mandate. UNHCR's interpretation of the provisions of the 1951 Convention and 1967 Protocol is considered an authoritative view which should be taken into account when deciding on questions of refugee law.
27. That each of the petitioners have been granted I-cards from UNHCR recognising them as refugees. That India cannot send them back in keeping with the international law provisions, which assert that refugees should not be returned to a country where they face serious threats to life or freedom. The principle of non refoulement, now considered a rule of customary international law, is binding on all states whether they have signed the convention or not.
28. That responding to the statement of the Minister of State for Home Affairs, Human Rights Watch, South Asia Director, Meenakshi Ganguly stated *"Indian has a long record of helping vulnerable populations fleeing from neighbouring*

countries, including Sri Lankans, Afghans and Tibetans. Indian authorities should abide by India's international legal obligations and not forcibly return any Rohingya to Burma without first fairly evaluating their claims as refugees." A copy of the scroll.in article carrying these statement is annexed as

Annexure P 12 (Page ____to ____)

That Amnesty International stated, "Forcing Rohingya asylum seekers and refugees back to Myanmar would violate the international principle of non-refoulment – which is recognised in customary international law and is binding on India – that forbids states from forcibly returning people to a country where they would be at real risk of serious human rights violations."

29. That UNHCR is mandated by its parent statute to conduct individual refugee status determination test and issue certificates of refugee status to those who fulfil the criteria of the Refugee Convention. The Refugee certificates are not formally recognised by the Indian Government, however authorities have, in general practice, taken cognisance of the UNHCR's Refugee Certificates to allow most refugees an extended stay in India in the absence of political opposition. Therefore, while a de jure system of refugee protection in India goes not exist, there is a system of procedures and practices that serve to create a de facto refugee protection regime in India. This must be extended to the petitioners to bar their deportation.

Constitutional provisions that accord protection to refugees

30. That the Indian Constitution accords refugees some degree of constitutional protection while in India. The following constitutional provisions offer a framework for protecting the rights of refugees:

That Article 51 (c) of the Indian Constitution, a Directive Principle of State Policy, requires fostering of respect for international law and treaty obligations in the dealings of organised peoples with one another.

Article 14 Right to equality states:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

This article guarantees to refugees in India, the right to equality before law and the equal treatment under the law.

Article 21 Right to life and liberty

“No person shall be deprived of his life or personal liberty except according to procedure established by law”

That in according protection to refugees, the Hon’ble Supreme Court has interpreted these constitutional provisions to extend the protection of the right to equality and the right to life and personal liberty of refugees.

31. That the Supreme Court in its landmark judgement on the right to privacy dated 24th August 2017, in, *Justice K.S. Puttaswamy (Retd) and Anr. v. UOI and Ors* WP (C) No. 494/2012, has categorically stated,

“Constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation.”

32. That In the *National Human Rights Commission v. State of Arunachal Pradesh* (1996) 1 SCC 742, the Supreme Court, states *“Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure*

established by law. Thus, the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise”

33. That in the *People's Union for Civil Liberties v. Union of India* (1997) 3 SCC 433, the Supreme Court states:

“provisions of covenant, which elucidate and go to effectuate the fundamental rights guaranteed under our Constitution can be relied upon by the Courts, as facets of those fundamental rights and hence, enforceable as such.”

34. That in *NHRC v. State of Arunachal Pradesh*, 1996 (1) SCC 742, the case was regarding the deportation of Chakmas, who migrated from East-Pakistan (now Bangladesh) in 1964, first settled down in the State of Assam and then shifted to areas which now fall within the State of Arunachal Pradesh. The court reiterated that the fundamental right under article 21 was indeed available to all persons, not just citizens and directed the State government to provide adequate protection to the refugees and to ensure that they are not forcibly evicted. The court held:

“We are a country governed by the Rule of Law. Our Constitution confers rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit any body or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its Constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance

with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics”

35. That the petitioners and other members of their community, being refugees who have a well-founded fear of persecution in their countries of origin and hence cannot return and should not be deported. That India has traditionally been hospitable host of refugees and displaced people, both from South Asia and across the world. Considering the mass massacre of the Rohingya community in their home county, India must continue to accord refuge to the Rohingya population residing in India and refrain from deporting them.
36. The petitioners have not filed any other petition, application, suit or case seeking similar relief before this Hon’ble Court or any High Court or any other Court throughout the territory of India. The petitioners have no better remedy available.

GROUND:

- A. Because the action of Respondent number 1, in seeking to deport the petitioners and other members of the Rohingya community is in violation of their rights guaranteed under the Constitution of India, namely the right to equality under article 14 and the right to life and personal liberty under article 21. The Delhi High Court in *Dongh Lian Kham v. Union of India*, 226(2016) DLT 208, states, “The principle of “non-refoulement”, which prohibits expulsion of a refugee, who apprehends threat in his native country on account of his race, religion and political opinion, is required to be taken as part of the guarantee under Article 21 of the Constitution of India, as “non-refoulement” affects/protects the life and liberty of a human being, irrespective of his nationality.”

- B. Because article 51 (c), a Directive Principle of State Policy, requires India to foster respect for international law and treaty obligations in the dealings of organised peoples with one another, hence India must respect the various Conventions and treaties that provide a framework for refugee protection and extend such protection to the Rohingya refugees in India.
- C. Because the petitioners are being persecuted in their home country. Even today, they apprehend that in case they are deported to the country in their native region, they would be face a server threat of bodily harm. The ongoing violence against the Rohingyas in Myanmar has been reported widely in the media. The principle of non – refoulment, enunciated explicitly under Article 33(1) of the 1951 United Nations Convention on the Status of Refugees prohibits sending back refugees to a place where they face danger – is considered part of customary international law and binding on all states whether they have signed the 1951 UNHCR Refugee Convention or not, mandating India to recognise this principle in the protection of the Rohingya refugees and prevent their deportation to their country where they are facing discrimination and threat to their life

PRAYERS

In view of the above facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased:

- a. To issue an appropriate writ, order or direction, directing the Respondents not to deport the petitioners and other members of the Rohingya community who are presently in India.
- b. To issue appropriate writ or order directing the respondents to provide the petitioners and other members of the Rohingya community in India, such basic amenities to ensure that they can live in human conditions as required by International law in treatment of refugees.

- c. To pass such other order as this Hon'ble Court may deem fit and proper in the interest of equity, justice and conscience.

Through:

(PRASHANT BHUSHAN)

(COUNSEL FOR THE PETITIONERS)

Drawn By: Cheryl D'souza, Advocate

Drawn On: 28.08.2017

Filed On :30th August 2017.

New Delhi,