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IN

IN THE MATTER OF:

VERSUS

APPLICATION FOR DIRECTIONS

To.

The Humble Application of the
Petitioner above-named

MOST RESPECTFULLY SHOWETH: -

- 1) That the petitioner has filed the present Writ Petition under Article 32 of the Constitution of India. It is filed in the public interest, in order to secure and protect the right against deportation of the petitioner refugees in India and to protect 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 widespread violence, bloodshed and discrimination against their community in their home State of Myanmar.
- 2) That on the 8th of August 2017, the Ministry of Home Affairs, Government of India, issued a letter to all the Chief Secretaries of all the State

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Governments/UT Administrations, raising a concern regarding the increased 'illegal immigrants' in India and their purported 'grave security challenge.' The letter further states,

"Detection and deportation of such illegal immigrants from Rakhine State, also known as Rohingyas is a continuous process...All States/UT Administrations are, therefore, advised to sensitize all the law enforcement and intelligence agencies for taking prompt steps in identifying the illegal migrants and initiate the deportation processes expeditiously and without delay."

That the petitioners face an imminent danger of being deported vide the government circular which directs the relevant authorities to identify and expeditiously deport illegal Rohingya refugees. 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 *jus cogens* principle of Customary International Law. That the petitioners claim that despite these Constitutional and international law 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 Myanmar where they face serious persecution.

- 3) This Hon'ble Court while hearing the present petition had observed that the Constitution is based on humanitarian values and hence a humanitarian approach should be taken on the matter. The Hon'ble Court further observed that the state has a multi-pronged role - while national security and economic interests need to be secured, innocent women and children among the refugee population cannot be ignored. The Hon'ble Court stated in its order dated 13th October 2017 that in case of any contingency during the pendency of this petition, the petitioner was free to approach the Hon'ble Court.
- 4) Through this interim application the petitioner requests to bring to the notice of this Hon'ble Court that even while this Hon'ble Court is seized of the matter, various new reports and circumstances have arisen. These raise serious issues regarding the Border Security Force (BSF), who have been 'pushing back' Rohingya refugees: halting ingress, and deporting

them. These actions amount to a clear violation of the principle of non-refoulement. Further there have been reports that have highlighted the deplorable living conditions of the Rohingya refugees, who are scattered in make shift camps across many States in India. This is again a violation of their rights to life and dignity, which the Constitution guarantees to every person living in India. The petitioner seeks to bring these two issues before the Hon'ble Court and seek directions through this interim application.

I. Push backs and deportation of Rohingya refugees from India

- 5) In order to curb the influx of Rohingyas into India, the BSF have recently adopted a policy that is euphemistically called 'Non-engagement'. By this policy the BSF do not arrest the Rohingya trying to enter India, but they 'push them back' and do not allow them to pass through the borders. Indian security forces push back Rohingya refugees (the majority of whom are children, women, disabled and elderly) using chilli and stun grenades. Such 'pushbacks' are illegal. They are in clear violation of India's binding international law obligations and in clear violation of Indian municipal law. These illegal actions are staining India's reputation as a country that upholds the rule of law.
- 6) Numerous reports over a number of months show that the BSF are subjecting Rohingya refugees to push backs. A Reuters report of 22nd September 2017 quotes an unnamed official with BSF in New Delhi (who declined to be identified because he was not authorized to speak to media):

*"We don't want to cause any serious injury or arrest them, but we won't tolerate Rohingya on Indian soil...**We're using grenades containing chilli spray to stop hundreds of Rohingyas trying to enter India** ... the situation is tense."*

(A copy of the Reuters report dated 22nd September 2017 is annexed as **Annexure P - 1** Pages **23** to **24**)

- 7) A report in the Times of India of 29th November 2017 quoted K K Sharma, BSF Director, during his interactions with media persons at the annual conference of the BSF:

"Rohingya issue is a complicated one. Our policy is to push them back and not arrest them. If we arrest anyone trying to infiltrate into India, then they become a liability and then there has to be a process of identifying them. So we just push them back. As per my information, there are 9-10 lakh Rohingyas in Bangladesh and the possibility of the spillover to India cannot be ruled out so our policy is to push them back."

The report goes on to state that K K Sharma added:

"...that none of the Rohingyas apprehended by them were found to be linked with any terror organization."

(A copy of the Times of India report dated 29th November 2017 is annexed as **Annexure P- 2** Pages 25 to 26)

8 A report in The Asian Age of 30th November 2017 corroborates K K Sharma's comments :

"The Border Security Force has apprehended 87 Rohingyas till October 31 this year at the India-Bangladesh border out of which 76 have already been pushed back to Bangladesh.

"BSF chief K.K. Sharma, while admitting that the issue of illegal Rohingya migrants was a complicated one, said, 'It is our policy to push back the Rohingyas infiltrating into the country rather than arresting them. If we arrest them, it becomes a liability since then a process has to be followed in terms of identifying them. So the best way to deal with the problem is to push them back.'"

(A copy of the Asian Age report dated 30th November 2017 is annexed as **Annexure P- 3** Pages 27 to -)

9) Pushbacks are not only occurring on the border with Bangladesh. As a report in The Hindu on 19th September 2017 shows, pushbacks have also been ordered in states that share borders with Myanmar:

"... BJP-led State governments in Assam and Manipur have asked their police, especially in the border districts, to 'push back anyone who tries to cross the border.'...The Manipur government, led by BJP's N. Biren Singh, too has instructed the police to crack down in borders towns like Moreh that routinely see brisk cross-border trading."

(A copy of the Hindu report dated 19th September 2017 is annexed as Annexure P-4 Pages 28 to 29)

REPATRIATION AGREEMENT

10) It has been widely reported that Bangladesh and Myanmar signed an accord on November 23 with the stated aim of returning all Rohingya refugees in Bangladesh to Myanmar. This accord further states that it aims to begin returning refugees by January 23rd 2018. A Reuters report of 23rd November 2017 states:

"Myanmar and Bangladesh signed an accord on Thursday over terms for the return of hundreds of thousands of Rohingya Muslims who have fled to Bangladesh, both governments said, amid concern that Myanmar's powerful army could prove obstructive.

*...
"The return of the refugees should start in two months, the pact says. A joint working group will be set up in three weeks and a specific bilateral arrangement for repatriation "will be concluded in a speedy manner," the Bangladesh foreign affairs ministry said in a statement."*

(A copy of the Reuters report dated 23rd November 2017 is annexed as Annexure P- 5 Pages 30 to 32)

✓ 11) Numerous respected actors have warned that returns are unthinkable and premature given the scale of persecution in Myanmar. A Human Rights Watch report of 11th December 2017 notes:

"An agreement by Bangladesh and Burma to begin returning Rohingya refugees to Burma by January 23, 2018, creates an impossible timetable for safe and voluntary returns and should be shelved, Human Rights Watch today said in a letter to the two governments.

...

✓ "Burma has yet to end its military abuses against the Rohingya, let alone create conditions that would allow them to return home safely," said Bill Frelick, refugee rights director at Human Rights Watch. "This agreement looks more like a public relations effort by Burma to quickly close this ugly chapter than a serious effort to restore the rights of Rohingya and allow them to voluntarily return in safety and dignity."

[emphasis added]

(A copy of the Human Rights Watch report dated 11th December 2017 is annexed as Annexure P- 6 Pages 33 to 34)

Moreover the conditions in the repatriation agreement, including purported respect for rights of voluntary return, are hollow and insincere. As one example, a letter dated 11th December 2017 sent from Human Rights Watch to Bangladesh and Myanmar highlights:

"Guiding Principle A.3 [of the agreement] appropriately states that verification for return "will be based on evidence of past residence in Myanmar." However, the principle should acknowledge explicitly that much documentary evidence of past residence in Myanmar has been lost during the ethnic cleansing campaign that forced people from their homes, the difficult journey to Bangladesh, and the chaotic conditions after arrival in Bangladesh. Evidence of past residence should include having been registered in Bangladesh after arrival, witness affidavits, and other non-documentary means of verification." (Page 38)

[emphasis added]

The letter adds another fatal flaw:

(Page 36)
"Thus far the government of Myanmar has not publicly admitted the causes of the displacement and has taken no steps to address them. Senior military officials responsible for planning, ordering, or allowing ethnic cleansing, and security force personnel and others who participated in attacks, have not been identified or held accountable. The security forces continue to present an imminent threat to any Rohingya families that would return. Any assurances of security upon return would be meaningless, since that security would depend on the very

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same security forces that recently drove them out of the country."

[emphasis added]

(A copy of the Human Rights Watch letter dated 11th December 2017 is annexed as Annexure P- 7 Pages 35 to 40)

PUSHBACK OF WOMEN & CHILDREN

12) The pushbacks are particularly egregious since the vast majority of Rohingya refugees are either children (under the age of 18), women, disabled or elderly. A UNICEF Report of 26th January 2018 states:

"Almost 60 per cent of the refugees are children. Many have become separated from their families or fled on their own. All have suffered tremendous loss."

[emphasis added]

(A copy of the UNICEF report dated 26th January 2018 is annexed as Annexure P- 8 Pages 41 to 45)

An October 2017 report by UN Women indicates the proportion of the total Rohingya population who are female:

"The distressed and traumatized displaced population - approximately 51 percent of which are women and girls - lives in terrible conditions and lacks adequate food, water, sanitation, medical care and access to their livelihoods and assets."

[emphasis added]

(A copy of the UN Women report from October 2017 is annexed as Annexure P- 9 (Pages 46 to 49)

13) The pushbacks are also egregious in the context of the humanitarian catastrophe in Bangladeshi refugee camps - hundreds of thousands of children and otherwise vulnerable people face a real risk of death and because of unsanitary conditions and disease outbreaks (including diphtheria) as a UNICEF report of 16th January 2018 shows:

"As the Bay of Bengal region gears up for cyclone and monsoon seasons, the United Nations Children's Fund (UNICEF) is warning that more than half-a-million Rohingya children already living in "horrific" conditions in makeshift settlements in

Bangladesh may face compounded risks of disease and displacement.

"What is already a dire humanitarian situation risks becoming a catastrophe," Edouard Beigbeder, the head of UNICEF programmes in Bangladesh said Tuesday, raising alarm over the impact of the approaching cyclone and monsoon seasons.

"Hundreds of thousands of children are already living in horrific conditions, and they will face an even greater risk of disease, flooding, landslides and further displacement.

"According to the UN agency, an outbreak of diphtheria in the camps has already claimed some 32 lives, including at least of 24 children, with more than 4,000 suspected cases reported."

[emphasis added]

(A copy of the UNICEF report dated 26th January 2018 is annexed as Annexure P- 10 Pages 50 to 57.)

Pushbacks are illegal

14) It is in the above-mentioned context that the petitioner submits pushbacks are illegal because they violate the non-derogable customary international law norm of non-refoulement.

15) It is well established that the customary international law norm prohibiting refoulement includes within its scope the prohibition of any measure that would directly or indirectly refoule a refugee, including pushbacks. In its Note on International Protection of 13th September 2001 UNHCR stated:

Page 57

"...The duty not to refoule is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at

the frontier, interception and indirect refoulement, whether of an individual seeking asylum or in situations of mass influx."

[emphasis added]

(A copy of the Note on International Protection of 13th September 2001 UNHCR is Annexed as Annexure P- 11 Pages 52 to 82)

16) On 31st January 1994 the UNHCR published its response to questions posed to it by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 (henceforward "UNHCR Response to FCC"). It came to the following conclusions, *inter alia*, about the principle of non-refoulement as a norm of customary international law:

(Page 96-97)

Conclusions. "(1) The principle of non-refoulement has received widespread acceptance and its fundamental character has been fully recognized.

(5) The principle of non-refoulement includes non-rejection at the frontier, if rejection would result in an individual being forcibly returned to a country of persecution.

(6) The principle of non-refoulement, including non-rejection at the frontier, has also been accepted in the practice of States and its fundamental nature has not been seriously questioned.

(7) In view of the above, UNHCR considers that the principle of non-refoulement has acquired a normative character and constitutes a rule of international customary law."

[emphasis added]

(A copy of the relevant portion of the UNHCR Response to FCC published 31st January 1994 is Annexed as Annexure P- 12 Pages 83 to 97)

17) It is further submitted, in corroboration of the above, that non-refoulement must include pushbacks within its scope because the principle of non-refoulement as stated in Article 33(1) of the Convention, which is also customary international law, prohibits refoulement: "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" [emphasis added].

18) The above makes it clear that as a point of law, pushbacks amount to refoulement. It is also clear as a point of logic why, on the current facts, pushbacks amount to refoulement. Where Rohingya refugees are pushed

back into Bangladesh, chain-refoulement is almost certain, given the Bangladesh government's stated intentions and active attempts to return Rohingya refugees to Myanmar. Where Rohingya are pushed back into Myanmar then they are directly refouled.

- 19) It is not open to the Government of India to suggest that a norm of customary international law does not apply where a State has chosen not to become party to a treaty that has identical provisions to a norm of customary international law. Such a claim is wrong in law. As the International Court of Justice noted in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits, 1986 ICJ Reports, page 14:

179. "It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."

[emphasis added]

JUS COGENS

- 20) Some norms of customary international law rise to the status of non-derogable norms – also called *jus cogens* norms or peremptory norms. Such norms are not open to appeal, challenge or derogation, but are so axiomatic to civilized international order that they are deemed final. They are the highest ranking norm in the international hierarchy, above both Treaties and ordinary customary international law. Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a peremptory norms as:

"...a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

(A copy of the relevant portion of the Vienna Convention 1969 is Annexed as Annexure P- 13 Pages ~~98~~ to ~~99~~)

- 21) Non-refoulement is not only a norm of customary international law, but it is also a non-derogable norm. The UNHCR in its Advisory Opinion dated 26th January 2007, referenced in the main petition submitted, states:

12. ... "The fundamental and non-derogable character of the principle of non-refoulement has also been reaffirmed by the

(Page 104)

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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.'"

The UNHCR goes on to spell out what it means in practice for the principle to be non-derogable:

(Page 109)

"It is non-derogable and applies in all circumstances, including in the context of measures to combat terrorism and during times of armed conflict."

[emphasis added]

(A copy of the UNHCR Advisory Opinion dated 26th January 2007 is Annexed as Annexure P- 14 Pages 100 to 115)

22) The above makes it clear that: pushbacks amount to refoulement; refoulement is prohibited as a *jus cogens* norms of customary international law. The Border Security Force's pushbacks, on the orders of the Government of India and state Governments, therefore put India in breach of a non-derogable norm of customary international law. India stands guilty of one of the most egregious violations of international law possible.

23) Even if there is a national security exception for refoulement, it is not available for pushbacks as a matter of logic. Conceptually, pushbacks force refugees back into the hands of their persecutors before even a semblance of a chance arises to scrutinize the refugees' antecedents. Moreover the national security exception is not available as a matter of fact for these specific pushbacks occurring. These specific pushbacks are occurring in an indiscriminate and arbitrary manner - chili grenades and stun grenades are used to refoule whole groups. Moreover, there is not even pretence on the State's part that each individual being refouled poses an individual security threat. To the contrary, the BSF Director K K Sharma admitted that pushbacks occur for mere expediency, because otherwise: "*it becomes a liability since then a process has to be followed in terms of identifying them.*" Moreover he admitted that none of the Rohingya actually apprehended by them in the course of BSF pushbacks were found to have any links to any terrorist organisation. Since pushbacks are arbitrary - both conceptually (as a matter of logic), and on

the current facts - any attempt to justify them by 'national security' is absurd.

4) Moreover, as a jus cogens norm, the principle of non-refoulement is axiomatic to civilised international order. To the extent that 'national security' exceptions exist, they must be limited and carefully applied - any 'national security' exception must be rigorously and carefully proved. The term cannot become a 'catch-all' into which everything falls, because that would extinguish the substance of the right. The Hon'ble Court must therefore take exceptional care in evaluating whether measures purported in the interests of 'national security' are in fact on that basis.

5) It is clear that refoulement is a breach of Article 21 rights guaranteed by the Constitution of India. Infringements of Article 21 must satisfy the procedural and substantive due process tests. Pushbacks satisfy neither of these - the fact they are arbitrary means that they are not fair or reasonable, either in process or substance. Pushbacks are also disproportionate. First, their arbitrariness means that there is little rational nexus between the stated aim and what is being done. Second, the seriousness of the *jus cogens* rights being violated outweighs any countervailing interest, particularly given that the purported countervailing interest (national security) is not rationally linked to the action of pushbacks. Third, the manner in which the Article 21 rights are being violated makes the infringements necessarily disproportionate. This is because the BSF's use of stun and chilli grenades (against all Rohingya including children, disabled persons and pregnant women) violates the absolute prohibition on torture and other cruel, inhuman or degrading treatment under international human rights law. As noted by the European Court of Human Rights in Ali Güne v. Turkey (Application no. 9829/07) Judgment 10 April 2012:

43. "Having regard to the effects the gases cause and the potential health risks they entail, **the Court consider that the unwarranted spraying of the applicant's face in the circumstances described above must have subjected him to intense physical and mental suffering and was such as to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him** (see, *mutatis mutandis* *Kudla v Poland [GC]*, no. 30210/96 § 92, ECHR 2000-XI). It thus concludes that **by spraying the applicant in**

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such circumstances the police officers subjected him to inhuman and degrading treatment within the meaning of Article 3 of the Convention ["No one shall be subjected to torture or to inhuman or degrading treatment or punishment"]."

Since the unwarranted use of chilli and stun grenades by BSF amounts to inhuman and degrading treatment, it can never be justified, and will always be disproportionate. The petitioner hence seeks directions from this Hon'ble court that there be an immediate halt to all such border pushbacks which are a clear violation of the non-refoulement principle of customary international law.

II. Living Conditions in Rohingya Refugee Camps

26) There are a reported total of around 40,000 Rohingya in India (though this is unverified). Numerous media reports claim 17,000 have been registered with UNHCR. Many of the Rohingya refugees have been in India since 2012 following sectarian violence in Rakhine State, Myanmar. They live in different locations across India (Delhi, Hyderabad, Jammu, Mewat in Haryana and Jaipur). With their legitimacy as refugees still under question, their living conditions and scope for livelihood in terms of minimum standards is below par. A fact-finding report by Human Rights Law Network to a refugee camp in Kalindi Kunj noted:

(Page 121)

"The Rohingya in India live in squalid camps without access to schools, medical facilities, or regular work. India does not allow refugees or asylum seekers to work, so the Rohingya are forced to eke out a living in the informal sector as day labourers or domestics."

For the sake of this application, the treatment of Rohingya Refugees is compared with that of the Sri Lankan Tamil Refugees in Tamilnadu, who benefited from numerous welfare schemes.

(A copy of fact-finding report in Kalindi Kunj, Delhi by Human Rights Law Network dated November 2012 is annexed as **Annexure P- 15** Pages 119 to 135)

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27) Though some Rohingya refugees live in rented accommodation with reasonable living conditions, most are living in urban/semi-urban slums/shanties (jhuggies) constructed from 'kacha' materials. Settlements are often located in smaller, free spaces such as street corners, farm fields, garbage dumps, riverbanks, industrial sites, train tracks, under bridges, beside major highways. The settlements are little more than overcrowded shanties that are at risk of fires and public health risks. Examples include the Mewat camp in Haryana where a fact-finding mission of the Human Rights Law Network reported in September 2015 (Pg 140 Pic) "the community has to fend for itself." The report further noted:

(Page 154)

"the recent water logging and snakebite incident is a result of insufficient infrastructure such as a decent housing for the refugees."

(A copy of fact-finding report to Mewat by Human Rights Law Network September 2015 is annexed as **Annexure P- 16** Pages 136 to 154)

28) The petitioner submits that despite the refugees' temporary and makeshift accommodation, there is no government intervention to provide shelter and other basic amenities. By dismissing Rohingya as 'illegal immigrants' the government has washed its hands of the problem, without the provision of any form of aid to them. In comparison, Minister Kiren Rijiji noted in an answer to a question in the Rajya Sabha (Un-starred Question No. 1175, Answered on 04.05.2016) that Tamil refugees benefited from:

(Pg 156)

"accommodation, electricity, drinking water and toilet facilities etc. free of cost. In addition, other facilities such as monthly cash assistance, free clothing materials, utensils, subsidised ration, educational assistance etc. are provided."

(A copy of Shri Kiren Rijiju's answer on 4th May 2016 is annexed as **Annexure P- 17** Pages 155 to 156)

A report in The Hindu of 9th December 2007 corroborated the State assistance given:

(Pg 157)

"The State government will spend Rs.6 crore this year towards improvement of infrastructure facilities in refugee camps"

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housing Sri Lankan Tamils, Special Commissioner and Commissioner for Rehabilitation R. Karpoora Sundarapandian said on Saturday.

"The Department of Rehabilitation has been allocated Rs.42 crore for the current year, which will be utilised for infrastructure improvement in the camps, cash dole, supply of rice at subsidised prices and utensils, he told presspersons at the Vazhavandankottai refugee camp near here."

[emphasis added]

(A copy of The Hindu report dated 9th December 2007 is annexed as **Annexure P- 18** Pages 157 to _____)

A report in The Indian Express on 26th September 2007 added:

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"Officials said the Tamil Nadu government provides Rs 1,000 every month to the head of a Sri Lankan Tamil refugee family, Rs 750 to each adult, and Rs 400 to each child. Each refugee family gets 20 kg of rice every month, and has ration cards to purchase from the public distribution system (PDS)."

(A copy of The Indian Express report dated 26th September 2007 is annexed as **Annexure P- 19** Pages 158 to 159)

29) The petitioner submits that access to adequate housing and shelter is part of the Article 21 rights that are available to refugees in India as well as part of International human rights law, which recognizes everyone's right to an adequate standard of living, including adequate housing. Adequate housing was recognized as part of the right to an adequate standard of living in the 1948 Universal Declaration of Human Rights and in the 1966 International Covenant on Economic, Social and Cultural Rights. These rights must be secured to the Rohingya refugees in India in order to realise the rights guaranteed to them under the Constitution and International law.

Health and Sanitation

30) Access to basic services is limited in most Rohingya settlements. There is an acute shortage of water and sanitation services, and restricted or no electric supply, making the areas unsafe - particularly for women and

children. As the Human Rights Law Network fact-finding team to Mewat of September 2015 noted, water-logging is a persistent and deadly problem:

"The water logging problem is a recurring situation that requires ad hoc as well as prevention measures. The recent incident of snake bite has shown that the water not only exacerbates life but also poses a threat to the life of the residents." (Pg 154)

They added:

"The people residing in these camps are living without any access to safe water and sanitation. The only possibility for the refugees to get fresh water is to buy the water. The camps lack the facility of safe drinking water. Potable and non-potable 1,400 litres water costs Rs. 600/-. Poor sanitation systems are among the leading causes of the spread of preventable diseases in developing nations. The waste is disposed in the streets. Toilets with proper plumbing does not exist (neither temporary nor permanent ones); instead, people are left with no other option but to defecate in the open (by digging holes in the ground)." (Pg 140)

(As noted in Annexure P-16)

A similar situation was discovered by the fact-finding team at the Kalindi Kunj camp, and reported in the already mentioned article from The Wire dated 15th September 2017.

31) A number of Rohingya women and girls report reproductive health problems – unsurprising given the use of rape as a weapon of war by their persecutors. However as the Human Rights Law Network fact-finding team to Mewat of September 2015 noted:

"Pregnant and lactating women are in an especially vulnerable position. These women are in dire need of special care, for which schemes do exist but are mostly not available for the refugee women. This is either due to the lack of knowledge of such services, the denial of access, or non-existence of facilities." (Pg 54)

(As noted in Annexure P-16)

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32) The provision of health and sanitation facilities is a primary prerogative of any State and something that cannot be derogated from. The right to live that is guaranteed in any civilised society (and to all people by Article 21) implies the right to food, water, decent environment education, medical care, and shelter. These are basic human rights and upheld as such by this Hon'ble Court. Therefore, the right to healthcare must be guaranteed to refugees as well.

33) Shri Kiren Rijiju, Minister of State in Ministry of Home Affairs, sanitation facilities, noted the contrasting provisions made available to Tamil refugees. He did so in response to a Rajya Sabha Question (Unstarred Question No. 1175, Answered on 04.05.2016):

"the State Government is also extending various welfare schemes such as Girl Child Protection Scheme, Social Security Scheme, Maternity Financial Assistance Scheme, Marriage Assistance Scheme etc. to the Sri Lankan Tamil refugees in the camps."

(As noted in Annexure P-17)

Similar schemes need to be put in place for the welfare of the Rohingya refugees to improve their overall living conditions.

Livelihood

34) UNHCR policy associate Ipshita Sengupta explains in a Scroll report of 8th January 2018:

"Rohingya refugees in India are very poor, have limited education and skills and work in low-paid, informal jobs where they are sometimes harassed and exploited," said UNHCR policy associate Ipshita Sengupta."

The above-mentioned Scroll report goes on to document how that many Rohingya work in exploitative industries, like rag-picking, and as bonded labourers:

"Sold for \$130 to work as a rag picker in the northern Indian town of Mathura, Rohingya refugee Abdul Rahman lived in a tenement of

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stitched-together polythene bags and pined for his home and the lush farmland he owned in Myanmar's Rakhine state.

...

(Pg 161)

"Rahman was sold, along with three other trafficked Rohingya, for Rs 25,000 in Mathura. His employer deducted the money from his wages, leaving him penniless when he was rescued.

Another rescued Rohingya, Sadiq Hussain, 22, had not earned enough to pay back the Rs 25,000 his employer gave him when he started work almost four years earlier. "I still owed him Rs 5,000 when I was rescued," he said.

Hussain did not have a job or a roof over his head and feared he could not find work because his identity card, issued by the UN refugee agency was with the authorities."

(A copy of the Scroll report dated 8th January 2018 is annexed as **Annexure P- 20** Pages 160 to 162)

A few refugees run their own businesses such as vegetable hawkers, grocers and mobile phone shops. Most women in the community do not work. Some women are engaged in home-based work such as tailoring/embroidery, domestic helpers or take up seasonal work such as walnut breaking (Jammu).

35) In contrast programmes for Tamil refugees, such as under the auspices of the Commissionerate of Rehabilitation and Welfare of Non Resident Tamils (CRWNRT), have sought to facilitate the livelihoods of those in the camps as a priority. A report in The Hindu on 2nd May 2012 documents:

"The State Government had sanctioned Rs.76 lakhs for creating infrastructure at Sri Lankan refugee camps in the district, said Minister for Power R. Viswanathan.

"He was distributing laptops to village administrative officers and priceless sewing machines to Sri Lankan refugees at the Collectorate here on Tuesday.

"More facilities will be created in all the seven camps for creating better living place for the refugees. Sewing machines will ensure sustainable income generation activities for them. Basic amenities would be improved and infrastructure created, he added."

...

"In his special address, Collector N. Venkatachalam said that refugees should avail themselves of schemes for their uplift."

(A copy of The Hindu report dated 2nd May 2012 is annexed as **Annexure P-21** Pages 163 to _____)

36) Access to government schemes for educations, pensions, rations as well as other social security benefits and livelihood opportunities is essential for the Rohingya community's welfare and overall development. Moreover, as with the Tamils there should be no discrimination in terms of gender; women must be provided resources and trained, too.

Rohingya children

37) Children in the Rohingya community are particularly vulnerable as many have witnessed severe violence in Myanmar and during their journey in search of asylum. Many have faced physical and emotional abuse, exploitation and forced marriage. Some have been separated from their families. Many children have never attended school and cannot read or write.

38) Due to the poor socio-economic status of the Rohingya community some Rohingya children are working in hazardous industries such as heavy construction and rag-picking. While a few children attend government schools, many others remain out of school as they work to support their families, are married off early, or lack documentation as the fact-finding report to [Mewat] states: HRNL report

(141)

"The children of the camp are not allowed to register at the local government school due to lack of proper documents and Adhaar card. Although the refugee children can attend classes, they are not a part of the formal education system because their names are not registered. As a consequence, they are not able to attain certificates or to properly enrol in the education system."

(As noted in Annexure P-16)

39) Children in school are empowered and have significantly gained from the opportunity to learn and play in a safe space. Children not in school are exposed to risks of child labour, child marriage, child molestation and may suffer from low self-esteem, depression and loss of hope. The Free School Education scheme enforced by the CRWNRT in Tamilnadu

encourages refugees to send their children to school. In corroboration of Minister Kiren Rijiju's comment that Tamils receive "educational assistance", an Indian Express report of 26th September 2017 details what this is:

(13159)

"Refugee children are eligible to study free up to Class 12, and receive benefits due to Indian students including free textbooks, uniform, bicycles, mid-day meals, bus passes and laptops."

(As noted in the The Indian Express report at Annexure P- 19)

The government must ensure that all Rohingya refugee children are guaranteed access to government schools and scholarships/schemes for higher educations as well.

40) All of the above submissions on living conditions also draw on case studies by South Asia Human Rights Documentation Centre. These detail living conditions in camps in Delhi, Hyderabad, and Jaipur along with photographic evidence of the conditions.

(A copy of some of the Case Studies on living conditions of Rohingyas done by the South Asia Human Rights Documentation Centre are annexed as **Annexure P- 22** Page 164 to 166)

Overall: Discrimination in Living Conditions

41) As the discrimination against Rohingya Refugees is apparent, the government cannot continue to overlook the rights and entitlements of these people. There are fundamental human rights and principles of international law that cannot be infringed upon, and it places an obligation on the State to provide for food, sanitary facilities, education and quality health care to all refugee populations to the exclusion of none.

42) Taking into consideration the welfare schemes put in place for Tamil refugees, the government of India must implement policy measures for the safety and protection of the Rohingya refugees.

PRAYERS

In view of the above facts and circumstances, it is respectfully prayed that this Hon'ble Court may be pleased to pass the following ad-interim direction:-

- a. Direct the Union Government and all border State governments to ensure that the "push-back" of Rohingya Refugees does not take place, as it is in contravention of non-derogable principles of customary international law.
- b. Direct the Border Security Forces to file a compliance report directly or through the Ministry of Home Affairs regarding their strict adherence to no push back policy for Rohingya Refugees seeking refuge in Indian Territory.
- c. Direct the respective State or local municipal run medical health care centers to provide medical services to those residing in the Rohingya camps.
- d. Direct all State governments to provide education in all State run schools to Rohingya refugee children
- e. Direct the Ministry of Home Affairs to expeditiously grant Refugee identification cards through the FRRO for the Rohingyas in the informal camps, so that they may avail employment opportunities, health and education facilities.
- f. Issue or pass any other direction or order, which this Hon'ble court may deem fit and proper.

PETITIONER

THROUGH

PRASHANT BHUSHAN

COUNSEL FOR THE PETITIONER

DRAWN BY: CHERYL D'SOUZA

DATE: 20 JANUARY, 2018, NEW DELHI

IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

I.A. NO. _____ OF 2018

IN

Writ Petition (Civil) No. 793 Of 2017

IN THE MATTER OF:

MOHAMMAD SALIMULLAH & Anr

....PETITIONERS

VERSUS

UNION OF INDIA & Ors

....RESPONDENTS

AFFIDAVIT

I, Mohammad Salimullah, S/o Amanullah, R/o Anagaung, Buthidaung, Rakhine, Myanmar, (presently residing at, Plot No. G-15, Gali no. 2, Kanchan Kunj, near Kalandikunj, Madnapur Khadar, Delhi - 110025), do hereby solemnly affirm and state on oath as under:

1. That I am the Petitioner No. 1 in the aforementioned writ petition and being familiar with the facts and circumstances of the case. I am competent and authorized to swear this Affidavit. I have also been authorised to file this affidavit on behalf of Petitioner No. 2 as well.
2. That I have read and understood the contents of the Interim Application. I state that the facts therein are believed to be true to the best of my knowledge and nothing material has been concealed therefrom.
3. I further state that the annexures are true copies of their respective originals.



DEPONENT

VERIFICATION:

I, the above named Deponent, do hereby verify that the contents of the above Affidavit are true and correct to my knowledge; that no part of it is false and that nothing material has been concealed therefrom.

Verified at New Delhi on 29 day of January 2018.

ORIGINAL FILE
SOLICITOR
ADVOCATE
NOTARY PUBLIC
29/01/18

Identified by the
Executive
Signed in my Presence

DEPONENT

India using chilli sprays, stun grenades to dissuade Rohingya influx

September 22, 2017

Rupam Jain

Reuters

NEW DELHI (Reuters) - India has stepped up security along its largely porous eastern border with Bangladesh and is using "chilli and stun grenades" to block the entry of Rohingya Muslims fleeing from violence in their homeland of Myanmar, officials said on Friday.

Border forces in Hindu-majority India, which wants to deport around 10,000 Rohingya already living in the country, citing security risks, have been authorized to use "rude and crude" methods to stop any infiltration attempts.

"We don't want to cause any serious injury or arrest them, but we won't tolerate Rohingya on Indian soil," said a senior official with the Border Security Force (BSF) in New Delhi.

"We're using grenades containing chilli spray to stop hundreds of Rohingyas trying to enter India ... the situation is tense," added the official, who declined to be identified as he was not authorized to speak to media.

More than 420,000 Rohingya have fled to Bangladesh since Aug. 25, when a coordinated attack by Rohingya insurgents on Myanmar security forces triggered a counteroffensive, killing at least 400 people, mainly militants. The United Nations has called the assault a "textbook example of ethnic cleansing".

Densely populated Bangladesh is struggling to shelter all the refugees desperate for space to set up shacks, sparking worries in India that the influx could spill into its territory.

P.P.S. Jaswal, a deputy inspector general of the BSF patrolling a large part of the border in India's eastern state of West Bengal, said his troops were told to use both chilli grenades and stun grenades to push back the Rohingyas.

A chilli grenade makes use of a naturally-occurring compound in chilli powder to cause severe irritation and temporarily immobilize a target.

Prime Minister Narendra Modi's Hindu nationalist government is growing increasingly hostile towards the Rohingya in India, with Home Minister

Rajnath Singh calling on Thursday for their deportation as illegal migrants.

Seeking to get legal clearance for the deportation plan, the home ministry told the Supreme Court this week it would confidentially provide it with intelligence information showing Rohingya links with Pakistan-based militants.

Most of the peaceloving refugees had no link to criminal activity, two Rohingya men protesting against the deportation move told India's top court on Friday.

An official of India's federal investigations agency said it was seeking help from Muslim religious leaders to step up surveillance of the Rohingya.

Police have arrested a suspected al Qaeda member they believe was trying to recruit Rohingya in the country to fight security forces in Myanmar. More than 270 Rohingya have been in Indian jail since 2014.

"Our investigations have revealed that Al Qaeda wants to use India and Bangladesh as their base to start a religious war against Myanmar," said New Delhi police official Pramod Singh Khuswah. "Clearly they are a threat to our security."

Link: <https://www.reuters.com/article/us-myanmar-rohingya-india/india-using-chilli-sprays-stun-grenades-to-dissuade-rohingya-influx-idUSKCN1BX1BG>

TRUE COPY

**Our policy is to push back Rohingyas and not arrest them:
BSF**

November 29, 2017

Neeraj Chauhan

The Times of India

NEW DELHI: The Border Security Force has apprehended 85 Rohingyas till October 31 this year at the India-Bangladesh border out of which 76 have already been pushed back to Bangladesh. Interacting with media persons at the annual conference of the force, BSF director general KK Sharma said, "Rohingya issue is a complicated one. Our policy is to push them back and not arrest them. If we arrest anyone trying to infiltrate into India, then they become a liability and then there has to be a process of identifying them. So we just push them back".

As per my information, there are 9-10 lakh Rohingyas in Bangladesh and the possibility of their spillover to India cannot be ruled out so our policy is to push them back," said KK Sharma.

Sharma, however, claimed that none of the Rohingyas apprehended by them were found to be linked with any terror organization.

The intelligence agencies have claimed that some of the Rohingyas have linked with terror groups like ISIS and LeT.

Sharma also said that BSF men are not qualified enough to distinguish between the facial features and language of different kind of people infiltrating into India from the India-Bangladesh border.

To control the situation at the India-Bangladesh border, BSF has also proposed raising five more battalions for enhancing deployment on vulnerable routes of infiltration.

About why Rohingyas are trying to come to India, BSF said in a statement, "The interrogation of apprehended Rohingyas has revealed that they have been staying in refugee camp at Cox's Bazaar in Bangladesh where there is no basic amenities available so they do not want to settle there."

Agents allure these Rohingyas with good job opportunities in India and tell them that they will work with their own Muslim community in some of the states such as Jammu and Kashmir, Tamil Nadu and West Bengal. They assure them to facilitate their cross-border movement and ensure safe arrival at their destination in lieu of some amount. Most of the

Rohingyas go to Jammu because some Rohingyas have already been staying there for the last few years," says BSF.

"Apart from being a natural choice due to its Muslim majority, the Rohingyas say that they pick Jammu and Kashmir due to economic considerations and most of them follow the same pattern," says BSF.

"Once a Rohingya reaches Jammu, he stays there for a few months and then invites other relatives, informing them of job opportunities and better pay. In rare cases, if some of the Rohingyas do not get permanent job, they go to another state for earning money or to settle there," the BSF statement says.

Link: <https://timesofindia.indiatimes.com/india/our-policy-is-to-push-back-rohingyas-and-not-arrest-them-bsf/articleshow/61847346.cms>

TRUE COPY

BSF: Policy is to push back Rohingyas, not arrest them

November 30, 2017

The Asian Age

This year, the BSF has apprehended as many as 87 Rohingyas till October 31 out of which 76 have already been pushed back into Bangladesh.

New Delhi: The Border Security Force has said that its policy was to push back the Rohingyas rather than arrest them as it then becomes a "liability."

BSF chief K.K. Sharma, while admitting that the issue of illegal Rohingya migrants was a complicated one, said, "It is our policy to push back the Rohingyas infiltrating into the country rather than arresting them. If we arrest them, it becomes a liability since then a process has to be followed in terms of identifying them. So the best to deal with the problem is to push them back."

He claimed that there were an estimated 36,000 Rohingyas present in different parts of the country.

This year, the BSF has apprehended as many as 87 Rohingyas till October 31 out of which 76 have already been pushed back into Bangladesh. BSF officials claimed that Bangladesh remained the main source of Rohingya migrants as an estimated 9-10 lakh of them were staying in different camps in the neighbouring country. Most of these Rohingya migrants are said to be in camps in Bangladesh's Cox's Bazar area. Mr Sharma also claimed that the BSF was dealing with the "spill over" of these Rohingyas into India and patrolling along the sensitive Indo-Bangladesh border has already been intensified in a bid to push the Rohingyas back into Bangladesh if they were caught crossing into India.

"The feedback we have received is that most of the Rohingya migrants are not happy with the conditions in camps in Bangladesh. So they try to cross over into India in hope of getting jobs and a better life. There are a number of agents operating along the border areas who assure Rohingyas of a safe passage into India so we are alert and dealing with this problem," a senior BSF official added.

In a bid to further strengthen patrolling, the BSF is also planning to raise five additional battalions which would be deployed along the Indo-Bangladesh borders to check infiltration by illegal Rohingya migrants.

Link: <http://www.asianage.com/india/all-india/301117/bsf-policy-is-to-push-back-rohingyas-not-arrest-them.html>

TRUE COPY

BJP States tell police to push back Rohingya

28

September 19, 2017

Sandeep Phukan

The Hindu

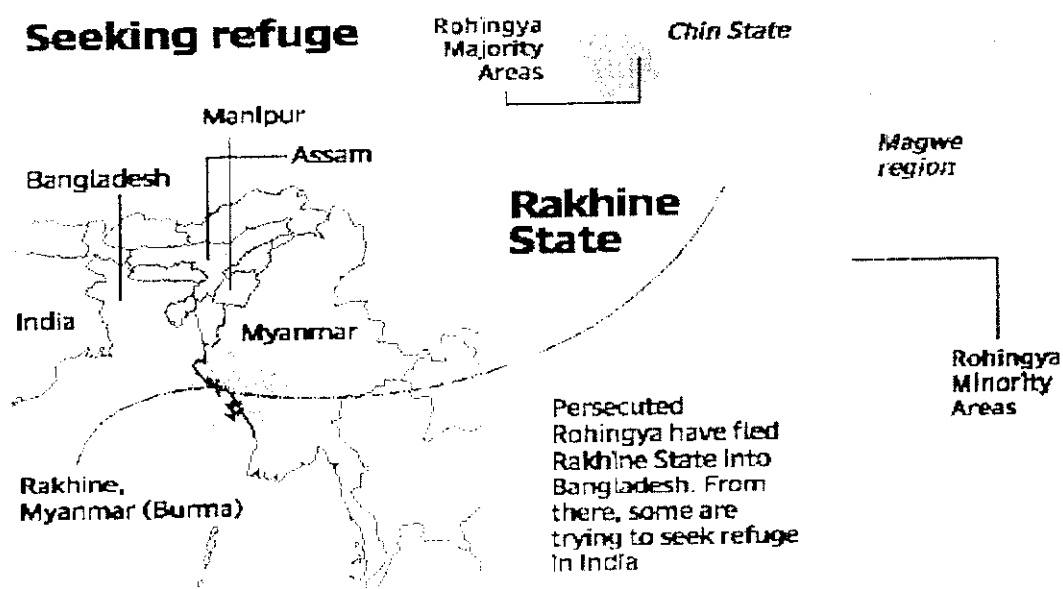
Assam and Manipur have placed their forces on alert

The Centre is yet to spell out its stand on undocumented Rohingya but BJP-led State governments in Assam and Manipur have asked their police, especially in the border districts, to "push back anyone who tries to cross the border."

While Assam shares a 262 km border with Bangladesh, three other northeastern States — Manipur, Mizoram and Nagaland — are also front-line States. The BJP governments in Assam and Manipur have issued "alerts to mount extra vigil in the border areas."

Assam Chief Minister Sarbananda Sonowal is believed to have conveyed to the Border Security Force (BSF) personnel and top officials of the State police to "push back if any Rohingya family tried to cross over the Bangladesh border, seeking refuge."

Seeking refuge



The Manipur government, led by BJP's N. Biren Singh, too has instructed the police to crack down in border towns like Moreh that routinely see brisk cross-border trading. It is not uncommon to find Myanmar traders residing in these areas on a temporary basis.

Intelligence inputs

Sources say the decisions by the State governments follow "intelligence inputs from the Centre that terror groups could use the refugee crisis to sneak in their members and pose a security challenge to the country."

The intelligence input was discussed at a recent security review meeting held by the Ministry of Home Affairs. The Assam Chief Minister, however, refused to spell out his government's position. "It

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is not a State issue but a national issue and we will follow what the Centre decides," said Mr. Sonowal, while confirming that "his government has mounted extra vigil on the Indo-Bangla border."

The Rohingya — a minority Muslim community in the Rakhine state of Myanmar on the border with Bangladesh — have been forced to flee the country following periodic ethnic clashes and crackdown by Myanmar's Army. The latest bout of violence erupted last month, following an attack on a police post.

Around 3,00,000 Rohingya have sought refuge in Bangladesh since the August 25 crackdown on their settlements.

Link: <http://www.thehindu.com/news/national/bjp-states-tell-police-to-push-back-rohingya/article19694238.ece>

TRUE COPY

Myanmar, Bangladesh ink Rohingya return deal amid concern over army's role

November 23, 2017

Thu Thu Aung, Yimou Lee

Reuters

NAYPYITAW (Reuters) - Myanmar and Bangladesh signed an accord on Thursday over terms for the return of hundreds of thousands of Rohingya Muslims who have fled to Bangladesh, both governments said, amid concern that Myanmar's powerful army could prove obstructive.

Rights groups have accused the military in mostly Buddhist Myanmar of carrying out mass rape and other atrocities during a counter-insurgency operation launched in late August in retaliation for attacks by Rohingya militants in Rakhine State.

On Wednesday, the United States said the military operation that drove 620,000 Rohingya to seek sanctuary in neighboring, largely Muslim Bangladesh, amounted to "ethnic cleansing", echoing an accusation first leveled by top U.N. officials in the early days of the humanitarian crisis.

Myanmar is seeking to ease international pressure by striking an initial agreement on returns, while Dhaka wants to ensure overstretched refugee camps that have mushroomed in the Cox's Bazar region don't become permanent.

The return of the refugees should start in two months, the pact says. A joint working group will be set up in three weeks and a specific bilateral arrangement for repatriation "will be concluded in a speedy manner," the Bangladesh foreign affairs ministry said in a statement.

"We are ready to take them back as soon as possible after Bangladesh sends the forms back to us," MyintKyaing, a permanent secretary at Myanmar's ministry of labor, immigration and population, told Reuters, referring to forms the Rohingya must complete with personal details before repatriation.

The signing took place after a meeting between Myanmar's civilian leader Aung San Suu Kyi and Bangladesh foreign minister Abul Hassan Mahmood Ali in Naypyitaw.

In its statement, Myanmar said the deal was based on the 1992-1993 repatriation pact between the two countries that followed a previous spasm of violence in Myanmar.

Although Western countries and the world Muslim body, the Organisation for Islamic Cooperation, portrayed the matter as an international issue, Myanmar said it was resolved via two-way talks based on "friendly and good neighborly relations".

"Issues that emerge between neighboring countries must be resolved amicably through bilateral negotiations," Suu Kyi's office said.

On the basis of the 1992-1993 agreement, Myanmar would accept those who could present identity documents issued to the Rohingya by governments in the past, MyintKyaing said.

Acceptable identity documents include the currently distributed national verification cards, the now-withdrawn "white cards", and receipts the Rohingya received for the return of "white cards", he said.

The refugees have to provide names of family members, previous addresses in Myanmar, birthdates and a statement of voluntary return in the forms they fill out, he added.

Diplomats have said key deal elements will be the criteria of return and the participation of the United Nations refugee agency, UNHCR.

Other important points include safeguards for the Rohingya against further violence, a path to resolving their legal status and whether they would be allowed to return to their own homes and farms.

Rohingya refugees recover in the Norwegian-Finnish Red Cross field hospital at Kutupalong refugee camp near Cox's Bazar, Bangladesh, November 22, 2017. REUTERS/Susana Vera

MyintKyaing declined to elaborate on these points.

Speaking at a military event in Dhaka, Bangladesh Prime Minister Sheikh Hasina said she was calling on Myanmar "to start taking back soon their nationals from Bangladesh".

However, there was little enthusiasm for the deal among Rohingya refugees in the camps in Bangladesh's Cox's Bazar area near the Myanmar border.

"We will go back to our country if our demands are met," said one of them, Salimullah, who arrived in Bangladesh 15 days ago. "Our demands are that we are given citizenship. They also have to give us back our land," he told Reuters Television.

Suu Kyi, whose stature as a Nobel peace prize winner was tarnished by the crisis, has said repatriation of the largely stateless Muslim minority would be based on residency and that it will be "safe and voluntary".

But her civilian administration, which is less than two years old, has to share power with the military that ruled Myanmar for decades, and the generals have appeared less enthusiastic about the prospect of Rohingya returning.

Russia's ambassador to Myanmar criticized the U.S. stance, saying that using the term "ethnic cleansing" was unhelpful and could aggravate the situation.

On a visit to Beijing on Wednesday, Myanmar's commander in chief, Senior General Min Aung Hlaing, was told by a senior Chinese general that China wanted stronger ties with Myanmar's military.

Humanitarian workers told Reuters they were particularly concerned about a statement by Min Aung Hlaing last week.

"The situation must be acceptable for both local Rakhine ethnic people and Bengalis, and emphasis must be placed on wish of local Rakhine ethnic people who are real Myanmar citizens," Min Aung Hlaing said.

His use of the term Bengali for the Rohingya implies they are from Bangladesh, and Buddhists in Rakhine are largely opposed to their presence.

Min Aung Hlaing, over whom Suu Kyi has no control, also said the returnees would be "scrutinized and re-accepted under the 1982 Citizenship Law and the 1992 Myanmar-Bangladesh bilateral agreement".

The 1982 law, passed during the junta's long rule, ties Myanmar citizenship to membership of recognized ethnic groups, an official list that excludes the Rohingya.

Senior U.N. officials based in Myanmar told Reuters they feared that security personnel in key positions may not cooperate over the return of Rohingya.

Link: <https://www.reuters.com/article/us-myanmar-rohingya/myanmar-bangladesh-ink-rohingya-return-deal-amid-concern-over-armys-role-idUSKBN1DN0HA>

TRUE COPY

Burma: Rohingya Return Deal Bad for Refugees**33**

December 11, 2017

Human Rights Watch

Burma, Bangladesh Need to Redraft Agreement, Involve UN

(New York) – An agreement by Bangladesh and Burma to begin returning Rohingya refugees to Burma by January 23, 2018, creates an impossible timetable for safe and voluntary returns and should be shelved, Human Rights Watch today said in a letter to the two governments. International donors, who would be needed to fund the massive repatriation effort, should insist that Burma and Bangladesh invite the United Nations High Commissioner for Refugees (UNHCR) to join in drafting a new tripartite agreement that ensures adherence to international standards.

Since late August 2017, more than 645,000 ethnic Rohingya have fled a campaign of ethnic cleansing by Burma's security forces and sought asylum in Bangladesh. Human Rights Watch has interviewed more than 200 of the refugees. Many said that they wish to eventually return home, but that they do not believe it is safe to return to Burma for the foreseeable future and until their security, land, and livelihoods can be ensured.

"Burma has yet to end its military abuses against the Rohingya, let alone create conditions that would allow them to return home safely," said Bill Prelick, refugee rights director at Human Rights Watch. "This agreement looks more like a public relations effort by Burma to quickly close this ugly chapter than a serious effort to restore the rights of Rohingya and allow them to voluntarily return in safety and dignity."

On November 23, Bangladesh and Burma signed an "Arrangement on Return of Displaced Persons from Rakhine State" on behalf of "residents of Rakhine State" who crossed from Burma into Bangladesh after October 9, 2016 and August 25, 2017. The agreement makes no reference to the cause of most of the forced displacement: a campaign of killings, widespread rape, and mass arson carried out by Burmese security forces that amounted to crimes against humanity. The agreement also fails to identify the displaced either as Rohingya or as refugees.

Voluntary repatriation in safety and dignity as required by international law will not be feasible until the Burmese government demonstrates its willingness and ability to ensure full respect for returnees' human rights, equal access to nationality, and security, Human Rights Watch said.

The agreement expresses Burma's commitment to "take necessary measures to halt the outflow of Myanmar residents to Bangladesh" – which raises grave concerns since everyone has a right to flee persecution in their own country. The agreement also makes no direct

reference to nonrefoulement, the principle of international refugee law that prohibits the forcible return of refugees to places where their lives or freedom would be threatened. And the agreement restricts returnees' freedom of movement to Rakhine State in "conformity with existing laws and regulations," many of which discriminate against the Rohingya.

Several Burmese officials have spoken about putting Rohingya in "camps." This would be an unacceptable approach to their return as camps set up after previous anti-Rohingya violence have led to de facto detention and segregation.

While the agreement says that Bangladesh will immediately seek assistance from UNHCR to carry out safe and voluntary returns, Burma agrees only "that the services of the UNHCR could be drawn upon as needed and at the appropriate time."

"After the widespread atrocities, safe and voluntary return of Rohingya will require international monitors on the ground in Burma," Frelick said. "This means a central role for the UNHCR, the only UN agency with a statutory mandate to facilitate the voluntary repatriation of refugees."

Given the critical flaws in the agreement, Burma and Bangladesh should invite UNHCR to join in the drafting of a new tripartite agreement, Human Rights Watch said. This should include some existing provisions, such as encouraging refugees "to return voluntarily and safely to their own households and original places of residence or to a safe and secure place nearest to it or their choice." The current agreement also commits Burma "to see that the returnees will not be settled in temporary places for a long time."

Link: <https://www.hrw.org/news/2017/12/11/burma-rohingya-return-deal-bad-refugees>

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**HUMAN
RIGHTS
WATCH**

HRW.org

H.E. Mr. Abul Hassan Mahmood Ali, M.P.
Foreign Minister
Ministry of Foreign Affairs
Segunbagicha, Dhaka 1000
Bangladesh

U Kyaw Tint Swe
Union Minister
Ministry of the Office of the State Counsellor
Office No. 8
Naypyidaw
Myanmar

Re: Myanmar-Bangladesh "Arrangement" on Rohingya Refugees

Dear Foreign Minister Hassan Mahmood Ali and Union Minister Kyaw Tint Swe,

We write to you on behalf of Human Rights Watch concerning the “Arrangement on Return of Displaced Persons from Rakhine State” (the “Arrangement”), which Myanmar and Bangladesh signed on November 23, 2017. The Arrangement responds to the forced displacement of more than 645,000 members of the ethnic Rongya minority in Myanmar who have entered Bangladesh during the past three months.

Any agreement to return Rohingya refugees to Myanmar must be based on fundamental principles of international law, including that all returns must be voluntary and safe, and carried out with full respect for the principle of nonrefoulement, which prohibits the return of refugees to places where they would be persecuted or face a real risk of torture, or cruel, inhuman, or degrading treatment.

The text of the Arrangement raises concerns that these principles will not be fully adhered to. While the Arrangement states that those displaced left Myanmar following “terrorist attacks” occurring on October 9, 2016, and August 25, 2017, it makes no reference to the campaign of killings,

Rossella Kelly, Vice Chair
 Robert Kelly, Vice Chair
 Michael Kelly, Vice Chair
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 Stephen S. Scher
 Bruce Simpson
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 Theodoros T. Tsiaras
 William Wang
 Yakovleva, Yana
 Yana Wang

widespread rape, and mass arson carried out by Myanmar security forces that caused the vast majority of these refugees to flee. The human rights violations, which amount to crimes against humanity, have been documented by Human Rights Watch and other independent organizations. The United Nations Security Council has met to address these abuses and a Special Session of the UN Human Rights Council was convened on December 5.

The Arrangement fails to identify those who fled Myanmar for Bangladesh either as Rohingya or as refugees.

The Arrangement states that the process of return will commence within two months after the signing of the agreement, and will be completed within “a reasonable time” in a “time-bound manner.” While we commend the implicit recognition of the right of refugees to return and the stated intention to resolve this situation, the timeframe indicated in the Arrangement is unrealistic. Tens of thousands of Rohingya have no homes or even villages to return to after they were burned by the security forces and government-backed groups, making it unclear where they would go upon return.

Thus far the government of Myanmar has not publicly admitted the causes of the displacement and has taken no steps to address them. Senior military officials responsible for planning, ordering, or allowing ethnic cleansing, and security force personnel and others who participated in attacks, have not been identified or held accountable. The security forces continue to present an imminent threat to any Rohingya families that would return. Any assurances of security upon return would be meaningless, since that security would depend on the very same security forces that recently drove them out of the country.

Protection mechanisms need to be put into place to ensure the safety of people who choose to return. The United Nations High Commissioner for Refugees (UNHCR) should have direct and unhindered access to all returnees—including to spontaneous and internally displaced returnees—to monitor every stage of the repatriation and reintegration process. This is necessary to ensure that returnees are not subjected to harassment, intimidation, punishment, violence, or denial of fair access to services or institutions, or discriminated against in the enjoyment of any basic rights until the situation in Myanmar can be considered safe, effective national protection measures are put in place and become available to all returnees, and returnees have been reintegrated.

In addition, to ensure an environment conducive to returns necessitates that the government of Myanmar abolish or revise various discriminatory and abusive laws, policies, and regulations. Voluntary repatriation in safety and dignity will not be feasible

until the Myanmar government demonstrates its willingness and ability to ensure full respect for returnees' human rights, equal access to nationality, and fully protected security among communities in Rakhine State.

The Arrangement contains several additional critical flaws:

- 1) Guiding Principle A.2 states, "Myanmar has agreed to take necessary measures to halt the outflow of Myanmar residents to Bangladesh." The right of any person to leave any country is a human right enshrined in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Universal Declaration also enshrines the right of anyone to leave their country to seek asylum from persecution in another country. This provision of the Arrangement is unacceptable if it would prevent members of the Rohingya minority from fleeing persecution in Myanmar.
- 2) Guiding Principle C.16 pledges both countries not to violate universally agreed principles of human rights "as enshrined in international human rights instruments to which they are parties." However, we note that neither country is a party to the 1951 Refugee Convention or its 1967 Protocol. Any repatriation accord involving the two countries should explicitly recognize that the parties are lawfully obligated to respect customary international law, including the principle of nonrefoulement under international refugee law. The principle of nonrefoulement prohibits any government from forcing an asylum seeker at its border or a refugee on its territory back to a place where their lives or freedom would be threatened. This includes direct or indirect pressure that would give refugees little or no option but to return to a place where they would face a risk of serious harm.
- 3) While Bangladesh agrees in Guiding Principle A.4 to immediately avail itself of the assistance of the UNHCR in the process of safe and voluntary return, Myanmar agrees only "that the services of the UNHCR could be drawn upon as needed and at the appropriate time." As the only UN agency with a statutory mandate to cooperate with governments to facilitate the voluntary repatriation of refugees, UNHCR's involvement should be required as part of any agreement and regarded by both countries as an indispensable element of any organized voluntary repatriation program at every stage of the process, including monitoring reintegration in Myanmar.

Because of these and other flaws in the Arrangement, we believe that it should be suspended until it is amended to reflect the above concerns. We urge both parties to invite UNHCR to participate in any future negotiations in order to ensure that international standards are included in any future agreement.

The Arrangement does, however, include some elements that could provide the basis for a new tripartite agreement on voluntary repatriation involving Bangladesh, Myanmar, and UNHCR. The following points, if properly amended, suggest helpful principles governing the voluntary return of Rohingya refugees from Bangladesh:

- 1) Guiding Principle A.2 includes a commitment to encourage those who have left Myanmar "to return voluntarily and safely to their own households and original places of residence or to a safe and secure place nearest to it or their choice." Recognition of the right of refugees to return to their homes or to other places of their choice is welcome.
- 2) Guiding Principle A.2 states that "Myanmar will take all possible measures to see that the returnees will not be settled in temporary places for a long time and their freedom of movement in Rakhine State still be allowed in conformity with the existing laws and regulations." This should be amended to be a positive statement of principle, stating instead: "Myanmar will take all possible measures to see that the returnees will not be settled in temporary places for a long time and their freedom of movement be allowed throughout Myanmar." The right to freedom of movement applies to all throughout Myanmar, not just in Rakhine State, and should not be limited by "existing laws and regulations," which are discriminatory toward Rohingya.
- 3) Guiding Principle A.3 appropriately states that verification for return "will be based on evidence of past residence in Myanmar." However, the principle should acknowledge explicitly that much documentary evidence of past residence in Myanmar has been lost during the ethnic cleansing campaign that forced people from their homes, the difficult journey to Bangladesh, and the chaotic conditions after arrival in Bangladesh. Evidence of past residence should include having been registered in Bangladesh after arrival, witness affidavits, and other non-documentary means of verification.
- 4) Guiding Principle A.5 includes an agreement by Myanmar not to prosecute or penalize returnees for illegal exit. This is a positive pledge, but should also include a commitment to revise Myanmar law to respect freedom of movement and end any possibility of being prosecuted for leaving the country without permission. The agreement should also ensure that returnees will not be subjected to harassment, intimidation, discrimination, or any other punitive measures on account of them or their families having left Myanmar.

Finally, there are a number of elements that were not included in the Arrangement that should be part of a new tripartite agreement on voluntary repatriation. These include:

- Refugees should be provided with complete, objective, up-to-date, and accurate information about conditions in prospective areas of return, including security conditions, and availability of assistance and protection to reintegrate in Myanmar.
- Bangladesh should provide refugees a genuine choice to stay in Bangladesh, return to Myanmar, or seek resettlement in a third country.
- Myanmar should explicitly ensure that refugees have the right to have restored to them any housing, land, and property of which they were arbitrarily or unlawfully deprived, or to be fully compensated for any housing, land, and property that cannot physically be restored as determined by an independent, impartial tribunal.
- Myanmar should explicitly ensure that refugees who have been arbitrarily or unlawfully deprived of their liberty, livelihoods, citizenship, family life, and identity also have the right of restitution.
- The parties should make every effort to ensure that families are not separated in the process of repatriation and that every effort is made to facilitate the reunification of separated family members.
- 6) Bangladesh should issue or validate documents with respect to changes in legal or civil status, including births, deaths, marriages, divorces, adoptions, as well as educational and vocational degrees, certificates, and diplomas for refugees living in Bangladesh, and that Myanmar should recognize the validity of such documents and credentials.
- 7) The parties should take special measures to ensure that vulnerable groups, including people with disabilities, older people, and children, especially unaccompanied and separated children, receive adequate protection, assistance, and care throughout the repatriation and reintegration process.
- 8) The parties should ensure that refugee women, and children in both refugee and affected communities, are consulted and involved in every phase of the repatriation and integration process, including in "go and see" visits of refugees to areas of intended return.
- 9) The parties should ensure that the United Nations and other humanitarian agencies have unimpeded access to areas of return in Rakhine State to provide humanitarian and development assistance to all communities.

We were concerned to see Union Minister for Social Welfare, Relief and Resettlement, Dr. Win Myat Aye, cited in *The Irrawaddy* as saying, "Anyone coming back will have to undergo the national verification process according to the 1982 Citizenship Law." This contradicts Guiding Principle A.3, which states that verification for return will be based on evidence of "past residence" in Myanmar, not past citizenship.

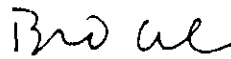
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We would welcome the opportunity to meet with you to discuss these recommendations or otherwise to assist efforts to help protect the rights of refugees, internally displaced people, and others affected by this urgent humanitarian situation.

Sincerely,



Bill Frelick
Director
Refugee Rights Program



Brad Adams
Executive Director
Asia Division

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