

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

I.A. No. _____ OF 2019

IN

W. P. (C) NO. 793 OF 2017

IN THE MATTER OF:

Mohammad Salimullah & Anr ... PETITIONER

VERSUS

Union of India & Ors. ... RESPONDENTS

APPLICATION FOR INTERVENTION

I N D E X

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1.	I.A. No. _____ of 2019: Application for Intervention with affidavit	
2.	ANNEXURE A-1: True copy of the UN Human Rights Council resolution 7/34	
3.	ANNEXURE A-2: True copy of the written submission of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume	
4.	ANNEXURE A-3: True copy of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	
5.	ANNEXURE A-4: True copy of the International Covenant on Civil and Political Rights (ICCPR)	
6.	ANNEXURE A-5: True copy of the International Covenant on Economic and Social and Cultural Rights (ICESCR)	

7. **ANNEXURE A-6:** True copy of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
8. **ANNEXURE A-7:** True copy of the Convention on Rights of the Child (CRC)
9. **ANNEXURE A-8:** True copy of the judgment of 20 July 2012 of the International Court of Justice in Questions Relating to the Obligation To Prosecute or Extradite (Belgium v. Senegal)
10. **ANNEXURE A-9:** True copy of the extract of General Recommendation No. XXX, U.N. Doc. HRI/GEN1/Rev.9 (Vol. II)
11. **VAKALATNAMA**

ANJANA CHANDRASHEKAR
ADVOCATE FOR THE APPLICANT

IN THE SUPREME COURT OF INDIA

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To

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

The humble petition of the
Applicant above-named.

Most Respectfully Showeth:

1. That the Applicant is filing the present application seeking to intervene in Writ Petition (Civil) No. 793 of 2017 and praying that she be allowed to make submissions before this Hon'ble Court in the instant matter.

2. The Applicant, E. Tendayi Achiume, is the 5th Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. Special Rapporteurs are independent experts who are appointed by the United Nations Human Rights Council (HRC). Their mandate requires them to monitor, advise and report on human rights situations in specific countries (country mandates) and on certain categories of human rights violations worldwide (thematic mandates). Although the UN Office of High Commissioner for Human Rights (OHCHR) equips them with the logistical assistance and personnel required to carry out their specific mandates, Special Rapporteurs serve in their personal capacity and do not receive any financial compensation for their work.
3. The mandate for the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance was created in 1993 by resolution 1993/20 and was most recently renewed by HRC resolution 34/35 adopted on 24th March 2017.
4. With regard to all issues and alleged violations falling within the purview of the mandate of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, UN Human Rights Council resolution 7/34 describes it as being *“to investigate and make concrete recommendations, to be implemented at the national, regional and international levels, with a view to preventing and eliminating all forms and manifestations of racism, racial discrimination, xenophobia and related intolerance.”* True copy of the UN Human Rights Council resolution 7/34 is annexed hereto as **ANNEXURE A-1 (Page Nos. __ to __)**.

5. The Applicant was appointed as the Special Rapporteur for racism, racial discrimination, xenophobia and related intolerance in September 2017. Since assuming the mandate, the Special Rapporteur has documented and reported on numerous manifestations of xenophobia and racial discrimination against migrants, racial, ethnic and religious minorities, and populations otherwise perceived as “foreign.” The Applicant’s objective in making this intervention, is to assist the Court by offering her expertise and experience on the issue of State parties’ obligations under international law with regard to the prevention of racial discrimination. While not appointed by the Hon’ble Court, the Applicant seeks to make these submissions in the spirit of an *amicus curiae* so as to aid the Court in upholding India’s obligations under various international law instruments and principles to which it has committed. As the Special Rapporteur, she has previously submitted similar briefs in other jurisdictions including before the European Court of Human Rights and the Dutch Immigration and Naturalisation Service, both in 2018.

6. The Applicant respectfully submits that she is therefore uniquely qualified to make submissions before this Hon’ble Court pertaining to India’s international law and treaty obligations in relation to the deportation of Rohingya refugees from India, particularly in the context of the ICERD and other obligations pertaining to racism and xenophobia. The Applicant has accordingly prepared a written submission for the consideration of this Hon’ble Court, true copy of

which is annexed herewith as **ANNEXURE A-2 (Page Nos. __ to __)**.

7. With respect to this Application, the Applicant clarifies that the views expressed herein are her own and that authorization for the positions and views expressed by the Special Rapporteur, in full accordance with her independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

8. It is respectfully submitted that the Applicant is filing this Application for the sole purpose of submitting the written submission at **Annexure A-2**. The same is the entirety of the submissions that the Applicant wishes to make before this Hon'ble Court. It is respectfully submitted that the submission by the Special Rapporteur at **Annexure A-2** as well as this Application for Intervention are provided on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, including of the Applicant as Special Rapporteur, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations .

MYANMAR GOVERNMENT'S ONGOING INVOLVEMENT IN ETHNIC CLEANSING

9. The Applicant, in her written submissions, seeks to bring the attention of this Hon'ble Court to the findings of the United Nations on

Myanmar's treatment of the Rohingya, including the UN's extensive evidence that the Myanmar Government has perpetrated crimes against humanity. Myanmar's treatment of the Rohingya ethno-religious minority represents a racially discriminatory, systematic project carried out with clear evidence of genocidal intent and has been referred to by the UN as "a textbook example of ethnic cleansing". Vast numbers of Rohingyas have attempted to flee the certainty of death, rape, torture, cruel and inhuman treatment, and other forms of violence. The UN's most recent figures estimates the number of Rohingya refugees at more than a million. The majority of these refugees, in excess of 900,000, are currently in Bangladesh, while India, as per Government estimates, hosts around 40,000.

10. Numerous United Nations reports confirm that Myanmar has subjected Rohingyas to gross violations of international law and international human rights law. Best estimates indicate that more than 24,000 Rohingyas have been killed by the Myanmar State over the past two years. Although a case against Myanmar is set to proceed in the International Court of Justice, the United Nations has emphasized that impunity for these violations continues. UN reports have confirmed that until Myanmar ceases its violations of Rohingya rights and undertakes acts sufficient to guarantee the safety and racial equality of the Rohingya people, return of Rohingya to Myanmar will violate the principles of *non-refoulement*.
11. In light of the above, the decision of the Ministry of Home Affairs to detect and deport Rohingyas residing in India, raises critical issues as to its compatibility with these instruments and principles of international

human rights law; as well as the degree to which it infringes upon essential human rights including those pertaining to racial equality and freedom from racial discrimination.

INDIA'S HUMAN RIGHTS OBLIGATIONS TO RACIAL EQUALITY AND NON-DISCRIMINATION:

12. The Applicant respectfully submits that The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which India ratified on 3 December 1968, establishes the obligations of State parties to respect and ensure racial equality and the right to be free from racial discrimination. Article 1(1) of the ICERD defines racial discrimination in broad terms as:

“...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

True copy of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is annexed hereto as **ANNEXURE A-3 (Page Nos. __ to __)**.

13. The Applicant submits that India's broad international human rights law commitments include an obligation to ensure racial equality for all populations and to eliminate racial discrimination. This obligation not only arises from its commitment to ICERD, but also from Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR); Articles 2(2) & 3 of the International Covenant on Economic and Social Rights (ICESCR); Article 2 of Convention on

the Elimination of All Forms of Discrimination Against Women (CEDAW), and Article 2(1) of the Convention on Rights of the Child (CRC). As a foundational element of international human rights law, the prohibition on racial discrimination has also achieved the status of peremptory norms of international law. True copy of the International Covenant on Civil and Political Rights (ICCPR) is annexed as **ANNEXURE A-4 (Page Nos. __ to __)**, true copy of the International Covenant on Economic and Social Rights (ICESCR) is annexed as **ANNEXURE A-5 (Page Nos. __ to __)**, true copy of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is annexed as **ANNEXURE A-6 (Page Nos. __ to __)** and true copy of the Convention on Rights of the Child (CRC) is annexed as **ANNEXURE A-7 (Page Nos. __ to __)**.

14. Furthermore, it is submitted that with few exceptions, States must guarantee non-nationals equal enjoyment of civil, political, social, and economic rights. These obligations further require India not to discriminate on the basis of national origin. In the context of residency, citizenship, asylum, refugee status, and deportation, India's ICERD and ICCPR commitments require it to ensure policies that satisfy principles of racial equality.
15. Racial equality-based human rights obligations further require India to ensure that all non-nationals, regardless of national origin or "criminal entry," enjoy equal due process in residency, citizenship, asylum, and deportation decision-making. The Applicant submits that India must ensure that its *non-refoulement* evaluations are free

from racial discrimination and that racial inequalities in these decisions do not arise directly or indirectly.

INDIA'S OBLIGATIONS TO UPHOLD THE PRINCIPLE OF *NON-REFOULEMENT*

16. In addition to the ICERD, India has laudably joined several other international human rights law agreements, including ICCPR, ICESCR, CEDAW, and CRC, which create obligations under international law. The Applicant submits that while India has not ratified the Convention Against Torture (CAT) or the Refugee Conventions, the principle of *non-refoulement* is a peremptory international law norm. The International Court of Justice has added further weight to these human rights law commitments, explaining that the prohibition on *refoulement* to torture or other cruel, inhuman, or degrading treatment (CIDT) or deprivation of life has achieved peremptory norm status, as held in Questions Relating to the Obligation To Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012. Accordingly, States may never derogate from their commitment not to *refoul* individuals. True copy of the judgment of 20 July 2012 of the International Court of Justice in Questions Relating to the Obligation To Prosecute or Extradite (Belgium v. Senegal) is annexed hereto as **ANNEXURE A-8 (Page Nos. __ to __)**.
17. The Applicant further submits that India's commitment not to *refoul* individuals also arises under its ICCPR Article 6 and Article 7 obligations, which prohibit the deportation of individuals to arbitrary

deprivation of life and to cruel, inhuman or degrading treatment. Further, India's human rights law commitments under ICERD also prohibit this practice. The Committee on the Elimination of Racial Discrimination has emphasized, in General Recommendation No. XXX, U.N. Doc. HRI/GEN1/Rev.9 (Vol. II), that States' obligations toward racially equal enjoyment of security of their person encompasses a ban on *refoulement*. In light of the above, the deportation of Rohingyas will amount to a violation of *non-refoulement* and thus to a violation of human rights law and settled international law. True copy of the extract of General Recommendation No. XXX, U.N. Doc. HRI/GEN1/Rev.9 (Vol. II) is annexed hereto as **ANNEXURE A-9 (Page Nos. __ to __)**.

18. The Applicant respectfully submits that to ensure that each individual receives adequate protection from *refoulement*, India's human rights obligations prohibit it from engaging in mass expulsion or subjecting someone to summary expulsion. Further, to realize effective protection against *non-refoulement*, India must carry out due process obligations necessary for protection of each individual's human rights and evaluate the likelihood an individual, if deported, will face CIDT or deprivation of life in the receiving State.
19. In conclusion, the Applicant submits that India's mass deportation order of Rohingya, like all mass deportation orders, is impermissible under international human rights law. India must ensure that Rohingya in India enjoy equality before the law and equal access to judicial remedies and individualized forms of due process.

20. In the circumstances aforesaid, it is respectfully submitted that it would be in the interests of justice for this Hon'ble Court to allow this application, and allow the Applicant, in writing or through her counsel, to make submissions that may not have been placed before this Hon'ble Court in order to assist this Hon'ble Court in this matter.

PRAYER

In light of the aforesaid, the Applicant, therefore, prays that this Hon'ble Court may kindly be pleased to:

- a. Allow the Applicant to intervene in the instant writ petition being Writ Petition (C) No. 792 of 2017;
- b. Take on record the **Annexure A-2**, the written submission of the Applicant for the perusal of this Hon'ble Court;
- c. Pass any such other order or direction in favour of the Applicant as this Hon'ble Court may deem fit and proper on the facts and circumstances of the case.

FILED BY

ANJANA CHANDRASHEKAR
(ADVOCATE FOR THE APPLICANT)

Drawn on :
Filed on :

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

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AFFIDAVIT

I, E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, aged about 39 years, having my office at, do hereby solemnly affirm and state as under:

1. That I am the Applicant in the abovementioned matter and am conversant with facts and circumstances of the case and as such am competent to swear the present affidavit.
2. That I have gone through the contents of the accompanying application for intervention. The contents of Paragraph Nos. 1 to ___ are true to my knowledge and the rest of the application contains submissions and prayers to this Hon'ble Court.
3. That the annexure(s) filed along with the present application are the true copies of their respective originals.
4. This application is made by the Applicant on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, including the

Applicant, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations

DEPONENT

VERIFICATION

I, the above named Deponent, do hereby solemnly affirm and verify that the contents of this affidavit are true to best of my knowledge and belief and nothing material has been concealed therefrom.

Verified on this the ____ day of _____, 2019 at _____.

DEPONENT

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
I.A. No. _____ OF 2019

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VAKALATNAMA

I, E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the Applicant above named, in the writ petition, do hereby appoint and retain,

ANJANA CHANDRASHEKAR

To act and appear for me in the above petition and on my behalf to conduct the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed therein, including proceedings in taxation and application for review and to file and obtain return of documents, and deposit and receive any money or on my behalf in this Writ Petition and in any application for review and to represent me and to take all necessary steps on my behalf in the above matter. I agree to pay his fees and out of pocket expenses and agree to ratify all acts done by the aforesaid advocate in pursuance of his authority.

I have made this application on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Dated this the day of 2019.

Accepted

ANJANA CHANDRASHEKAR
Advocate on Record,
Supreme Court of India.

Petitioner/Respondent

MEMO OF APPEARANCE

To,
The Registrar
Supreme Court of India
New Delhi 110 001

Sir,
Kindly enter my appearance in the abovementioned petition made on behalf of the petitioner.

Yours Faithfully,

New Delhi
Dated: