

# AFGHAN REFUGEES AND THE PRINCIPLE OF NON-REFOULEMENT



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## Abstract

Pakistan is not a signatory to the Refugee Convention 1951 and therefore the principle of non-refoulement *prima facie* is not applicable to the expulsion of Afghan refugees present in Pakistan. However, this article discusses the issue in the context of Customary International Law. Further, in view of the intractability of the problem, exceptions to the principle of non-refoulement have been highlighted in the light of juristic opinion and national and international caselaw.

## Keywords

Non-Refoulement, Refugee Convention 1951, Customary International Law, Afghan Refugees, Foreigners Act 1946.

## Introduction

The continued presence of Afghan refugees in Pakistan is rapidly becoming the focus of various, sometimes clashing, views in Pakistan. Ultimate concern seems to be whether the refugees have lost their entitlement to protection as refugees and therefore should be sent back to their country of origin? In the above circumstances, the issue of the future of Afghan refugees, i.e. the validity of their continued stay in the territories of Pakistan, has arisen with an intensity and force not experienced before.

This issue becomes more significant as Pakistan is a law abiding member of the international community and in this capacity is determined to honour the international law and norms regarding the protection of refugees in its territory. It is therefore essential to find out the rights of refugees under national and international law and consequent actions that Pakistan can take in consonance with its national and international responsibilities.

Protection to refugees (technically termed as "non-refoulement") may be studied under the following legal regimes:-

- Convention Relating to the Status of Refugees, 1951 (Refugee Convention 1951).
- Customary International Law (CIL) (insofar it is applicable to Pakistan in this respect).
- Foreigners Act 1946 (Act 1946).

Now I discuss the detail of each of the above instruments/ norm as following:-

### Convention Relating to the Status of Refugees, 1951<sup>1</sup>

According to Article 26 of the Vienna Convention on the Law of Treaties 1969,<sup>2</sup> **a treaty is not binding on a country that is not a party to the treaty.** Seen in this view, Convention 1951 does not apply to Pakistan as Pakistan is not a signatory to the Convention 1951. However, the matter does not end here as we shall see below, therefore, two provisions of the Convention 1951 require mention.

**Article 1** of the Convention 1951 defines "refugee" as the one who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality,

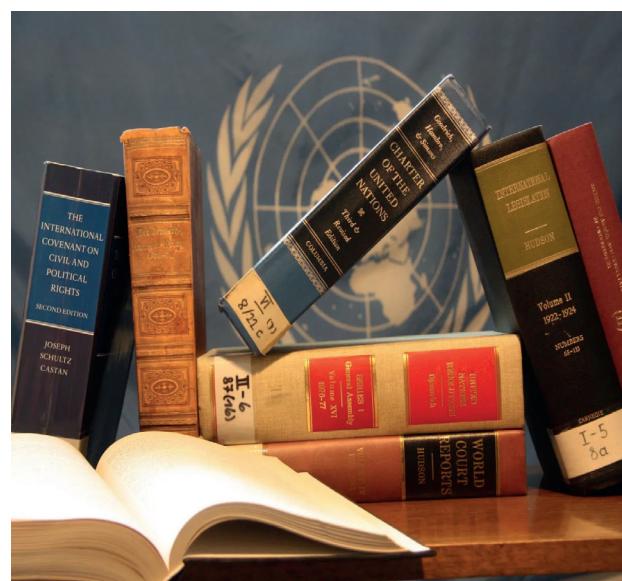
membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." A core principle of the Convention is "non-refoulement" which is mentioned in Article 33 of the Convention. Section 1 of Article 33 provides that "No Contracting State shall expel or return ("refoulé") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Principle of non-refoulement is also dealt with by other international and multilateral Conventions where it has different nuances and signification according to the subject matter dealt with by the concerned Convention. However descriptions of "refugee" and "non-refoulement" as given by the Convention 1951 are well known and internationally recognised. These descriptions therefore may be taken as working definitions insofar as the present article concerns.

*Based on Article 26 of the Vienna Convention (referred above), conclusion is that status of refugees Convention 1951 is not applicable to Pakistan.*

### Customary International Law (CIL)

It is almost universally recognised among the international lawyers that according to Article 38 (1)(b) of the Charter of International Court of Justice (ICJ),<sup>3</sup> CIL is a source of international rights



and obligations for every member of the international comity. There are various treaties which codify certain rules of CIL and according to the opinions of several jurisconsults become binding even upon non-members to the extent of incorporating the specific rule or norm of the CIL.

Simply described CIL is a consistent State practice adopted as a matter of obligation and not merely as comity or accommodation. ICJ in various opinions have thrown light on the process of formation of CIL and its applicability on the members of international comity. According to the jurisprudence developed by ICJ opinions, it is not necessary that applicability of CIL depends on explicit adoption of a practice by a State. Silence of a State regarding a widespread State practice observed by other members of the international comity may be taken as its consent to the acceptance of the practice as customary international law. In the Fisheries Case<sup>4</sup>, ICJ held that "the ten-mile rule would appear to be inapplicable as against Norway in as much as she has always opposed any attempt to apply it to the Norwegian coast".

It is therefore required to be examined what has been the practice of Pakistan in relation to the status of refugees and principle of non-refoulement, i.e. whether Pakistan has consistently and explicitly maintained its opposition to the principle of refoulement. However, before advertiring to this matter, an allusion becomes necessary to an opinion of United Nations High Commissioner of Refugees (UNHCR) given in 1994<sup>5</sup> in which it was decided that non-refoulement had become a norm of CIL.

UNHCR observes that there have been also numerous cases in which the High Commissioner required to make representations to States which were parties neither to the Convention nor to the Protocol, and it is here that the Office has necessarily had to rely on the principle of non-refoulement irrespective of any treaty obligation. In response to such representations by the High Commissioner, the Governments approached have almost invariably reacted in a manner indicating that they accept the principle of non-refoulement as a guide for their action. They indeed have in numerous instances sought to explain a case of actual or intended refoulement by providing additional clarifications and/or by claiming that the person in question was not

to be considered a refugee. The fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle. In this connection, reference can appropriately be made to the Judgment of the ICJ of June 27, 1986 (Case concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua vs United States of America) which contained the following statement:-

*"In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."*

*(ICJ Reports 1986 page 88 paragraph 186)*

### **Practice of Pakistan in Relation to the Non-Refoulement Principle**

Pakistan appears to have never explicitly objected to the principle of non-refoulement as not binding to it. (Fisheries case of ICJ referred above). In this relation, following two considerations bear upon the matter:-

- UNHCR conducts refugee status determination under its mandate (Statute of the Office of the United Nations High Commissioner for Refugees adopted by the General Assembly Resolution 428 (V) of December 14, 1950) and on behalf of the Government of Pakistan in accordance with the 1993 Cooperation Agreement between the Government of Pakistan and UNHCR. This international body has claimed<sup>6</sup> that Pakistan generally accepts UNHCR decisions to grant refugee status. Its States:-



***"Pakistan generally accepts UNHCR decisions to grant refugee status and allows asylum-seekers (who are still undergoing the procedure) as well as recognised refugees to remain in Pakistan pending identification of a durable solution."***

- Supporting the above view is a recent decision by the Sindh High Court,<sup>7</sup> in which it is held as below:-

***Petitioners and their families had a legally enforceable expectation that before the Federal Government took the action of refusing them extensions in their visas they ought to have been given a chance to say something in regard thereto---Furthermore, petitioners and their families were entitled to some indication as to why, if the Federal Government was going to refuse any extension, it had to be so---Furthermore the offer made by the Federal Government to wait for and abide by the decision of the United Nations High Commissioner for Refugees (UNHCR) in respect of the pending asylum applications of the petitioners and their families must be regarded as a binding commitment; this was especially so given that the Federal Government generally accepted the decisions of the UNHCR--- Petitioners and their families had made out a case for appropriate directions from the High Court.***

- On the website of "Commissioner for Afghan Refugees Punjab"<sup>8</sup> in reply to the question "is Pakistan signatory to Refugee Convention 1951" it is responded that "Pakistan is not a signatory to United Nations Convention 1951 or its Protocol 1967 on Refugees. However, Pakistan has never faltered on its commitment to hosting and helping refugees."

In relation to application of CIL to non-parties to the Convention 1951, In paragraph 197 of their opinion (The scope and content of the principle of

non-refoulement: Opinion),<sup>9</sup> eminent jurisconsults, Sir Elihu Lauterpacht and Daniel Bethlehem observe as under:-

***It is well established that conventional principles can, and frequently do, exist side-by-side with customary principles of similar content. In the Nicaragua case, for example, the ICJ accepted that the prohibition on the threat or use of force in Article 2(4) of the UN Charter also applied as a principle of customary international law. The fact that the customary principle was embodied in a multilateral convention did not mean that it ceased to exist as a principle of customary law, even as regards States that were parties to the convention. This conclusion is consistent with the Court's earlier jurisprudence in the North Sea Continental Shelf cases in which it had accepted that largely identical rules of customary law and treaty law on the delimitation of the continental shelf could exist side-by-side.***

In paragraph 194 of the Opinion ibid, it is observed:-

***For one thing, there are still some fifty States that are not parties to the 1951 Convention and the 1967 Protocol. Such States are therefore not formally bound by the Convention and, in particular, the provision relating to non-refoulement. Are such States free, therefore, of any obligations relating to the treatment of refugees? This question can only be answered in the negative. All States will be bound by such customary international legal obligations as exist in respect of refugees.***

It is concluded that the above evidence and juristic opinion establishes that the CIL relating to non-refoulement applies as well to Pakistan notwithstanding the fact that Pakistan is not a signatory to the Convention 1951.

## The Foreigners Act 1946<sup>10</sup>

*"Foreigner" is defined by section 2 (a) of the Act 1946 as "foreigner means a person who is not a citizen of Pakistan".*

It is doubtful, whether this definition include within its ambit "refugees" also, especially in consideration of rules of interpretation applicable in cases where there appears to be a disjunction between national and international obligations of a State. In this regard, reference may be made to a recent decision of the Lahore High Court<sup>11</sup> in which it was held as below:-

*The courts in Pakistan are required to interpret and apply every statute, so far as its language admits, in accordance with the principle of comity of nations and the recognised norms of international law, even in situations where no such law has been enacted. Reliance is placed on Hanover Fire Insurance Company v. Messrs Muralidhar Banechand (PLD 1958 SC 138), Al-Jehad Trust through Habibul Wahab AlKhairi, Advocate, and 9 others v. Federation of Pakistan, and 3 others (1999 SCMR 1379), Human Rights Case No.29388-K of 2013 (PLD 2014 SC 305), and Najib Zarab Limited v. Government of Pakistan and 4 others (PLD 1993 Karachi 93). In Khadim Hussain v. Secretary, Ministry of Human Rights, Islamabad, and others (PLD 2020 Islamabad 268).*

*In above situation, keeping in view the applicability of the principle of "non-refoulement" to Pakistan under CIL, "foreigner" in section 2 (a) of the Foreigners Act 1946 shall performe have to be interpreted as not including "refugees". In this regard Sindh High Court in another case<sup>12</sup> held:*

*It is of course, well settled as a general principle that if two interpretations of a provision are possible, then the one consistent with international law or Pakistan's treaty obligations will be preferred. And it is equally well settled that if the meaning of the municipal law is clear then it must be given effect to, even though it may conflict with Pakistan's obligations under international law. Reference in this regard may be made to Hanover Fire Insurance Company v. Muralidhar Banechand PLD 1958 SC 138, 142 and Marine Engineers' Association of Pakistan vs. Shipping Office, Government of Pakistan and another 1989 CLC 588 (SHC; DB).*



Further to above, it appears that any national law which provides for interference with individual rights conferred under norms of International Law must be sufficiently precise and must not be general and open to multivalent interpretation.

*Therefore it is concluded that Foreigners Act 1946, not with standing a widespread view to the contrary, does not apply to the case of Afghan refugees.*

## Whether Expulsion of Afghan Refugees Possible, if so advised, under International Law

This subject may be dealt with under the following headings:-

### • Loss of Refugee Status

Refugee is a temporary status and arises only under certain circumstances mentioned in Article 1 of the Convention 1951. It declares refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

It is justified to believe that the circumstances entitling a person to the protection of refugee status once coming to end, the entitlement to protection as a refugee by itself ends and the host



country is entitled to expel the erstwhile refugee to the country of origin. In this regard, reference to **Article 1 (c) (5)** of the Convention 1951 will suffice which provides as under:-

*This Convention shall cease to apply to any person.... (if)..... He (the refugee) can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality".*

Security in Afghanistan has become quite stable and it is well-founded to assert that the Afghan nationals currently residing in Pakistan have no "serious" or "credible" threat of persecution. Three reports may be referred issued in May, June and September 2023 by UN Interregional Crime and Justice Research Institute (UNICRI),<sup>13</sup> UNSC Monthly Forecast for June 2023<sup>14</sup> and UNSC monthly forecast September 2023 on situation in Afghanistan<sup>15</sup> respectively. The cumulative study of these detailed reports bear out that Afghan refugees in Pakistan may safely return to their country of origin as the circumstances mentioned in **Article 1** of the Convention justifying their protection as refugee are no more obtaining in Afghanistan.



Further to above, the Afghan Government is fully responsible to provide security to its nationals under the adopted 1964 Monarchy Constitution<sup>16</sup> (**Article 26, paragraphs 1, 2, 10 & 16; Article 31, 32, 33, 34, 37**). In this regard reference may be made to a statement<sup>17</sup> made by Abdul Hakeem Sharree, the Taliban's acting Minister of Justice, in September 2021 where in Mr Sharree categorically stated that the 1964 Constitution would be the guiding document for state affairs.

- **Article 1 (F) of the Convention 1951**

According to **Article 1 (F)** of the Convention 1951, The provisions of this Convention shall not apply to any person with respect to whom there are **serious reasons for considering** that:-

- 1F (a) committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- 1F (b) committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- 1F (c) guilty of acts contrary to the purposes and principles of the United Nations.

In so far as "**serious reason for considering**" is concerned, it has been held in a UK case that "there was no requirement to make a positive or conclusive finding.....it sufficed that the evidence pointed strongly to the appellant's guilt"<sup>18</sup>

In so far as **Article 1 F (c)** is concerned, the purposes and principles of the United Nations are set out in the Preamble and **Articles 1 & 2** of the Charter of the United Nations<sup>19</sup> and are, amongst others, embodied in the United Nations Security Council Resolutions relating to measures combating terrorism (UNSCRs 1373/2001<sup>20</sup> and 1377/2001<sup>21</sup>) which declare the "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".

Moreover, while **Article 1 F (c)** applies to whoever

commits an act which is contrary to the purposes and principles of the United Nations, that person does not have to be acting on behalf of a State. UNSCR 1377 reinforces this view by stating the UN Security Council's unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed. In addition, Security Council Resolution 1624/2005<sup>22</sup> also calls upon States to adopt measures, consistent with international obligations, to prohibit by law incitement to commit terrorist acts and to deny safe haven to those for whom credible evidence exists that they have been guilty of such conduct.

In the matter of A-H,<sup>23</sup> while deciding a case for asylum, Attorney General of US, John Ashcroft observed that "[t]he United States has significant interests in combating violent acts of persecution and terrorism wherever they may occur." "[I]t is," he added, "inconsistent with these interests to provide safe haven to individuals who have connections to such acts of violence."

- **Article 32 of the Convention 1951**

**Article 32** of the Convention 1951 provides as under (Section 1 provides grounds for expulsion of the refugee)

- The Contracting States shall not expel a



refugee lawfully in their territory save on grounds of national security or public order.

- The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
- The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

According to section 1 above, a refugee in addition to grounds provided under **Article 1 (C) and 1 (F)** of the Convention 1951, may be expelled lawfully on the grounds of "**national security**" and "**public order**". However, the procedure provided by section 2 and 3 of **Article 32** needs to be followed for taking such steps.

In the leading case of Suresh vs Canada<sup>24</sup> Canadian Supreme Court in para 78 of the judgment has held that:-

*"We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s.7 of the Charter or under s.1. (A violation of s.7 will be saved by s.1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like": see *Re B.C. Motor Vehicle Act, supra*, at p. 518; and *New Brunswick (Minister of Health and Community Services) vs. G. (J.)*, [1999] 3 S.C.R. 46, at para. 99.)"*

A unique instance of availing the ground of “national security and public order” for expulsion under **Article 32** section 1 is Australia’s Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014<sup>25</sup> (the Australian Law). Through this law, not only non-refoulement entitlement has been recalibrated but internal responsibilities of the State in relation to non-refoulement have been changed.

Under Section 198 of the Australian law, if an assessment is made by Australian authorities that indicates that a refugee would face a real risk of persecution or other forms of serious harm if deported, he can now be deported irrespective of whether Australia has non-refoulement obligations towards him. The Australian Law removes almost all references to the United Nations Convention relating to the Status of Refugees and subjects international obligations to the Government’s own interpretation of Australia’s duties towards refugees. While some of the reinterpretations are broadly consistent with Australia’s obligations under the Refugee Convention, several are out of step with the Convention and international guidelines on the assessment of refugee claims.

### Non-Refoulement: Another View

In 2021, the Supreme Court of India in Mohammad Salimullah vs. Union of India,<sup>26</sup> allowed the deportation of Rohingya Muslim refugees back to Myanmar. The petitioners who were refugees had submitted that deportation would violate the rights guaranteed under **Articles 14** (Right to Equality) and **Article 21** (Right to Life and Personal Liberty) of the Indian Constitution. The court however observed that the right not to be deported, is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under **Article 19 (1)(e)** and that such a right was only available to Indian citizens. The court also held that since India was not a signatory to UN Convention on the Status of Refugees 1951 or its 1967 Protocol, the principle of Non-refoulement would not apply.

The above Indian case is still pending final adjudication and judgment was passed on an interlocutory

application seeking interim relief.<sup>27</sup> In our view therefore it does not constitute a precedent and does not state Indian legal position on the matter concerned. Further, it needs to be realised that Court on Constitutional grounds was obliged to enforce the law of the land. However, Indian administration could not be absolved of its obligations under CIL bearing upon non-refoulement. In any case, the case is yet to be decided and this particular issue may be argued in detail as and when the case is refixed for final determination before the Supreme Court of India.

### Influx of Afghan Refugees in Pakistan and Their Categorisation

As of June 2022, approximately 1.3 Million registered Afghan refugees have been living in Pakistan.<sup>28</sup> According to the figures reported<sup>29</sup> “more than half (52%) of the registered refugee population are children, including 197,428 (15%) being four years of age or under. Only 4% of those registered are 60 years of age or older. Women, children and older represent 76% of the population. Over half of the registered Afghan refugees reside in Khyber Pakhtunkhwa province”

Afghan refugees remaining in Pakistan may be categorised in the following classes:-

- The Pakistani government began admitting Afghans after the beginning of the Soviet–Afghan War in 1979. By the end of 2001, there were over four Million of them on the Pakistani side. Their children are born and raised in Pakistan during the last four decades.
- In 2005 the government of Pakistan began registering all Afghans, and they received computer-generated “proof of registration” (PoR) cards with biometric features—similar to the Pakistani Computerised National Identity Card (CNIC) but with “Afghan Citizen” on its front. They are also called refugees having “Afghan Citizen Card”
- After establishment of the government of the Afghan Taliban in 2021, an influx of refugees started to arrive Pakistan. More than 600,000 are estimated to have entered Pakistan, bringing the country’s total population of Afghan refugees (both registered and unregistered) to 3.7 Million. 1.4 Million are unregistered.<sup>30</sup>

## Conclusion

It may be stated that most of the Afghans present in Pakistan are no longer entitled to protection of a refugee once the government in Afghanistan is capable of fulfilling its obligations under international law. Most of them have become what is called illegal immigrants. The host country is entitled to instruct their sending back to the country of origin. It goes without saying that obligation of non-refoulement vis a vis Afghan refugees in Pakistan applies to the State by virtue of CIL.

The Afghans that are registered in Pakistan and are accounted for are not being treated as illegal immigrants. Afghan refugees though concentrated in Khyber Pukhtunkhwa province, are scattered throughout Pakistan in all four provinces and the Federal Capital Territory. According to different criteria of age, gender, geography etc they may be categorised in several classes. Needless to say certain nuances are required to be observed while dealing with different categories of Afghan refugees in Pakistan.

## AUTHOR

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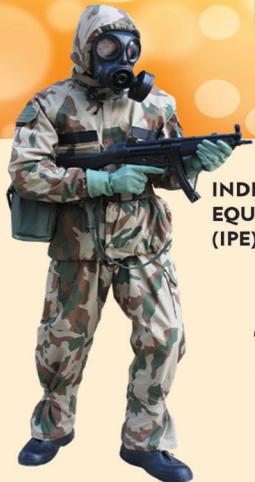
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# GROWTH THROUGH SELF RELIANCE

## Chem-Bio Defence Equipment



INDIVIDUAL PROTECTIVE EQUIPMENT (IPE)



MOBILE DIAGNOSTIC UNIT



HIGH EFFICIENCY ADVANCED DECONTAMINATION SYSTEM (HEADS)



## Security & Detection Equipment



VEHICLE BASED IED JAMMER

EXPLOSIVE & DRUG DETECTOR



X-RAYS BAGGAGE SCANNER



BODY SCANNER



WALK THROUGH GATE

METALLIC MINE DETECTOR

## Riot Control Devices



TGS (Short)



TGS (Long)



CS HAND GRENADE OUTDOOR



SMOKE GRENADE WHITE



STUN GRENADE SINGLE BANG



STUN GRENADE MULTI BANG

COLORED SIGNAL SMOKE GRENADES



## Food Testing (GMO & Aflatoxin) Pesticides Testing



**DESTO**

(DEFENCE SCIENCE & TECHNOLOGY ORGANIZATION)

