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LAW**

**Analysis of Pakistan's Policy Towards Afghan Refugees: A Legal Perspective**  
**BACHELORS THESIS**

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**DECLARATION OF HONOUR:**

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

*Signed :*

A handwritten signature in black ink, appearing to read 'irfan', written in a cursive style.

**RIGA 2021**

## **Abstract**

Pakistan hosts to the world's largest single population of Afghan refugees. However, despite Pakistan's long-standing acknowledgment of Afghan refugees, their legal status remains unclear. This is due to Pakistan's refusal to sign either the 1967 Protocol Relating to the Status of Refugees or the United Nations Convention Relating to the Status of Refugees (also known as the Geneva Convention). This paper investigates whether Pakistan's approach against Afghan refugees is in accordance with international law and human rights principles. Moreover, this paper seeks to provide a comprehensive response to the above question by highlighting the many difficulties that Afghan refugees have encountered as a result of a lack of consistent refugee legislation protecting their rights and providing recommendations on how the situation of Afghan refugees can be improved.

## **Analysis of Pakistan's Policy Towards Afghan Refugees: A Legal Perspective**

### **Summary**

The Afghan migration to Pakistan dates back to 1979, in response to the country's first of many foreign-backed regime changes and prolonged violence. Despite the fact that more than a hundred countries accepted the refugees, the vast majority of them choose Iran and Pakistan, two neighboring countries, as their destinations. This paper primarily explores Pakistan's policy towards dealing with refugees from Afghanistan, from a legal perspective. It highlights the various obstacles that Afghan refugees have had to face due to the absence of clear refugee laws safeguarding their rights and makes recommendations on how the situation of Afghan refugees can be improved. For the last four decades, Pakistan has hosted the world's largest single population of Afghan refugees. However, despite Pakistan's long-standing acknowledgment of Afghan refugees, their legal status remains unclear. This is due to Pakistan's refusal to sign the Protocol Relating to the Status of Refugees of 1967 and the UN Convention relating to the Status of the Refugees of 1961 either the 1967 Protocol Relating to the Status of Refugees.<sup>1</sup> Moreover, despite having "traditionally adopted universal norms pertaining to refugee security," the Pakistani government has no national legislation particularly on refugee rights.<sup>2</sup> In the case of states that have not ratified the relevant international refugee treaties, the focus tends to be on the principles defined by customary international law, especially the prohibition of refoulement, in order to safeguard refugees' fundamental rights. Additional legal rights are stressed as having been derived by multiple human rights agreements, including the Geneva Conference, of which the host state is a party. Pakistan has granted Afghan refugees de facto refugee status based on a number of treaties signed between Pakistan and the United Nations High Commissioner for Refugees (UNHCR). In addition, Pakistan's duty to respect the customary norms (more specifically the *jus cogens*), as well as international human rights conventions such as International Covenant on Civil and Political Rights (ICCPR), has culminated in Pakistan providing protections to Afghan refugees, ensuring that their basic human rights are secured. Despite this, Pakistan's domestic legal framework in relation to Afghan refugees is both inadequate and ambiguous. As a result of the lack of appropriate refugee legislation, Afghan refugees have faced a slew of problems, which have largely been addressed by the colonial-era Foreigner's Act of 1946. Besides this, the courts, police, and other law enforcement authorities remain largely ignorant of the refugee law, resulting in unequal prosecution and a lack of access to procedural justice for Afghan refugees. Moreover, Pakistan has forced hundreds of thousands of Afghan refugees to return to their home country or to other countries where living conditions are deplorable. Several analysts have noted that Pakistan has undermined international law prohibiting refoulement by forcing a vast number of Afghan refugees to return to their homeland. This has left Afghan refugees with a great deal of doubt over their legal status and rights.

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<sup>1</sup> UNHCR, Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Pakistan, 19 April 2012, Available on : <https://www.refworld.org/publisher,UNHCR,,PAK,4f9663d12,0.html>.

<sup>2</sup> UNHCR, Pakistan - Community Based Protection Strategy (2020-2022), 24 December 2019, url, p.

<sup>3</sup> Available on : <https://data2.unhcr.org/en/documents/details/73795>.

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### **List of abbreviations**

APS	Army Public School
ARV	Afghan Refugee Villages
CCAR	Chief Commissionerate for Afghan Refugees
CCR	Convention on Child Rights
CRS	Congressional Research Service
ECtHR	European Court of Human Rights
FATF	Financial Action Task Force
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Internally Displaced Persons
IHC	Islamabad High Court
KPK	Khyber Pakhtunkhawa (former NWFP)
MORR	Ministry of Refugees and Repatriation
NADRA	National Database and Registration Authority
NAP	National Action Plan
NARA	National Alien Registration Authority
POR	Proof of Registration
RAHA	Refugee-Affected and Hosting Areas Programme
SIM	Subscriber Identity Module
UDHR	Universal Declaration of Human Rights
GoP	Government of Pakistan
UN DESA	United Nations Department of Economic and Social Affairs
UNHCR	United Nations High Commissioner for Refugees
UNCRC	Convention on the Rights of the Child

## Introduction

The concept of war and conflicts is indispensable and is as old as history itself. As a result of such tensions, a number of problems emerge. The dilemma of civilians forced to flee their home country to escape war and conflict and unable to return safely, is one of them. The lack of access to food, health care, shelter, jobs, life insecurity, access to clean water and sanitation, and the loss of community are all examples of the insecurity that refugees face. When people are forced to leave their home nations, they become a burden on the host countries, who might lack the resources needed to accommodate a large number of foreign nationals. Furthermore, if the legal status of refugees in a host country is unclear, it adds to the suffering of those who have already been displaced.

Years of civil unrest, war, and insecurity have resulted in a large-scale exodus from Afghanistan. Afghans have been forced to leave their homeland for more than four decades, seeking shelter in neighboring countries. The overwhelming majority of these refugees were forced to seek asylum in Afghanistan's neighboring countries, including Iran and Pakistan. Pakistan has housed the world's largest single population of Afghan refugees, who have tended to migrate over the last four decades. However, despite Pakistan's recognition of Afghan refugees for years, their legal status remains unknown. This is due to Pakistan's refusal to sign either the United Nations Convention Relating to the Status of Refugees (also known as the Geneva Convention) or the 1967 Protocol Relating to the Status of Refugees.<sup>3</sup> Furthermore, it lacks any legislation enacting international commitments for the management of refugees at the state level. Pakistan has generally agreed to uphold the international principles relating to refugee protection and based on the series of treaties concluded between Pakistan and UNHCR, and given Afghan refugees prima facie refugee status. However, despite this, the domestic legal framework of Pakistan with respect to Afghan refugees is both inadequate and ambiguous. Moreover, the judiciary, police and other law enforcement agencies are generally unaware about the refugee law, which makes Afghan refugees often undergo a biased treatment and lack of access to procedural justice. Pakistan has also coerced hundreds of thousands of Afghan refugees to repatriate back where the conditions of life is unsuitable. Several observers have noted that Pakistan's coercion of such a large number of Afghan refugees to return to Afghanistan amounts to the violation of the international laws against refoulement.

This Thesis will examine whether Pakistan's policy towards Afghan refugees is appropriate as per international laws and human rights standards. Thesis aims to answer the above question holistically by highlighting the myriad challenges that Afghan refugees have faced due to the lack of consistent refugee legislation safeguarding their rights and making suggestions about how the condition of Afghan refugees can be improved. Where first chapter involves a discussion of the events that caused millions of Afghans to leave their homeland to seek refuge in Pakistan. The second section is divided into two chapters : while the first one provides a discussion about the standards of international law and human rights in Pakistan, the second one deals with the standards of the enforcement of international law and human rights in Pakistan by courts, government

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<sup>3</sup> UNHCR, Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Pakistan, 19 April 2012, Available on : <https://www.refworld.org/publisher,UNHCR,,PAK,4f9663d12,0.html>.

and police authorities. Pakistan has welcomed a substantial number of Afghan refugees despite not being a signatory to international refugee agreements. However, the existing legal system remains vague, preventing Afghan refugees from possessing rights and freedoms guaranteed by international and human rights law, and as a result of the needless limitations put on them, they are unable to completely integrate into society and advance economically. The last section chapter four provides recommendations to improve the void existing in the current legal framework of Pakistan to improve the situation of Afghan refugees. The majority of the analysis will be done using doctrinal research techniques, further this thesis will test the above-mentioned hypothesis using a variety of research tools, including quantitative evidence from censuses and surveys, as well as qualitative data from interviews with relevant persons. Although a number of researchers, including Anatol Lieven, Maleeha Lodhi, and Babar Sattar, have discussed the question of Afghan refugees in the past, the available literature generally takes a political or economic approach rather than a legal one. As such, this paper aims to add to the existing literature by considering the Afghan refugee crisis in the context of the international law paradigm and broader legal scholarly debate, rather than as a purely political or economic concern.

## **1. History of Afghan Refugees Settlement in Pakistan**

### **1.1 Mass Arrival of Afghan Refugees After Soviet Attack**

Afghanistan is regarded as one of the world's poorest nations. It ranks at the bottom of nearly all indices, including HDI, GDP, and the socioeconomic index. Its infrastructure, which is still primitive, is the legacy of nearly four decades of unending violence and warfare.<sup>4</sup> Although these poor development index forced many Afghan to relocate to the other countries in search of a better future, the first major impetus for mass migration came with the Soviet invasion and occupation of Afghanistan in December 1979 forcing millions of Afghans to separate from their birthplace. Turton and Marsden estimated in 2002 that it caused about 3.8 million people to leave Afghanistan, with 2.3 million seeking asylum in Pakistan.<sup>5</sup> The Soviets were never able to completely dominate the region, and an insurrection against Soviet forces was waged over the next decade by a coalition of local mujahideen backed by the West. The resulting violence that ensued forced additional hundreds of thousands of Afghans to flee their home country. While reliable numbers are difficult to come by in any war-torn region, let alone one as undeveloped and traditionally difficult to reach as Afghanistan, Kronenfeld estimates that the percentage of those Afghans who at some point in their lives compelled to leave their homes is greater than seventy five per cent.<sup>6</sup> For many Afghans, this period was much bloodier than the Soviet conflict. The numbers raised to four million in the late twentieth

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<sup>4</sup> Kronenfeld, Daniel A. "Afghan refugees in Pakistan: not all refugees, not always in Pakistan, not necessarily Afghan?." *Journal of Refugee Studies* 21, Available on : <https://academic.oup.com/jrs/article-abstract/21/1/43/1513931> no. 1 (2008): 43-63.

<sup>5</sup> Turton, David, and Peter Marsden. "Taking refugees for a ride." *The politics of refugee return to Afghanistan* (2002). Available on <https://www.refworld.org/pdfid/47c3f3cb1a.pdf>.

<sup>6</sup> Kronenfeld, Daniel A. "Afghan refugees in Pakistan: not all refugees, not always in Pakistan, not necessarily Afghan?." *Journal of Refugee Studies* 21, no. 1 (2008): 43-63. Available on : <https://academic.oup.com/jrs/article-abstract/21/1/43/1513931>



century.<sup>7</sup> In 1996, the Taliban seized control of Kabul, and by 1998, they had taken control of the majority of Afghanistan. Despite the fact that this brought peace and security to the Taliban-controlled regions, many Afghans, especially the educated, fled the country due to the ultra-conservative regime's restrictions on many practices, including social and cultural life.<sup>8</sup> The United States-led invasion of Afghanistan in October 2001 following 9/11 served as the next big catalyst for mass Afghan migration, and the world witnessed the one of the world's largest mass displacements.

Due to established economic, kinship, and social network connections and contacts in Pakistan, their transit to Pakistan was relatively simple. According to a 2017 World Bank project, the highest Afghan migrant outflow occurred in the late twentieth century, following the Soviet intervention, which culminated in mass migrations.<sup>9</sup> When the country's population was about twelve million people in 1990, over six million people left. However, because many people who had been living overseas moved home, there was a decrease in outflow over the next few years. According to a survey by the United Nations Department of Economic and Social Affairs, the overall number of Afghan refugees had reached 4.8 million in 2015.<sup>10</sup> About 80% of them are hosted by neighboring Pakistan and Iran, with many others residing in Central Asia, India, and Gulf countries.<sup>11</sup>

Pakistan is hosting over three successive generations of Afghan refugees. Several reasons made Pakistan a popular destination choice for the Afghan refugees. Firstly, it was a simple matter of proximity – being a neighboring country, it was easy for Afghan refugees to relocate to Pakistan. Secondly, there was the historic connection between the two countries. The Afghan people could openly travel between the two countries prior to the existence of the Durand line in 1893, which separated Afghanistan from British India.<sup>12</sup> Even after the establishment of the Durand line, the British allowed most Afghans migrants and trades access to the Northern parts of British India (what is now Pakistan). Even after the establishment of Pakistan in 1947, despite efforts of successive Pakistani governments to limit access of Afghans into Pakistan, there remained a consistent movement of Afghans into Pakistan. Therefore, many Afghans had long standing ties with Pakistan. Furthermore, in the 1970s, an extreme drought in Afghanistan drove a large number of rural Afghans to seek work in Pakistan. This resulted in the development of katchi abadis (illegal settlements on federal property) in Pakistan, enabling the

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<sup>7</sup>Amnesty International. *Afghanistan's refugees: Forty years of dispossession*. Amnesty International. Available on: <https://www.amnesty.org/en/latest/news/2019/06/afghanistan-refugees-forty-years/>. Accessed December 5, 2020.

<sup>8</sup> Rashid, Ahmed. *Taliban: militant Islam, oil and fundamentalism in Central Asia*. Yale University Press, 2010.

<sup>9</sup>World Bank. *International Labor Mobility of Nationals: Experience and evidence for Afghanistan at macro level*. World Bank. Available on: <http://documents1.worldbank.org/curated/en/536541530196136716/pdf/International-Labor-Mobility-of-Nationals-Experience-and-Evidence-for-Afghanistan-at-the-Macro-Level.pdf>. Accessed December 4, 2020.

<sup>10</sup> International Migration Report 2015 Un.org. 2021. [online] Available on :: [https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015\\_Highlights.pdf](https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf) [Accessed 20 April 2021].

<sup>11</sup> Afghanistan: Balancing between Pakistan and Iran . (n.d.). Retrieved April 20, 2021, from <https://www.jstor.org/stable/43857991>

<sup>12</sup> Lieven, Anatol. *Pakistan: A hard country*. PublicAffairs, 2012.

subsequent migrants fleeing the Soviet occupation to settle there because there was already an existing Afghan presence there.<sup>13</sup>

## **1.2 Pakistan's Treatment of Afghan Refugees: Early Friendly Treatment**

More than forty years have passed since the first migration from Afghanistan and the lot has changed over the years. Afghans were accepted as brothers in need as they were fleeing from the hostile environment of Afghanistan by the time of 1970s and 1980s. However, a change in society's stance toward refugees was noted in the 1990s. Considering the strategic trends in the South Asian region, Pakistan's Afghan refugee policies have always been unclear.<sup>14</sup>

Soviet fight with the US in Afghanistan for gaining control resulted in huge aid to Pakistan from the US for training fighters on its soil that could defeat the Soviets. They were called mujahidin and were praised for their bravery and valor. Relying on this narrative as dictated by the then top military and civil command of Pakistan these Afghans were wholeheartedly accepted by the people. But these friendly relations were short-lived and changed subsequently owing to some reasons.

## **1.3 Restrictive Afghan Refugee Policy**

Despite this early favorable treatment of the Afghan refugees, the Government of Pakistan developed a more restrictive policy for the Afghan refugees. A series of developments led to the change of perspective. Firstly, a report was prepared by Mr. Afzal Shigri in 1996 which was named as Shigri report that declared the refugees as illegal migrants and stated reasons for doing so.<sup>15</sup> It argued that the factor that resulted in mass migration (reference was made to Soviet incursion) no more existed that renders the refugees stay as illegal. US troops had withdrawn in large numbers and the stable government machinery was restored in Afghanistan. This prolonged stay had not been restricted to camps but has spread to other rural and urban parts of Pakistan. Moreover, refugees had commercial involvement in Pakistan meaning that many refugees had gained employments or began businesses in Pakistan. A lot of crimes some of serious nature were committed by refugees and the Kalashnikov tradition was introduced by Afghan refugees that made the arms and ammunition available in the market at cheaper rates making it accessible to the public at large. This was detrimental to the law and order situation of the country. This report also argued that shaming and labeling was another concern since afghan refugees illegally obtained passports and visas for traveling to third countries and indulged in illegal activities ostensibly as citizens of Pakistan. The report also notes the miseries of Afghan refugees in Pakistan and identified the reasons for the

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<sup>13</sup> Zieck, Marjoleine. "The legal status of Afghan refugees in Pakistan, a story of eight agreements and two suppressed premises." *International Journal of Refugee Law* 20, no. 2 (2008): 253-272. Available on : <https://heinonline.org/HOL/LandingPage?handle=hein.journals/intjrl20&div=17&id=&page=>

<sup>14</sup> Kronenfeld, Daniel. "Afghan refugees in Pakistan: not all refugees, not always in Pakistan, not necessarily Afghan?." *Journal of Refugee Studies* 21,2008: 52

<sup>15</sup> Shigri, A.A., 1996. Report on illegal immigrants and Afghan refugees in Pakistan Government of Pakistan (GOP). Available on : Last accessed on 2 February 2021 <https://easo.europa.eu/file/30904/download?token=17vIUyM>

mass influx and proposed recommendations as well. By the time the Shigri report was prepared a policy was needed to address refugees' future as the international assistance for the protection of refugees also dwindled. Basic argument raised in this report is Afghan refugees who left the village where initial shelter assistance was provided by Govt of Pakistan and those move towards urban areas and cities, have committed violation of tripartite agreement, by doing that they give away their status of refugee. This report has been adopted as a national framework for dealing with refugees and undocumented immigrants.<sup>16</sup>

On the basis of the report's recommendations, the Pakistan Foreigners Act was revised, and a new provision was inserted into Section 14-D for the creation of a new agency to register illegal immigrants.<sup>17</sup> National alien registration authority(NARA) came into force in year 2000, Sole purpose of this institution was to registered all the immigrants on the soil of Pakistan. NARA was later in 2015 merged into the National database and registration authority (NADRA). Soon after its merging, NARA renounce any obligation for the status of immigrants registered as aliens. The Primary view of this merger was to grant the Proof of Registration document (PoR), which allows them to get basic facilities such as health, employment, education etc on humanitarian grounds and in the light of customary international law principles.<sup>18</sup>

Another issue that changed perceptions was that Afghan refugees posed a significant threat to Pakistan's stability. The APS school attack in 2014 in Peshawar and the terrorists' connection with Afghanistan instilled intolerance in Pakistanis who demanded the immediate return of refugees to Afghanistan. Only a little and indirect connection of Afghanistan with the terror attack was identified in later investigations. Thereafter the diameter of the asylum circle for Afghan refugees reduced significantly.<sup>19</sup> Moreover, the pressure from the US and the drone attacks by the US in the Kurram agency in 2017 killing the alleged terrorists living in the Afghan refugee house created tensions in the bilateral relations of Pakistan and Afghanistan that ultimately affected the Afghan refugee policy. It was asserted by the top military leadership of Pakistan as well that refugee return is the sine qua non of the stability in the country.<sup>20</sup>

## **2. Standards of International Law and Human Rights vis-à-vis Refugees in Pakistan**

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<sup>16</sup> Ibid.

<sup>17</sup> *Pakistan: Foreigners Act, 1946*, 1946, Available on :: <https://www.refworld.org/docid/3ae6b4f314.html> [accessed 27 April 2021]

<sup>18</sup> Pakistan hosts first formal meeting on Afghan returns; non-Afghan refugees granted more rights Available on <https://www.unhcr.org/news/latest/2003/5/3ec1bb112/pakistan-hosts-first-formal-meeting-afghan-returns-non-afghan-refugees.html> Last accessed 15 April

<sup>19</sup> Mushtaq yousafzai "Post APS attack upset afghan refugees", "The news" Available on : <https://www.thenews.com.pk/print/25864-post-aps-attack-crackdown-upsets-afghan-refugees> Last accessed 14 March 2021

<sup>20</sup> US drone strike terrorist in refugees complex "The Dawn" Available at <https://www.dawn.com/news/1385202/us-drone-strike-targeted-terrorists-hiding-in-refugee-complex-ispr-says-pushing-for-repatriation> Last Accessed 2 January 2021

## 2.1 The Legal Status of Afghan Refugees

Refugee status determination is the mechanism by which an individual's refugee status in a municipal, regional, or national context is decided in accordance with applicable national and international law. From the standpoint of state supremacy, the legal structure under which the refugees are situated is decided by nation-states. This viewpoint assumes that states are sovereign entities, and that the legal status of refugees is determined by each particular state. On the other hand, there is the opposing view of international law and conventions, which argues that humanitarian principles are extracted from international law and that states must adhere to them as such.<sup>21</sup> The 1951 UN Convention Relating to the Status of Refugees and its subsequent 1967 Protocol provide the basis for the universal legal framework for the protection of refugees. The ensuing reality is often a compromise between these two perspectives. On one hand, the principle of state sovereignty prevails, and states are free to make their own laws and regulations concerning the status of refugees. Pressure from foreign organizations, other nations, and human rights organizations, on the other hand, also forces states to uphold the principles of customary international law (or at least some portions of it) in order to provide certain guarantees to refugees. It is also worthwhile to mention that according to the principle established in the Vienna Convention on the Law of Treaties states that states may not refer to their national laws in cases of violations of international laws. However, at the same time, Pakistan follows a “dualist” legal doctrine rather than a monist one, in the case of customary international law. The applicability is based on the subject matter that determines the type of act required by the state in order to be applied domestically.<sup>22</sup> The dualism doctrine is primarily due to the fact that while Pakistan’s legal system is primarily based on the English Common Law, the country is at the same time an “Islamic Republic”. With regards to the case of Pakistan with respect to Afghan refugee, refugee administration in Pakistan is governed mainly by the domestic legal framework of the country. However, Pakistan is sometimes bound by international treaties it has ratified, as well as its status as a nation state, which expects it to follow customary international law, such as the international refugee rights system.

The government of Pakistan distinguishes between recognized refugees and those without recognition that are considered undocumented immigrants; this distinction is critical in determining the freedom, security, and facilities they may obtain.<sup>23</sup> In the early 1980s, the government of Pakistan provided identification cards to all Afghan arrivals in order to provide them with basic services but little legal security.<sup>24</sup> Later, in the year 2000,

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<sup>21</sup> Goodwin-Gill, Guy S., and Jane McAdam. *The refugee in international law*. Oxford University Press, 2007.

<sup>22</sup> Jamshaid ,Hamid “International Law and Pakistan Domestic Order” Available at [file:///C:/Users/angle/Downloads/\[9789041108722%20-%20Asian%20Yearbook%20of%20International%20Law,%20Volume%204%20\(1994\)\]%20INTERNATIONAL%20LAW%20AND%20PAKISTAN'S%20DOMESTIC%20LEGAL%20ORDER.pdf](file:///C:/Users/angle/Downloads/[9789041108722%20-%20Asian%20Yearbook%20of%20International%20Law,%20Volume%204%20(1994)]%20INTERNATIONAL%20LAW%20AND%20PAKISTAN'S%20DOMESTIC%20LEGAL%20ORDER.pdf) Last accessed 21 April 2021

<sup>23</sup> Danish Refugee Council, Protection for forcibly displaced Afghan populations in Pakistan and Iran, September 2018, Available at <https://www.rsc.ox.ac.uk/publications/protection-for-forcibly-displaced-afghan-populations-in-pakistan-and-iran/@/download/file> url., p.16

<sup>24</sup> HRW, Closed Door Policy: Afghan Refugees in Pakistan and Iran, February 2002, url, p. 19 Available on : <https://www.hrw.org/report/2002/02/27/closed-door-policy/afghan-refugees-pakistan-and-iran>

NARA was established to register all refugees, which merged into NADRA in 2015. A Memorandum of Understanding (MoU) on the Registration of Afghan Citizens in Pakistan was signed in April 2006 by the GoP and UNHCR. While NADRA was in charge of registration, UNHCR officials oversaw the operation, and a group of staff from the Afghan Ministry of Refugees and Repatriation (MORR) assisted with the registration and monitoring process. Biometrics were made mandatory to ensure the authenticity of the registration process. Only those Afghan refugees who arrived or were born in Pakistan after December 1, 1979 and were counted in the 2005 census (a total of 3,049,268) were qualified for registration.<sup>25</sup> Until 2006, refugees in Pakistan were not expected to present any kind of official documentation. Since registering immigrants, the GoP began distributing the Proof of identification card (PoR) in 2006.

In general, Afghan immigrants in Pakistan can be classified into four groups. First, PoR holders who are registered refugees with legal immunity and basic rights; second, unregistered or undocumented immigrants are considered by the GoP dealt under the 1946 Foreigners Act; third, Afghan nationals with valid visas, either for business or family visits; and finally, Afghan resident card (ACC) holders. The Government of Pakistan initiated project in 2017 to issue ACC cards, and NADRA and Ministry of Refugees and Repatriation (MORR) are supervising it in order to register unregistered Afghan immigrants and issue them ACC cards. These cards would protect cardholders against any violations of their rights, such as imprisonment or wrongful arrest under the 1946 Foreigner Act. The validity of these cards lasts until the cardholder receives a new passport from the Government of Afghanistan (GoI), which allows them to return home.<sup>26</sup> There are currently 0.4 million unregistered refugees who do not have any kind of legal documentation, and 0.7 million who have ACC cards or are waiting to collect them.<sup>27</sup>

### **2.1.1 UNHCR Mandate in Pakistan**

Since 1980, after Soviet invasion, the UNHCR has had an official permanent office in Pakistan. However, despite the fact that UNHCR plays a role in registration and general policy formulation, especially in monitoring the registration and repatriation processes, Pakistan has not granted UNHCR authority to monitor refugees directly on its territory.<sup>28</sup> Aside from that, if UNHCR was to provide access to refugee camps, all assistance had to be routed by local authorities. These camps were built in areas known as Afghan Refugee Villages (ARV). The Commissionerate of Afghan Refugees (CAR) was created, with representatives serving as a link between the refugees and the government. The UNHCR mandate is broader since it recognizes people as refugees who run not only from the effects of military war, but also from “man-made disasters”, a term which encompasses colonialism, external invasion, occupation and international dominance. This broad

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<sup>25</sup> UNHCR et al., Registration of Afghans in Pakistan 2007, Available on : <https://www.unhcr.org/news/briefing/2007/2/45d58a692/registration-afghans-pakistan.html>

<sup>26</sup> On the margins: Afghans in Pakistan, December 2018  
Last accessed 28/04/2021 <http://www.acbar.org/upload/1562673003902.pdf>

<sup>27</sup> Pakistan to Host Conference on Afghan Refugees, 10 February 2020  
Last accessed 28/04/2021 <https://tolonews.com/afghanistan/pakistan-host-conference-afghan-refugees>

<sup>28</sup> UNHCR. *Afghan Refugees in Pakistan During the 1980s: Cold War Politics and Registration Practice*. Accessed on January 23, 2021. <https://www.unhcr.org/research/working/4868daad2/afghan-refugees-pakistan-during-1980s-cold-war-politics-registration-practice.html>

inclusion criteria can also be seen in regional treaties. Thus, if an individual comes under one of the two definitions, the Party is liable for the protections provided. Although, in general, states should not feel obligated to those who do not fit under such a category; whether they do, it could be out of comity, reciprocity, or fear. This decision is made by the country of destination for each person, or by UNHCR in the absence of appropriate mechanisms in the host country. In general, it is an accepted principle of international law that the doctrine of prima facie recognition of refugee status is used for collective migration from a country with cases that come within the purview of the UNHCR mandate, and persons are automatically given refugee status.

### 2.1.2 Pakistan's Refugee Law

Pakistan is not a signatory to the 1951 United Nations Convention Relating to the Status of Refugees or its 1967 Protocol, nor does it have any national legislation dealing with refugee management. According to Zubair, Khan, and Shah, the issue of defining a refugee continues to be virtually eluded among those countries that have not ratified any refugee-related conventions. Instead, the attention should be on the protection requirements, on which norms of customary law should be invoked.<sup>29</sup>

However, despite the fact that Pakistan has traditionally respected universal standards relating to refugee rights, the host country lacks in the national framework specifically designed to tackle refugee problem.<sup>30</sup> When it comes to states that are not party to applicable refugee law instruments, the emphasis appears to be on international protection, specifically the principles laid down by customary international law. The most critical of these principles is non-refoulement, which ensures refugee safeguards in those countries and ensures that they are not sent back to their home countries, where they can face severe human rights abuses, including death threats, torture, or other cruel treatment. Additional civil protections for refugees are emphasized to come from human rights conventions to which the host state is a signatory. Based on a series of treaties signed between Pakistan and the UNHCR, Pakistan granted Afghan refugees prima facie refugee status until 1998, entitling them to basic assistance such as housing, food, and protection. However, the Pakistani government has declined to register new immigrants as prima facie refugees since late 1999. Moreover, while Pakistan is bound by customary international law principles as well as international legal instruments of which Pakistan is a signatory, such as the Universal Declaration of Human Rights (UDHR), despite this, the domestic legal framework of Pakistan with respect to Afghan refugees in both inadequate and ambiguous.

Due to the lack of appropriate refugee legislation in Pakistan, Afghan refugees have faced a slew of problems. In Pakistan, there is no single law that establishes the rights and responsibilities of refugees. The Foreigners Act of 1946 is Pakistan's major piece of legislation dealing with foreigners on its territory. The Act, as well as its corresponding Order, distinguishes between refugees and other foreigners on the territory. However, the

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<sup>29</sup> Zubair, Muhammad, Muhammad Aqeel Khan, and Muzamil Shah. "Analysis of Pakistan's Policy Towards Afghan Refugees: A Legal Perspective." *Global Political Review* 4, no. 3 (2019): 28-38. Available at <https://econpapers.repec.org/scripts/redir.pf?u=https%3A%2F%2Fgprjournal.com%2Fadmin%2FAuthor%2F31rvIo1A2LALJouq9hkR%2F5MYCgs0G0.pdf;h=repec:aaw:gprjrn:v:4:y:2019:i:3:p:28-38>

<sup>30</sup> UNHCR, Pakistan - Community Based Protection Strategy (2020-2022), Available on : <https://data2.unhcr.org/en/documents/details/73795>, url, p. 3

Act, on the other hand, makes no special provisions for refugees. In fact, certain provisions of the Foreigners Act make Afghan refugees extremely vulnerable to persecution and abuse, especially at the hands of law enforcement agencies. It has given authorities the right to search and control the movements of foreigners in the country, including refugees and asylum seekers, as well as detain and deport them.<sup>31</sup> Later, in 1997, the Pakistani government released a policy circular exempting refugees from the 1946 Foreigners Act. In February 2001, the Pakistani government issued a clarification statement clarifying that the 1946 Foreigners Act would apply to unauthorized per se unregistered Afghan immigrants who are not licensed with NARA. Moreover, the Afghan refugees' citizenship status is not addressed in Pakistan's Citizenship Act either. Articles 4 and 10 of the Pakistan Citizenship Act mention qualifying requirements that may apply to refugees; for example, article 4 specifies that anyone born in Pakistan is entitled to Pakistani citizenship; however, this criteria has not been applied to Afghan refugees or their children born in Pakistan. Furthermore, the Article 10 states that a foreigner man who marries a Pakistani citizen woman is ineligible for citizenship. When the Pakistani government agreed to repatriate Afghan refugees in 2016, this situation caused great distress among women who are married to Afghan refugees. Moreover, the Naturalization Act of 1926 states that someone who has lived in Pakistan for five years in the preceding eight years is entitled to apply for citizenship; however, according to the Asia Displacement Response Website, refugees who meet these conditions are still denied citizenship under this statute.<sup>32</sup> Citizenship has been refused to many Afghan refugees who have lived in Pakistan for three decades.<sup>33</sup> As a result, Afghan refugees have little hope of obtaining Pakistani citizenship and are only allowed to stay temporarily before returning home.

As a consequence of the judiciary's and police's lack of knowledge of refugee law, refugees are vulnerable to injustice and unequal treatment. Besides that, Pakistan has compelled hundreds of thousands of Afghan refugees to return to a region where circumstances are deplorable. Several critics have pointed out that the forced return to Afghanistan entails the responsibility of Pakistan regarding the compliance to the peremptory norm of non-refoulement.. This has led to a great deal of uncertainty for the Afghan refugees pertaining to their legal status and rights.

The proceeding chapters discussion begins with an evaluation of the international framework including the treaties to which Pakistan is a party to of as well as the principles of customary international law as it pertains to refugees in Pakistan. It provides a critical analysis of Pakistan's compliance with these international standards. The

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<sup>31</sup> A Critique of the Foreigners Act, 1946: A Legislation de Jure or de Facto? Available on : [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1989060](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989060) Last accessed 4 April 2021

<sup>32</sup> On the margins: Afghans in Pakistan, December 2018  
Last accessed 28/04/2021 <http://www.acbar.org/upload/1562673003902.pdf>

<sup>33</sup> Alimia, Sanaa. "Performing the Afghanistan–Pakistan border through refugee ID cards." *Geopolitics* 24, no. 2 (2019): 391-425.

subsequent discussion also engages with the domestic legal framework of Pakistan and the inadequacies therein.

## **2.2 International Refugee Protection**

The Convention Relating to the Status on Refugees, the International Bill of Human Rights, which includes the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, as well as the United Nations Convention on the Rights of the Child and the United Nations Convention Against Torture, are all important international legal structures pertaining to refugees. The UN High Commissioner for Refugees' mandate also serves as a guide for dealing with refugees. Principles contained in customary international law also bind states in their treatment of refugees. Each will be discussed in detail in succeeding paragraphs.

### **2.2.1 The Convention Relating to the Status of Refugees, 1951**

The multilateral treaty specifically dealing with refugee protection and ratified by 145 states is the 1951 Refugee Convention and its Additional Protocol of 1967 that increased the horizon of its applicability. The convention governs everything from identifying refugees to states' obligations to protect them. It classifies refugees as individuals who need protection from the apprehension of being persecuted based on caste, color, race, and political affiliation in the country of fleeing. Certain rights are accorded to such class of people including the freedom to practice religion, access to education, freedom of movement,<sup>34</sup> etc. Although Pakistan is not a signatory to the Refugee Convention nor its Protocol, some of its principles are a part of customary international law, which is binding even on non-member states. An example is the principle of non-refoulement which is discussed below. Pakistan today is facing issues in managing the Afghan refugees that migrated in the mass groups in the last four decades. Temporary and discretionary policies administer the refugees within the country since Pakistan did not ratify the main convention. Though some of those principles are still binding being part of the universal treaties and conventions to which Pakistan is a signatory.

### **2.2.2 The Customary International Law and the Principle of non-refoulement**

The concepts that developed into customary international law are binding on all nations, regardless of their status (member-state, observer state, or non-member state). The theory of non-refoulement, which is a component of both customary international law and treaty

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<sup>34</sup> The Convention Relating to the Status of Refugees, 1951 Available on : <https://www.unhcr.org/1951-refugeeconvention.html#:~:text=The%201951%20Refugee%20Convention%20and,the%20basis%20of%20our%20work.&text=The%20core%20principle%20is%20non,to%20their%20life%20or%20freedom.Last> accessed 7 February 2021



law, is one such classic example. In several international treaties, this principle is stipulated. Although Pakistan is not a signatory to the parent convention, it is obligated to uphold the principle of non-refoulement because it is a part of other treaties (discussed below) of which Pakistan is a signatory, and also since it is a part of customary international law. This principle prohibits the states to remove persons from their territory to others where there is a possibility of being persecuted or inhumanely treated on account of color, race nationality, or affiliation with a certain social or political group. The principle of non-refoulement has been elevated to the status of jus cogens, which means it is a mandatory rule from which no exceptions can be made. However, there is little indication that this principle has been incorporated into Pakistan's legal code.<sup>35</sup>

The concept of non-refoulement is enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees, which prohibits contracting states from deporting refugees to unsafe territories. According to Article 33 of the 1951 Convention the State Parties are prohibited from repatriating the refugee in the conditions and to the territory where it could reasonably be foreseen to be subjected to torture on any ground because torture is absolutely prohibited. Furthermore, Article 3 of the United Nations Convention Against Torture (of which Pakistan is a signatory) states that no governmental organization may expel, return, or extradite an individual to another country if there are reasonable grounds to believe that he would be tortured. As a result, the principle of non-refoulement forbids states from transferring or eliminating persons from their territory where there are fair reasons to believe that they will face irreparable harm if they returned, such as harassment, torture, ill-treatment, or other significant human rights abuses.<sup>36</sup>

Some legislative frameworks, such as resolutions passed by the United Nations General Assembly, support the concept of refoulement.<sup>37</sup> Furthermore, the non-refoulement clause is interpreted (by a human rights committee) as being found in Article 7 of the International Covenant on Civil and Political Rights. The same interpretation is given by the European Court of Human Rights (ECtHR) to the principle laid down in article 3 of ECHR.<sup>38</sup> The return of refugees that is adversarial and forceful is also prohibited in the treaties at the regional level. However, as the concept of non-refoulement is regarded as part of the customary international law, the countries which are not the part of 1951 convention like Pakistan and India, are still bound to respect those provisions which are also part of customary international law.

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<sup>35</sup> Jean Allain, "The jus-cogens nature of non-refoulement," *International Journal of Refugee Law* 13 (4) (2001): pp. 533-558. Available on : [https://www.researchgate.net/publication/31412200\\_The\\_jus\\_cogens\\_Nature\\_of\\_non-refoulement](https://www.researchgate.net/publication/31412200_The_jus_cogens_Nature_of_non-refoulement)

<sup>36</sup> United Nations Human Rights. "The Principle of Non-Refoulement Under International Human Rights Law." Available on :: < <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>>.

<sup>37</sup> "Resolution adopted by the General Assembly on 16 December 2005." Office of the United Nations High Commissioner for Refugees. Available on :: < [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_60\\_129.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_129.pdf)>

<sup>38</sup> Ahmed v. Austria [1997] 24 EHRR 278; Chahal v. United Kingdom [1996] 108 ILR 385; Soering v. United Kingdom [1989] 98 ILR 270; T.I. v. United Kingdom [2000] INLR 211; Vilvarajah v. United Kingdom [1991] 108 ILR 321.

Although international law prohibits Pakistan from refusing to return refugees whose lives, liberty, or protection could be jeopardized if they return to their home country, despite this, Pakistan has pressed tens of thousands of Afghan refugees to return to a region where the situation is dire. Afghanistan is not only battling the internal armed conflict with the Taliban but also internationally on different fronts. Afghanistan is the victim of the conflict between the world economic giants and the outcome is just the sufferings of the innocent Afghans. Evidence indicates that many refugees have been forced to flee Afghanistan despite dangerous and adverse circumstances at home, as highlighted by Valentina Hiegemann.<sup>39</sup> The strained relationship between Pakistan and Afghanistan, security issues, and a reduction in international assistance to Pakistan are among the factors that have prompted the Pakistani government to call for tough conditions for Afghan refugees and, as a result, for their return to their homeland.<sup>40</sup> It is critical to recognize that Pakistan, as a developing country with a rapidly increasing population and a scarcity of capital, lacks the requisite facilities to cope with the large influx of refugees without foreign assistance.<sup>41</sup> The inconsistency of Afghan refugees' residency status in Pakistan has resulted in police surveillance, intimidation, and extortion. Pakistani officials, according to Human Rights Watch, have launched a coordinated effort to force Afghans out of the country. A volatile mix of immigration threats and police violations drove almost 0.365 million of the country's 1.5 million registered Afghan refugees and just over 0.2 million of the country's estimated 1 million undocumented Afghans out in the second half of 2016.<sup>42</sup> Many commentators have pointed out that Pakistan's intimidation of such a vast number of Afghan refugees into returning to Afghanistan breaches the international law against refoulement.<sup>43</sup> While Pakistan could rightfully argue that it has no national legal obligation to not return Afghan refugees, this may be seen as a breach of various precepts of Customary International Law and well-established international norms and principles such as the right to life, liberty, and security.

### 2.2.3 International Bill of Rights

UDHR, ICCPR (along with two optional protocols), and ICESCR are termed as International Bill of Rights. These guaranteed certain rights and make it obligatory for the

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<sup>39</sup> Hiegemann, Valentina. "Repatriation of Afghan Refugees in Pakistan: Voluntary?." *Oxford Monitor of Forced Migration* 4, no. 1 (2014): 1-4. Available on [https://adsp.ngo/wp-content/uploads/2018/12/P-17\\_Repatriation-of-Afghan-Refugees-in-Pakistan\\_Voluntary.pdf](https://adsp.ngo/wp-content/uploads/2018/12/P-17_Repatriation-of-Afghan-Refugees-in-Pakistan_Voluntary.pdf)

<sup>40</sup> "Afghan Refugees in Pakistan: Push Comes to Shove." 2009. Human Rights Commission of Pakistan. Available on :: <<https://www.ecoi.net/en/document/1084957.html>>.

<sup>41</sup> Hiegemann, Valentina. "Repatriation of Afghan Refugees in Pakistan: Voluntary?." *Oxford Monitor of Forced Migration* 4, no. 1 (2014): 1-4.

<sup>42</sup> Human Rights Watch. "Pakistan Coercion, UN Complicity The Mass Forced Return of Afghan Refugees." 2017. Available on :: <<https://www.hrw.org/report/2017/02/13/pakistan-coercion-un-complicity/mass-forced-return-afghan-refugees>>.

<sup>43</sup> Human Rights Watch. "Pakistan Coercion, UN Complicity The Mass Forced Return of Afghan Refugees." 2017. Available on :: <<https://www.hrw.org/report/2017/02/13/pakistan-coercion-un-complicity/mass-forced-return-afghan-refugees>>.

Also see: Pakistan to repatriate Afghan refugees. The Central Asia-Caucasus Analyst. 2017. Available on :: <<https://www.cacianalyst.org/publications/analytical-articles/item/13426-pakistan-to-repatriate-afghan-refugees.html>>

state to respect them as they are inherent in every human being be it its citizen or an alien. Each will be discussed below.

### **Universal Declaration of Human Right of 1948**

The UDHR gave people the right to request refuge from violence and asylum in countries where they would be secure. It is a general human rights convention that explains the inherent rights of people, regardless of their status.<sup>44</sup> It covers the rights to education, health care, religious freedom, man's inviolability and integrity, and equality before the law. These impose obligations on Pakistan in terms of Afghan refugees, and Pakistan must devise a compassionate and feasible policy to fulfill their needs.

### **International Covenant on Civil and Political Rights of 1966**

Most of the fundamental human rights in the UDHR are reflected in the ICCPR, which requires states to recognize and secure individuals' civil and political rights. Pakistan is a signatory to the ICCPR and its two optional protocols whereby it is under the obligation to devise such mechanisms where under the legislature, executive and the judiciary must ensure the efficacious provisions of civil and political rights. It also acts as a bar to the inhumane treating of refugees in Pakistan.<sup>45</sup>

Pakistan has complied with certain provisions of the ICCPR. The International Covenant on Civil and Political Rights, for example, grants refugees general rights to freedom of travel and choice of residence. Pakistan's government does not place any limitations on refugees' ability to settle in the country. According to Gare and Male, the Pakistani government does not impose travel or residency restrictions on registered Afghans, nor does it deny assistance to those living outside of camps. He believes that refugees have always been mostly free to settle however they choose. According to his report, refugees have been usually granted a great deal of flexibility in deciding where they want to go, as well as permission to fly through Pakistan, despite the fact that they do not have international travel permits.<sup>46</sup>

However, there are other provision of ICCPR which are not complied with. For example, the ICCPR provides that law enforcement agencies shall not arrest or detain Afghan refugees arbitrarily. However unfortunately, all of these privileges are not upheld, and violations are occasionally reported by different media outlets or the UNHCR. The

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<sup>44</sup> Universal Declaration of Human Right of 1948 Article 14(1) Available on : <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

<sup>45</sup> International Covenant on Civil and Political Rights of 1966 available <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>46</sup> Grare, Frédéric, and William Maley. "The afghan refugees in Pakistan." *J Middle East Institute. Refugees Cooperation* (2011). Available on : [https://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_1647.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1647.pdf)

government has cracked down on refugees on many occasions. Refugees' homes were raided, and they were denied employment, as the rules for their continued stay in Pakistan were tightened.<sup>47</sup> In several occasions, the Pakistani government has given ultimatums to Afghan refugees, requiring them to return to their homeland or face expulsion.<sup>48</sup> Furthermore, the unpredictability of Afghan refugees' residency status in Pakistan has facilitated police surveillance, intimidation, and extortion.<sup>49</sup>

### **International Covenant on Economic, Social and Cultural Rights of 1966**

A just and peaceful society cannot exist without the protection of inalienable human rights. And in the provision of these rights, state should act neutrally. Refugees are too entitled to rights under this covenant. The right to basic health facilities, the right to work and carry out trade businesses, right to social security are some of the rights enshrined in the said instrument.<sup>50</sup>

Pakistan's commitment to uphold the International Covenant on Economic, Social and Cultural Rights of 1966 has also met with mixed results. On the surface, Pakistan's Foreigners Act 1946 forbids recruiting someone who does not have permission to stay in the region. The government, on the other hand, has long tolerated refugees who serve in the informal sector. Even in the formal sector, officially according to the relevant laws, refugees need Pakistani partners for business and they by themselves cannot acquire and own immovable property which is prerequisite to doing business.<sup>51</sup> However, in practise, this law is bypassed on a daily basis and is tolerated by the law enforcement authorities. Afghan refugees cannot legally own trucks in the province of Khyber Pakhtunkhwa, for example, but they control the entire transportation sector in reality.<sup>52</sup>

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<sup>47</sup> Roehrs, Christine. "The Refugee Dilemma: Afghans in Pakistan between expulsion and failing aid schemes." *Afghanistan Analysts Network* 9 (2015). Available on <https://www.afghanistan-analysts.org/en/reports/migration/the-refugee-dilemma-afghans-in-pakistan-between-expulsion-and-failing-aid-schemes/>

<sup>48</sup> Pakistan to repatriate Afghan refugees. *The Central Asia-Caucuses Analyst*. 2017. Available on :: <<https://www.cacianalyst.org/publications/analytical-articles/item/13426-pakistan-to-repatriate-afghan-refugees.html>>

<sup>49</sup> Human Rights Watch. "Pakistan Coercion, UN Complicity The Mass Forced Return of Afghan Refugees." 2017. Available on :: <<https://www.hrw.org/report/2017/02/13/pakistan-coercion-un-complicity/mass-forced-return-afghan-refugees>>.

<sup>50</sup> International Covenant on Economic, Social and Cultural Rights of 1966 Available on :

<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

<sup>51</sup> World Refugee Survey, Pakistan, <http://www.refugees.org/countryreports.aspx?id=2337>.

<sup>52</sup> World Refugee Survey, Pakistan, <http://www.refugees.org/countryreports.aspx?id=2337>.

### **2.2.4 Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment of 1987**

The convention against torture requires state parties to take reasonable measures to prohibit inhuman and gruesome abuse of people who are present on their territories. What constitutes torture and for what objectives torture is inflicted has clearly been defined in the starting articles of said convention. The principle of non-refoulement is reiterated in the convention debarring states from expelling people to territories where there is the apprehension of them being tortured. Pakistan is a signatory to it and to a major extent it has respected the principle of non-refoulement as it had not coerced refugees to return rather entered into a tripartite agreement for voluntary return.<sup>53</sup>

## **3. Domestic Enforcement of International Law regarding Refugees in Pakistan**

The states have unanimously agreed not only to provide asylum to refugees but also to protect their guaranteed rights in national and international laws. In the context of Pakistan, it is of great relevance since it is a host to millions of Afghan refugees as discussed earlier. The refugee crisis exuberated primarily due to a lack of consistent policy making in this regard. To date, there is no legislation at a national level that is specifically devoted to the cause of refugees. The current government is optimistic about the solution to refugee problems with the Prime Minister pledging to grant them citizenship. Under the principle of jus soli as recognized by the municipal law of Pakistan, every person born in Pakistan is entitled to citizenship but refugee children born in Pakistan the only country they know are still refugees. Various factors lead to discriminatory behavior towards Afghan refugees specifically. The Shigri report on Illegal Immigrants and Afghan Refugees in Pakistan<sup>54</sup> that forms the basis of policy implications in the late twentieth century highlighted the grievance of refugees. Though not coerced to return they are tortured to confess their involvement in crimes which they had not committed and which they do for sake of their families and their stay in the country. Economic exploitation is another concern where they are coerced in one way or the other to work at a wage below standard. Bribe demand by the law enforcement agencies from Afghan refugees as they are the most vulnerable ones have also added to their misery. They are deprived of basic facilities of health, education, water, and food resources. Afghan refugees are not allowed to be treated in governmental hospitals arguably because these health care facilities are run through the taxes of Pakistani nationals and they should only be benefitted from it. Moreover, there are restrictions in terms of land transport, hotel bookings, bank account openings, etc<sup>55</sup>. These are the violations of internationally guaranteed human rights. Moreover, the coping strategies are

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<sup>53</sup> Tripartite agreement for voluntary return GoP ,unhcr and refugees” Available on <https://www.refworld.org/pdfid/42fb2b7be.pdf> Last Accessed 19 April

<sup>54</sup> Shigri, A. "Report on Illegal Immigrants and Afghan Refugees in Pakistan." *Confidential Memo. Karachi. Authors Copy (digital)* (1996).

<sup>55</sup> Report by European asylum support office “Pakistan situation of afghan refugees” Available at <https://easo.europa.eu/file/30904/download?token=17vIUUnYM> accessed 23 January

sometimes more gruesome like child labor, involvement in anti-social behaviors. The recent effort in the education sector is appraisable where under specific quota is fixed for the refugee students to pursue higher education on government scholarships in the institutions of Pakistan. The doctrine of *pacta sunt servanda* that the treaties must be honored is not fulfilled in the case of Pakistan regarding universal human rights treaties and a lot has to be done specifically for Afghan refugees. These issues will be discussed concisely in upcoming chapters.

### 3.1 Domestic Laws Governing the Refugee Regime

As discussed above, Pakistan lacks a comprehensive legal regime dealing with refugees in Pakistan. This section discuss the relevant domestic legal framework of Pakistan as it pertains to Afghan refugees. The analysis highlights the obstacles Afghan refugees have to face due to the inadequacies in the current framework.

#### 3.1.1 The Constitution of Pakistan 1973

Pakistan's 1973 Constitution is the ultimate law of the country. It defines the state, citizens, and their basic rights, as well as the state's constitutional law and directives, and the constitutional system and institutions. Rule of law is the essence of the supreme law of Pakistan i.e constitution. Every individual is equal in the eyes of law and to be dealt with strictly in compliance with the legal provisions. An act contradictory therefrom is *ultra vires* and to be declared by the court as null and void. Article 4 of Pakistan's Constitution is crucial to refugee rights because it establishes the rule of law. The right to be treated equally in the eyes of law is made an inalienable right not only for the nationals but even for the aliens residing in Pakistan for time being. The life and liberty cannot be curtailed except in lawful way. Individuals are given the right to engage in activities not prejudicial to the law for time being enforce. Likewise an individual cannot be compelled to do an act whose commission is not demanded in binding terms.<sup>56</sup>

Article 4 of the Pakistani Constitution guarantees rights to all residents of the country, not only nationals. The term person has not been defined thus a general connotation implies the usage of the word to include all human beings. As a result, Afghan refugees are also covered by these protections. Article 4 has been understood to include procedural due process; the right to be handled equally at all times; the right to procedural justice and propriety; and immunity against any act endangering a person's life, liberty, or property.<sup>57</sup> It also imposes an obligation on any public functionary to behave "justly, reasonably, and without arbitrariness" in all matters, and has been dubbed an

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<sup>56</sup>The Constitution of Pakistan 1973 Available on :  
<http://www.pakistani.org/pakistan/constitution/part1.html>

<sup>57</sup> Rashid, Umar. "UNHCR in Pakistan: Analyzing the Global Governance Regime-Repatriation of Afghan Refugees from Pakistan." *LUMS LJ* 6 (2019). Available on : <https://sahsol.lums.edu.pk/law-journal/unhcr-pakistan-analyzing-global-governance-regime-%E2%80%93-repatriation-afghan-refugees>

inalienable privilege that also reflects the values of good governance, such as a check on discretionary, unfair, and excessive use of power.<sup>58</sup>

Chapter II of the Constitution provide fundamental guarantees that includes protection of life and liberty under article 9, protection against unlawful detention under article 10, right to a fair trial under article 10A, protection against all forms of slavery under article 11, prohibition on retrospectively punishing a person under article 12, prohibition on double jeopardy under article 13, human dignity and inviolability under article 14, freedom of movement under article 15, assembly and association rights under article 16 and 17, the right of engaging in business under article 18, freedom of speech under article 19, the right to access to information under article 19A and the freedom of professing religion under article 20. The distinguishing feature of these rights are that they are not absolute rather qualified and that these rights are made judicially enforceable.

Several observers also recognized that the human rights and freedoms secured by the Islamic Republic of Pakistan's 1973 Constitution are fundamental and apply to all citizens and non-nationals within Pakistan's territorial boundaries.<sup>59</sup> Since Chapter 1, Part II of the Constitution uses the word "persons" instead of "nationals/citizens," it is reasonable to infer that non-citizens or foreigners are covered under the said chapter if they are within Pakistan's borders.<sup>60</sup> However, despite these guarantees of protections and rights under the Constitution, the Afghan refugees are frequently denied their rights. Although Article 10 of the Constitution provides immunity from arrest and incarceration, law enforcement authorities routinely abuse this privilege for thousands of Afghan refugees. As Zubair, Shazad and Khan note:

“The ground reality even for the registered Afghan refugees is not satisfactory because of the inalienable predisposition of Pakistani authorities towards them, they are liable to capture without due reason and regularly mope in the slammer with next to zero plan of action to lawful portrayal which is an encroachment of their fundamental human rights and an infringement of the privilege to fair trial under this.”<sup>61</sup>

In 2015, Human Rights Watch released a study titled "What are you doing here?" based on interviews, highlighting the acute insecurity of Afghan refugees in the custody of Pakistani law enforcement, regardless of their nationality, whether they are PoR card holders or unregistered immigrants. Almost all participants reported their accounts of

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<sup>58</sup> Rashid, Umar. "UNHCR in Pakistan: Analyzing the Global Governance Regime-Repatriation of Afghan Refugees from Pakistan." *LUMS LJ* 6 (2019).

<sup>59</sup> Rashid, Umar. "UNHCR in Pakistan: Analyzing the Global Governance Regime-Repatriation of Afghan Refugees from Pakistan." *LUMS LJ* 6 (2019): 31.

<sup>60</sup> Rashid, Umar. "UNHCR in Pakistan: Analyzing the Global Governance Regime-Repatriation of Afghan Refugees from Pakistan." *LUMS LJ* 6 (2019): 31.

<sup>61</sup> Zubair, Muhammad, Suhail Shahzad, and Muhammad Aqeel Khan. "The Position of Afghan Refugees under Various Agreements and Constitution of Pakistan: An Analysis." *Global Regional Review* 4, no. 1 (2019): 462-472.

police violence, torture, bribes, and inhumane treatment, with those who had been interviewed in Afghanistan citing law enforcement brutality as the primary reason for their return. They all agreed that we are living in a state of fear. According to one of the participants states If you are unable to pay the requested ransom, you will be formally charged with a felony and sent behind bars. Article 7 of the ICCPR bans cruel, inhumane, and abusive treatment as well as punishment. It also goes against the 1987 Convention Against Torture and Any Cruel, Inhuman, or Degrading Treatment or Punishment.<sup>62</sup>

Similarly, Article 24 of the Constitution prohibited the forceful deprivation of property except in a manner provided by law. However, Afghan refugees are included in the ambient of the title “persons” and their property rights are violated. According to Zubair, Shazad, and Khan, "they (Afghan refugees) are essentially barred from owning land in Pakistan due to the Pakistani state's stringent repatriation policy, which prevents them from naturalizing."<sup>63</sup> Officially, no Afghan refugee can lease property or own land; only PoR card holders can rent property on a rent deed, which must be signed by two witnesses and pasted with a judicial stamp. The dilemma arises where PoR card holders do not have the mandate to purchase a judicial stamp; as a result, the legal title passes to a Pakistani resident. Unregistered Afghan refugees, on the other hand, are denied access to even rental housing. It should be remembered that the identification process is complex and time-consuming, and refugees must have a variety of papers to confirm their identity. If refugees want to apply for the service, it would be a time-consuming process.<sup>64</sup>

The above-mentioned rights and guarantees are equally applicable to all residents and non-citizens under Pakistan's Constitution. As a result, Afghan refugees who have registered in Pakistan should not be treated differently. All of the articles of the constitution relating to freedoms and human rights that refer to "persons" rather than citizens apply to Afghan refugees who are currently living within Pakistan's boundaries. If their legal rights are abridged, then they do have the locus stand necessary for bringing an action under the Constitution of Pakistan.<sup>65</sup>

### **3.1.2 Pakistan citizenship act 1951 and Citizenship Claims by Afghan Refugees**

There is no single explicit statutory provision in Pakistani domestic legal system relating to the status of refugees who fulfil the criteria of citizenship. The bare text of the article 4 of the Pakistan Citizenship Act of 1951 read as under:

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<sup>62</sup> HRW “what are you doing here” last accessed 27/04/2021  
[https://www.hrw.org/sites/default/files/report\\_pdf/pakistan1115\\_4up.pdf](https://www.hrw.org/sites/default/files/report_pdf/pakistan1115_4up.pdf)

<sup>63</sup> Zubair, Muhammad, Suhail Shahzad, and Muhammad Aqeel Khan. "The Position of Afghan Refugees under Various Agreements and Constitution of Pakistan: An Analysis." *Global Regional Review* 4, no. 1 (2019): 462-472. Available on : <https://grrjournal.com/article/the-position-of-afghan-refugees-under-various-agreements-and-constitution-of-pakistan-an-analysis>

<sup>64</sup> ADSP, On the margins: Afghans in Pakistan, December 2018  
Last accessed 28/04/2021 <http://www.acbar.org/upload/1562673003902.pdf>

<sup>65</sup> Zubair, Muhammad, Suhail Shahzad, and Muhammad Aqeel Khan. "The Position of Afghan Refugees under Various Agreements and Constitution of Pakistan: An Analysis." *Global Regional Review* 4, no. 1 (2019): 462-472.



“Citizenship by birth.— Every person born in Pakistan after the commencement of this Act shall be a citizen of Pakistan by birth. Provided that a person shall not be such a citizen by virtue of this section if at the time of his birth:

(a) His father possesses such immunity from suit and legal process as is accorded to an every of an external sovereign power accredited in Pakistan and is not a citizen of Pakistan; or

(b) His father is an enemy alien and the birth occurs in a place then under occupation by the enemy.”<sup>66</sup>

The case of Afghan refugees is special since the kids born to them are not given Pakistani citizenship. Few Afghans have tried to obtain Pakistani citizenship, but their demands have been rejected at both the administrative and judicial levels. The *Geneva Accord* were the series of agreements between the prominent stakeholders Pakistan and Afghanistan on the pressing issue of the situation in Afghanistan entered into on 14 April 1988 at UN headquarters and UN and USA participated as guarantors. One such agreement dealt with voluntary repatriation. But the increasing terror situation in the country of origin many refugees continue living in Pakistan and their claims or naturalization is been rejected at judicial and administrative fronts in Pakistan. Some refugees have obtained citizenship by furnishing wrong and bogus information to officials which were later canceled. Moreover, the law of the land had not been successful in granting citizenship status to the children born to refugees in Pakistan. One such example in the last four decades is when a refugee kid born on host soil and raised thereupon attaining majority applied for the issuance of national identity card but was disallowed. This decision was challenged before the High Court<sup>67</sup> to issue directions to registration officials for issuance on grounds of his birth and upbringing in Pakistan.<sup>68</sup> The decision of the high court vague in some aspects denied the grant of citizenship by saying that refugees are considered aliens or foreigners under local laws and their kids though born in Pakistan are not the subjects of the Citizenship Act. The mere long continual stay would not entitle them to citizenship rather they are dealt with the Foreigners Act.

In the case of *Abdul Majeed and another vs. The S.H.O. Police Station Naulakha*, the petitioner being an Afghan refugee challenged the curtailment of certain fundamental rights such as right of free movement.<sup>69</sup> The petitioner argued in court that Afghan

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<sup>66</sup> Pakistan, Pakistan Citizenship Act, 1951 [Pakistan], 13 April 1951, Art.4 Available on : [https://data.globalcit.eu/NationalDB/docs/PAK\\_Pakistan%20Citizenship%20Act%201951%20%5BEN%5D.pdf](https://data.globalcit.eu/NationalDB/docs/PAK_Pakistan%20Citizenship%20Act%201951%20%5BEN%5D.pdf)

<sup>67</sup> Ghulam Sanai v. The Assistant Director National Registration Office, Peshawar, PLD 1999 Peshawar 18. Available on <https://cite.pakaselaw.com/PLD-PESHAWAR-HIGH-COURT/1999/18/>

<sup>68</sup> Iftikhar A. Khan. *Afghan refugees' children can't get CNICs: Nisar*. Available on: <http://www.dawn.com/news/1276821>. Accessed January 24, 2021.

<sup>69</sup> Abdul Majeed and another v. The S.H.O. Police Station Naulakha, Lahore, PLD 1989 Lahore 223. Available on : <https://cite.pakaselaw.com/PLD-LAHORE-HIGH-COURT-LAHORE/1989/223/>

refugees should not be considered as aliens, since refugees who arrived in Pakistan at the time of partition in 1947 and refugees from the disputed territories of Kashmir are classified as citizens and therefore enjoy all of the Constitution's guarantees. According to the petitioner, Afghan refugees should be granted equal citizenship rights. The court dismissed the case, stating that Afghan refugees are not the same as those who fled the 1947 partition or those who fled Kashmir. The court emphasized that the Geneva Accords were the basis of granting refugee cards that legitimate the stay of Afghan refugees in Pakistan till the time Afghanistan return to a new normal. As a consequence, the court determined that law enforcement agencies are justified in limiting Afghan refugee migration in the country.

According to Section 3 of the Naturalization Act of 1926, that if in the last eight years a person is found to have lived in Pakistan for five years provided such person is in Pakistan for the year immediately preceding the filing of application he is entitled to citizenship. But there are other considerations attached to it which includes the character of applicant the understanding of local language and above all the necessary mental element of making Pakistan his permanent abode.<sup>70</sup> Naturalization is granted at the discretion of the federal government under Section 3 of the Naturalization Act. Many Afghan refugees meet these criteria because they are fluent in Pashto and Urdu and have been living peacefully for decades. However, according to a report conducted by the Afghan Displacement Solutions Platform, even Afghan refugees who satisfy the requirements for naturalization have been denied by the federal government at its discretion..<sup>71</sup>

Section 5 of the Act gives citizenship to the children of Pakistani women married to Afghan refugees. In 2018 the current Prime Minister of Pakistan in the lower house of Parliament stated that despite the way you interpret the law children born to Afghan parents in Pakistan are our citizens and it should be our priority to protect them. “Afghans whose children have been raised and born in Pakistan will be granted citizenship Inshallah (God willing) because this is the established practice in countries around the world.”<sup>72</sup> Although human rights groups around the world applauded this, opposition parties denounced the Prime Minister's comment. As a result, the Prime Minister and his political party reversed their decision to give citizenship to Afghan refugees in the region.<sup>73</sup>

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<sup>70</sup> Pakistan, Naturalization Act, 1926 [Pakistan], 26 February 1926, Available on : <https://dgip.gov.pk/images/Acts%20And%20Rules.pdf>.

<sup>71</sup> ADSP, On the margins: Afghans in Pakistan, December 2018.

<sup>72</sup> The Guardian, Pakistan's Imran Khan pledges citizenship for 1.5m Afghan refugees, 17 September 2018 Available on <https://www.theguardian.com/world/2018/sep/17/pakistan-imran-khan-citizenship-pledge-afghan-refugees>.

<sup>73</sup> Nation (The), Facilitating Afghan Refugees, 27 February 2019, Available on : <https://easo.europa.eu/file/30904/download?token=17vIUnYM>.

Policymakers and top civil commands have criticized the comment made by the current Prime Minister of Pakistan on the grant of citizenship to Bengalis and Afghans born in Pakistan.<sup>74</sup> In 2019 a bill was presented before the Parliament. This bill demanded a change in the Citizenship Act of 2001. It stated that any person, not a national of Pakistan living continuously for over twenty years or born in Pakistan and registered with a duly authorized registering body (like NADRA, NARA, UNHCR, etc) be given the Pakistani nationality. This bill was unanimously rejected by the Standing Committee of Interior Ministry established for deliberating on this bill. The parliamentarian who introduced this bill argued that Pakistan should specify its stance on refugees, either they should be made the formal part of society or be marginalized. Pakistan should have a clear-cut policy in this regard to avoid mammoth future problems. The committee's stance was that if this bill is accepted and made a law then it will result in serious repercussions for the economy and security both.

### 3.1.3 Foreigners Act 1946

The Foreigners Act of 1946 governs immigrant entrance, visit, and departure in Pakistan. In the year 2000, a law was enacted that stated that any international visitor who did not have the necessary documentation would be denied entry into the state. The distinction between refugee and foreigner is though recognized in the Act yet no specific mechanism is set out for refugees. The section 3 clause 2 (e) of the Foreigners Act of 1946 read as under:

“(2) In particular and without prejudice to the generally of the foregoing power orders made

under this section may provide that the foreigner

[...] (e) shall comply with such conditions as may be prescribed or specified

(i) requiring him to reside in particular places;

(ii) imposing any restrictions on his movements;[...]<sup>75</sup>

Moreover, Article 11 of the Foreigners Order of 1951 says:

“The civil authority may, by order in writing, direct that any foreigner shall comply with such condition as may be specified in the order in respect of- (1)his place of residence, (2)his movements, (3)his association with persons of a description specified in the order, and (4)his possession of such articles as may be specified in the order.”<sup>76</sup>

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<sup>74</sup> The Guardian “Pakistan to grant citizenship to refugees” Available at <https://www.theguardian.com/world/2018/sep/17/pakistan-imran-khan-citizenship-pledge-afghan-refugees> Last accessed 24 March 2021.

<sup>75</sup> Pakistan, The Foreigners Act, 1946 (Act XXXI of 1946), 23 November 1946, including amendments as of 28 April 2016, Art. 3 section 2e.

<sup>76</sup> Pakistan, Foreigners Order, 1951, 26 October 1951, Art. 11.

The Foreigners Act contains provisions that have been used by authorities to monitor and regulate the travel of foreigners within the region. Refugees are considered illegal outsiders and thus authorities can detain them if found without a valid documentation<sup>77</sup>. The cases in which they are pleaded as illegal immigrants are generally discharged on the requestor appeal from the relevant ministry of States and Frontier Relations (SAFRON) or UNHCR.<sup>78</sup> According to the Government of Pakistan, the UNHCR recognized refugees are factually the illegal immigrants and they should not be allowed to settle in the host state. The Foreigners Order, according to Younas, violates the relevant international law, namely the 1951 Convention, since the authorized officers are given the power of reusing entrance in Pakistan even on the provision of lawful travel documents.<sup>79</sup> Umar Rashid in his article *UNHCR in Pakistan: Analyzing the Global Governance Regime – Repatriation of Afghan Refugees from Pakistan* argues that exposing Afghans to the rigors of the Foreigners Act 1946 and Foreigners Order 1951, which considers all foreigners without a proper visa to be illegal immigrants, has exposed Afghan refugees to increased police repression in the form of searches, imprisonment, and intimidation, as well as made it impossible for them to attain livelihood.<sup>80</sup>

## 3.2 Judgments of the domestic courts

### 3.2.1 Resort to domestic courts

Pakistan's domestic courts have jurisdiction to enforce human rights under customary international law. The reason for this is that, unlike treaty law (dualistic approach of common law countries), customary law is considered to be a part of national law as it involves the coherent tradition followed by the most civilized nations ultimately maturing into a binding custom. A classical precedent is the decision of the Sindh High Court wherein the court highlighted the importance of considering the customs as auto integrated into domestic law notwithstanding the absence of prior legislative sanction.<sup>81</sup> However, this principle is applicable in so far as there is no repugnancy between the customary norm and the internal law of the state. This implies that refugees can also resort to domestic courts to seek legal remedies including those that are derived from customary international law.

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<sup>77</sup> Alimia, Sanaa. "Performing the Afghanistan–Pakistan border through refugee ID cards." *Geopolitics* 24, no. 2 (2019): 391-425.

<sup>78</sup> M. Zubair, M. Aqeel Khan and Muzamil Shah, "Analysis of Pakistan's Policy Towards Afghan Refugees: A Legal Perspective," *Global Political Review* IV (3) (2019): pp.28-38.

<sup>79</sup> Younas, S. (2018., December 11). Afghan Refugees and International Refugee Law (UNHCR). (M. Zubair, Interviewer).

<sup>80</sup> Rashid, Umar. "UNHCR in Pakistan: Analyzing the Global Governance Regime-Repatriation of Afghan Refugees from Pakistan." *LUMS LJ* 6 (2019): 31.

<sup>81</sup> Najib Zarab Ltd v. the Government of Pakistan, PLD 1993 Karachi 93. Available on : <https://cite.pakcaselaw.com/PLD-KARACHI-HIGH-COURT-SINDH/1993/93/>.

### **3.2.2 Ghulam Sanai vs. The Assistant Director, National Registration Office, Peshawar and another (PLD 1999 Peshawar 18)**

A petition was filed before the Peshawar High Court to direct the registration officials to issue the computerized national identity card to him. The facts of the instant are that the father of the petitioner had fraudulently obtained the Pakistani nationality card which was subsequently revoked. Any provision of law cannot be read in isolation. In the interpretation of division bench section 4 read with section 5 of Citizenship Act provides citizenship to every individual born in Pakistan. But this is subjected to the provision contained in section 3 whereby an individual born after the commencement of said action will be entitled to citizenship if his father was a Pakistani national at the time of his birth.

The Father of the petitioner was an afghan refugee (of an Afghan origin) who had obtained a national identity card by furnishing false information and have bought property even. They base their arguments upon the fact that for a long they have been living in Pakistan and even bought the property in their name. Their continual long stay entitles them to Pakistani nationality albeit the fact that he is not born in Pakistan. It was held by the court that a mere long stay or any such intention is not sufficient, citizenship can be obtained only by due process of law.<sup>82</sup> Specifically talking about Afghan refugees they are allowed a temporary and restricted stay in Pakistan thus the Foreigners Act governs them not the Citizenship Act. For this the reliance was made on the definition of foreigner provided in the Foreigners act that it includes any person other than the citizen of Pakistan. As Afghan refugees are not citizens so they shall not be governed by Citizenship Act. A further reason was given in another judgment Saeed Abdi Mahmud vs. NADRA 2018 CLC 1588 hereinafter discussed refereeing to the instant case. It stated that the UNHCR has recognized Afghan refugees and their claim to citizen status does not hold good. But Saeed Abdi Mahmud vs. NADRA 2018 CLC 1588 decision of the petition was a technical error because deciding the citizenship under section 4 is the executive prerogative and thus the decision of granting citizenship or not lies to the Ministry of Interior. Moreover, no distinction among the status of individuals is expressed in article 4 and thus is universally applicable to every individual. Thus, even refugees can be the subject of section 4. Moreover, section 16 of the Foreigners Act does not bar the operation of any other law but it operates in addition to other laws and not in derogation. The loopholes in these judgments are still not fixed and it was not challenged on other forums.

### **3.3.3 Saeed Abdi Mahmud vs. NADRA 2018 CLC 1588**

This case does not directly deal with Afghan refugees but it is a precedent set by the Islamabad High Court in 2018. A university student born in 1997 in Pakistan's government hospital upon turning 18 approached National Database and Registration Authority for issuance of a computerized national identity card. NADRA refused to issue on the ground that his parents were Somalians not Pakistani. He filed a petition before IHC and claim citizenship on the ground of his birth in Pakistan (principle of jus soli under section 4 of Citizenship Act). The court deliberated on the mechanisms of acquiring

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<sup>82</sup> Ghulam Sanai vs. The Assistant Director, National Registration Office, Peshawar and another (PLD 1999 Peshawar 18) Available on : <https://cite.pakcaselaw.com/PLD-PESHAWAR-HIGH-COURT/1999/18/>

citizenship in detail. Court also mentions the five ways of becoming the citizens of Pakistan as enumerated in the relevant Act. Court went on to quote the example of several countries like the UK, the US, France, etc which grants citizenship irrespective of the child's descent and whether his or her parent is an illegal immigrant or not. Reference was made to afore discuss Ghulam Sanai case wherein PHC held that merely prolong stay does not entitle the grant of citizenship. It is to be governed by appropriate law and due mechanism. As said earlier the present case is not of an afghan refugee but the court still gave its observations to the issue of citizenship of Afghan refugees in Pakistan. Court reinforced that refugees are the exception to the grant of citizenship on basis of jus soli because they are admitted as refugees and are subject to restrictions and conditions. The 1951 Refugee Convention regulates the determination of refugee status. The convention was originally intended for World War II refugees, but its 1967 Protocol broadened the scope of the convention to include all refugees. Afghans living in Pakistan meet the requirements for refugee status. Even the court calls Pakistan a signatory to UN Refugee Convention. And that UNHCR mandate regulates refugees and thus they are outside the scope of the Citizenship Act. Their entitlement is not to nationality rather just to certain social-economic constitutional guarantees that are also subject to restrictions. Apart from refugees other foreigners are entitled to citizenship by section 4 of the Citizenship Act and shall be dealt with accordingly. The Islamabad High Court allowed the petition and the petitioner was directed to redress his grievance from the Interior Ministry as not the court but the executive authority of the country has the prerogative of finally deciding on citizenship matters.<sup>83</sup>

This judgment imparts certain implications on the issue of Afghan refugees in Pakistan both in terms of rights guaranteed under the constitution as well as the claim of citizenship. This judgment relied on the prior judgment of the Peshawar High Court. Had the prior judgment been challenged, many ambiguities would have cleared by executive order. The first issue with the judgment was that it was based on the erroneous assumption of Pakistan being a signatory to the 1951 refugee convention and that refugees are dealt with under the mandate of UNHCR. However, the reality is the opposite, and even with the passing of four decades since the first wave of Afghan migration the legal void is yet to be filled and some domestic mechanisms need to be introduced in line with Refugee Convention. If we follow the approach adopted by IHC in defining the refugee status of Afghans then many Afghans arriving late in Pakistan will not be called refugees rather economic immigrants as they did not flee from the fear of persecution rather improve their standards of living and search for economic opportunities. Moreover, if the term refugee is used for solely those afghans registered with UNHCR then unregistered (not register themselves for fear of repatriation) would not be refugees. However, there is a significant number of refugees currently present in Pakistan who have not registered themselves as such. So both these classes of afghans, according to IHC judgment, are not refugees rather illegal immigrants as defined in the Foreigners Act. This brings them within the scope of the Citizenships Act whereby they have entitlement to citizenship.

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<sup>83</sup> Saeed Abdi Mahmud vs. NADRA 2018 CLC 1588 Available on : <https://cite.pakcaselaw.com/CLC-ISLAMABAD/2018/1588/>.

#### **4. Fate of Millions of Afghans Present in Pakistan: Suggestions and Recommendations**

Given the current situation management of refugees in Pakistan is very difficult. With the internal disturbances and displacements, the country will not be willing anymore to accept any new wave of migration nor will accept the continuity of stay of those Afghans who have been living there since birth. There shall be some novel political arrangements if they want to reach to certain point keeping in view the mutual benefits arising from mass migration for both Afghanistan and Pakistan. To reach a certain agreement is thought a difficult task in the given political discourse. Pakistan itself is a contributor to such regional disturbances owing to its support for the Taliban and the Afghans some of whom are the refugees per se while others came for economic opportunities have decided to live in Pakistan and not return voluntarily. The refugee situation in Pakistan has largely been a political assessment rather than a genuine cost-benefit analysis and this is evident from the absence of any empirical research in this regard. Today Pakistan's policies in Afghanistan are cause root of migration dilemmas which have repeatedly been criticized by international organizations. International funding has partially resolved the issue but still, non-political sources are insufficient for tackling a substantially political problem. Based on conditionality, the sufferings of both the refugees and the host country can be mitigated. Pakistan's approach has always been controversial. At the times the problem is treated as a security concern and sometimes dealt with as a humanitarian problem in its interest. Undoubtedly refugee problem is to a certain extent an overall responsibility of the world community as well. The world community should clog their assistance if Pakistan fail to assume responsibility by ratifying the 1951 Convention Pakistan. Pakistan at the moment though not signatory to said convention still follows its principle but not in binding terms and could use refugees as a tool. If Pakistan enters the convention and does not abide by any of its rules then it has to face the consequences as well. This makes it the best possible solution to address the refugee problems in Pakistan. Moreover, independent assessment of the situation in Pakistan by the international community is also needed as it has time and again asserted that assessment done by Pakistani authorities is more of a political one.

With the expiration of the tripartite agreement,<sup>84</sup> proper screening is a must to help Pakistan in policy making regarding the leftover Afghan population. Those who come within the ambit of refugee protection shall be treated accordingly. And those who won't qualify for the refugee status must be informed of their illegitimate stay and possible future outcomes if they do not repatriate voluntarily. And this has to be done without recourse to the use of force. The benefits of returning to Afghanistan should outweigh the

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<sup>84</sup> UNHCR and the governments of Afghanistan and Pakistan signed a tripartite agreement that for the first time establishes a formal process for resolving the 23-year-old Afghan refugee problem in Pakistan. Under the agreement, UNHCR will continue to assist the voluntary repatriation of Afghan refugees from Pakistan for three more years. The agreement is designed to support a gradual organized return that is sustainable. See: "Afghanistan tripartite agreement with Pakistan." 2003. Available on :: <  
<https://www.unhcr.org/news/briefing/2003/3/3e77334d1/afghanistan-tripartite-agreement-pakistan.html>>.

benefits derived from staying in Pakistan, only then returning would be more attractive for the refugees. This will help in fostering brotherly relations of Pakistan with Afghanistan. Their return should be facilitated by both governments. Social media campaigns are another step that can instigate refugees to return to their country and play their roles in the reconstruction of their country. One such example is a campaign of the Ghani government encouraging Afghans to come back home and contribute positively to rebuilding their homeland. But these efforts did not attract the attention of refugees. Not only return to their country but another mass migration of refugees was witnessed despite the promise of creating economic opportunities. Pressure from regional organizations is also a must to bridge the gaps that are preventing refugees from returning.

### **3.1 Role of Afghanistan**

War in Afghanistan has led to the close economical and strategic linkage between Afghanistan and Pakistan. Afghanistan has an equal responsibility of making the return more sustainable. Efforts need to come from the country of origin instead of solely depending upon the foreign policies and mechanisms. These are Afghans themselves who can bring new life to the war-trodden country. Because Pakistan can do nothing for the voluntary repatriation if Afghanistan puts a deaf ear on the issue. A constructive role is to be played by Afghanistan as well. Given the current situation and economic activity in Afghanistan return voluntarily seems next to impossible in such circumstances. The return will be sustainable if the benefits in leaving the host state are outweighed by the benefits and opportunities available on a return to a state of origin. One such measure includes providing war-free zones for returnees. The returnee quota shall be placed in jobs to encourage them to return and apply for those jobs. Afghanistan shall fulfill its 2005 promise of providing a scheme for disbursement of land and housing for both internally displaced persons (IDPs) and returnees.

### **3.2 Recommendations for the Pakistan Government**

It is the state's duty to guarantee that Afghan refugees are secure in Pakistan and that they can enjoy their life there as long as things in Afghanistan do not return to normal. The most pressing problem for Afghan refugees in Pakistan is the legal uncertainty surrounding their legal status. Pakistan's government has shown little consistency in its approach to the Afghan refugee crisis. They have become welcoming at times, "accepting the inevitability in encouraging refugees to travel openly and work."<sup>85</sup> However, "at other times there were efforts to apply the rigors of the Foreigners Act," which resulted in the suffering of many Afghan refugees.<sup>86</sup> As such, the first major suggestion for the government of Pakistan is to ratify the Convention and Protocol relating to refugees. Once the principles of the convention find its way into the domestic law of the country by

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<sup>85</sup> Rashid, Umar. "UNHCR in Pakistan: Analyzing the Global Governance Regime-Repatriation of Afghan Refugees from Pakistan." *LUMS LJ* 6 (2019): 31.

<sup>86</sup> Rashid, Umar. "UNHCR in Pakistan: Analyzing the Global Governance Regime-Repatriation of Afghan Refugees from Pakistan." *LUMS LJ* 6 (2019): 31.



ratification, it would bring much needed clarity with respect to the status of Afghan refugees.

Refugees cannot be forcefully repatriated. For this Pakistan needs to devise a flexible approach and systemize the refugee return. And all the relevant stakeholders need to make a sustainable effort. Pakistan should recognise and accept that its forceful repatriation of Afghan refugees is in violation of customary international law. This will help in improving the Pak-Afghan ties and on the other hand, the economically weak Afghanistan will get an opportunity to make arrangements for refugee return if there is a proper timeline. Those refugees who are desirous of attaining citizen status under relevant law and have been living here by birth or for long, where marriage has been solemnised between an Afghan lady and a Pakistani man or vice versa provided all these do not carry a criminal recorded be afforded citizenship on their surrendering of Afghan nationality (dual nationality prohibited). As such the Government should make regulations that provides citizenship rights to Afghan refugees especially those who have been living in Pakistan for over three generations.

Law enforcement agencies should be compelled to respect the inherent rights of all refugees (both registered and unregistered) and those infringing those rights should be dealt with firmly. One of the main issues concerning the well being of the Afghan refugees is that the law enforcement agencies are ignorant of the relevant laws and as such often stomp upon the legitimate rights of the refugees. Such law enforcement agencies should be educated about the rights of the refugees. This can be done by holding educational seminars and ensuring that the head of such agencies educate their staff about the provisions.

Pakistan should adopt a friendly policy for those refugees who are actively the economic contributors such as Pashtun refugees who are carrying business of gemstone in Peshawar (the sole gemstone business of Pakistan). The example of the carpet weaving industry is already explained that how forcing the refugees to return has impacted Pakistan economically. The refugee population also has many positive contributions on the economy of a country. For instance, refugees offer cheap labour, agricultural contributions, and improves bilateral trade. They play the role of both productive producers and consumers in the host economy.<sup>87</sup> They have a contribution to the host economy in the shape of human capital, economic help, international aid. Though it is argued that the gains from refugees are outweighed the burden they impose on the host economy. Contributions of Afghan refugees towards the economic sector of Pakistan are often overlooked due to a lack of official data. Another consideration yet to be explored is the contribution of Afghans informal entrepreneurial activities in generating employment opportunities in the market. Viewed from this perspective, the Afghan refugees can have reinforcing role playing in the Pakistan's economy which needs to be promoted. Not only will this allow for a positive attitude towards Afghan refugees but will also for their effective settlement while they play a contributing role in the country's economy.

The registration of the unregistered refugees must be facilitated by Pakistani Government and be provided the proof of registration. This is important from the perspective of both the government as well as the refugees. From the refugee's perspective it will give them

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<sup>87</sup> UNHCR. *Economic and Social Impacts of Massive Refugee Populations on Host Developing Countries, as Well as Other Countries*. Accessed on December 27, 2020.

valid documentation which will allow for certain legal rights. Moreover, they would not fear the risk of deportation for being undocumented. From the perspective of the government, it will make the situation of the country more secure as the undocumented people would now have proper documentation.

The right to appeal should be given to those unregistered refugees who are convicted for illegal presence in the host country. As discussed in the preceding section, the judicial system is very unfavourable towards Afghan refugees. There cases have been pending for years and access to justice has been a major problem for the Afghan refugees. Although, some legal aid facilities have been made available to the refugees, these are very limited in scope. The government of Pakistan needs to take swift action and provide for the legal remedies to Afghan refugees which are also provided to the ordinary citizens of Pakistan.

Strict border regulations are very important to maintain a check on the movements and only those with proper travel documents be allowed to cross the border. Pakistan has taken strict action in recent times to fence the border across the Durand line. This move has instilled anger not only among refugees but also Pashtun population of Khyber Pakhtunkhwa who cross the border frequently for personal, family and economic reasons. Moreover, several elements within the Afghan government have shown their resentment of Pakistan's move to fence the line. This is due to Afghanistan's refusal to recognize the Durand Line as the two countries' foreign boundary. The Durand Line's fence, on the other hand, is critical for both Pakistan's and Afghanistan's stability, as well as for preventing unrestricted movement of Afghan refugees.

Pakistan should also pay attention to the health care and education facilities offered to the Afghan refugees. Particular emphasis should be paid to educating the refugees as it is fundamental human right and one that will serve the long-term interest of refugees as well as of Pakistan. However, Pakistan being a developing country with limited resources has limited infrastructure in place to facilitate the educational rights of the refugees and would likely need international support to afford such programs.

### **3.3 Recommendations for the UNHCR**

The UN High Commissioner for Refugees (UNHCR) has been instrumental in assisting Afghan refugees in Pakistan. The UNHCR has been involved in Pakistan since the 1980s, with its primary mission being to assist humanitarian efforts financially and institutionally while also providing refugee protection. The costs of hosting a vast refugee community were enormous, and the United Nations High Commissioner for Refugees (UNHCR) bore the brunt of the strain. As Umar Rashid suggests "It cannot be ignored that UNHCR's efforts in Pakistan have been essential in handling one of the greatest and most protracted humanitarian crises in history, and as such should be lauded."<sup>88</sup> The UNHCR should therefore continue in its support of the refugee population by providing the necessary funding to support the refugees in Pakistan. Furthermore, education has been one of UNHCR's core activities, with the organization partly financing Afghan children's

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<sup>88</sup> Rashid, Umar. "UNHCR in Pakistan: Analyzing the Global Governance Regime-Repatriation of Afghan Refugees from Pakistan." *LUMS LJ* 6 (2019): 31.

primary school education and offering legal assistance. These efforts should be continued by the UNHCR.

The continual involuntary repatriation should be put to halt by the UNHCR who needs to be straightforward in the implementation of its mandate. The UNHCR should break the silence on uninterrupted violations of rules of international law and should be bold enough to publicly scold the government for its coercive measures. The UNHCR should reinforce that its support to incentivize the returning refugees does not confirm that the refugees are returning in a friendly environment. This will put pressure on the government of Pakistan who may stop the repatriation of Afghan refugees. However, pressurizing Pakistan would not be so easy. As Dr. Sudha Ramachandran suggests, “it will not be easy to persuade Pakistan to do so, particularly because European countries that are signatories to the 1951 Convention are returning Afghan refugees themselves”.<sup>89</sup>

Albeit the fact that Pakistan implements much of the provisions of the Refugee Convention and its Protocol yet still it cannot be legally bound to ensure full respect except of the principle that forms the part of customary law. One way to resolve this issue is to pressurize Pakistan in signing and ratification of the 1951 Convention and Protocol. This will create a strong legal obligation for Pakistan with respect to the refugees and one that the government of Pakistan cannot wriggle out of. As Grace and Maley argue:

“As a party to the 1951 Convention and the 1967 Protocol, Pakistan could not threaten to send the refugees back and would be forced by a legal obligation to face the consequences of its policy in Afghanistan. This would be a far stronger obligation than any which it arguably bears under customary international law.”<sup>90</sup>

The UNHCR has also provided free legal aid to Afghan refugees. However, this legal assistance has been conditional on the Afghan refugee's legal status, the type of the offence (civil/criminal), and the nationality of the perpetrator/victim.<sup>91</sup> According to the ADSP report, legal assistance is only provided to the Afghan refugees that are permanent cardholders and no legal aid is being provided to the undocumented Afghan refugees. Moreover, according to the same report, UNHCR does not provide legal aid in criminal cases.<sup>92</sup> The UNCHR can improve on this aspect and ensure that legal aid is being provided to as many refugees as possible. Given the problems the Afghan refugees face in dealing with the law enforcement agencies of the country, having access to legal aid can be of instrumental aid to their wellbeing.

### 3.4 Role of the International Community

International assistance both in pooling funds and joint policy making for the millions of refugees living in pitiful conditions for over forty years is a must. Pakistan is

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<sup>89</sup> Pakistan to repatriate Afghan refugees. The Central Asia-Caucuses Analyst. 2017. Available on : < <https://www.cacianalyst.org/publications/analytical-articles/item/13426-pakistan-to-repatriate-afghan-refugees.html>>

<sup>90</sup> Grare, Frédéric, and William Maley. "The afghan refugees in Pakistan." *J Middle East Institute. Refugees Cooperation* (2011).

<sup>91</sup> ADSP, On the margins: Afghans in Pakistan, December 2018.

Also see: UNHCR, Pakistan: Summary of Legal | Assistance and Aid Programme | January, 2020, 14 February 2020,

<sup>92</sup> ADSP, On the margins: Afghans in Pakistan, December 2018.

receiving millions of dollars every year as foreign aid to protect and assist refugees within its territory.<sup>93</sup> But it is evident from this research it has done little to protect. This is time for the international community to divert from traditional assistance to actual protection of Afghan refugees in Pakistan. A list of things to be done should be created by all stakeholders and the top and first priority task should be either Pakistan should sign 1951 Refugee Convention or amend its 1946 National Foreign Act and 1926 Naturalization Law to create legal certainty regarding Afghan refugee status in Pakistan. Limitation on financial aid is a best tool to create pressure on GoP to make positive change in its policies. Recently the European Parliament has passed the resolution against Pakistan to review its Generalised Scheme of Preferences Plus (GSP+) in response of Pakistan's stance on freedom of expression and speech, where the Prime Minister of Pakistan urged western countries that freedom of speech and expression are never absolute, there must be limitation when it extends to sacred religious personalities.<sup>94</sup> This resolution has created huge intensity within the Government to review its policies and relationship with western countries. In the author's view, it will be more adequate for those international institutions who are in an influential capacity should bring refugee severe violations and their legal status issue on the table to put pressure on GoP to change its policy stance towards refugees.

Pakistan, being a developing country, is plagued with an increasing population, limited resources, and lack of infrastructure. This combined with the political instability and insecurity the country has to face, Pakistan lacks the necessary infrastructure to host the Afghan refugees on its soil. Therefore, the international community needs to recognize that it too has to play its part and the burden cannot be left on the shoulders of Pakistan alone.<sup>95</sup> Recent visit of UN General Secretary António Guterres in Pakistan calls the international community to help and show solidarity with refugees and also urge that it is time to act and deliver the results.<sup>96</sup>

At the time of writing this paper, one such positive step is undertaken by Japan, who has pledged to grant nearly four million US dollars to back all the relevant stakeholders and their initiatives.<sup>97</sup> It is a three-year program aiming at providing assistance for necessities, education, and community programs in major cities of Pakistan. The need for vocational training for social reintegration is asserted vital in a ceremony in Islamabad. Repatriation is only possible if the situation is stabilized. During the COVID-19 pandemic, this need is stressed upon the Ministry of States and Frontier Regions (Pakistan) while visiting the

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<sup>93</sup> Afghan refugees: €21 million in humanitarian aid for host communities and vulnerable populations in Pakistan and Iran Available on: <https://reliefweb.int/report/pakistan/afghan-refugees-21-million-humanitarian-aid-host-communities-and-vulnerable> last accessed 29 April 2020.

<sup>94</sup> European Parliament resolution on the blasphemy laws in Pakistan, in particular the case of Shagufta Kausar and Shafqat Emmanuel Available at [https://www.europarl.europa.eu/doceo/document/RC-9-2021-0254\\_EN.html](https://www.europarl.europa.eu/doceo/document/RC-9-2021-0254_EN.html) last accessed 29 April 2021

<sup>95</sup> M. Zubair, M. Aqeel Khan and Muzamil Shah, "Analysis of Pakistan's Policy Towards Afghan Refugees: A Legal Perspective," *Global Political Review* IV (3) (2019): pp.28-38.

<sup>96</sup> UN secretary visit of Pakistan Available at: <https://www.unhcr.org/news/stories/2020/2/5e4b57e14/world-must-act-deliver-afghan-refugees-says-un-chief.html> Last accessed 30 April 2021.

<sup>97</sup> Amin Ahmad (Dawn). *Japan announces \$3.7m for Afghan refugees, host communities in country.* Available on: <https://www.dawn.com/news/1608857>. Accessed January 29, 2021.

refugee camps that the international community must contribute in mitigating the suffering of Afghan refugees which have multiplied to the pandemic outbreak. It should not be forgotten that many of the Afghan crises are the by-product of foreign interventions.<sup>98</sup>

## Conclusion

Millions of Afghans have sought refuge in other nations, mainly Pakistan, due to years of unrest, war, and political turmoil. Due to established economic, kinship, and social network connections and contacts in Pakistan, their transit to Pakistan was fairly straightforward. Pakistan has provided shelter to one of the largest refugee population, who have been settling in the country in vast numbers for the past four decades. However, despite Pakistan's recognition of Afghan refugees for years, their legal status remains unclear. This is because Pakistan is not a party to the relevant international conventions dealing with the issues of refugees. Moreover, Pakistan domestic legal framework lacks a comprehensive outlay of the refugee status. Instead, a patchwork of different laws apply to Afghan refugees making the situation for them particularly difficult. Since Pakistan has generally agreed to uphold the international principles relating to refugee protection and based on the series of treaties concluded between Pakistan and UNHCR, Pakistan has given Afghan refugees prima facie refugee status. However, despite this, the domestic legal framework of Pakistan with respect to Afghan refugees in both inadequate and ambiguous. The absence of the refugee protection mechanism at national level coupled with the ignorance of the prevailing customary principles, Afghan refugees have faced a variety of problems, leaving them vulnerable to injustice and unequal treatment. Hundreds of thousands of Afghan refugees have been coerced by Pakistan to return to a country where circumstances are unfavorable. Several critics have pointed out that Pakistan's intimidation of such a vast number of Afghan refugees into returning to Afghanistan violates the international law against refoulement. There is always a potential of exploitations of the weaker segments including refugees and these factors might be within them or in the surroundings wherein they live (host society). And the situation worsens when the actor loses control over its actions and that costs the lives of not only refugees but citizens as well. This has been the case in Pakistan as well. The crisis of Afghan refugees in Pakistan requires immediate attention by the respective governments of Pakistan and Afghanistan, the UNHCR as well as the international community. Pakistan, being a developing country does not have the capacity to host the Afghan refugees on its soil sustainably. As a result, the international community and the UNHCR must play a part in assisting the Afghan refugee population in Pakistan.

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<sup>98</sup> US intervention in Afghanistan available on <https://www.cfr.org/timeline/us-war-afghanistan> Last accessed 25 April 2021.

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