



FORUM

“What about Me?": How Upholding Non-Refoulement Principles Amidst Turbulent Pakistani-Afghani Relations Paves the Way for a More Peaceful Future

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I. Legal Background

The rights of Afghani refugees in Pakistan are being infringed upon and violated, exacerbating tensions and ongoing ethnic conflicts in the country. On October 3, 2023, Pakistan’s government announced a significant enforcement effort targeting individuals residing in the country without proper documentation. The government indicated its intention to deport these individuals, which has caused concern among undocumented foreigners, including an estimated 1.7 million Afghani nationals. Pakistan’s Constitution does not explicitly include domestic asylum laws and procedures, but this lack of procedural protection does not absolve the state of its obligations to uphold the principle of non-refoulement under international human rights and customary law— which guarantees that no individual person should be returned to a country that has dangerous conditions in which the person would face torture, cruel or degrading treatment or punishment, or other irreparable harm, as Pakistan is in consistent collaboration with the United Nations’ member countries to ensure protection for those seeking safety in the country. Pakistan is a state party of the Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment (CAT), which furthers the necessity of the obligatory implementation of non-refoulement principles. Civic nationalism, which is where a shared identity is centered around the values of the state rather than being concentrated in individual ethnic identities, should serve as the basis for the enactment of laws centered around migrants, rather than the divisive notion of ethnic nationalism exemplified in the forced deportations of Afghan refugees and migrants.

Pakistan's interim Interior Minister, Sarfraz Bugti, clarified that this crackdown is not specific to Afghans and will apply to migrants of all nationalities, even though the majority of migrants in Pakistan are of Afghan origin. The Pakistani government alleges that Taliban-affiliated militants, who traverse the shared 2,611-kilometer border between the two countries, have been responsible for attacks in Pakistan and often find refuge in Afghanistan. This move comes at a time of strained relations between Pakistan and its neighboring Taliban-led Afghanistan. These tensions stem from an ongoing dispute over what is known as the Durand Line, an international border inherited by Pakistan after the country gained its independence in 1947. The Afghani government has always refused to accept this agreement, attempting to seize Pakistan's western provinces of Balochistan and Khyber Pakhtunkhwa over the last few decades. Pakistan has issued repatriation laws that forced residents illegally residing in Pakistan to leave by November 1, 2023.

The *Trial of Pakistani Prisoners of War, Pakistan v. India, Interim Measures, Order (1973) ICJ Rep 328, ICGJ 129*, a case before the United Nations International Court of Justice, considered whether or not to grant Pakistan's request for interim measures regarding the handling of the Pakistani prisoners of war that were currently detained in India. The court heard this case after Pakistan informed the court of its ongoing negotiations with India and requested that the Court postpone consideration of its request for interim measures in order to facilitate those negotiations. This case references the repatriation of prisoners of war and that the process should not be interrupted by the virtue of charges of genocide against a certain number of individuals detained in India. This court decision is what laid the framework for repatriation laws in Pakistan to be both utilized and weaponized against minority groups and prisoners residing in Pakistan. Ultimately, the repatriation laws at hand need to be amended in the context of the geopolitical situation unfolding in Pakistan, as the aforesaid Pakistani Prisoners of War case has made it all the more pertinent to reduce the number of Afghani refugees flowing into Pakistan while protecting the rights and security of existing Afghani refugees currently residing in Pakistan in accordance with non-refoulement laws in Pakistan, as this would help

protect the existing resources and political stability in Pakistan while providing a safe haven for Afghan refugees.

Amidst the uptick of violence directed towards marginalized residents in Pakistan, there has been a push from external factors for the Pakistani government to create laws centered around mitigating the ongoing tensions between Pakistan’s government and Afghani residents through a constitutional standpoint, focusing on how the government can play a crucial role in protecting the civil liberties of its constituents to achieve a more peaceful, safe, and tolerant society. Such a result is pivotal for quelling unrest and civil disobedience that has been plaguing both Pakistan and Afghanistan for centuries. Because Pakistan has a government that is much closer to a liberal democracy than Afghanistan, adopting laws promoting civic nationalism, where a shared identity is centered around the values of the state rather than being concentrated in individual ethnic identities, is a viable solution. Quelling these ethnic conflicts would allow the Pakistani government to perpetuate non-refoulement laws that protect Afghani refugees from returning to a conflict-ridden state while limiting further immigration in an effort to preserve Pakistani resources and political stability.

II. The History and Legality of Non-Refoulement and Forced Removal of Residents

To fully understand the geopolitical context of this issue, it is important to consider the history and legality of repatriation laws and how certain countries have weaponized the ability to forcefully remove residents. Repatriation laws, also known as the exercise of the right of return, is the personal right of a refugee or prisoner of war to return to their country of nationality due to specific circumstances rooted in various international, human rights, and customary international law instruments, which bears similarities to the principle of non-refoulement under international human rights law. This principle is expected to apply to all immigrants at all times, regardless of their citizenship or residency status, and this principle is explicitly delineated in the CAT and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). Non-refoulement laws are implemented without any exception, and it applies wherever a State exercises jurisdiction or effective control, even when it is outside of that particular State’s territory.

One case in particular that references the usage of non-refoulement laws and its significance regarding migrants whose residency status is in question is the COT15 v. Minister for Immigration and Border Protection and Migration Review Tribunal

Appeal decision. The case centered around an Ethnic Hazar from Afghanistan whose family resided in Pakistan and whose subclass 101 visa (which allows a dependent child to enter Australia to live with their parents that are Australian citizens or permanent residents) under the Migration Act of 1958 was canceled. This was because his wife applied for a subclass 309 (Partner) visa that violated the statutory VISA requirements stating that the applicant did not have a spouse or a de-facto partner. The applicant argued that, as an Afghan Hazara with family in Pakistan, being forced to return to Afghanistan would place him and his family in constant danger and fearing kidnapping, shootings, or bombings by Islamic terrorists and cited obligations under Australia's Convention on the Rights of the Child and Article 23 of the International Covenant on Civil and Political Rights relating to family unity and the non-refoulement obligations (a person should not be returned to a country where they faced imminent harm or danger) under the Convention Relating to the Status of Refugees.

It is pertinent to consider the rights of individuals who are seeking asylum, regardless of their citizenship status. In Afghan Asylum Seeker v Federal Office for Migration and Refugees, Decision, 13 A 1294/14.A, ILDC 2387 (DE 2014), 15th September 2014, Germany; North Rine-Westphalia; Higher Administrative Court [OVG], an Afghan citizen applied for international protection in Germany and the asylum authority rejected his application; the applicant filed an appeal but this was rejected. The complaint argued that his right to be heard was violated as German consular officials did not question Afghan witnesses within Afghanistan as part of the evidence-gathering process. Ultimately, the core issues at hand were whether or not the right to be heard required the asylum authority to conduct witness interviews on the territory as part of its evidence gathering in an asylum application process, demonstrating how the rights of minority residents and those residing in a particular area are often overlooked if the individual lacks proper documentation, even in the context of basic human rights.

III. The Danger of Refoulement

The government of Pakistan has recently decided that all of the foreigners currently residing in Pakistan illegally (without valid documentation or those who have overstayed their visas) will be forcefully returned to their country of origin in a "safe and dignified manner." This process, however, is not exempt under the mandatory human rights principle of non-refoulement. Furthermore, the process of voluntary return will continue, and the illegal foreigners returning voluntarily to their country of origin will not be arrested or detained; the process of returning

illegal foreigners is said to be carried out in a 'smooth and transparent manner,' but any form of resistance or exploitation by the targeted individual(s) will be reported to authorities who are then at full discretion to take whatever measures they deem necessary in the name of repatriation. This blatant disregard for non-refoulement principles is extremely dangerous, as the individual human rights and protection of the Afghan immigrants are gravely compromised when they are forcefully sent to a country riddled with conflict and violence. Halting the deportations of Afghan nationals following the Taliban takeover and waiting for the human rights situation to level out in Afghanistan would allow the safe and dignified returns of Afghan immigrants.

As per the appeal in *COT15*: although it is explicitly stated in the Pakistani Constitution, non-refoulement should be enforced for all Afghan refugees currently residing in Pakistan. Pakistan should stop all forced returns and continue to host Afghan nationals who fled for safety. The government must also ensure their full access to procedures where their individual human rights protection needs and their need for effective protection in line with international human rights and refugee standards, are fully assessed. On the basis of civic nationalism, the case of *COT15 v. Minister for Immigration and Border Protection and Migration Review Tribunal* was incorrectly decided; the appeal should not have been dismissed, as individual rights should be constitutionally protected in accordance with non-refoulement principles. Moreover, using civic nationalism as a basis of constitutionality bars cruel and unusual punishments and methods of torture inflicted upon those residing illegally in the country. Ultimately, in order to sustain political stability and maintain a level of human rights protection among Afghan migrants residing in Afghanistan, the Pakistani government must adhere to the principles of non-refoulement in accordance with the United Nations, as a State party, and put forth repatriation laws in practice in an effort to preserve the individual human rights of those seeking asylum.