

**NON-REFOULEMENT AND  
PAKISTAN'S GO-HOME ATTITUDE:  
A CASE STUDY OF AFGHAN REFUGEES**

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DATA ENTERED



BY

**AḤMAD KHĀLID ḤĀTAM**

UNDER THE SUPERVISION OF

**PROFESSOR MUḤAMMAD MUSHTĀQ AḤMAD**

AT THE

**FACULTY OF SHARI'AH AND LAW  
INTERNATIONAL ISLAMIC UNIVERSITY ISLAMABAD**



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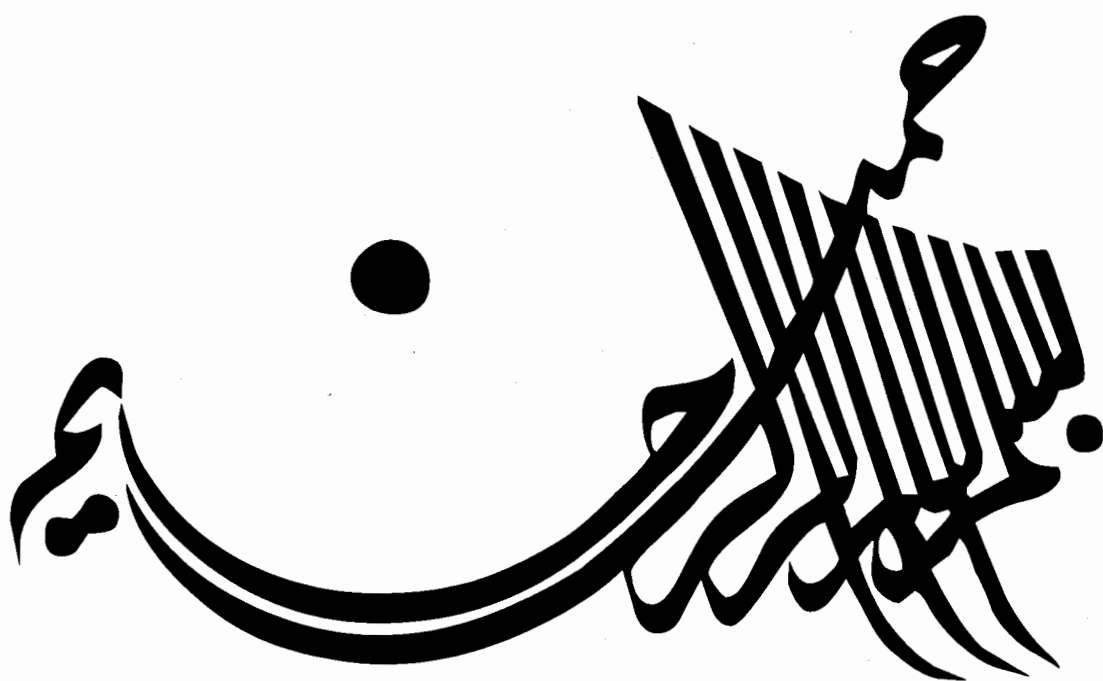


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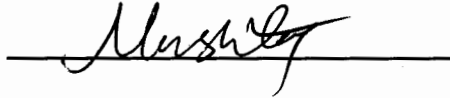
**By**

**AḤMAD KHĀLID ḤĀTAM**

Accepted by the Faculty of Shariah and Law, International Islamic University  
Islamabad (I.I.U.I.) in partial fulfillment of the requirements for the award of the  
degree of LL.M (International Law)

Master's (LL.M) Committee:

Supervisor

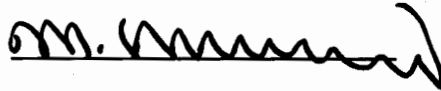


**Muḥammad Mushtāq Aḥmad**

**Assistant Professor,**

**Department of Law, I.I.U.I**

Internal Examiner

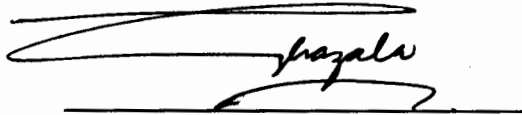


**Dr. Muḥammad Munīr**

**Assistant Professor,**

**In-charge Department of Law, I.I.U.I**

External Examiner



**Ghazāla Mirzā**

**Assistant Protection Officer,**

**U.N.H.C.R. Islamabad**

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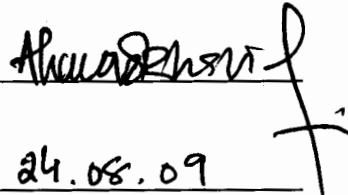
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**DECLARATION:**

I, **Aḥmad Khālīd Ḥātām**, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

**Student:**      **Aḥmad Khālīd Ḥātām**

**Signature:**      

**Date:**      24.08.09

**Supervisor:**      **Prof. Muḥammad Mushtāq Aḥmad**

**Signature:**      

**Date:**      24.08.09

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Last but not least, I am grateful to my parents, family and friends for the sincere support they provided me throughout my life. I thank them all, for being there when I needed their support the most.

**DEDICATION:**

To the Afghan Refugees.

To my Parents whose inspirations, wisdoms, prayers, persistent support, encouragement  
and indignation have brought me where I stand today,

I am truly grateful for your unswerving support.

## LIST OF ACRONYMS:

AIHRC	Afghan Independent Human Rights Commission
CAT	Convention Against Torture 1984
EX-Com	Executive Committee of UNHCR's Program
GoA	Government of Afghanistan
GoP	Government of Pakistan
ICCPR	International Covenant on Civil and Political Rights 1979
ICJ	International Court of Justice
ICJ	International Commission of Jurists
IDP	Internally Displaced Person
IRO	International Refugee Organization
MoRR	Ministry of Refugees and Repatriation (Afghanistan)
OAU	Organization of African Unity
PDPA	Peoples Democratic Party of Afghanistan
QIP	Quick Impact Projects
SAFRON	Ministry of States and Frontiers Regions, Pakistan
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMA	United Nations Assistance Mission for Afghanistan
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner For Refugees
UNICEF	United Nations Children's Fund
UNRRA	United Nations Relief and Rehabilitation Agency
UNSC	United Nations Security Council
USCRI	United States Committee for Refugees and Immigration

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## ABSTRACT:

*This thesis appraises the degree of conformity of the Pakistani legal system with the requirements of the principle of non-refoulement. It is contended that the principle forms part of customary international law and as such it is binding on all states irrespective of whether or not they are parties to the Convention Relating to the Status of Refugees 1951 or its Protocol 1967.*

*The thesis also assesses the performance of Pakistan in dealing with Afghan refugees on its territory. For this purpose, a thorough study of the Pakistan's legal regime dealing with foreigners has been conducted in the light of the principle of non-refoulement. It is concluded that Pakistani law does not distinguish between the legal status of a foreigner and a refugee. As such Pakistan is not performing its obligations under international law specifically the obligation of non-refoulement.*

*The notion of repatriation has also been examined in detail with specific reference to the Afghan repatriation programs carried out by the UNHCR and the Governments of Pakistan and Afghanistan. It has been concluded that proper care has not been taken in carrying out these repatriation programs. This is because the time was not appropriate for executing any of the repatriation programs due to problems of security and gross violations of human rights particularly economic and social rights.*

\*\*\*\*\*

## INTRODUCTION:

The principle of *non-refoulement*, in basic terms, is a tool to offer protection to an individual or a group who does not enjoy the protection of their country of origin and are hence at the border of another state or have entered it looking for such protection.

It is very important to understand the meaning, scope and status of the principle by looking to the *travaux préparatoires* and subsequent juridical developments in the field of the refugee law as well as the international human rights law. It, however, seems that state practice has not been consistent in respecting the principle. It is in this sense that questions are raised whether the principle is a norm of customary international law? How would we deal with the issue of violations and attack on the principle?



Moreover, the link between voluntary repatriation of refugees and *non-refoulement* seems vital for understanding the fact that lack of voluntariness on the part of refugees to return would turn the process of repatriation to *refoulement* and hence would be in disconformity with refugee law as well as human rights law.

As this study focuses on the case of Afghan refugees in Pakistan, this work attempts to ascertain whether Afghans are refugees in Pakistan? What is the position of Pakistani legal regime in respect of refugees? After arriving at an answer to the above questions, an attempt would be made to assess whether the tripartite agreements between Governments of Pakistan, Afghanistan and the UNHCR for repatriation of refugees could be legally justified despite the fact that the situation in Afghanistan did not improve from any aspect including security and human rights?

#### LITERATURE REVIEW:

It has been a matter of consistent debate over the last fifty years whether the principle of *non-refoulement* has qualified the status of a norm of customary international law or it still has to be practiced as a moral obligation only.

The issue of qualification of the principle seems to be settled down to a large extent in the light of the opinion of Elihu Lauterpacht and Daniel Bethlehem<sup>1</sup> during the 2001 Global Consultations of the United Nations High Commissioner for Refugees (UNHCR) where it was asserted that the principle had become part of customary international law. It was argued that a very widespread and representative participation in

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<sup>1</sup> UNHCR, *the Scope and Content of the Principle of Non-refoulement, Opinion*, Sir Elihu Lauterpacht and Daniel Bethlehem (20 June 2001). Available online at, <http://www.unhcr.org/publ/PUBL/419c75ce4.pdf> > (last accessed 02.02.09).

the convention rule has been witnessed and 90% of the UN membership is party to one or another convention containing the principle of *non-refoulement*.<sup>2</sup>

In addition, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligation under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*<sup>3</sup> provides an overview of states' *non-refoulement* obligations with regard to refugees and asylum seekers under international refugee and human rights law. It also casts light on extraterritorial applicability of the principle of *non-refoulement* under the 1951 Convention and its 1967 Protocol.

Practically, however, the principle has been under attack as violations are frequently committed by states. Professor Guy S. Goodwin-Gill has discussed in brief the issue of history and scope of the principle of *non-refoulement* from refugee, human rights and extradition contexts while emphasis has been laid down on the attacks on the principle. He is of the opinion that the diplomatic assurances as justifications for extradition or removal of refugees lack efficacy and they add nothing to the obligations of receiving states much as they in no way diminish any of the sending states' obligations.<sup>4</sup>

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<sup>2</sup> The discussion has recently shifted from status of the principle to the issues of Complementary or subsidiary protection for individual refugees falling outside the scope of the 1951 Convention and temporary protection in mass influx situations. See for instance, Edward R Grant, *Vulnerable Categories and Subsidiary Protection: the Trends Toward Harmonization and Consolidation*, online at, <[http://www.upf.pf/IMG/pdf/24\\_Grant.pdf](http://www.upf.pf/IMG/pdf/24_Grant.pdf)> (last accessed 05.01.2009), *Temporary Protection*, online at <[http://www.ecre.org/topics/asylum\\_in\\_EU/temporary\\_protection](http://www.ecre.org/topics/asylum_in_EU/temporary_protection)> (last accessed 10.08.2009), and respect for *non-refoulement* through time, see, Jean Francois Durieux and Jane McAdam, "Non-refoulement Through Time: the Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies", *International Journal of Refugee Law*, 16:1 (2004), 4-24. In addition efforts are made to address refuge and human rights at same level so that the 1951 Convention is not discussed in isolation from other human rights treaties. This Interpretation, of the 1951 Convention in combination with the human rights treaties, is called 'rights based refuge'. See Tom Clarke, "Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation", *International Journal of Refugee Law*, 16:4 (2004): 584-608.

<sup>3</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*. See online at, <<http://www.unhcr.org/refworld/docid/45f17a1a4.html>> (last accessed 02.02.09).

<sup>4</sup> See his, *Overview of History and Current Scope of Non-refoulement and Current Attacks on the principle in Non-Refoulement Under Threat*, a seminar held jointly by the Redress Trust (REDRESS) and the Immigration Law Practitioners' Association (ILPA) (November 06). See,

The problem of attacks on the principle has intensified in the wake of 9/11 events in New York and Washington D.C due to the so-called 'anti-terror measures' taken all over the world. Alice Farmer criticizes these measures in his *Non-Refoulement and Jus Cogens: Limiting Anti-terror Measures that Threaten Refugee Protection*<sup>5</sup> asserting that the principle of *non-refoulement* is a *Jus Cogens*. He maintains that strict limits should be observed on the exceptions to the principle enshrined in the 1951 Convention. Furthermore, he is of the opinion that strict adherence to the exception criteria of the 33(2) could well serve the purpose of defying terror vitiating the need to create more exceptions and exemptions.

Focusing on the Afghan scenario, the Afghan refugees arrived in Pakistan consequent to the Soviet occupation in 1979 where they were initially welcomed but a harsh attitude was adopted later on. This transformation in attitude has been well elaborated by Lester A. Zeager<sup>6</sup> where he points out that there is a link between non-compliance in refugee asylum with the configuration of interests between the asylum and donor countries.

The problem with this study is that economic considerations were held liable to a larger extent for asylum denials, while the case of Afghan refugees differs as the government of Pakistan (GoP) always called for repatriation of refugees on the basis of commencement of reconstruction in Afghanistan or challenges to national security within Pakistan. Further, the issue of decrease in donations arose in 1991 after the Soviet withdrawal but the phenomenon of *refoulement* emerged in 1996 onwards.

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<http://www.redress.org/publications/Non-refoulementUnderThreat.pdf> > (last accessed 02.01.2009).

<sup>5</sup> Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-terror Measures that Threaten Refugee Protection* <[http://works.bepress.com/alice\\_farmer/1/](http://works.bepress.com/alice_farmer/1/)> (last accessed 12.08.2009).

<sup>6</sup> Lester A. Zeager, *Diagnostic Tools for Refugee Asylum Crises: An Application to Afghan Refugees in Pakistan, 1997-2001*, available online at <<http://www.ecu.edu/cs-educ/econ/upload/AfghanRefugees.pdf>> (last accessed 12.08.2009).

The Human Rights Watch and Amnesty International have given account of the Afghan refugees in Pakistan, repatriation and the reintegration of the returnees inside Afghanistan<sup>7</sup> while reports of UNHCR highlights the security, human rights and social issues inside the country.

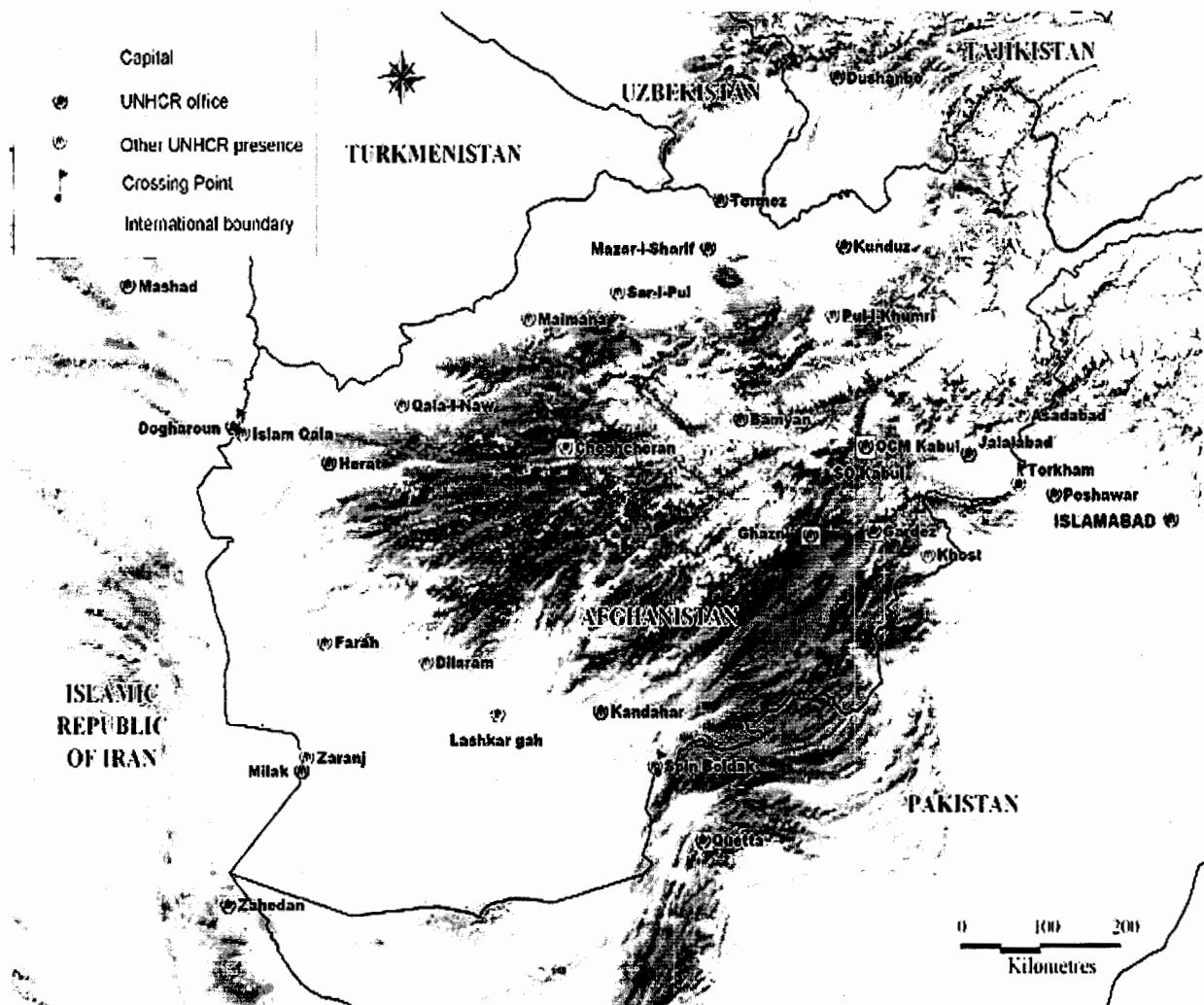
As could be seen from the above that although work has been carried out on the issues of the status of *non-refoulement*, Afghan refugees in Pakistan and their repatriation on various levels, nonetheless a comprehensive study of all the above in a single document is required in order to analyze the status of *non-refoulement*, Afghan refugees in Pakistan and their repatriation programs conducted by Governments of Pakistan, Afghanistan and UNHCR. This research thus aims at establishing that Afghan refugees, irrespective of their declaration as such, enjoy the benefit of Article 33(1) of the 1951 Convention and hence could not be returned against their will to Afghanistan.

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<sup>7</sup> See for instance, Human Rights Watch World Report 2002, *Refugees, Asylum Seekers, Migrants and Internally Displaced Persons*, see, < <http://www.hrw.org/legacy/wr2k2/pdf/refugees.pdf> > (last accessed 12.08.2009), Amnesty International, *Out of Sight Out of Mind: the Fate of the Afghan Refugees*, see, < <http://www.amnesty.org/en/library/asset/ASA11/014/2003/en/9f3e291e-d6d2-11dd-ab95-a13b602c0642/asa110142003en.html> > (last accessed 12.08.2009).

# CHAPTER ONE

## NON-REFOULEMENT AND INTERNATIONAL LAW



Source: <http://www.unhcr.org/publ/PUBL/4487e8f72.pdf> (last accessed 24.05.09)

## 1.1 INTRODUCTION:

The term *non-refoulement* is derived from the French term “*refouler*” which denotes to drive back or to fend off, “as of an enemy who fails to breach one’s defenses”<sup>1</sup> while the English translation of the term includes words like ‘repulse’, ‘repel’ or ‘drive back’.<sup>2</sup> The principle, according to many at the international arena, constitutes the cornerstone of international refugee<sup>3</sup> protection.<sup>4</sup> *Refoulement*, on the other hand, signifies the removal of a person to a territory where he/she would be at risk of being persecuted, or of being moved to another territory where he/she apprehends the risk of persecution.<sup>5</sup> *Refoulement*

<sup>1</sup> Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1985), 69.

<sup>2</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, para 27. See, <http://www.unhcr.org/refworld/docid/45f17a1a4.html> (last accessed 02.02.09). (Hereinafter, *the Advisory Opinion*).

<sup>3</sup> The term refugee is defined by the Convention relating to the Status of Refugees 1951 as the person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. However, the customary international law, in B.S. Chimni’s view, has amplified the scope of the term ‘refugee’ from that enshrined in the 1951 Convention and has caused inclusion within the ambit of the term of displaced persons who are not protected by the government of their country of origin. Guy S. Goodwin Gill, “Non-refoulement and the New Asylum Seekers”, in, *International Refugee Law a reader*, ed. B.S. Chimni (New Delhi: Sage Publications, 2002), 109.

<sup>4</sup> Scheinin Martin, *Non-Refoulement under the ICCPR* (November 2004), 3. See, [http://www.karen.abo.fi/juscogens/texts/11Non-refoulement\\_ICCPR.doc](http://www.karen.abo.fi/juscogens/texts/11Non-refoulement_ICCPR.doc) (last accessed 02.02.09).

<sup>5</sup> Persecution, in Hathaway’s view, is ‘the sustained or systematic violation of basic human rights demonstrative of a failure of state protection’. A well founded fear of persecution exists when one reasonably anticipates that the failure to leave the country may result in a form of serious harm which a government cannot or will not prevent”. See, Gorlick Brian, “The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees”, *International Journal of Refugee Law*, 11:3 (1999), 479-495 at 480.

While according to para. 65 of the *Handbook on Criteria and Procedures for Determining Refugee Status*: “persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. ... Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities,

or deterring refugees constitutes a violation of the principle of *non-refoulement*, and is therefore a breach of refugee law and of the customary international law.<sup>6</sup>

As a consequence of the state-practice during the last 150 years the practice or moral obligation of *non-refoulement* got transformed into the principle of *non-refoulement* recognized in 1933, following its mere existence at the era of League of Nations.

### 1.1.1 Evolution of the Principle:

Human beings have suffered great problems due to the enmity, hatred and lust-for-more incorporated in their nature, compelling them to find alternatives in-case they are 'stateless' or unable to live at a specific area. Hence, they had to develop institutions for their own survival and putting an end to or at least restricting the effects of those problems. The same fact is true for the evolution of the notions of refuge and asylum with addition of the principle of *non-refoulement* subsequently. It is, hence, assumed that an insight of the circumstances and reasons surrounding the development of the principle would help understand it.

Considering the history, the development of Islamic notion of *Hijra*<sup>7</sup> (Refuge) seems to be the first systematic approach to finding a solution to the problem of displacement.

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or if the authorities refuse, or prove unable, to offer effective protection." See, UNHCR, *Update of the Situation in Afghanistan and International Protection Considerations* (Jul 2003), 33.

<sup>6</sup> *Refugee Protection: A Guide to International Refugee Law* (the Inter-Parliamentary Union with the Office of the United Nations High Commissioner for Refugees 2001), 131.

<sup>7</sup> *Hijra* denotes the migration from *Dār-ul-Kufr* (the Domain of Disbelief) to *Dār-ul-Islām* (the Domain of Islam). See, Ibn-e-Qudamah, *Al-Mughni* (Cairo: Hijr Publishers, 1990), 13:135. The difference between both of the domains is that while the former refers to the territory under the effective control of non-Muslims where their own laws are applied, the later refers to the domain where Muslims exercise effective and 'seemingly permanent control'. For a comprehensive study of the notion of domains, see, Muhammad Mushtaq Ahmad, "The Notions of *Dār al-harb* and *Dār al-Islām* in Islamic Jurisprudence with Special Reference to the *Hanafi* School" *Islamic Studies*, 47 (2008), 5-37. While the concept of *Hijra* in Islamic law differs with concept of refuge principally in as much as *Hijra* is a sacred duty undertaken by Muslims whenever they are unable to carry out their religious duties. The questions of voluntary and involuntary movement of *Muhajirin* (pl. of *Muhajir*, a refugee) and the existence of persecution are secondary considerations. For an analysis of the concept and the chronology of *Hijra* expeditions see, Astri Suhrke, "Refugees and Asylum in the Muslim World," in *International Refugee Law: A reader*, ed. B.S. Chimni (New Delhi: Sage

Prophet Muhammad (peace be upon him) asked his companions to move to Ethiopia initially and commanded them to move to Madinah in 622 A.D because they were unable to practice their religious functions in Makkah.<sup>8</sup>

Later on, agreements were concluded among various states for reciprocal surrender of the deserters and traitors and it was only the mid-nineteenth century when the concepts of asylum and non-extradition of political offenders were introduced into reality.<sup>9</sup> The idea of *non-refoulement* emerged as a consequence of the popular support for the persons fleeing their country due to persecution and arbitrary treatment of the governments.<sup>10</sup>

Although by 1905 the UK Statute of Aliens Act 1905 (S. 1) incorporated permission for entry to persons with a fear of persecution for political or religious reasons, the idea of *non-refoulement* of such people was recognized subsequent to the World War I, when the members of the League of Nations agreed to issue identity certificates to Russian refugees for travel onwards.<sup>11</sup> Hence, as a matter of fact, the notion of *non-refoulement* did exist in the international dialogue during the era of the League of Nations.

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Publications, 2002), 94. The Holy Qur'an affirms the status of *Hijra*: "Those whose lives are terminated by the angels, while in a state of wronging their souls, the angels will ask them, "What was the matter with you?" They will say, "We were oppressed on earth." They will say, "Was God's earth not spacious enough for you to emigrate therein?" For these, the final abode is Hell, and a miserable destiny". (4:97). Being a duty, a religious obligation, an exemption is granted to the "weak men, women, and children who do not possess the strength nor the means to find a way out. These may be pardoned by God. God is Pardoner, Forgiver." (4:98). While the consideration for the said obligation, according to the holy Quran, is "anyone who emigrates in the cause of God will find on earth great bounties and richness. Anyone who gives up his home, emigrating to God and His messenger, then death catches up with him, his recompense is reserved with God. God is Forgiver, Most Merciful." (5:97-99), translation of the Holy Qur'an by Dr. Rashad Khalifa.

<sup>8</sup> Although the principle of *non-refoulement* was not specifically recognized, a verse of the holy Quran did command Muslims in relation to a non-Muslim to 'send him back to his place of security' once he was in an Islamic state seeking safe passage in order to hear words of Allah. (9:6). See the discussion on 'obligations under Islamic law' in chapter 2.

<sup>9</sup> Gill, *The Refugee in International Law*, 70.

<sup>10</sup> Harun Rashid, *Refugees and the Legal Principle of Non-Refoulement (Rejection)*, 1, available online at: <http://www.thedailystar.net/law/2005/07/02/index.htm> (last accessed 02.01.2009).

<sup>11</sup> Gill, *The Refugee in International Law*, 70.



Similarly, under a 1928 Arrangement, States had agreed to accept a series of legal provisions related to social, economic and legal status of Armenian and Russian refugees.<sup>12</sup>

However, its formal recognition in international law took place in the 1933 Convention Relating to the International Status of Refugees,<sup>13</sup> Article 3 of which states that the contracting state-parties must avoid removing<sup>14</sup> resident refugees from their territory. Only nine States ratified the Convention but it was by virtue of this convention that *non-refoulement* acquired the status of international treaty law.<sup>15</sup>

In 1934-38, the European countries were stimulated by the refugees from the Nazi Germany to kowtow to the legal principle of *non-refoulement*. The principle, hence, found expression in the '1936 Arrangement on the Status of Refugees among several European States that "No refugees shall be sent back across the frontier of the Reich (Nazi Germany)".<sup>16</sup> Hereby and as a result of other developments the need for immunizing

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<sup>12</sup> Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (New York: Oxford University Press, 1993), 38. They agreed on the point that "Measures for expelling foreigners or taking such other action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighboring country in a regular manner". See, Rashid, *Refugees and the Legal Principle of Non-Refoulement*.

<sup>13</sup> Jessica Rodger, *Defining the Parameters of the Non-Refoulement Principle* (Wellington: Victoria University, 2001), 3.

<sup>14</sup> These steps were taken in treatment of the Russian, Armenian and assimilated refugees as defined in 1926 and 1928 agreements. They were issued the so-called Nansen passports and an agreement took place that they would not be expelled, except for reasons of public order and safety. They were, in addition, given free access to the courts and were exempted from application of the principle of reciprocity. See, Sir Robert Jennings, Sir Arthur Watts, *Oppenheim's International Law, Peace, Introduction and Part I* (Singapore: Pearson Education, 9th Edn., 1996), 1:892-3.

<sup>15</sup> France and the United Kingdom, the most important powers of that time, were among the parties to the convention. The UK, however, did not accept the second paragraph of Article 3. See, Jaeger Gilbert, *On the History of the International Protection of Refugees*, International Committee of the Red Cross (ICRC) 83:843, (2001), 727, available online at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JREE/\\$File/727\\_738\\_Jaeger.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JREE/$File/727_738_Jaeger.pdf) (last accessed 19.04.2009).

<sup>16</sup> Rashid, *Refugees and the Legal Principle of Non-Refoulement*.

principle of *non-refoulement* firmly emerged and the principle of *non-refoulement* received recognition in various international conventions.<sup>17</sup>

### 1.1.2 The 1951 Convention

A landmark was achieved on 14<sup>th</sup> December 1950 when through resolution 428 (V), the United Nations General Assembly (UNGA) adopted the UNHCR's Statute whereby the UN members agreed on a common description of the refugee concept. The following year, through the 1951 Convention and subsequently the 1967 Protocol, the international community laid down the cornerstone of international refugee law including the most fundamental of all international refugee law obligations codified in Article 33 of the 1951 Convention - the prevention of *refoulement*.<sup>18</sup>

The prohibition of sending, expelling, returning or otherwise transferring (*refoulement*) a refugee to a territory where he or she would face persecution on account of his or her race, religion, nationality, membership of a particular social group or political opinion is incorporated in the 1951 Convention on the Status of Refugees,<sup>19</sup> its 1967 Protocol<sup>20</sup> and is enshrined in numerous universal and regional instruments.

In addition to protection<sup>21</sup> of asylum seekers from being sent back or repelled against their will including deportation, expulsion, extradition, informal transfer or

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<sup>17</sup> A detailed study of the conventions on the subject is available at Gilbert, *On the Study of History of the International Protection of Refugees*.

<sup>18</sup> Erika Feller, "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come", *International Journal of Refugee Law*, 18:3-4, 509-536 at 512.

<sup>19</sup> *UN Convention Relating to the Status of Refugees*, adopted 28 July 1951 and entered into force 22 April 1954, (189 UNTS 137). <[http://www.unhcr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhcr.ch/html/menu3/b/o_c_ref.htm)> (last accessed 02.02.09). (Hereinafter the 1951 Convention).

<sup>20</sup> *UN Protocol Relating to the Status of Refugees*, adopted 31 January 1967 and entry into force 4 October 1967, (606 UNTS 297). (Hereinafter the 1967 Protocol).

<sup>21</sup> It must be clarified regarding the concept of 'protection' that it is not defined in any international or regional refugee or human rights instrument, this may thus, indicate that "there is no singular concept of 'protection' in international law", Goodwin-Gill terms it as "term of art". See, Jane McAdam, *Complementary Protection in International Refugee Law* (Great Britain: Oxford University

“renditions”,<sup>22</sup> the principle, nevertheless, connotes the protection from military attacks by home country’s armed forces and from legal and economic exploitation by the host nation. It also includes the provision to the displaced aliens by the host nation of the same legal, police and military protection that they extend to their own citizens.<sup>23</sup>

The principle of *non-refoulement* is also considered to apply in the sphere of human rights to prohibit the forceful reversion or transfer of a person to a country where he or she may face persecution and torture.<sup>24</sup>

Since its expression in section 33 (1) of the 1951 Convention, the principle has played a key role in governing the conduct and behavior of the states dealing with refugees and asylum seekers. Notwithstanding the viability of the *non-refoulement* principle contained in Article 33 (1), Article 33 (2) of the 1951 Convention permits derogation from the principle in order to protect “security of the country” in-case a refugee “has been convicted by a final judgment of a particularly serious crime”<sup>25</sup> and is thereby “a danger to the community of that country”.

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Press, 2007), 35. Notwithstanding this, the phrase ‘International Protection of Refugees’ is described by UNHCR as “interventions by states or UNHCR on behalf of asylum-seekers and refugees to ensure that their rights, security and welfare are recognized and safeguarded in accordance with international standards. Such interventions include: ensuring respect for the principle of *non-refoulement*, admission to safety, access to fair procedures for the determination of refugee status, humane standards of treatment and the implementation of durable solutions” while “UNHCR is the only [UN] agency with a mandate for the protection of refugees”. See, UNHCR, IPU, *Refugee Protection: a Guide to International Refugee Law* (2001), 129. While according to Erika Feller the ‘Effective protection is the quality protection’. See, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come”, *International Journal of Refugee Law*, 18:3-4 (2006), 509-536 at 516.

<sup>22</sup> *The Advisory Opinion*, para. 7.

<sup>23</sup> Gil, *Beyond Charity*, 143.

<sup>24</sup> *Non-Refoulement Under Threat*, a seminar held jointly by the Redress Trust (REDRESS) and the Immigration Law Practitioners’ Association (ILPA) (November 06), 2. See, <http://www.redress.org/publications/Non-refoulementUnderThreat.pdf> > (last accessed 02.01.2009).

<sup>25</sup> A serious offence is ‘one that would on the facts attract a long period of imprisonment, and should include direct and personal involvement’. See, *Summary Conclusions: Exclusions from Refugee Status*, Expert roundtable organized by the United Nations High Commissioner for Refugees and the Carnegie Endowment for International Peace, hosted by the Luso-American Foundation for Development, Lisbon, Portugal, 3-4 May 2001. See, <http://www.unhcr.org/publ/PUBL/419dbaa44.pdf> > (last accessed 02.02.09).

The exceptions in the 1951 Convention highlight the reality that while the asylum states have accredited the notion of not sending a person back to an impending situation of torture, they have not recognized a non-derogable right of refugees to settle therein. Nonetheless, the principle of *non-refoulement* and its status as a peremptory<sup>26</sup> norm<sup>27</sup> has been entrenched in the human rights law. Besides, Article 42 of the 1951 Convention affirmed by Article VII (1) of the 1967 Protocol transforms the principle into a non-derogable liability of receiving states.<sup>28</sup>

Due to the said developments and as a peremptory norm; human rights treaty bodies, regional human rights courts, and domestic courts have ruled that the right to be free from torture, cruel, inhuman or degrading treatment is absolute and could not be violated under any circumstances. Asylum-seekers and refugees have used the application of the rule of prohibition against torture, cruel, inhuman or degrading treatment in an attempt to prevent extradition. This strategy has been particularly successful in terms of the International Convention against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR) at the universal level and the European Convention on Human Rights (ECHR) at the regional.<sup>29</sup>

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<sup>26</sup> Rules of *Jus Cogens* or peremptory norms of general international law are defined in Article 53 of Vienna Convention of the Law of treaties 1969, as norms 'accepted and recognized by the international community of states as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. See, Jennings and Watts, *Oppenheim's International Law* 1:7.

<sup>27</sup> See the discussion in "1.4: Is It Part of Customary Law, Then?" and the related Ex-Com Conclusions.

<sup>28</sup> Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 2. See, [http://www.worksbepress.com/context/alice\\_farmer/article/1000/type/native/viewcontent](http://www.worksbepress.com/context/alice_farmer/article/1000/type/native/viewcontent) (last accessed 02.01.2009).

<sup>29</sup> Claire Reid, *International Law and Legal Instruments* (March 2005), 9. See online at: <http://www.forcedmigration.org/guides/fmo038/> (last accessed 18.02.09).

### 1.1.3 Other International and Regional Instruments:

Grant or denial of asylum is the business conducted at the states level in exercise of the sovereign rights of a state. This right however, is exercised keeping in view the human rights' context of each and every case. It, therefore, seems obvious that a state is not bound to grant asylum to any person just as it's not bound to extradite a person to a state except in case of extradition arrangements among the states concerned. So the issue of sovereignty seems significant in this aspect. The problem could, however, emerge where a state has extradition treaty with another and the former has in the meanwhile granted asylum status to a person, in case the later demands extradition of the asylee would he be handed over to that state? Would importance be given to the humanitarian obligation of the state or the obligation under the international law; to honor its commitment under the treaty? Here asylum emerges as a pure matter of human rights.

Considering the viability of human rights, the UN Charter have made a mention of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" among its purposes and principles. Similarly, Article 55 of the Charter, a standard-setting provision, calls for promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" while according to Article 56 "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".<sup>30</sup>

Subsequently, the Universal Declaration of Human Rights 1948 (UDHR) in article 14(2) recognizes the right to seek asylum of every person in need of protection. From this brief discussion we can assert that as refugee situations and request for asylum status

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<sup>30</sup> For complete text of the UN Charter, visit: <<http://www.un.org/en/documents/charter/>> (last accessed: 23.07.09).

are primarily results of human rights violations at the country of origin, so the right of the affected masses to seek asylum raises issues relating to human rights.

Following the World War II, a new era began for refugees. On 12<sup>th</sup> Feb 1946 the UN GA Resolution # 8(X), OP(c) (ii) accepted *inter alia* that the 'refugees or displaced persons' with 'valid objections' to the decision of returning to their homeland should not be compelled to do so.<sup>31</sup>

The 1949 Geneva Convention on the Protection of Civilian Persons (GC III)<sup>32</sup> in Article 45 provides:

*" Protected Persons shall not be transferred to a Power which is not a party to the Convention... ..in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs ".*

The Convention utterly rejects the possibility of transferring a person to a 'country' where he would be persecuted without any mention of the circumstances leading to the derogation, rather, it has maintained that 'in no circumstances' a person could be transferred to a place where the concerned person would be exposed to persecution.

The best-known form of codification of the principle took place in the 1951 Convention's Article 33 (1) which provides:

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<sup>31</sup> The resolution reads as "(c) recommends to the Economic and Social Council that it take into consideration in this matter the following principles: ...

(ii) no refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge of the facts, including adequate information from the governments of their countries of origin, expressed valid objections to returning to their countries of origin and who do not come within the provisions of paragraph (d) below, shall be compelled to return to their country of origin. The future of such refugees or displaced persons shall become the concern of whatever international body may be recognized or established as a result of the report referred to in paragraphs (a) and (b) above, except in cases where the government of the country where they are established has made an arrangement with this body to assume the complete cost of their maintenance and the responsibility for their protection."

<sup>32</sup> (21 October 1950) 973 UNTS 287.

"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." <sup>33</sup>

The provision is discussed in detail *supra* in 1.1.2.

The European Convention on Human Rights 1950 (ECHR)<sup>34</sup> in its Article 3 states that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The Article was interpreted by the European Commission on Human Rights so as to contain a *non-refoulement* component.<sup>35</sup>

The 1966 Asian-African Refugee Principles,<sup>36</sup> Art. III (3) states:

*"No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory."*

A development could be observed in the wording of the provision, inasmuch as it clearly includes the instance of 'rejection at the frontier' within the ambit of the principle; it further adds a confirming statement to the above contention stating 'compelling [the refugee]... to remain in a territory' where he fears persecution, denoting that the person has not yet arrived at the potential country of asylum and is on his homeland soil, and even then the rejection would amount to *refoulement*.

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<sup>33</sup> UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (Geneva: Division of International Protection UNHCR, 1995), 1:22. (Hereinafter UNHCR Collection of Texts on Refugees and Displaced Persons).

<sup>34</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols 1, 2, 3, 4 and 5, Signed in Rome on 4 November 1950. For full text see, UNHCR *Collection of Texts on Refugees and Displaced Persons*, 2:239.

<sup>35</sup> *Non-Refoulement Under Threat*; a seminar held jointly by the Redress Trust (REDRESS) and the Immigration Law Practitioners' Association (ILPA) (November 06), 16.

<sup>36</sup> As adopted by the Asian-African Legal Consultative Committee at its eighth Session, Bangkok, 1966. See, UNHCR, *Collection of Texts on Refugees and Displaced Persons*, 2:10.

The 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>37</sup> Article 7 prohibits subjecting a person “to torture or to cruel, inhuman or degrading treatment or punishment” while Article 13 states that “anyone who is lawfully within the territory of a state shall not be expelled from that state without due process”.

It is pertinent to note here that Article 7 prohibits seven acts, i.e. Torture, cruel treatment and punishment, inhumane treatment and punishment and degrading treatment and punishment, while Article 13 narrows down the scope of *non-refoulement* from that contained in the 1951 Convention, for it restricts the advantage of the present provision to only those ‘who [are] lawfully within the territory of a state’. Moreover, the criterion being the ‘due process’ the causes for exemption are not listed.

The 1967 UN Declaration on Territorial Asylum, Article 3 asserts:

“1. No person referred to in Article 1, paragraph 1 [seeking asylum from persecution in accordance with Article 14 of UDHR], shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this Article would be justified, it shall consider the possibility of granting the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State”.<sup>38</sup>

This seems to be a complete version of the principle, as it not only unreservedly reiterates the prohibition of *refoulement* from frontiers and from within, e.g. expulsion and forceful return, but it also contains the rule of temporary refuge being awarded to

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<sup>37</sup> (19 December 1966) 999 UNTS 171.

<sup>38</sup> Adopted by UNGA on 14 December 1967 (Resolution 2312 (XXII)). See, UNHCR, *Collection of Texts on Refugees and Displaced Persons*, 1:72.



refugees in cases of mass influx. It further calls on states to avoid deporting the asylum seekers as soon as they are declared disqualified for the refugee status; they should rather be provided the opportunity to resettle in a safe third country, thus, the Article imposes limitation on the authority of a state to take benefit of the exception and expel or return a refugee out of its territory.

The 1969 Organization of African Unity (OAU) Refugee Convention<sup>39</sup>, Article II (3) says:

*"No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2."*<sup>40</sup>

After going through this provision one can observe a somehow broader and detailed approach adopted, because threat to 'life, physical integrity or liberty' are elaborated as instances of persecution and hence as factors for entitlement to refugee status.

The 1969 American Convention on Human Rights,<sup>41</sup> Article 22(8) reads as:

*"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."*

The Article 22(8) of the Convention seems to have widened the scope of the principle inasmuch as it declares the absolute character of the principle by asserting that

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<sup>39</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969), 1001 UNTS 45. Online at,

[http://www.africaunion.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Refugee\\_Convention.pdf](http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf) > (last accessed 02.02.09)

<sup>40</sup> Paragraphs 1 and 2 of the Article 1 enumerate the factors entitling a person to refugee status; persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or being forced to leave the country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order are mentioned therein.

<sup>41</sup> Signed on 22nd November 1969, entered into force on 18 July 1978.

'in no case may an alien be deported or returned' to a country where his life and liberty may be at stake due to the prominent five factors. It further enumerates the reasons why a person would be in danger if returned home. Nonetheless, the Article needs to be read alongside Article 27 *infra* which authorizes derogation from the obligation in cases of war, public danger, or other emergency threatening the independence or security of the state party.<sup>42</sup>

The 1984 Cartagena Declaration<sup>43</sup>, Section III, paragraph 5 reads as follows:

*"... the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of Jus Cogens."*

The Cartagena Declaration regards the principle the cornerstone of international protection. It further goes far beyond that by acknowledging the principle to have qualified to be a rule of '*jus cogens*'.

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>44</sup>, in its Article 3 states:

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<sup>42</sup> Article 27 of the Convention authorizes "suspension of guarantees: in time of war, public danger or other emergency that threatens the independence or security of a state party, it may take measures derogating from its obligation under the present convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin". Article 27(2) declares some rights non-derogable but Article 22 is not among them.

<sup>43</sup> The convention was adopted at a colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 – 22 November 1984. For full text see, UNHCR *Collection of Texts on Refugees and Displaced Persons*, 2: 206.

<sup>44</sup> CAT is an international human rights' instrument adopted under the review of the UN aiming at prevention of torture around the world. The convention requires states to take effective measures to prevent torture within the borders, and forbids states to return people to their home country if there is reason to believe they will be exposed to torture. (10 December 1984) 1465 UNTS 113.

*"1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>45</sup>*

*For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."*

The CAT does not recognize any sort of exceptions to the prohibition of *refoulement*, in other words, absolute character of the principle is affirmed herein. It, further, widens the scope of the protection granted to those in fear of persecution in their countries of origin or any other territory to which they could be returned. However, the standard of proof is somehow higher than article 33 of the 1951 Convention as the existence of only '*consistent pattern of gross, flagrant or mass violations*' of human rights in a state are regarded impediments to return of a person back to his homeland.<sup>46</sup> It is hence explicit to contend that if a state forcefully returns a person into a territory where he is subjected to torture, the state has acted an accomplice in the crime of torture. Another noticeable point in this regard is that article 1(1) states as requisite to prohibition of torture that it must be committed by, at instigation or acquiescence of a state official or any other person acting in official capacity.

Above and beyond, the fundamental and non-derogable nature of the principle is proclaimed through Executive Committee<sup>47</sup> (Ex-Com) Conclusions since 1977,<sup>48</sup> as the

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<sup>45</sup> Torture is defined by Article 1(1) of the CAT as:

*"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*

<sup>46</sup> Brian Gorlick, "the Convention and the Committee against Torture: A Complementary Protection Regime for Refugees", *International Journal of Refugee Law*, 11:3 (1999), 479-495 at 480.

<sup>47</sup> The Economic and Social Council (ECOSOC) of UN established in 1958 the Executive Committee of the High Commissioner's Program in accordance with paragraph 4 of the UNHCR Statute. The Ex-Com is a subsidiary organ of the UNGA, wherefrom its documentation is issued in a series and the annual report is submitted to the GA directly where it is considered in the Third

Ex-Com Conclusion# 25<sup>49</sup> has claimed that the principle of *non-refoulement* is acquiring the character of 'peremptory rule' of international law.

## 1.2 PARAMETERS OF THE PRINCIPLE

### 1.2.1 Who is Bound?

Mere cognition of the Art 33 of the Convention indicates that "contracting states", i.e. the states party to the 1951 Convention are bound by the obligation of the Article. Further, the ambit of the application is extended through Article I (1) of the Protocol<sup>50</sup> to states party to the 1967 Protocol, immaterial of their membership to the 1951 convention.<sup>51</sup>

Moreover, the reference to the "contracting states", according to the Draft Articles on State Responsibility (DASR) adopted by the International Law Commission (ILC) of the UN in 2001, will include sub-divisions of the state including provincial or state authorities, organs of the state, other persons and bodies exercising governmental<sup>52</sup> authority.<sup>53</sup>

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Committee. Ex-com holds one annual session during the first half of October for one week in Geneva. See, <http://www.unhcr.org/excom/400e3c86a.html> (last accessed 24.05.09). It currently consists of 76 members, who meet annually in Geneva to review and approve UNHCR's programs and budget, give advice on international protection and discuss a wide range of other issues with UNHCR and its inter-governmental and non-governmental partners. For Ex-Com's mandate, structure and offices see, <http://www.unhcr.org/excom.html> (last accessed 19.04.09).

<sup>48</sup> *The Advisory Opinion*, para 12.

<sup>49</sup> Conclusion# 25 (XXXIII) 1982, Para "(b) Reaffirmed the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law".

<sup>50</sup> The Article reads "General provision 1. The States Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined."

<sup>51</sup> UNHCR, *the Scope and Content of the Principle of Non-refoulement, Opinion*, Sir Elihu Lauterpacht and Barrister Daniel Bethlehem (20 June 2001), 22. (hereinafter, *the Opinion*).

See, <http://www.unhcr.org/publ/PUBL/419c75ce4.pdf> (last accessed 02.02.09).

<sup>52</sup> "Attributions of conduct to a State: Article 4: Conduct of organs of a State: The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any functions, whatever position it holds in the

In considering the act of the state, significance shall be given to the fact of attribution of the conduct rather than to the territory of the state concerned. Hence, if an act of *refoulement* is committed, no matter within or outside the state concerned, by persons connected to a state, it is said to be committed by the state itself. In short, geographical limits or territory of a state is not of essence, essential is the fact that the doers are within effective control and "subject to or within their (the state's) jurisdiction".<sup>54</sup>

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organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

An organ includes any person or entity which has that status in accordance with the internal law of the State.

**Article 5:** Conduct of persons or entities exercising elements of governmental authority:

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." See, <http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf> (last accessed 02.02.09).

- <sup>53</sup> The application of the Article 33 of the Convention will also extend to the conduct of an organ placed at the disposal of a State by another State if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed (Article 6). The conduct of a person or group of persons in fact acting on the instructions of, or under the direction or control of, the State (Article 8). the conduct of a person or group of persons in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority (Article 9). Conduct which is not otherwise attributable to a State but which has nonetheless been acknowledged and adopted by the State as its own. (Article 11). For full text visit <http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf> (last accessed 02.02.09).
- <sup>54</sup> Lauterpacht, *the Opinion*, para. 63. The Human Rights Committee in its General Comment# 31 stated regarding the Nature of the General Legal Obligations Imposed on States Parties to the ICCPR that the states can "be held accountable for violations of the rights under the ICCPR which its agents commit on the territory of another state, whether with the acquiescence of the government of the state or in opposition to it" and that occasionally "persons may fall under the subject-matter of a state party to the ICCPR even when outside that state's territory". See, *The Advisory Opinion*, paras 35-6. In relation to the state responsibility, it would be proper to have account of the ICJ decision in the famous Corfu Channel Case where it held that due the fact that "laying of the minefield could not have been accomplished without the knowledge of Albania" therefore it was liable for the damage done to the British cruise ships. For full decision see, <http://www.icj-cij.org/docket/files/1/1647.pdf> (last accessed 09.05.09). Furthermore, it decided in Nicaragua case that mere material support to the contras in Nicaragua would not suffice the US liability for the acts committed by them because "it would have to be proved that the State had effective control of the operations in the course of which the alleged violations were committed". For the decision see, <http://www.icj-cij.org/docket/files/70/6505.pdf> (last accessed: 23.05.2009). In addition, as regards effective control of a state, in the Tadic case it was held that no hard and fast rule exists for measuring control of one over the other, instead, 'dependency and control' would be sufficient to prove control of a group over the other. It was also held that the effective control standard was limited to the Nicaragua case, thus, implying that the standard of control would vary and must be adjudged on case to case basis. See, Rochus J.P. Pronk & Brian D Tittemore, *ICTY Issues Final Judgment Against Dusan Tadic in First International War Crimes Trial Since World War II*, online at:

## 12.2 Who is Protected?

It is obvious that Article 33 (1) of the 1951 Convention protects a “refugee”, who meets the inclusion criteria and does not come within the scope of the exclusion provisions<sup>55</sup> from being *refouled*. This status is awarded to him because he “owing to well-founded fear<sup>56</sup> of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and because of the fear he apprehends is unable or unwilling to avail himself of the protection of his homeland. Further, who due to lack of a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.”<sup>57</sup>

An important point in this regard is the fact that formal recognition of the person concerned as refugee is not essential for application of the principle of *non-refoulement*,<sup>58</sup> because the recognition is declaratory and not constitutive, connoting “a person does not become a refugee because of recognition, but is recognized because he or she is a refugee”.<sup>59</sup> Hence, any person fulfilling the qualifications of the Article 1A(2) of the

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<http://www.wcl.american.edu/hrbrief/v4i3/icty43.htm> (last accessed 09.05.2009). It was decided in Namibia case that the “Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”. See, the Advisory Opinion of ICJ available online at: <http://www.icj-cij.org/docket/files/53/5595.pdf> (last accessed 09.05.09). The scope was further widened through the contention in Caire case that a state is liable for the acts of its agent even if the later has acted *ultra vires* but have used the resources and means of the state he is an agent of. See, Muhammad Mushtaq Ahmad, *Aadab-ul-Qital: Tarz-e-h-e-Mazeed* (Urdu) (*Jus in Bello: Additional Explanation*) available online at: [www.alsharia.org](http://www.alsharia.org) (March 2009) (last accessed 09.05.09).

<sup>55</sup> *The Advisory Opinion*, para 6.

<sup>56</sup> It is contended that as fear is a subjective feeling thus difficult to assess and varying from person to person, the objective qualification of being “well-found[ed]” was added to denote a real chance of persecution. It is thus a combination of both subjective and objective tests requiring consideration of both while determining existence of a “well-founded fear”. See, Thomas Musgrave, *Refugees in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds.), Public International Law: an Australian Perspective* (Australia: Oxford University Press, 2003), 305-6.

<sup>57</sup> Article 1 A (2) of the 1951 Convention, as amended by Article I (2) of the 1967 Protocol.

<sup>58</sup> UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)*, EC/SCP/2, see, <http://www.unhcr.org/refworld/docid/3ae68ccd10.html> (last accessed 02.02.09).

<sup>59</sup> *The Advisory Opinion*, para. 6.

Convention and able to prove that persecution exists nationwide could take advantage of the Article 33.<sup>60</sup>

Furthermore, the Handbook on Procedures and Criteria for Determining Refugee Status drafted by UNHCR regards as refugee, in accordance with Article 1A(2) of the 1951 Convention, every person "as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. *Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.*"<sup>61</sup>

This conception is confirmed by Article 31(1) of the 1951 Convention which states that:

*"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*

Further, Conclusion 6 (XXVIII) 1977 of the Ex-Com affirms this contention and "reaffirms the fundamental importance of the observance of the principle of *non-refoulement* –both at the border and within the territory of a State– of persons who may be

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<sup>60</sup> "US INS Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims from Women, Memorandum (26th May 1995)", in *International Refugee Law A reader*, ed. B.S. Chimni, 42.

<sup>61</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva: Department of International Protection, 1992), para. 28.

subjected to persecution if returned to their country of origin *irrespective of whether or not they have been formally recognised as refugees*".<sup>62</sup>

It could, therefore, be inferred rightly that, despite his illegal entry to a state, a person meeting the requirements of a refugee could not be punished under Article 31 (1), while Article 33 (1) protects a refugee from being expelled or returned from a state. It would therefore seem irrational that a person enjoys 'immunity' for an act, nonetheless, could be sent back to a place where he would face a greater risk, i.e. persecution due to race, religion, nationality, particular social group or political opinion.<sup>63</sup>

Besides, a person asking for refuge or protection could not, according to Article 33 (1), be sent to "*territories*" where he would face persecution. This certainly is not restricted to his country of origin alone but includes every state, his own and others. Moreover, the person could enjoy protection from *refoulement* if he is at a place or premises within his country of origin controlled by a foreign state, e.g. diplomatic mission of a state, or he receives protection with armed forces of a state engaged in peacekeeping mission.<sup>64</sup> Thus, under the principle of *non-refoulement* he could not be produced to meet head-on persecution outside the protected area mentioned.

Another issue worth considering is the application of the principle of *non-refoulement* to the situations of mass influx of refugees intending to enter a state. It stands mandatory that the case of every person subject to expulsion should be dealt with individually and only then could be denied protection.<sup>65</sup>

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<sup>62</sup> UNHCR, *a Thematic Compilation of Executive Committee Conclusions*, chapter on 'Return of Persons Found Not to be in Need of International Protection' (3rd Ed. Aug. 2008), 422. See, <http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf> > (last accessed 05.01.2009).

<sup>63</sup> Lauterpacht, *the Opinion*, para. 93.

<sup>64</sup> *Ibid*, paras. 113-14.

<sup>65</sup> *Ibid*, para. 100.



The basis of this misconception has been Article 1A(2) of the Convention as the definition of the term 'refugee' therein is, according to those objecting, "essentially individualistic". However, the Convention itself contains nothing to suggest exclusion of mass-influx from its purview because groups are comprised of individuals and the discussion at the drafting stage on 'categories of refugees' indicates that refugeehood is not an individualistic but a group initiative.<sup>66</sup>

In addition, applicability of the 1951 Convention to situations of mass influx is recognized by international community through Conclusion# 22 (XXXII) 1981 which, *inter alia*, states that:

*"In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.*

*2. In all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed."*<sup>67</sup>

In sum, every person asking for protection could not be expelled or returned from a state or its frontiers to a territory where he is exposed to a threat of persecution on account of race, religion, nationality, membership of a particular social group or political opinion. Or he faces a real risk of torture, cruel, inhuman or degrading treatment or punishment, or is exposed to threat to life, physical integrity or liberty<sup>68</sup> or any other

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<sup>66</sup> Jean Francois Durieux and Jane McAdam, "Non-refoulement Through Time: the Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies", *International Journal of Refugee Law*, 16:1 (2004), 4-24 at 9-10.

<sup>67</sup> Conclusion# 22 (XXXII) 1981, 12. See, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2004* (Conclusion No. 1-101), 37, <<http://www.unhcr.org/publ/PUBL/41b041534.pdf>> (last accessed 05.01.2009).

<sup>68</sup> *Lauterpacht, the Opinion*, para. 144.

form of irreparable harm.<sup>69</sup> This rule is applicable to situations of mass influx in the same way as it is applicable to individual situations.<sup>70</sup>

### 1.2.3 Is it an Absolute Principle?

Going through Article 33 of the 1951 Convention, one can infer that it has prohibited *refoulement* “in any manner whatsoever”, hence, prohibiting act of removal or rejection that would place the person concerned at risk.<sup>71</sup> This includes extradition, deportation, rendition, expulsion, non-admission at the border or any other form of removal from a state.<sup>72</sup> The principle however is not absolute as it merely allows temporary refuge pending adjudication of individual or group status of refugees.<sup>73</sup>

As far other expressions of the principle are concerned, as already discussed, some of them have regarded the principle to be an absolute and non-derogable one, for instance CAT.

#### 1.2.3.1 Exceptions to the Principle:

Article 33 of the Convention 1951 contains an exemption clause, 33 (2), asserting:

“2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having*

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<sup>69</sup> *The Advisory Opinion*, para 11.

<sup>70</sup> Although international community must share the burden with a state facing a mass influx, the observance of fundamental protection principles such as *non-refoulement*, nevertheless, could not be conditioned on burden sharing. Therefore, the state concerned must award the refugees the temporary protection “adopting the minimum standards of treatment” including, protection from *refoulement* in accordance with Ex-Com Conclusion No. 28 (C) of 1982 [the reference to the Conclusion no. 28 (C) however, seems erroneous, as the extract seems to be taken from Conclusion 22 (XXXII) 1981]. See, *Refugee Protection: A Guide to International Refugee Law*, 53-56.

<sup>71</sup> Lauterpacht, *the Opinion*, para. 69.

<sup>72</sup> *The Advisory Opinion*, para 7.

<sup>73</sup> Tom Clark, “Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation”, *International Journal of Refugee Law*, 16:4 (2004), 584-608 at 588.

*been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*

In order to avail the protection of Article 33 (1) a refugee must not pose threat to the security or community of the country of asylum. An essential point here is the irrelevance of the place of commission of the crime, meaning the Article is silent as to the place where the person has been convicted of a serious crime.

Nevertheless, it seems appropriate to contend that the past conduct of the refugee could be evaluated for assessing if he is a danger to the security of community of the country of asylum, but the material consideration should be given, for inviting the exception into application, to the *future* prospect of the refugee, meaning the refugee poses a threat to the country of refuge and others in the future, as he, for instance, has committed the crime either in the country of asylum or elsewhere *subsequent* to refuge.<sup>74</sup>

The Article maintains two exceptions to the principle, namely, public order and national security. The public order exception is applicable to every refugee who "*having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country*". Hence, asserting that a conviction at final judgment establishes an initial threshold prior to the application of the exception. Following the final judgment of a court of law, the Article calls for the determination whether the *individual* poses a future threat to the community. While the security exception contains the test: whether reasonable grounds exist for regarding the refugee as a danger to the security of the country.<sup>75</sup>

Keeping in view the prerequisites for declaring a refugee a threat to 'national security' of a country, it seems that the provision is valid only under highly exceptional cases

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<sup>74</sup> Lauterpacht, *the Opinion*, paras. 147-9.

<sup>75</sup> *Ibid.*

because in order for it to be applicable, it must be proved that 'there is a direct link between the presence of a refugee in the territory of a particular country and a national security threat to that country'.

A glance to the Declaration on Territorial Asylum signifies that although states are allowed to expel or reject an asylum seeker for the permitted reasons, they must, however, allow him to move to a safe-third-state rather to be *refouled* to a state where he is exposed to persecution.<sup>76</sup>

Keeping in view the dire consequences of a refugee being sent back to a territory where he is in serious danger of facing persecution, it is very essential that the exceptions are interpreted restrictively and applied with careful caution<sup>77</sup> keeping in account all the circumstances of the case and the possibilities of rehabilitation and reintegration.<sup>78</sup>

### 1.3 STATE PRACTICE:

According to Professor Guy S. Goodwin-Gill, the moral obligation of the states to assist refugees fleeing persecution and to provide them a safe haven has transformed into a legal obligation "albeit at a relatively low level of commitment". State practice, in his opinion, is liable for the said transformation and the principle of *non-refoulement* now applies beyond the narrow scope prescribed by the Art 33 of the 1951 Convention.

State practice has, primarily, confirmed that the duty of *non-refoulement* is not restricted to expulsion and return and it applies to measures such as rejection at the frontier and

<sup>76</sup> Lauterpacht, *the Opinion*, para. 151.

<sup>77</sup> Rene Bruin and Kees Wouters, *Terrorism and the Non-derogability of Non-Refoulement*. Available online at: <http://ijrl.oxfordjournals.org/cgi/content/abstract/15/1/5> > (last accessed 18.02.09).

<sup>78</sup> UNHCR, *Note on the Principle of Non-Refoulement (November 1977)*. See, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68ccd10> > (last accessed 02.02.09).

even extradition. Moreover, it has established the principle of *non-refoulement* in international law by extending its application to a broader category of refugees.<sup>79</sup>

As already mentioned, the notion "state practice" will fit rightfully to the conduct of the state organs, officials and other actors if they are within effective control of the state concerned, immaterial of the place of occurrence of the *refoulement*, because in such a situation they will be regarded to be subject to or within the jurisdiction of a state, or more generally, are effected by those acting on behalf of the state.

Considering the assertion, therefore, a state will violate the principle of *non-refoulement* if state officials, those acting on behalf of the state, carriers, agents responsible for checking documentation in transit and other persons acting on behalf of a contracting state or in exercise of the governmental activity of the state cause *refoulement* of refugees.<sup>80</sup>

The principle would be respected without raising any concerns on the part of any stakeholder in case a person is granted formally the status of a refugee under the 1951 Convention and/or the 1967 Protocol. However if the country of asylum is not a party to the 1951 Convention or the Protocol, or despite being a member, has not yet developed the procedure for determining the refugee status, or have allowed the refugee to reside therein with a normal residence permit or have simply endured his presence without formal recognition as a refugee, then, technical problems may accrue. Notwithstanding this, it is essential to scrupulously respect the principle of *non-refoulement* due to the fact, as already mentioned, that recognition of a person as refugee is declaratory in nature.<sup>81</sup>

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<sup>79</sup> B.S Chimni (ed.), *International Refugee Law A reader*, 109.

<sup>80</sup> Lauterpacht, *the Opinion*, paras. 61 and 67.

<sup>81</sup> UNHCR, *Note on Non-Refoulement (submitted by the High Commissioner)*, EC/SCP/2, paras. 15-17.

Coming to the topic under discussion, it seems that the state practice is very different from the theoretical notions discussed above,<sup>82</sup> especially following the terrorist incidents of 9/11 where we have come across legislations restricting the movement of refugees and asylum seekers. Based on the plea that a person committing the offences enumerated in the 1951 Convention could well be regarded “a danger to the security” and thus excluded of the refugee protection, some scholars maintain that the exception in Article 33 (2) and Article 1 F are enough to afford protection to states against terrorist acts.

Despite the prohibition of *refoulement*, the principle has been under attack in recent years at least in two aspects, the one of which is the counter ‘terrorism’ efforts following the events of 9/11 in USA and the handling of ‘national security’ cases involving persons alleged to be international “terrorists” and a fear among the states of increase in the number of asylum seekers in those countries.<sup>83</sup>

It is, indeed, a sad phenomenon that although parties to the 1951 Convention, some states compelled the refugees to live in substandard conditions and are denied various economic and social protections stipulated by the 1951 Convention.<sup>84</sup> Further, apart from rejection at border, arms-length *non-entrée* policies are adopted by some states deterring and controlling migration to those states making it difficult for refugees and asylum seekers to reach countries where they can present their asylum applications.<sup>85</sup>

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<sup>82</sup> For some of the GA Resolutions expressing concern at violations of the principle of *Non-Refoulement*: 35/41, PP7, 25 Nov 1980; 37/195, OP3, 18 Dec 1982; 42/109, OP2, 7 Dec 1987; 43/117, OP3, 8 Dec 1988; 51/75, PP6, 12 Dec 1996; 52/132, PP12, 12 Dec 1997.

<sup>83</sup> *Non-Refoulement under Threat*, 2.

<sup>84</sup> Jean Francois Durieux and Jane McAdam, “*Non-refoulement* Through Time: the Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies”, *International Journal of Refugee Law*, 16:1 (2004), 4-24 at 14.

<sup>85</sup> Erika Feller, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come”, *International Journal of Refugee Law*, 18:3-4 (2006) 509-536 at 509.

### 13.1 Violation of the Principle:

Notwithstanding the prohibition of *refoulement*, as already mentioned, the principle has been under attack in two aspects, the first aspect is the 'anti-terrorism' efforts and the notion of 'national security' while the second aspect is the "hysteria" of the countries of asylum from increase in the number of asylum-seekers. Hence, in order to bring down the level of those people as soon as possible, they reject at frontier or forcibly expel the "failed" asylum seeker without provision of an opportunity of review on the facts of every individual case.<sup>86</sup>

NGOs have also expressed regret on the violation of the principle of *non-refoulement* despite being an absolute principle,<sup>87</sup> and practice of states to forcibly return asylum seekers and refugees to countries where they risk serious human rights abuses, torture and other forms of persecution.<sup>88</sup>

#### 1.3.1.1 Rejection at the Border

It has been contended sometimes that the principle of *non-refoulement* does not apply to the situations of rejection at the frontier or the border.<sup>89</sup> It, however, seems strange to

<sup>86</sup> *Non-Refoulement Under Threat*,

see, <http://www.redress.org/publications/NonrefoulementUnderThreat.pdf> > (Last accessed 02.01.2009).

<sup>87</sup> Absolute in the sense of subsequent developments to the 1951 Convention, for instance CAT does not recognize any limitation or exception to the absoluteness of the principle.

<sup>88</sup> Ex-Com program, 42nd meeting, 24-26 June 2008, *NGO Statement Note on International Protection*. See, <http://www.icva.ch/doc00002996.doc> > (last accessed 02.02.09).

<sup>89</sup> The first attack on principle of *non-refoulement* was in shape of the US Haitian interdiction program. US Coast Guards intercepted boats carrying Haitians intending to arrive at the US. The US administration claimed, later on affirmed by the US Supreme Court, that principle does not apply extra-territorially, while this position was rejected and condemned by UNHCR and international community. The second attack arose in the context of exodus of Iraqi Kurds in 1991 to Turkey. See, <http://209.85.173.132/search?q=cache:ZkfeoHlVSIQJ:www.redress.org/publications/Non-refoulementUnderThreat.pdf+Attacks+on+the+principle+of+non-refoulement&hl=en&ct=clnk&cd=2&gl=pk> > (last accessed 03.02.09). In *Sale, acting Commissioner INS v. Haitian Centers Council*, the Supreme Court held that neither domestic law

claim so because the Article asserts that the contracting states should not "... return ("refouler") a refugee", the wording confers that even if a person is outside the territorial limits of the states but on the border; he could not be "returned" to a territory where his life or liberty is at stake.

While discussing international standards and state responsibility, Goodwin-Gill asserts that "States party to the 1951 Convention and the 1967 Protocol undertake to accord certain standards of treatment to refugees, and to guarantee to them certain rights, [*inter alia*], *non-refoulement* (Article 33: non-return, including non-rejection at the frontier, to a territory in which the refugee's life or freedom would be threatened for reasons set out in Article 1)".<sup>90</sup> He has further contended that anyone presenting himself at a frontier post, port or airport will already be within territory and jurisdiction of the state concerned, it is, therefore, fruitless to discuss the issue of rejection at frontier<sup>91</sup> as within the ambit of the Article or otherwise.

Moreover, key instruments concerning refugee protection and Conclusions of the Executive Committee; explicitly embrace rejection at the frontier within the ambit of the principle of *non-refoulement*.<sup>92</sup> The practice of states and international organizations since the inception of the 1951 Convention in this regard is in addition to the above-mentioned sources.<sup>93</sup>

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nor the 1951 Convention could curtail the authority of the president to 'refouler' undocumented aliens. For detailed study of the case: Chimni (ed.), *the International Refugee Law A reader*, 124.

<sup>90</sup> Guy S. Goodwin-Gill. *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection*, 32. See, <http://www.unhcr.org/publ/PUBL/419c778d4.pdf> (last accessed 02.02.09).

<sup>91</sup> Gill. *The Refugee in International Law*, 75.

<sup>92</sup> These instruments include the Asian-African Refugee Principles of 1966, the Declaration on Territorial Asylum of 1967 and the OAU Refugee Convention of 1969. For understanding the significance of non-binding international instruments in the field of Human Rights and Humanitarian Law; see, Lauterpacht, *the Opinion*, paras. 28, 77.

<sup>93</sup> Over the last thirty years, Goodwin-Gill states, the broader interpretation of *non-refoulement* has established itself. States have not only sanctioned entrance of mass influx into their territories but have permitted the refugees to stay therein until a durable solution is attained. He affirms that states in their practice and recorded views have recognized that the principle of *non-refoulement*



Therefore, UNHCR is of the view that upon taking in account the unambiguous language, purpose and intent of the Article 33 (1) of the Convention 1951 an obligation could be incurred on all states to avoid returning a refugee or asylum seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a state exercises jurisdiction, including at frontier, on the high seas<sup>94</sup> or on the territory of another state.<sup>95</sup>

### **1.3.2 War-on-Terror: Umbrella against *Non-Refoulement*?**

The incident of 9/11 was taken by the Bush administration as an act-of-war against the USA and accused al-Qa'eda of carrying out the attacks and asked the Taliban regime for handover of Osama bin Laden, the founder of al-Qaeda to be prosecuted for the attacks. A war was waged against Taliban in Afghanistan in the course of which Taliban were overthrown from the power and the vacuum was subsequently filled through installation of an interim government led by Hamid Karzai.

The war continues against the fleeing Taliban and al-Qaeda leadership and their followers in Afghanistan, Pakistan and the rest of the world, undermining peace and prosperity of both the former states more than any other state in the world. This war is referred to as the war on terrorism or the global war on terror.

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applies as soon as one presents himself for entry. See, Gill. *The Refugee in International Law*, 75 and 77.

<sup>94</sup> The Malaysian Navy and local police dragged or permitted the dragging of refugee boats from Vietnam back to the sea in 1980s, the Italian navy rammed and sank Albanian refugee ships in 1997, the US Coast Guards intercepted Haitian boats for most of the 1980s and 90s. See, Astri Suhrke, "Burden Sharing During Refugee Emergencies: the Logic of Collective vs. National Action", *Journal of Refugee Studies*, 11:2 (1998).

<sup>95</sup> *The Advisory Opinion*, para 24. The following acts would then be regarded as *refoulement* and breach of the international law: the then Deputy Prime Minister of Malaysia, Dr. Mahathir Mohammed, on 15 June 1979 announced that refugees arriving on Malaysian shore would be "shot on sight". In the same month, Indonesian authorities organized "Operation Lightening" a naval blockade to intercept and return Vietnamese refugees, while at the same year, the Thai government returned 40,000 Cambodians. See, Luise Druke, *Preventive Action for Refugee Producing Situations* (Germany: Peter Lang, 1993), 75. See, <http://www.unhcr.bg/luise/kn2.pdf> > (last accessed 02.02.09).

### 1.3.2.1 War-on-Terror: the Global Scenario

In reality, as already contended, the situation totally varies with the theories that we have been through, hence, 'terrorism' concerns are presumed to lead to automatic disqualification from asylum. People with suspected behavior were ineligible for asylum and subject to deportation even before the events of 9/11.

To focus on a specific state, we can focus on the USA where the situation is grave following post 9/11 legislation undertaken by the Congress in 2001 and again 2005, broadening the already existing restrictions even further.<sup>96</sup> The commentators, nonetheless, state that exception in Article 33 (2) and Article 1 F<sup>97</sup> are enough to afford protection to states against terrorist acts because a person committing the offences enumerated there could well be regarded "a danger to the security" and thus excluded of the refugee protection.<sup>98</sup>

Under the current U.S. law, any person who provides "material support" to terrorists will be refused asylum. Since there is no exemption for cases of coercion, even acts such as providing drinking water at gunpoint to terrorists are to be considered material

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<sup>96</sup> *Asylum Law, Asylum Seekers and Refugees: A Primer*. See, <http://trac.syr.edu/immigration/reports/161/> (last accessed 02.02.09).

<sup>97</sup> Article 1 (F): "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

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

<sup>98</sup> Alice Farmer, *Non-refoulement and Jus Cogens: Limiting Anti-terror Measures that Threaten Refugee Protection*, 8. See, [http://www.works.bepress.com/context/alice\\_farmer/article/1000/type/native/viewcontent](http://www.works.bepress.com/context/alice_farmer/article/1000/type/native/viewcontent) (last accessed 02.01.2009).

support.<sup>99</sup> US have relied on the language of Article 33 (2) to enact legislation and policies prioritizing 'anti-terrorism' measures above refugee protection.<sup>100</sup>

Despite the High Commissioner's call on states with a reminder that "refugees [were] victims of 'terrorism', not its perpetrators",<sup>101</sup> the situation seems to have remained the same since 2001 because the states have taken actions that have ultimately undermined the respect for principle of *non-refoulement* by returning persons suspected of involvement in 'terrorism' to their home countries or sent them to third countries for purposes of detention or interrogation despite their knowledge that returnees would be subjected to torture.<sup>102</sup>

An unfortunate development, nonetheless, is the efforts to establish a link between refuge or asylum and 'terrorism', inferred from the language of various states in addition to the UN itself. For instance, the resolution of UNSC, UNGA and Commission on Human Rights relating to 'terrorism' call upon states to take appropriate measures "before granting refugee status, with the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts...".<sup>103</sup>

The prohibition of *refoulement* to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment extends to all

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<sup>99</sup> *Asylum Law, Asylum Seekers and Refugees: A Primer*.

<sup>100</sup> Farmer, *Non-refoulement and Jus Cogens*, 2.

<sup>101</sup> The Commissioner, further, called on states that they must not resort to forceful and arbitrary detention of asylum seekers or to procedure that curtail the rights of enjoying due process of law. Resettlement programs, according to him, must be maintained and should not discriminate against particular ethnic or religious groups and nationalities. See, UNGA, *Refugees Victims of Terrorism, Not its Perpetrators, High Commissioner Tells Third Committee, as Refugee Debate Opens*, see online at: <http://www.un.org/News/Press/docs/2001/GASHC3667.doc.htm> (last accessed 02.02.09).

<sup>102</sup> Human Rights Watch, *Torture and Non-Refoulement, Briefing the 60th Session of the UN Commission on Human Rights (Jan 04)*, <http://hrw.org/english/docs/2004/01/29/global7250.htm> (last accessed 02.02.09).

<sup>103</sup> UNSC resolution S/RES/1373 of 28 Sep. 2001, for more see, Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 509-10.

person who may be within a state's territory or subject to its jurisdiction, including asylum seekers and refugees and applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed. Moreover, it is a non-derogable right and applies in all circumstances, including in the context of measures to combat 'terrorism' and during the conduct of an armed conflict.<sup>104</sup>

UNHCR have also complained about the practice of some states where the legislative exceptions to the principle went beyond those mentioned in Article 33(2) of the 1951 Convention, particularly in the context of 'counter-terrorism' efforts. Security concerns were also cited as grounds for deportation, including of unaccompanied refugee children.<sup>105</sup>

#### **1.3.2.2 War-on-Terror and the Situation in Pakistan:**

Following the events of 9/11, Pakistan as a neighboring state adopted the frontline status in the global war on terror mainly conducted against Taliban and al-Qaeda militants in Afghanistan. Taking advantage of the soft long unguarded Pak-Afghan border, huge number of Taliban and al-Qaeda elements moved into Pakistan in sake of a safe haven. Once on Pakistani territory they were looking for a secure place, and according to the viewpoint of the GoP, the refugee camps were the perfect hideouts where security agencies could not operate and function the way they should have due to the congested and unpredictable locations of the said camps.

It is a reality one has to affirm that Pakistan in its national interest and security had to dismantle these elements, assure peace and implement its writ within the state but could

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<sup>104</sup> *The Advisory Opinion*, para. 20.

<sup>105</sup> UNGA, *Note on International Protection, Report by the High Commissioner* (A/AC.96/1053, 30 June 2008), see, <http://www.unhcr.org/e.xcom/EXCOM/488dd0e12.pdf> (last accessed 24.11.2008).

generalized approach towards solving the problem by claiming an entire camp rather numerous camps to be used by 'terrorists' and hence subject to 'repatriation' be justified? Here in our opinion, the issue of individualistic approach of international refugee law seeks relevance. A blank cheque could not be awarded to anyone to declare an entire camp to be terrorist and thus subject to 'deportation', the criminals has to be targeted and prosecuted in accordance with the law.<sup>106</sup>

#### 1.4 IS IT PART OF CUSTOMARY INTERNATIONAL LAW THEN?

Article 38 (1) (b) of the Statue of the International Court of Justice (ICJ) enumerates "international custom, as evidence of general practice accepted as law" amongst the sources of international law to be consulted while dealing with a case on the international level.<sup>107</sup>

ICJ has further identified three elements material to the determination of crystallization of a rule into a norm of customary international law in the famous *North Sea Continental Shelf case*. These elements are:

- The convention rule should be of a norm-creating character as could be regarded as forming the basis of a general rule of law,
- A very widespread and representative state support for the rule, including of the states whose interests are specifically affected, and
- Consistent practice and general recognition of the rule.<sup>108</sup>

While assessing the principle of *non-refoulement* if it fulfills the criteria for establishment of customary international law, we must first look at the international

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<sup>106</sup> The issue of Pakistan's approach towards Afghan refugee camps is discussed in detail in chapter 2.

<sup>107</sup> Martin Dixon, *Textbook on International Law* (London: Blackstone Press Limited, 2000), repr. 02, 21.

<sup>108</sup> Lauterpacht, *the Opinion*, para 200.

Conventions containing the principle of *non-refoulement* which indicate the view of the states generally, in a normative manner and not merely as a contractual obligation.<sup>109</sup> In addition, it is deemed proper to make mention of the UNGA Resolutions in order to have an idea of weight attached to the said principle.

UNGA expressed<sup>110</sup> distress “at the widespread violation of the principle of *non-refoulement* and of the rights of refugees, in some cases resulting in loss of refugee lives, and at reports indicating that large numbers of refugees and Asylum-seekers have been *refouled* and expelled in highly dangerous situations, and recalling that the principle of *non-refoulement* is not subject to derogation”.

It, moreover,<sup>111</sup> “Reaffirm[ed] that the 1951 Convention and the 1967 Protocol remain the foundation of the international refugee regime and recognizes the importance of their full application by States parties, note[d] with satisfaction that one hundred and forty-one States are now parties to one or both instruments, encourage[d] the Office of the United Nations High Commissioner for Refugees and States to strengthen their efforts to promote broader accession to those instruments and their full implementation, and underlines in particular the importance of full respect for the principle of *non-refoulement*”.

The UNGA<sup>112</sup> encourage[d] States not parties to consider acceding to those instruments, underline[d] in particular the importance of full respect for the principle of *non-refoulement*, and recognize[d] that a number of States not parties to the international refugee instruments have shown a generous approach to hosting refugees”.

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<sup>109</sup> We have dealt with ‘International Conventions’ containing the principle in 1.1.3.

<sup>110</sup> Resolution 52/132, PP12, 12 Dec 1997.

<sup>111</sup> Resolution 56/137, OP3, 19 Dec 2001.

<sup>112</sup> Resolution 57/187, OP4, 18 Dec 2002. See, General Assembly Resolutions with request to states to observe the principle of *non-refoulement*: 32/67, OP5(c), 8 Dec 1977; 33/26, OP6, 29 Nov 1978; 34/60, OP3(a), 29 Nov 1979; 35/41, OP5(a), 25 Nov 1980; 36/125, 14 Dec 1981; 37/195, 18 Dec 1982; 38/121, 16 Dec 1983; 39/140, 14 Dec 1984; 46/106, 16 Dec 1991; 50/152, 21 Dec 1995; 52/132, 12 Dec 1999; 56/137, 19 Dec 2001, 57/187, 18 Dec 2002.

Goodwin-Gill asserts that, despite the absence of any formal judicial pronouncement, persuasive evidence is available indicating concretization of a customary rule. In this regard, he focuses on practice of international organizations, including UN General Assembly and UNHCR which, as mentioned earlier, have reiterated consistently the principle of *non-refoulement*.<sup>113</sup>

However, some scholars suggest that countries of the world albeit protecting refugees, retain some sort of discretion that could override the rule at any point. Thus, some objections were raised to the fact of *non-refoulement* being a rule of customary international law voicing that "it constitutes only a very weak version of customary international law".<sup>114</sup> Others, however, have regarded the principle as qualified to be considered as part of customary international law in *statu nascendi*, indicating, that the principle constitutes regional customary law in Western Europe, the Americas and Africa.<sup>115</sup>

The important point is to check the mode of opposition to the principle of *non-refoulement*. As a matter of fact, however, no formal or informal opposition to the principle could be found as no state can claim a general right to return refugees or asylum seekers to a territory where they would be exposed to persecution or danger to life or limb. Nevertheless, the objections to the protection and assistance activities of UNHCR are intended to challenge the status as refugee(s) of particular person(s) or are presented to invoke exceptions to the principle, specially the national security factor, and not to challenge the legitimacy of the principle itself.<sup>116</sup>

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<sup>113</sup> Gill, *The Refugee in International Law*, 98.

<sup>114</sup> Omar N. Chaudhary, *Turning Back, an Assessment of Non-Refoulement under Indian Law*, 19. See, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=668124](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668124) (last accessed 02.02.09).

<sup>115</sup> Weis P., *Briefer Notes (Review of Das Prinzip des Non-Refoulement by Walter Kälin)* (American Society of International Law, No. 3, 1984), 78:742. Online at: <http://www.jstor.org/stable/pdfplus/2202649.pdf> (last accessed 25.11.2008).

<sup>116</sup> Gill, *The Refugee in International Law*, 98-99.

To be specific, we could exemplify the situation in a way that although prohibition of torture have attained the status of an absolute and non-derogable principle, states are frequently reported to have committed various types of torturing techniques; would it be taken as nullification of the *jus cogens* nature of the prohibition of torture? Never! Inasmuch as no state seems to consider imposition of torture as a right or a lawful act, they instead look for excuses and methods to evade the blame of violating the norm.

As far as the second condition is concerned, i.e. A practice must be general in order to constitute an international custom<sup>117</sup> majority of the UN membership is party to one or the other Convention which includes *non-refoulement* in it.<sup>118</sup> ICJ has asserted that in order to establish a rule of customary international law, the practice of state did not have to be in rigorous conformity with the rule, instead, it stated that "in order to deduce the existence of customary rules, the court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule."<sup>119</sup>

Further, regarding the interpretation of a treaty, the Vienna Convention on the Law of Treaties confirms that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. For the 1951 Convention this means, interpretation by reference to the object and purpose of extending the protection of the international community to refugees, and assuring to 'refugees the widest possible exercise of... fundamental rights and freedoms'.<sup>120</sup>

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<sup>117</sup> Jennings and Watts, *Oppenheim's International Law*, 1:29.

<sup>118</sup> Lauterpacht, *the Opinion*, paras 209-210.

<sup>119</sup> *Ibid.*

<sup>120</sup> Guy S. Goodwin-Gill, *The Refugee in International Law*, Introduction, 7-8.



While for the third condition, one can point at the participation of states in treaties embodying the rule as evidence of state practice and *opinio juris*.<sup>121</sup> Some, on the other hand, have went far beyond the discussion of whether the principle forms part of customary international law by asserting that the principle is a rule of *jus cogens*. Amongst them, although opposed by Kay Hilbrunner, Allain considers that due to various Executive Committee Conclusions and the state practice which has emerged on the basis of Cartagena Declaration on Refugees 1984 in Latin America, the principle of *non-refoulement* could be characterized as a norm of *jus cogens*.<sup>122</sup>

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<http://fds.oup.com/www.oup.co.uk/pdf/0-19-920763-1.pdf> > (last accessed 03.02.09).

<sup>121</sup> Lauterpacht, *the Opinion*, para 211-215.

<sup>122</sup> Nan Li, *States' Practice of Non-refoulement and Suggestions on Avoiding the Derogation* (US-China Law Review), 2:64. See, <http://www.jurist.org.cn/doc/uclaw200512/uclaw20051208.pdf> > (last accessed 02.01.09).

## 1.5 CONCLUSION:

A comprehensive review of the *travaux préparatoires* of the 1951 Convention confirms the overriding humanitarian object and purpose of the Convention 1951 and provides significant evidence that *non-refoulement* provision in Article 33(1) was intended to prohibit any acts or omissions by a contracting state which have the effect of returning a refugee to territories where he or she is likely to face persecution or danger to life or freedom. Further, a treaty should be interpreted taking in account its juridical context including the subsequent rights and benefits and related jurisprudence.<sup>123</sup>

Thus any interpretation which interprets the scope of the aforementioned Article short of measures whereby a state, acting outside its territory, returns or otherwise transfers refugees to a country where they are at risk of persecution would be fundamentally inconsistent with the humanitarian object and purpose of the Convention 1951 and its 1967 Protocol.

The right conferred through Article 33, however, is not absolute and does not confer along with it the right to be granted asylum. It merely creates negative obligation not to return a refugee to a country where he or she has a well-founded fear of persecution, torture or any other ill-treatment. Unlike other Articles in the Convention, the application of this very principle is not dependant on lawful residence or formal recognition of a refugee in the territory of the country of asylum because recognition as a refugee is declaratory in nature.

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<sup>123</sup> Article 31, Vienna Convention on the Law of Treaties. This provision contemplates that *non-refoulement*, as already observed, is reinforced by other human rights treaties, hence, the 1951 Convention should not be interpreted in isolation from the rest of human rights treaties. See, Tom Clark, *Rights Based Refuge*, 607.

*Non-refoulement* is recognized as non-derogable principle,<sup>124</sup> emerging as a new *jus cogens* norm, applicable in all the circumstances irrespective of the nature of activities carried by the person concerned or his immigration status; besides the country to which the person faces immediate return; to “any other country where he runs a risk of being expelled or returned”.<sup>125</sup>

Apart from Article 33 of the 1951 Convention, the principle of prohibition of *Refoulement* is inferred explicitly or through interpretation by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), the Fourth Geneva Convention of 1949 (Art. 45, Para. 4), the International Covenant on Civil and Political Rights (Article 7), the Declaration on the Protection of All Persons from Enforced Disappearance (Article 8), and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5).

In addition, *refoulement* is prohibited explicitly or through interpretation in a number of regional human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the American Convention on Human Rights (Article 22), the OAU Refugee Convention (Article II), and the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (Article 2).<sup>126</sup>

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<sup>124</sup> International Commission of Jurists (ICJ); *L69: Proposal on Changes to the Danish Aliens Act* (19 November 08), 2. See, <http://www.icj.org/IMG/DanishAliensActfinal.pdf> > (last accessed 05.01.2009). this is the view taken as regarding the international and regional conventions which haven't incorporated any exceptions to the principle, but as far as the 1951 Convention is concerned, taking in view the article 33 (2), 'national security' and 'public order' are potential justifications for derogation from the principle.

<sup>125</sup> *Non-refoulement under Threat*, 2.

See, <http://www.redress.org/publications/Non-refoulementUnderThreat.pdf> > (last accessed 02.01.2009).

<sup>126</sup> *Refugee Protection: A Guide to International Refugee Law*, 14.

## CHAPTER TWO

### AFGHAN REFUGEES IN PAKISTAN



Afghan Refugees in New-Jalozai Camp

## 2.1 INTRODUCTION:

Pakistan and Afghanistan enjoy strong religious, historic, cultural and blood relations as compared to any other state in the region. Moreover, despite the long history of invasions or short term occupations and consistent efforts made or conditions created, conscious or unconscious, to undermine the friendly relations between the two nations, they have lived together and have enjoyed close ties in the Islamic world. The refuge of two and a half million Afghan refugees for twenty years in Pakistan is an unprecedented and living example of this fact.

Pakistan and Afghanistan after the independence of the former indulged in some differences most notably the Durand Line<sup>1</sup> and Pukhtoonistan issue.<sup>2</sup> Fortunately, the

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<sup>1</sup> During its rule on the Indian subcontinent, the British Empire drew three lines on the map: the McMahon Line between India and China, the Radcliff Line between India and Pakistan and the Durand Line between India and Afghanistan, each leading to a dispute among the states concerned. See, Gurinder Rhandawa, *Disputed Durand Line: Pakistan's Fencing Plan Disturbs Afghans*, online at: <http://newsgroups.derkeiler.com/pdf/Archive/Soc/soc.culture.punjab/2005-12/msg00008.pdf> (last accessed 19.04.2009). Of the three lines, the Durand Line was consequent to the Russian and British expansionist ideas well elaborated as the "Great Game". Britain intended to impede formation of a broad-based resistance movement by disintegrating the Afghan community and dividing them along their racial, lingual and cultural lines. This aim was achieved by creating differences between pashtoon and non-pashtoon ethnic groups. In addition, it laid the ground for a future 'antagonism' between the Afghan and upcoming 'Pakistani' governments in shape of the Durand Line, drawn between the pashtoon tribes dwelling in eastern Afghanistan and north-west India (nowadays Pakistan) who were attached and loyal to each other more than they were and are to their respective governments. See, *Afghan History* online at: <http://arapahoe.littletonpublicschools.net/Portals/7/Language%20Arts/Miles/English%2010/Afghan%20history.pdf> (last accessed 19.04.2009). The Line takes its name from Sir Henry Mortimer Durand, foreign secretary of British India, who concluded an agreement with Amīr 'Abdul Rahmān Khān (ruled 1880-1901) of Afghanistan on 12 November 1893. See, Amin Tarzai, *The Durand Line - from Imagination to an International Border*, available online at: <http://www.kabul-reconstructions.net/images/durand1.pdf> (last accessed 20.04.2009). Soon after the expression of the British will to withdraw from the subcontinent (1940), Afghanistan claimed the territory for various reasons, notably, that Indus was the natural border between the two states and Amīr 'Abdul Rahmān Khān was under duress to sign the agreement. On the same basis, Afghanistan opposed admission of Pakistan into the UN. Pakistan backed by West rejected Afghanistan's claim observing that Durand Line was a border between the territories and this was decided, according to them, by the referendum held in July 1947 where the people decided to remain with Pakistan. Afghanistan rejects the referendum arguing that it gave only two options to the people, to be with India or Pakistan without any option to link with Afghanistan. For a detailed analysis see, *The Myth of Pashtoonistan*, online at:

commonalities of the religion, history and blood withstood any sort of armed conflict between them restricting the damage to internal sufferings only. If on the one hand, King of Afghanistan ignored the Indian and Soviet instigations during the disintegration of Bengal, on the other hand the Government and people of Pakistan helped Afghan Refugees and *Mujahedeen* during the Soviet occupation of Afghanistan in every possible manner; this amounted to another living example of the integrity and affiliation of both the states.

In the course of the Hafeez Ullah Amin and Nur Muhammad Taraki's regimes, Afghan refugees, protecting themselves from persecution of *Khalq*<sup>3</sup> and *Parcham*<sup>4</sup> (two

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<http://spearheadresearch.org/Pages/Documents/The%20Myth%20of%20Pashtunistan.pdf> > last accessed 19.04.2009). In brief, the Durand Line was never accepted by either Afghanistan or by the Pashtoons and the Afghan Parliament in 1949 cancelled all treaties concluded with British-India and hence did not recognize the Durand Line as a legal border between Afghanistan and Pakistan. See, W.P.S. Sidhu, *Why the Durand Line is Important?* Available online at: <http://www.expressindia.com/news/ie/daily/19991116/ie19059.html> > (last accessed 20.04.2009).

- <sup>2</sup> Following the opposition by Pakistan and the West, the Afghan policy of claiming the territory to amalgamate with Afghanistan was transformed in 1950s into voicing for an independent state of Pashtoons, the Pukhtoonistan. See, *The Myth of Pashtoonistan*. It refers to the idea of an independent state in the Pashtoon dominated areas of Pakistan and Afghanistan, pashtoon nationalists believed that the historic homeland of Pashtoons was divided by the above-mentioned Durand Line in 1893. See, <http://en.wikipedia.org/wiki/Pashtunistan> The issue of "Pukhtoonistan" has brought Afghanistan and Pakistan to the brink of war on more than one occasion, nonetheless, Afghanistan decided to stay out of all the Indo-Pak wars. Amin Tarzai, "Afghanistan Report," 11 and 24 July 2003, online at: <http://www.kabul-reconstructions.net/images/durand2.pdf> > (last accessed 20.04.2009).
- <sup>3</sup> *Khalq* (Pashto for Masses) was a faction of the People's Democratic Party of Afghanistan (PDPA) and was formed with USSR support in 1965 at the birth of PDPA. Among its leaders were Nur Muhammad Taraki and Hafeez Ullah Amin. The *Khalqist* wing of the party was made up primarily of pashtoons from the non-elite classes. For details visit: <http://en.wikipedia.org/wiki/Khalq> > (last accessed 19.04.2009).
- <sup>4</sup> *Parcham* (Dari for Banner or Flag) was the other faction of the PDPA. The *Parchamis* seized power in Afghanistan after overthrowing Hafeez Ullah Amin. Their basic ideology was to gradually transform the country into a socialist state. They felt that Afghanistan was enough industrialized to afford a true proletarian revolution in accordance with the communist manifesto. *Khalq* faction was opposed to the *Parchamis*; the former followed a traditional Marxist theory advocating an immediate and violent change of the government and establishment of a communist regime. See, <http://en.wikipedia.org/wiki/Parcham> > (last accessed 20.04.2009). Bitter resentment between the *Khalq* and *Parcham* factions eventually led to the failure of the Democratic Republic of Afghanistan and the occurrence of the *Saur* revolution (named after the month in which it took place). It was also responsible for the radical reforms that encouraged the resistance of the people of Afghanistan, and eventually to the creation of the *Mujahedeen* movement. Moreover, they were responsible for the Soviet invasion of Afghanistan in 1979. Visit: <http://www.experiencefestival.com/a/khalq%20-%20pdpa->

main pro-soviet organizations), took shelter in Peshawar regarded by some as “the second Afghan capital”, where they did not feel detachment from their homeland. The mass influx of Afghan refugees was warmly welcomed by the GoP, hence, even one-twentieth of the cordial assistance of N.W.F.P. and Baluchistan’s *Pashtoon* population could not be found in any other nation and region around the world.

#### 2.1.1 Cause of Afghan Displacement and Pull Factors in Pakistan:

Afghans commenced leaving their country in April 1978 consequent to the *coup d’état* of the Marxist People’s Democratic Party of Afghanistan (PDPA) against the Regime of Muhammad Daoud. He himself had seized the power from his cousin, the King, Muhammad Zahir Shah in 1973 through a bloodless coup. While the refugees’ flow escalated when the U.S.S.R. invaded the country in 1979 as at the beginning of 1981 the number of refugees hit the mark of 3.7 million refugees taking shelter in Pakistan and Iran.<sup>5</sup>

While by the beginning of the 1990s the number of refugees reached an estimated 6.2 million Afghans living as refugees outside the borders of their homeland and though some Afghans became refugees prior to the Soviet invasion in 1979, millions moved to Pakistan subsequently.<sup>6</sup>

The main cause of the Afghan refugee outflow in the 1980s was fear of physical insecurity; as unnatural deaths in Afghanistan between 1978 and 1987 amounted to 876,825, or on average over 240 every day throughout the decade.<sup>7</sup>

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[khalq%20and%20the%20saur%20revolution%20april%201979%20-%20april%201992/id/5207225](http://khalq%20and%20the%20saur%20revolution%20april%201979%20-%20april%201992/id/5207225) > (last accessed 20.04.2009).

<sup>5</sup> Rhoda Margesson, *CRS Report for Congress, Afghan Refugees: Current Status and Future Prospects* (Congressional Research Service, 26 Jan 2007), 2.

<sup>6</sup> Susanne Schmeidl and William Maley, *Finding Durable Solutions in Contested Transitions, the Case of the Afghan Refugee Population* (San Francisco: The International Studies Association, 2008), 16.

<sup>7</sup> *Ibid.*

The Afghan refugees in Pakistan lived initially in Refugee Tented Villages (RTVs) and were housed subsequently in the recently named Afghan Refugee Villages (ARVs). They were named RVs due to change in the structure of the villages as they were no more tents but had acquired a somewhat permanent appearance. Unlike other refugee situations, UNHCR was able to setup 345 official ARVs where the majority of refugees lived.<sup>8</sup>

The Refuge of a huge number of Afghans in Pakistan with a majority arriving in North West Frontier Province (N.W.F.P) bordering Afghanistan was not only on account of immediacy to their country,<sup>9</sup> but even because of the various commonalities they shared as of language, culture, religion and most importantly their racial and blood relations.<sup>10</sup> Its worth considering that many of the fleeing Afghans had connections, for instance, social networks, kinship ties,<sup>11</sup> economic contacts in Pakistan, hence, these factors effected and facilitated the transition of migration into Pakistan.<sup>12</sup>

Another pull factor was that the Government of Pakistan (GoP) by offering a secure and friendly environment to the Afghan masses and providing a safe haven to the Afghan resistance leaders throughout the Afghan *jihad* stood at a favorite position as compared to Iran and others.

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<sup>8</sup> *Ibid.*

<sup>9</sup> As Pakistan and Afghanistan share a 2,430 Kilometers long border.

<sup>10</sup> Most Pashtoon Tribes now inhabiting NWFP were once living in Afghanistan and they opted to settle here once they crossed over to these lands through Khyber, Nawa and other passes across the Durand Line.

<sup>11</sup> Kinship ties are enumerated amongst the pull factors, because majority of refugees in Pakistan originated from the Afghan provinces adjacent to the Durand Line drawn by Sir Mortimer Durand in 1893 which divided the Pashtoons between the two territories, the USSR sought to stop the movement of *mujahadeen* fighters operating from refugee camps in Pakistan.

<sup>12</sup> CRS Report for Congress, *Afghan Refugees*, 5.



Besides the pull factors, for some Afghans; the *Hijra* (migration)<sup>13</sup> of the Prophet Muhammad (P.B.U.H.) from Makkah to Madinah in 622 CE, provided religious backing for plight in face of persecutions and the difficulty in performing Islamic virtues.

GoP's response to Afghan refugees changed on different occasions; it welcomed the Afghans in 1980s following the Soviet invasion; it advocated repatriation in 90s following the ouster of Najeeb Ullah's regime and the emergence of Taliban in the Afghan scenario; it sealed the border with Afghanistan in 1998 following the UN sanctions imposed on Taliban for their alleged support of elements involved in bombing US embassies in Kenya and Tanzania; it denied to allow Afghans' entry into the country in 2001 following the US attack on Afghanistan in response to the events of 9/11 aiming at preventing the cross border movement of Taliban and al-Qaeda members<sup>14</sup> and eventually allowed the refugees to enter and reside in 'inhospitable border areas' consequent to immense international pressure.<sup>15</sup>

## 2.2 PAKISTAN'S LEGAL REGIME DEALING WITH REFUGEES:

The movement to and from the Islamic Republic of Pakistan is regulated through numerous enactments regulating the issues related to Foreigners, Extradition, Diplomatic Privileges, Emigration, Passports, Citizenship, Naturalization, Registration of Foreigners in the country and various other issues. As our concern is mainly the issue of refugees arriving at or the borders of Pakistan, we will have a look at the notion of refuge incorporated (if any) in these enactments.

<sup>13</sup> It is due to this word that, although with a wider scope, the term "*muhajirin*" in Arabic is used for refugees. The issue is discussed in chapter I in detail.

<sup>14</sup> *Perceptions of Afghan Refugees, Where Are the Refugees?*, 271.

See online at <http://www.migrationpolicy.org/pubs/VanSelmTerrorism22.pdf> > (last accessed 03.02.09).

<sup>15</sup> SDPI, *Report on Stakeholder Consultations on the Future of Afghan Refugees in Pakistan*, presented to the UNHCR Islamabad (September 2006), 2. See, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=462cb46b5> > (last accessed 22.12.2008).

Section 2(a) of the Foreigners Act 1946<sup>16</sup> defines foreigner as a person who is not a citizen of Pakistan,<sup>17</sup> who shall not enter Pakistan or shall enter at such times, on such routes and fulfilling such conditions as are prescribed by the Federal Government.<sup>18</sup> The government may, further, ask any foreigner concerned, all the foreigners, any prescribed class or description to leave the country or to move and remain in any specified area imposing restrictions<sup>19</sup> on their movements.<sup>20</sup>

The same Act further asserts that a foreigner could be arrested, detained and confined in the interest of the security of Pakistan.<sup>21</sup> Odd is the assertion of the provision that such a person could be detained for two months without being produced before a court of law,<sup>22</sup> while under the Constitution of the Islamic Republic of Pakistan 1973<sup>23</sup>

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<sup>16</sup> The Foreigners Act, 1946 (XXI of 1946), promulgated on 23<sup>rd</sup> November 1946.

<sup>17</sup> Same is the case with "The Registration of Foreigners Act, 1939" (XVI of 1939), promulgated on 8<sup>th</sup> April 1939, Section 2.

<sup>18</sup> Section 3(2) (a). The Section, *inter alia*, states that:

*"2. In particular and without prejudice to [the] generality of the foregoing power, order made under this section may provide that the foreigner:-*

*a. shall not enter or shall enter Pakistan only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed."*

<sup>19</sup> Section 3(2)(c)(d)(e)(i)(ii).

<sup>20</sup> The words of Afrasiab Khan J. of the Lahore High Court needs to be marked which he delivered during hearing of a case involving Afghan refugees claiming rights of freedom of movement and carrying business, "the case of the petitioners clearly falls within definition and scope of the definition of the 'foreigner' as given by the Act mentioned above [i.e. the Foreigner Act, 1946]. I cannot agree with the contentions... that [Afghan Refugees'] movement cannot be restricted under existing laws and that they should be at liberty to carry on their business throughout Pakistan according to their sweet will. ... the Government is competent to place any foreigner at a particular place and that their movements can be restricted." See, PLD 1989 Lahore 223: Abdul Majeed and another vs. the S.H.O. Police Station Naulakha, Lahore and another before Afrasiab Khan J. Petition No. 4887 of 1987, decided on 5<sup>th</sup> February 1989.

<sup>21</sup> Section 3(2) (g).

<sup>22</sup> The proviso to the abovementioned section confirms the power on the federal government to detain or arrest a foreigner, but it could not detain a person "for a period longer than two months without the authority or a Board consisting of a judge of the Supreme Court who shall be nominated by the Chief Justice of the Court and another senior officer in the service of Pakistan, who shall be nominated by the President".

<sup>23</sup> Article 10 of the Constitution 1973 states under the heading "safeguards as to arrest and detention" that "every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate".

and the Code of Criminal Procedure 1898, an ordinary detainee is required to be produced before a magistrate within twenty four hours of arrest, excluding the time required for transportation.<sup>24</sup>

The Foreigners Order, 1951<sup>25</sup> precludes foreigners from entry into Pakistan without the leave of a Civil Authority having jurisdiction at a port or place of entrance of the foreigner concerned,<sup>26</sup> whose entry *shall* be refused if the authority is satisfied that the foreigner does not possess passport or entry visa and is not exempted from having a visa.<sup>27</sup>

In case a foreigner is barred from entry into Pakistan, he may be detained at any place with approval of the civil authority and he would be considered outside Pakistan.<sup>28</sup>

The Act, further, restricts employment<sup>29</sup> and movement of foreigners within Pakistan.<sup>30</sup>

<sup>24</sup> Cr.P.C. Section 61 reads as: 'Persons Arrested Not to be Detained More Than Twenty Four Hours: No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a magistrate under section 167 exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's court'.

<sup>25</sup> The Foreigners Order, 1951, promulgated 22<sup>nd</sup> October 1951.

<sup>26</sup> Section 3(1).

<sup>27</sup> Section 3(2)(a).

<sup>28</sup> Section 3(5).

<sup>29</sup> Section 10. It's worth noticing that an estimated 3.35 million illegal immigrants are presently resident within Pakistan, posing a challenge to the country's already strained socio-economic infrastructure and, according to the GoP, adding to the crime rate. The administrative efforts to counter the alien populace have unfortunately failed due to the fact that aliens are without any documentation or that the country of origin of the said aliens is unwilling to accept him on deportation. The Federal Government has, therefore, promulgated the Foreigners (Amendment) Ordinance 2000 in pursuance of Section 14(D) of which an authority known as National Aliens Registration Authority (NARA) was established in order to register all the foreigners in Pakistan, issue work permits to those aliens seeking employment or running own business who entered Pakistan immediately before the commencement of the Foreigners (Amendment) Ordinance, 2000(promulgated on July 10, 2000) and who had no permission to stay herein. See, <[http://www.pakistan.gov.pk/divisions/ContentInfo.jsp?DivID=23&cPath=221\\_227\\_309&ContentID=782](http://www.pakistan.gov.pk/divisions/ContentInfo.jsp?DivID=23&cPath=221_227_309&ContentID=782)> (last accessed 23.07.09). But the Afghan refugees were excluded from the process of registration. See, UNHCR, *Country Operation Plan 2006: Pakistan*, 2. Available online at: <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=43327c9228&query=NARA%20and%20the%20status%20afghan%20refugees>> (last accessed 23.07.09).

<sup>30</sup> Section 11.

Apart from the abovementioned provisions dealing explicitly with the entry into and residence of foreigners in Pakistan, other enactments exist which govern the exit, transit and temporary stay of foreigners therein, but provisions could not be found which deal or govern the issue of refuge or migration into Pakistan. The enactments, moreover, strongly debar from entry into Pakistan any person without a passport or visa, which refugee certainly do not possess due to their unexpected flight to avail the international protection.

### 2.3 STUDY OF PAKISTAN'S LEGAL REGIME IN THE LIGHT OF THE INTERNATIONAL REFUGEE LAW:

Just as a food-for-thought we need to look into the notion of *non-refoulement* which signifies the prohibition of returning refugees to a place where they are exposed to danger of being persecuted. In addition, refugees fleeing persecution and human rights violations should be recognized and afforded permission to remain regardless of how they enter a country of asylum,<sup>31</sup> in other words they are entitled to the protection of the *non-refoulement* principle even if are illegally therein.

Now, taking into account Pakistan's legal regime dealing with foreigners, one can affirm that various problems do exist in considering the case of Afghan refugees, and that the presence of millions of Afghan refugees in Pakistan remains a gray area.

Not being a signatory to the 1951 Convention or the 1967 Protocol, Pakistan did not issue any identification documents to the Refugees<sup>32</sup> and considered them *prima facie*

<sup>31</sup> Human Rights Watch, *Afghanistan, Iran and Pakistan; Closed Door Policy: Afghan Refugees in Pakistan and Iran*, February 2002, 26. See, <http://www.hrw.org/legacy/reports/2002/pakistan/index.htm> (last accessed 07.02.09).

<sup>32</sup> Although; Afghan refugees were issued *Shinakhti Passes* for identity purposes and booklets for assistance and identity purposes but were not in a channelized manner as only those applying for it were issued. But later on the passbooks were used for assistance purposes only and did not

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refugees.<sup>33</sup> The legal problems in relation to coping with these refugees, primarily, stemmed from the lack of a unified policy towards refugees and of identification documents.<sup>34</sup> Thus, Afghan refugees can be and are actually apprehended and charged in accordance with sections of the Foreigners Registration Act (1946) making them subject to police harassment.<sup>35</sup> While, the problem escalated, instead of being solved, due to UNHCR, GoP and Government of Afghanistan's (GoA) decision in the shape of tripartite agreements to repatriate refugees and close their camps.<sup>36</sup>

As a matter of fact, Pakistan's treatment of refugees has been inconsistent and changeable, depending not upon a clear-cut policy or law but upon changing sets of political imperatives related to internal economic constraints, and regional and international pressures.<sup>37</sup> Hence, for instance, the Government of N.W.F.P.<sup>38</sup> was hostile to the presence of Afghan refugees while the Governor of Baluchistan expressed

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provide any identification and hence did not provide any legal protection. It should also be noted that Ex-Com Conclusion# 91 calls for registration of refugees.

<sup>33</sup> Nonetheless, states have recognized the 1951 Convention's relevance to mass influx situations, and have expressed the 'view that refugees recognized on a *prima facie* basis are entitled to the same rights as refugees recognized under an individual refugees status determination scheme' and have stated that 'it is quite possible, within the Convention, to develop a response to large-scale group arrivals. See, Jean Francois Durieux and Jane McAdam, "Non-refoulement through Time: the Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies", *International Journal of Refugee Law*, 16:10 (2004).

<sup>34</sup> As a matter of fact, however, the identification documents would have been issued subsequent to formal recognition of the refugees as such; hence, once Afghan refugees were not recognized as refugees, the question of issuing documents seems illogical. For further details consider: *Special Essay, Impact of International Jurisdiction on Afghan Refugee Rights*, 1. See, <http://www.mcrg.ac.in/rw%20files/rw22.doc#im> (last accessed 03.02.09).

<sup>35</sup> *Report on Stakeholder Consultations on the Future of Afghan Refugees in Pakistan*, iv.

<sup>36</sup> These agreements are concluded between UNHCR, GoP and GoA and UNHCR, GoA and Government of Iran.

<sup>37</sup> *Report on Stakeholder Consultations on the Future of Afghan Refugees in Pakistan*, 1.

<sup>38</sup> The then Governor of N.W.F.P. Iftikhar Hussain Shah, repeatedly accused Afghans of being economic migrants and expressed his wish to return 70% of the Afghan refugees, this would, in case committed, have been violations of Pakistan's obligations under international law. For a detailed discussion see, Human Rights Watch 2002, *Afghan Refugees in Iran and Pakistan*, Chapter VIII.

tolerance to their presence; this signifies somehow contradiction in the application of the laws enforced in the country.<sup>39</sup>

Taking into account the treatment of refugees, Pakistan deals with the refugees and asylum seekers alike in accordance with 'the 1946 Foreigners Act' (amended 2000) which acknowledges no difference among them and other foreigners. Rather, it undermines the concept of legal protection as no provisions are incorporated into the Foreigners Act, 1946 or the Foreigners Order, 1951 which discuss the granting of entry to asylum seekers or refugees.<sup>40</sup> This provides Pakistan with some 'leverage' in dealing with the refugees on its own terms, rather than having to adhere to international standards.<sup>41</sup>

The Foreigner as defined in S.2 of the Foreigners Act 1946 includes Afghan refugees, and hence, the Federal government can impose restrictions on their entry into Pakistan, their movement within the country if allowed to enter and employment or carrying business in Pakistan.<sup>42</sup> Although the government did not opt for such a move but according to the Act, it is competent to place Afghan refugees at particular places and could even warehouse<sup>43</sup> them in camps.<sup>44</sup>

<sup>39</sup> Human Rights Watch, *Afghan Refugees in Iran and Pakistan*, 20.

<sup>40</sup> Salma Malik, *Special Essay, Impact of International Jurisdiction on Afghan Refugee Rights*, 3.

<sup>41</sup> Susanne and William, *Finding Durable Solutions in Contested Transitions*, 16.

<sup>42</sup> The Foreigners Act 1946 prohibited employers from hiring a 'person who has no permission to stay in Pakistan'. Moreover, in 2003 Pakistan allowed refugees recognized as such by UNHCR, excluding Afghans, to enjoy the right to work. See, *World Refugee Survey*, 2005.

<sup>43</sup> The term 'warehousing' denotes "the denial of human rights found in the 1951 Convention and other instruments to live lives as normal as possible while in exile, especially the right to earn a livelihood and freedom of movement". Warehoused refugees are usually confined to camps or segregated settlements where they are virtually dependent on humanitarian assistance. Nonetheless, refugees free to move are still sometimes warehoused if they are not allowed to enjoy their right to work, practice professions, run businesses and own property. See, *FAQs about Refugee Warehousing and the Campaign to End it*. See, <http://www.refugees.org/article.aspx?id=1296&rid=1179&subm=33&ssm=87&area=Investigate&> (last accessed 03.02.09), and Merrill Smith, *Warehousing Refugees: A Denial of Rights, a Waste of Humanity*, available online at <http://www.refugees.org/data/wrs/04/pdf/38-56.pdf> (last accessed 02.02.09).

<sup>44</sup> M.A Zafar., *Manual of Foreigners Laws in Pakistan* (Lahore: Sindh Law Journal Publication, 2005), 125.

Besides, the opinion of a court in the N.W.F.P. that “every sovereign state possesses inherent powers to restrict entry into its territory or the movements in it of any foreigner[,] [t]his right of sovereign state cannot be hampered with by any principle of natural justice or on the ground of equity as such restriction would not be commensurate with the concept of the sovereignty of a state”<sup>45</sup> highlights the loophole<sup>46</sup> in the Pakistani legal system to deal with the refugees residing in Pakistan specifically the Afghan refugees with a majority living in N.W.F.P.

## 2.4 PAKISTAN'S OBLIGATIONS TOWARDS AFGHAN REFUGEES AND NON-REFOULEMENT:

The GoP has always stressed that international community must not ignore their liability of “Burden Sharing”<sup>47</sup> with Pakistan as the later is not able to cope single-handedly with millions of Afghan refugees, further it has time and again asked for

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<sup>45</sup> PLD 1980 Pesh. 275. Jean Charles Groosen vs. State of Pakistan, through Secretary M/o interior, Government of Pakistan, before Karimullah Durrani and Shah Abdul Rashid, JJ. Writ petition no. 782 of 1979, decided on 4<sup>th</sup> may 1980.

<sup>46</sup> It is noteworthy that ‘Equity’ is considered among the sources of international law and customary international law is considered a threat to the vague notion of sovereignty. See, *Oppenheim's International Law*, 43 and *International Law Conference Assesses Threats to Sovereignty* online at: [http://www.c-fam.org/publications/id.365/pub\\_detail.asp](http://www.c-fam.org/publications/id.365/pub_detail.asp) (last accessed 10.05.09). If we presume for a while that natural justice and equity could not compel a state to allow entry of any persons to its territory, being an Islamic state, Pakistan has to believe in sovereignty of Allah almighty alone, as the Constitution of the Islamic Republic of Pakistan 1973 suggests that “Whereas the sovereignty over the entire universe belongs to the almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by him a sacred trust”, (Art. 2(A)), it implies that Pakistan, as an Islamic state ought be, is not enjoying unfettered sovereignty because it cannot legislate on the basis of its sweet will but have to function within the limits prescribed by Islamic law.

<sup>47</sup> The idea of burden sharing or global sharing was promoted by legal scholars in 1970s, the notion denotes the idea that refugees should be assigned worldwide by matching refugee preferences with host countries ranked according to an index of wealth and population density. See, Astri Suhrke, “Burden Sharing During Refugee Emergencies: the Logic of Collective vs. National Action,” *Journal of Refugee Studies*, 11:2 (1998).

repatriation of Afghan refugees and had been affirming that repatriation would be voluntary<sup>48</sup>, rather it even claimed adherence to the principle of voluntary repatriation.<sup>49</sup>

Now, when subsequent to the withdrawal of Soviet forces from Afghanistan, the ouster of Najeeb Ullah's regime and the burst of civil war among *mujahedeen* factions, the international community ignored the refugees, and Pakistan had to carry the responsibility alone, would it still be under some obligations to honor or it is free to react in any possible manner? This part intends to find a solution to the question.

#### 2.4.1 Legal Obligations:

Although Pakistan has its own municipal law in shape of the Foreigners Act 1946 and Foreigners Order 1951, which does not recognize any difference between a foreigner (not in need of international protection) and an asylum seeker or refugee (the one in immediate need of international protection) to follow; still as a member of international community it has to observe some rules of customary international law besides the treaty rules that are applicable to it.

#### Treaty Law:

The border closures in 1998 and 2001, despite the justifiable and eminent need of Afghans to flee their homeland and seek safety in Pakistan, undermined the legal right to

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<sup>48</sup> Afghan Islamic Press (AIP), *Five Million Afghans Return Home Since Fall of Taliban*, *Afghan FM* (AIP 19 November 2008), (last accessed 24.11.2008) and *Militancy, Insecurity Slow Down Refugees' Repatriation: Afghan FM*, <http://www.reliefweb.int/rw/rwb.nsf/db900SID/PANA-7LJJAC?OpenDocument> > (22.12.2008).

<sup>49</sup> The News, Daily, *PM for Voluntary Repatriation of Afghan Refugees*, [http://www.thenews.com.pk/daily\\_detail.asp?id=132342](http://www.thenews.com.pk/daily_detail.asp?id=132342) > (last accessed 28.08.2008)



seek and enjoy asylum as per the Universal Declaration of Human Rights 1948 (UDHR) to which Pakistan is a party.<sup>50</sup>

Further, Pakistan undertook, as a party to the 1989 Convention on the Rights of the Child (CRC),<sup>51</sup> to provide them appropriate protection and humanitarian assistance in the enjoyment of the rights enumerated in the Convention (Article 22); but Pakistan felt short of its legal obligations by denying entry to refugees with children and returning children back into Afghanistan without being accompanied by someone.<sup>52</sup>

#### 2.4.1.1 Customary Law:

Are the states not party to the 1951 Convention or the related 1967 protocol not bound by the provisions contained therein including the *non-refoulement* principle? The answer is negative, because apart from a state being obliged by treaty obligations that it enters with its free will; a state may become bound by rules of customary law evolved consequent to huge appreciation of a rule by international community and the subsequent *opinio juris*. The same is the case with Pakistan; albeit not a party to the 1951

<sup>50</sup> Notwithstanding the nature of UHDR; a non-binding declaration, some of its provisions either constitute general principles of law or represent elementary considerations of humanity. The declaration serves as an authoritative guide See, Ian Brownlie and Guy S. Goodwin-Gill, *Basic Documents on Human Rights* (Great Britain: Oxford University Press, 4<sup>th</sup> Ed., 2002), 18. The Declaration is regarded by the General Assembly and many international jurists as forming part of customary international law qualified to be used as moral and diplomatic pressure against the violators of the fundamental human rights. See, [http://en.wikipedia.org/wiki/Universal\\_Declaration\\_of\\_Human\\_Rights](http://en.wikipedia.org/wiki/Universal_Declaration_of_Human_Rights) > (last accessed 02.05.2009).

<sup>51</sup> Adopted on 20<sup>th</sup> November 1989 through UNGA resolution 44/25, entered into force 2<sup>nd</sup> September 1990.

<sup>52</sup> Although the conventions are general and apply to all children, the refugee children must be given priority in treatment as they lack protection of their state and their parents are more often unable to accord them reasonable care and protection. Hence, we can assert that if these rights are available to children at their homeland, they must be available to refugee children. See, Human Rights Watch 2002, *Afghan Refugees in Iran and Pakistan*, 22.

convention (or related 1967 Protocol); it is bound by the Customary Principle of *non-refoulement* enshrined in Article 33 of the Convention.<sup>53</sup>

Therefore, by adopting non-entrée policy in 1998, 2000, 2001 and the following years,<sup>54</sup> GoP not only placed refugees at the risk of being returned to a country where their lives were seriously endangered but also violated its obligations of *non-refoulement* under customary international law and numerous Ex-Com Conclusions.

#### 2.4.2 Moral Obligations:

If one assumes that the principle of *non-refoulement* does not qualify the status of a customary norm, and Pakistan is not a party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, it is, nonetheless a member of the Ex-Com since 1958, it is thus under some moral obligation to honor the conclusions<sup>55</sup> it acclaimed in the Ex-Com meetings. Moreover, Pakistan acknowledged its legal obligations to refugees when it agreed with UNHCR to screen Afghan refugees according to standards generally based on international refugee law.<sup>56</sup>

For instance, when Ex-Com concludes that keeping in view Conclusions No. 6 (XXVII) and 7 (XXVIII) and numerous other references made in its other Conclusions to the principle of *non-refoulement*; it “expresses deep concern that refugee protection is seriously jeopardized by expulsion of refugees leading to *refoulement*; and calls on States to refrain from taking such measures and in particular from returning or expelling refugees

<sup>53</sup> The Customary nature of the principle is discussed in detail in Chapter 1.

<sup>54</sup> The issue is discussed in detail *Infra* at 2.5

<sup>55</sup> For instance, Conclusion# 22 (addressing the need to fully protect refugees who, arrive in a host country as a part of a large-scale influx), Conclusion# 81 (reiterating the importance of UNHCR’s protection mandate and the primary responsibility of states in protecting refugees within their territories), conclusion# 85 (addressing the problem of mass influx of refugees and the right to seek and enjoy asylum) and Conclusion# 91 (emphasizing on registration of refugees).

<sup>56</sup> Salma Malik, *Special Essay, Impact of International Jurisdiction on Afghan Refugee Rights*, 1.

contrary to the principle of *non-refoulement*”,<sup>57</sup> how can Pakistan express disregard to the conclusion? If not legally bound, as a minimum, it is morally bound to meet its obligation under the said conclusion.

### 2.4.3 Obligations under Islamic Law:

In addition, Pakistan as an Islamic State established with the name of Islam and respectful member of the Islamic community has religious duties to honor. An *ayah* of the holy Qur'an reads as 'If one of the idol worshipers sought safe passage with you, you shall grant him safe passage, so that he can hear the word of Allah, *then send him back to his place of security...*' [9:6].<sup>58</sup>

This according to the unanimous viewpoint of Islamic scholars is the principle for treatment of non-Muslims i.e. to be sent back to a secure place.<sup>59</sup>

In another *ayah*, Allah almighty states that 'Surely, those who believed, and emigrated, and strove with their money and their lives in the cause of Allah, as well as those who hosted them and gave them refuge, and supported them, they are allies of one another... Allah is Seer of everything you do.' [8:72] Both these groups are allies of each other and are vowed a victory in hereafter and a forever life in the Heaven.

Nonetheless, the case of Afghan refugees in Pakistan differs from the above-mentioned, as Afghans are Muslims entering territory of an Islamic state. The Quranic

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<sup>57</sup> Conclusion# 102 (LVI) – 2005.

<sup>58</sup> The same meaning is contained in Article 12 of the Cairo Declaration on Human Rights in Islam, adopted by OIC on 5<sup>th</sup> August 1990. The article states: "Every man shall have the right, within the framework of Shari'ah, to free movement and to select his place of residence whether inside or outside his country and if persecuted, is entitled to seek asylum in another country. *The country of refuge shall ensure his protection until he reaches safety*, unless asylum is motivated by an act which Shariah regards as a crime". For full text: Ian and Gill, *Basic Documents on Human Rights*, 764.

<sup>59</sup> *Al-Mughni*, 13:75.

principle that 'the believers are members of one family'<sup>60</sup> implies that if a Muslim enters an Islamic state, he automatically becomes a citizen of the later and acquires rights and obligations equal to that of Muslims of the Islamic state. If elaborated further, Muslim would not be considered *must'amin* (asylee or refugee) in the Islamic state<sup>61</sup> because they belong to one and the same nation.<sup>62</sup> Hence, he is eligible to reside in the Islamic state for indefinite period, as he may wish.

To sum up, let's presume that Muslim 'foreigners' are not considered on equal footing with the permanent residents of an Islamic state, and the rule for treatment of non-Muslims is that they ought to be sent back to a secure place after they have been to the domain of Islam, the said rule i.e. sending them to a secure place with safety and dignity, would be preferably applicable to the Muslims.

## 2.5 PAKISTAN'S PRACTICE OF DEALING WITH AFGHAN REFUGEES:

Subsequent to observing Pakistan's obligations under international and moral laws, we come to observe the actual situation of Afghan refugees in Pakistan, whether they have been granted the essential and foremost right of living in peace under the protection of GoP or else.

Pakistan did a commendable job when in spite of being a developing country it hosted millions of Afghan refugees during the 80s and 90s with support of international community until in 1995 the international aid came to an end and the story of refugees

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<sup>60</sup> The believers are members of one family; you shall keep the peace within your family and reverence God, that you may attain mercy. The Holy Qur'an: (49:10)

<sup>61</sup> Muhammad Mushtaq Ahmad, *Jihad, Muzahamat aur Baghawat* (Urdu) (Jihad, Resistance and Rebellion) (Gujranwala: Al-Shariah Academy, 2009), 122.

<sup>62</sup> Muhammad Hamidullah, *The Muslim Conduct of State* (Lahore: Sh. Muhammad Ashraf publishers, 1996), Para. 238. The author adds that "owing to Europeanized conception of policies of the Muslim state" provisions are laid down for treatment of foreigners, including Muslims, but as they are not rules of Muslim law, we need not take notice of them. *Ibid*, Para 242.

was put at the back seat.<sup>63</sup> Due to lack of burden sharing and a consistent legal policy towards refugees on one hand; while keeping in view the political pressures on national and international levels on the other hand, Pakistan had to think of ways to ease its burden; hence it started encouraging repatriation in 90s when *mujahedeen* entered Kabul and the period of Taliban in power. Following the 1998 attacks on US embassies in Kenya and Tanzania Pakistan closed its borders and termed the new waves of refugees as “economic” migrants<sup>64</sup> and stressed that GoA should deal with the famine and drought situation in Afghanistan itself.<sup>65</sup>

Pakistan kept its border closed during late 90s, while due to international pressure it had to open the border for the 40,000 new arrivals in 1996. Yet in 1999 Pakistani authorities threatened to move all refugees in urban areas to camps but did not actually implemented it, while in June the same year, police demolished the stalls of a number of Afghan traders at a market in Peshawar and beat the traders and their Afghan customers, while in November 1999 Pakistan reportedly pushed back 300 Afghan asylum seekers at the border.<sup>66</sup>

Again, Pakistan closed its border due to its ‘inability to absorb’ the 30,000 thousands refugees in November 2000, while by Jan 2001, the N.W.F.P. Governor with acquiescence of the Federal Government issued public orders empowering the police to

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<sup>63</sup> Amnesty International, *Afghanistan, Protect Afghan Civilians and Refugees*, ASA/11/012/2001, 3.  
<http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/2c9beb2a1b67bf4185256ae000690f0d> > (last accessed 03.02.09).

<sup>64</sup> Roughly speaking, if one is pushed he is a refugee but if he is pulled he is an ordinary migrant. Gil. *Beyond Charity*, 16.

<sup>65</sup> *Stakeholder Consultations on the Future of Afghan Refugees in Pakistan*.

<sup>66</sup> *World Refugee Survey 2000 – Pakistan*.

[http://www.unhcr.org/refworld/country\\_USCRI\\_PAK\\_3ae6a8cf4.0.html](http://www.unhcr.org/refworld/country_USCRI_PAK_3ae6a8cf4.0.html) > (last accessed 03.02.09).

detain and 'deport'<sup>67</sup> newly arrived Afghans in the N.W.F.P. and all 'undocumented' Afghans already in Pakistan<sup>68</sup> and hence committed *refoulement*.<sup>69</sup> Refugees were put in prison and then, sometimes, forcibly returned to Afghanistan without being charged or prosecuted for crimes, as per Human Rights Watch report 2002, 7,633 refugees, a majority of men and boys, were forcibly returned to Afghanistan between October 2000 and May 2001<sup>70</sup> while 300 refugees were returned during October and November 2001 from NWFP,<sup>71</sup> the total number of refugees returned in 2001 being 3000 refugees.<sup>72</sup>

Pakistan again closed its border with Afghanistan in acceptance of the US request to keep the borders closed in 2001<sup>73</sup>, sealing the border on-the-face of Afghan refugees arriving at thousands raised immense criticism on international level; therefore, it allowed refugees to enter Pakistan escaping the persecution they faced in Afghanistan, but confined them to inhospitable border areas.<sup>74</sup> This action was taken subsequent to some signs of improvement being observed in August 2001 when GoP and UNHCR agreed to conduct screening interviews of the refugees for their protection purpose, but on 28<sup>th</sup> the

<sup>67</sup> Legally speaking, deportation could only be the result of a legal procedure whereby an *individual* is adjudged criminal by a court of law in accordance with provisions of criminal, immigration or nationality law and is ordered to be expelled from the country. In the case of Afghan refugees being detained and expelled from Pakistan without charges being framed against them or prosecuted, the term does not fit well. See, Human Rights Watch, *Afghan Refugees in Iran and Pakistan*, 28-9.

<sup>68</sup> Human Rights Watch, *Afghan Refugees in Iran and Pakistan*, 20.

<sup>69</sup> The Governor reportedly instructed each police station to deport a minimum of five to ten Afghan men daily. This period was called by UN-commissioned study on the forcible return of Afghan refugees a period of 'mass harassment in cities and officially sanctioned forcible return to Afghanistan in a systematic manner'.

See, United States Committee for Refugees and Immigration (USCRI), *Afghan Refugees in Pakistan at Risk* (USCRI, 22:7, Refugee Reports, 2001). Available online at:

<http://www.unhcr.org/refworld/country,,USCRI,,AFG,4562d8cf2,3c58099a15,0.html> (last accessed 03.02.09).

<sup>70</sup> Human Rights Watch, *Afghan Refugees in Iran and Pakistan*, 28.

<sup>71</sup> *Ibid.*

<sup>72</sup> *World Refugee Survey* 2002, Country Report.

<sup>73</sup> Christian Science Monitor, *Embracing Afghan Refugees*.

Online at <http://www.csmonitor.com/2001/0919/p10s1-comv.html> (last accessed 03.02.09).

<sup>74</sup> *Stakeholder Consultations on the Future of Afghan Refugees in Pakistan*.

same month Pakistan 'clearly breached the August 2 agreement' by returning about 150 Afghan refugees to their country without being screened.<sup>75</sup> At the end of 2001, it moved the refugees, against their will contrary to the claims of GoP and UNHCR, to temporary camps established along the border.<sup>76</sup> This indicates that Pakistan's decision to play the frontline role in the 'war-on-terror' also influenced the border closure policy because US administration had, on occasions, asked Pakistan to keep its borders closed<sup>77</sup> in order to stop the movement of anti-US elements between Afghanistan and Pakistan.

Almost 50,000 Afghans, mostly ethnic Pashtoons, fled into Pakistan during 2002 citing the persecution by the non-Pashtoons and ongoing fighting among the causes of refuge whom were transferred to new camps in Chaman, Balochistan. In mid-February GoP suspended their registration leaving 20,000 Afghans stranded at the border, the number, however, rose to 40,000 in May the same year.<sup>78</sup> The problem persisted for Pashtoons, Hence a camp was established for them inside Afghanistan with their number increasing as it hit the mark of 80,000 persons in need of the basic necessities, agencies reported that 40 asylum seeking children died of cold in December<sup>79</sup> while the harassment of refugee inside Pakistan continued in the year 2002 the way it was in 2001.<sup>80</sup>

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<sup>75</sup> Human Rights Watch, *Afghan Refugees in Iran and Pakistan*, 21.

<sup>76</sup> *Pakistan: Refugees Not Moving Voluntarily* (New York, Dec 5, 2001).

<sup>77</sup> Salma, *Special Essay, Impact of International Jurisdiction on Afghan Refugee Rights*, 2.

<sup>78</sup> *World Refugee Survey 2003*, Country Report.

<sup>79</sup> <http://www.refugees.org/countryreports.aspx?id=208> > (last accessed 03.02.09).

<sup>80</sup> *Ibid.*

<sup>80</sup> *Ibid.*

437 refugees were 'deported' from Quetta into Afghanistan in 2003,<sup>81</sup> while some 50 *madrassah* students were deported in 2004 in response to US pressure to eliminate religious centers.<sup>82</sup>

It was decided in 2006 that four camps, two in each of NWFP (*Katcha Gari* and *Jalozai*) and Balochistan (*Girdi Jungle*, *Jungle Pir Alizai*), would be closed till 2007,<sup>83</sup> the GoP and UNHCR; despite the agitations by the refugees and their concerns for the insecurity in Afghanistan,<sup>84</sup> closed the former two of the above-mentioned four camps yet calling it a "voluntary repatriation". Human Rights Commission of Pakistan (HRCP) reported arrest of 2,500 Afghan refugees under Foreigners' Act 1946 and the denial of legal aid to the detainees.<sup>85</sup> Besides, Pakistan deported several hundred refugees without allowing UNHCR to screen and interview them.<sup>86</sup>

<sup>81</sup> *World Refugee Survey 2004 - Pakistan*.

[www.unhcr.org/refworld/country\\_USCRI\\_PAK\\_40b459438\\_0.html](http://www.unhcr.org/refworld/country_USCRI_PAK_40b459438_0.html) > (last accessed 03.02.09).

<sup>82</sup> *World Refugee Survey 2005 - Pakistan*.

[http://www.unhcr.org/refworld/country\\_USCRI\\_PAK\\_42c9289232\\_0.html](http://www.unhcr.org/refworld/country_USCRI_PAK_42c9289232_0.html) > (last accessed 03.02.09).

<sup>83</sup> Pakhtoon Sahar, *Refugees: Afghan Camps in Pakistan to Close in July* (PAN, IPS 2006). See, <http://ipsnews.net/news.asp?idnews=33504> > (last accessed 03.02.09). GoP's stance in relation to camp closures was that these camps were located in the provinces bordering Afghanistan and were therefore used by the 'militants' as safe havens and rest-places. Hence, in order to enforce law and order the GoP had to take action.

<sup>84</sup> *World Refugee Survey 2006*. See, <http://www.refugees.org/countryreports.aspx?id=2161> > (last accessed 07.02.09).

<sup>85</sup> *Ibid*.

<sup>86</sup> *World Refugee Survey 2007*. See, <http://www.refugees.org/countryreports.aspx?VIEWSTATE=dDwtOTMxNDcwOTk7O2w8Q291bnRyeUREOkdvQnV0dG9uOz4%2BUwqzZxIYLI0SfZCZue2XtA0UFEQ%3D&cid=2161&subm=&ssm=&map=&searchtext=World+Refugee+Survey+2007> > (last accessed 07.02.09).





Afghan refugees living in *Pir Alizai* camp near to the Pakistan-Afghanistan border, in Pakistan, Wednesday, May 16, 2007. According to officials and residents of the area, at least three Pakistani villagers and an Afghan refugee were killed in a clash with police, who were sent to demolish homes near a refugee camp that authorities want to close, officials and residents said.

Source: <<http://cache.daylife.com/imageserve/0dTpcAT5LB2Lx/610x.jpg>> (last accessed 24.05.2009)

The return of Afghan refugees and the *bulldozing* of their properties in the Jalozi Camp started at the beginning of April 2008 in accordance with a previous agreement between the UNHCR and the GoA and GoP. Shops and mud-huts owned by Afghan refugees in Jalozi refugee camp were *demolished* and refugees who were still living there were asked to *vacate* the area by the end of April the said year.<sup>87</sup>

A refugee said about the option to move to new camps on the Pak-Afghan border: "They've destroyed our houses and shops, and now they tell us to go and build new ones - it's inhumane and ridiculous".<sup>88</sup> However, officials reiterated that refugees had 'no option but to return to their country'<sup>89</sup> subjecting the plea of relocation to suspicion.

Citing an intended returnee to Afghanistan in 2007, 'Eurasia Insight' asserts that his concerns reflected the fact that he was a reluctant returnee because; according to him he didn't have a house and didn't know whether he will find work, nonetheless, Pakistani officials and international non-governmental organization representatives were determined to promote repatriation.<sup>90</sup> As far as his decision to go was concerned it was consequent to factors beyond his control, he complained "I can't go around the city because the police will arrest me, I can't find work so *I had no choice but to leave*".<sup>91</sup>

Further, the refugees had no option but to leave the camp as Pakistani soldiers surrounded the camp and knocked down a few shops run by Afghan refugees. The refugees reported that they were asked to vacate the camp within a week with the

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<sup>87</sup> IRIN Asia, *Afghanistan-Pakistan: Afghan Refugee Settlements Demolished at Jalozi*, <http://www.afgha.com/?q=node/7295> (last accessed 20.06.2008).

<sup>88</sup> *Ibid*

<sup>89</sup> Daily Times, *Jalozi Refugee Camp to be Closed by Mid-April*. Available online at: [http://www.dailytimes.com.pk/default.asp?page=2008%5C02%5C10%5Cstory\\_10-2-2008\\_pg7\\_14](http://www.dailytimes.com.pk/default.asp?page=2008%5C02%5C10%5Cstory_10-2-2008_pg7_14)

<sup>90</sup> Abubakar Siddique, *Afghan Refugees Reluctant to Leave Pakistan* (Eurasia insight, 26.03.2007). <http://www.eurasianet.org/departments/insight/articles/eav032607.shtml> (last accessed 22.12.2008).

<sup>91</sup> *Ibid*.

exclusion of carpet weavers whom were allowed by GoP to stay at the camp.<sup>92</sup> It is noticeable that approximately 100,000 refugees were residing in the camp.<sup>93</sup>

This was not the problem of *Jalozai* camp alone. The refugees in Balochistan, majority of them being from southern provinces, expressed concern over the closure of the two camps and even one of them stated "I am very sad. I will not go. *It's better for the government to kill us*"<sup>94</sup>, while another had questions to ask the Government of Balochistan and UNHCR "How can you willingly ask us to return to places like Helmand and Kandahar knowing how bad the security is there?"<sup>95</sup>

Even previously, due to the same reason i.e. unwillingness to return, Afghan refugees had clashes with security forces that tried to *bulldoze* several homes a day after authorities razed 70 shops and three houses to close *Katcha Garhi* Camp in NWFP.<sup>96</sup>

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<sup>92</sup> IRIN Asia, *Afghanistan-Pakistan: Insecurity, Uncertainty Stop Return of Afghan Refugees*. Available online at: <http://www.globalsecurity.org/military/library/news/2008/06/mil-080619-irin02.htm> (last accessed 20.06.2008).

<sup>93</sup> IRIN Asia, *Afghanistan-Pakistan: Sudden Return of Afghans Could Cause Crisis, UNHCR Warns*, online at: <http://www.globalsecurity.org/military/library/news/2007/08/mil-070823-irin03.htm> (last accessed 20.06.2008)

<sup>94</sup> IRIN Asia, *Pakistan: Afghan Refugees Concerned over Imminent Closure of Two Camps in Baluchistan*, online at: <http://www.alertnet.org/thenews/newsdesk/IRIN/e63e58711fd7b5d9ab99b0eeda48a658.htm> (last accessed 20.06.2008)

<sup>95</sup> *Ibid.*

<sup>96</sup> *World Refugee Survey 2008 (Pakistan)*, available online at: <http://www.unhcr.org/refworld/country...annualreport.afg.4562d8cf2.485f50c9c.0.html> (last accessed 22.12.08)



Source: <http://cache.daylife.com/imageserve/0dnN0SfeQN5ZJ/610x.jpg> > (last accessed 24.05.09)

Pakistani officials claimed that Taliban forces infiltrated the four border camps to be closed and used them as safe heavens for attacking the NATO and Afghan forces within Afghanistan, and police started door-to-door search in order to arrest and “deport” illegal entrants. However, UNHCR warned that Pakistan was pressuring refugees to repatriate by closing camps, deeming unregistered refugees illegal, threatening to confiscate their property and documents, and threatening to fine those who rented property to refugees.<sup>97</sup>

Although analysts suggested that shifting the refugees to the other side of border would escalate tensions because GoA is incapable of providing for their rehabilitation, some were of the view that in order to root Taliban, Pakistan needed to expel 2.4 million (Census 2005 figure) Afghan refugees residing therein. This view came consequent to rise in attacks on the NATO and the US forces inside Afghanistan in 2007.<sup>98</sup>

Moreover, Pakistan adopted a very harsh policy during 2008 towards refugees in some parts of the country, particularly *Bajaur* agency bordering Afghanistan. 60,000 Afghans were ordered to leave tribal areas<sup>99</sup> following which a crackdown was launched against them.<sup>100</sup>

Human Rights Watch reported in 2002 that credible reports were at hand indicating forced returns and deportations by Iran and Pakistan, and existence of push factors such

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<sup>97</sup> <<http://www.unhcr.org/refworld/country,,,annualreport,afg,4562d8cf2,485f50c9c,0.html>> (last accessed 22.12.08).

<sup>98</sup> David Montero for Christian Science Monitor, *To Root Out Taliban, Pakistan Needs to Expel 2.4 Million Afghans* (CSM, 14 February 2007). See, <<http://www.csmonitor.com/2007/0214/p06s02-wosc.html?s=hns>> (last accessed 03.02.09). It however is essential to check whether the security situation in Pakistan has improved or deteriorated following the *refoulement* of more than 2 million Afghan refugees, if the situation has deteriorated, it denotes that return of Afghans is not a cure but a new wound and Pakistan has to look somewhere else for the solution.

<sup>99</sup> <[http://www.thenews.com.pk/daily\\_details.asp?id=139908](http://www.thenews.com.pk/daily_details.asp?id=139908)> (last accessed 20.11.08)

<sup>100</sup> <[http://www.thenews.com.pk/top\\_story\\_detail.asp?id=17677](http://www.thenews.com.pk/top_story_detail.asp?id=17677)> (last accessed 20.11.08)

as police harassment and restrictions on employment rights and health and education services.<sup>101</sup>

## 2.6 CONCLUSION:

Afghans were compelled by the poor social, political and economic conditions prevailing in Afghanistan to avail the protection of Pakistan in 1979. Pakistan welcomed them throughout the *Jihad* period despite some variation in quality and quantity of their treatment. Lack of a specific legal regime dealing with refugees in addition to change in the political and economic considerations made Afghans vulnerable to various kinds of abuse and maltreatments.

Nonetheless, Pakistan has done a commendable job in protecting more than 2 million refugees throughout the past 3 decades, enough to cause embarrassment to the 'west' which even is not ready to accept small pockets of asylum seekers and is looking for various excuses to avoid their obligations under treaty and customary international law.

It is, nevertheless, obliged to at least honor the rules of customary international law the basic of them the principle of *non-refoulement*. We have come across numerous instances of border closures, 'deportations', camp closures and creation of push factors which amounts to Constructive *refoulement*<sup>102</sup> and thus violation of the principle.

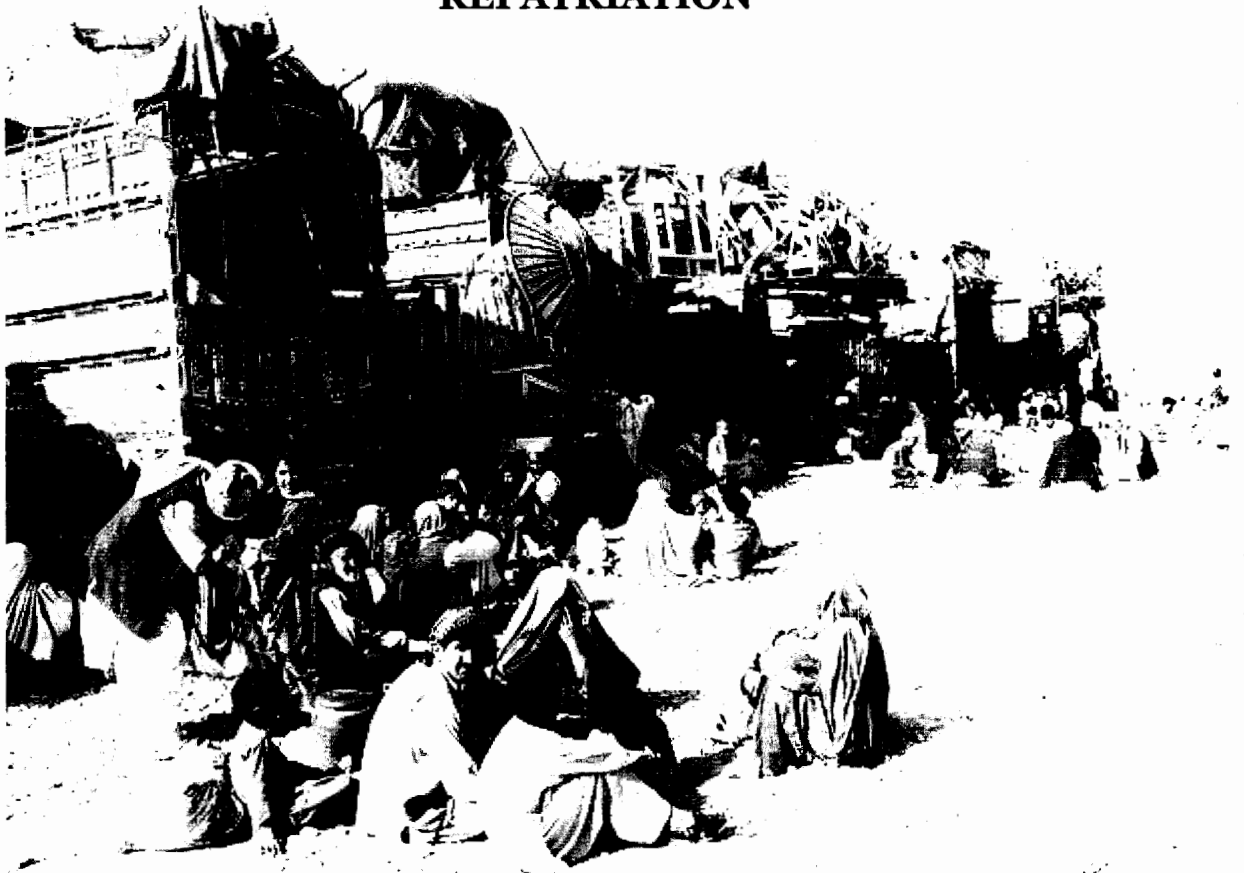
<sup>101</sup> *World Refugee Survey 2003 Country Report*,

[http://www.refugees.org/countryreports.aspx?\\_\\_VIEWSTATE=dDwtOTMxNDcwOTkZO2w8Q291bnRyeUREOkdvQnV0dG9uOz4%2BUwqzZxIYLI0SfZCZue2XtAQUFEQ%3D&cid=1928&subm=&ssm=&map=&searchtext=>](http://www.refugees.org/countryreports.aspx?__VIEWSTATE=dDwtOTMxNDcwOTkZO2w8Q291bnRyeUREOkdvQnV0dG9uOz4%2BUwqzZxIYLI0SfZCZue2XtAQUFEQ%3D&cid=1928&subm=&ssm=&map=&searchtext=>) (last accessed 15.12.2008).

<sup>102</sup> Ex-Com's Program, Global Consultations on International Protection, Geneva 22-24 May, 2002, *Voluntary Repatriation, NGO Statement* prepared by Elizabeth Ferris. See, <http://www.icva.ch/doc00000868.html> (last accessed 03.02.09).

## CHAPTER THREE

### REPATRIATION



### 3.1 INTRODUCTION:

The refugee situation does not last forever, therefore, the international protection provided to the refugees fleeing persecution in a specific territory is not normally given for unlimited period and it at last has to cease with restoration of national protection, either, in the country of origin (Voluntary Repatriation), integration in the host country or the country of first asylum (Local Settlement) or resettlement in a third country (Resettlement).<sup>1</sup>

It is thus inferred that durable solutions<sup>2</sup> to the refugee problems are mainly three, i. Voluntary Repatriation, ii. Local integration and iii. Resettlement. As would be discussed in detail shortly, the focus of the international community was during the period of 1945 till 1985 on resettlement as the practical solution<sup>3</sup> but subsequent to realizing the need to diminish the causes of flight and a change in the political interest of the 'north', the emphasis was shifted to voluntary repatriation as the strongly preferred solution<sup>4</sup>. Moreover, this was one of the principal objectives of the International Refugee Organization established after World War II.<sup>5</sup>

<sup>1</sup> Goodwin-Gill, however, puts it in other words as he states: "to the ultimate objective of permanent solutions to refugee problems, there are two basic alternatives, voluntary repatriation, or assimilation in new national communities, with the latter encompassing either integration in the country of first refuge or resettlement in a third state". See, Gill, *The Refugee in International Law* (Great Britain: Clarendon Press, Oxford, 1985), 219.

<sup>2</sup> "A durable solution for refugees is one that ends the cycle of displacement by resolving their plight so that they can lead normal lives". UNHCR, *An Introduction to International Protection, Protecting Persons of Concern to UNHCR* (Geneva: International Protection Department (IPD), 2005), 137. <http://www.unhcr.org/refworld/docid/4214cb4f2.html> (last accessed 22.12.2008).

<sup>3</sup> B.S. Chimni, *From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems*, 55. See, <http://rsq.oxfordjournals.org/cgi/reprint/23/3/55> (last accessed 25.11.08).

<sup>4</sup> Ragini Trakroo, Aparna Bhat, Samhita Nandi, *Refugees and the Law* (New Delhi: Human Rights Law Network, (nd.)), 195. (Hereinafter Ragini, *Refugees and the Law*).

<sup>5</sup> Gill, *The Refugee in International Law*, 219.



It was the period from 1985 to 1993, according to B.S. Chimni, during which “voluntary repatriation came to be promoted as *the* durable solution”, with assurance, however, of its voluntary character.<sup>6</sup>

### 3.11 Voluntary Repatriation, the Preferred Solution?

The General Assembly called upon the states to assist UNHCR in its function to promote voluntary repatriation<sup>7</sup>. Subsequently, the High Commissioner for Refugees, at the 42<sup>nd</sup> session of Executive Committee in 1991, highlighted the poor conditions in which the refugees were made to live in different states and asserted that the right of refugees to return to their homeland is recognized in the same way as the right to seek asylum<sup>8</sup> abroad is. She further vowed to pursue every opportunity in the upcoming year, i.e. 1992, for voluntary repatriation as the preferred solution to the problem of refugees.<sup>9</sup>

Consequently, Executive committee in the Conclusion 68 (XLIII) of 1992<sup>10</sup>:

*“(S) Reaffirms that voluntary repatriation of refugees is the preferred solution, where feasible, and endorses UNHCR’s efforts to work actively to create, from the outset of a refugee problem, condition conducive to voluntary return in safety and dignity. The success of this solution will depend on a number of factors, including assurances of safety on return, access*

<sup>6</sup> Chimni, *From Resettlement to Involuntary Repatriation*, 55.

<sup>7</sup> *Ibid.*

<sup>8</sup> Right of Asylum is a three-fold concept, it denotes, i. Right of entry, ii. Protection from forced Return and iii. enjoyment of some rights while remaining in the host state. While the 1951 convention deals with the final two elements, it does not affirm the first element. Instead, it ‘overlooks’ the illegal entry. Numerous international and regional human rights instruments are negotiated recognizing the ‘right of entry’ to those fleeing their homelands. Therefore, the combination of Article 33 with other relevant provisions of the 1951 Convention is a form of rights based refuge. Tom Clark, “Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation”, in *International Journal of Refugee Law*, 16:4 (2004), 584-608 at 587.

<sup>9</sup> *Discussion Note on Protection Aspects of Voluntary Repatriation*, 1, at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae68cd314> > (last accessed 19.11.08)

<sup>10</sup> See, a *Thematic Compilation of Executive Committee Conclusions*, Chapter on *Conclusions Specific to Voluntary Repatriation / General*, 479.

*arrangements and monitoring possibilities for UNHCR, the adequacy of reception arrangements and reintegration possibilities”.*

Why did the UNHCR or the UN resolution required to affirm the voluntary repatriation as the preferred solution? Was not it so since the beginning?

The answer to the above question seems to be negative. Because, consequent to the Cold War politics and Modern history of the European religious and racial groups, it was assumed that the refugee movements were good and that refugees did not admire of return to 'home', because refuge entitled the oppressed to look for and enjoy a better life and utilizing the sentiments of the refugees it gave states a chance to attack an adversary.<sup>11</sup> Most importantly, the North was passing through tremendous economic expansion, and hence was in need of labor, the Refugees, therefore, were used as a cheap labor force.<sup>12</sup> Thus, the emphasis in international instruments on refuge and asylum had been mainly on exile. This attitude, according to Gervase Coles, amounts to 'exile' bias and needed to be altered.<sup>13</sup>

Similarly, under the refugee regime of United Nations Relief and Rehabilitation Agency (UNRRA), the predecessor of International Refugee Organization (IRO), no formal respect for the basic rights of individuals was safeguarded, and so the displaced persons could have been repatriated against their will. Although, UNRRA disapproved this practice subsequently, it was at the commencement of the Cold War and formation of IRO regime that individuals' right to flee from persecution and choose the place of his asylum was recognized.<sup>14</sup>

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<sup>11</sup> Gervase Coles, "Approaching the Refugee Problem Today", in *International Refugee Law, a Reader*, edited by B.S. Chimni (New Delhi: Sage Publication, 2002), 346.

<sup>12</sup> Chimni, *From Resettlement to Involuntary Repatriation*, 57.

<sup>13</sup> Gervase, *Approaching the Refugee Problem Today*, 347.

<sup>14</sup> Chimni, *From Resettlement to Involuntary Repatriation*, 57.

Focusing on the Convention 1951, Article 34<sup>15</sup> of the Convention refers to assimilation and naturalization of the refugees with few other Articles containing the terms of "settlement" and "resettlement" conveying an implied status given to them of solutions and ignores repatriation as such.<sup>16</sup> Nonetheless, the desirability of addressing durable and permanent solutions and the temporary nature of refugees could be figured out of Article 1(C) of the 1951 Convention which provides for cessation of refugees status on voluntary acquisition of a new nationality, the voluntary reacquisition of the former nationality and/or the voluntary retrieval of the protection of the country of origin.<sup>17</sup> Similarly, the 1967 Protocol goes without making any mention of the voluntary repatriation as a solution to the problem of refugees.

It was only the Statute of the United Nations High Commissioner for Refugees (UNHCR) that mentioned voluntary repatriation amongst the durable solutions to the refugee problem.<sup>18</sup>

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<sup>15</sup> Article 34 of the 1951 Convention calls on contracting states to facilitate as far as possible "the assimilation and naturalization of refugees" and that the states must "in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings".

<sup>16</sup> For instance, Article 19. *Liberal professions*, Article 30: *Transfer of Assets*.

<sup>17</sup> *Discussion Note on Protection Aspects of Voluntary Repatriation*, 1. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae68cd314> > (last accessed 19.11.08)

<sup>18</sup> Through General Assembly Resolution 428 (V) of 14 December 1950 "The General Assembly in view of its resolution 319 A (IV) of 3 December 1949: 1. Adopt the annex to the present resolution, being the Statute of the Office of the United Nations High Commissioner for Refugees,

2. Calls upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office, especially by:

(d) Assisting the High Commissioner in his efforts to promote the voluntary repatriation of refugees,"

"General Provisions "1. The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

Similarly, clause 8 (c) of the UNHCR Statute calls on the High commissioner to provide for protection of refugees by "Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities"

Likewise, a proposal to incorporate an Article asserting that "nothing in the declaration shall be interpreted to prejudice the right of everyone to return to his country as stated in Article 13, paragraph 2 of the Universal Declaration on Human Rights", was opposed and rejected in 1966 when the UN General Assembly was adopting the Declaration on Territorial Asylum. Surprisingly, even UNHCR did not mention voluntary repatriation as the most preferable solution and instead regarded external settlement as the normal solution. A transformation is witnessed in recent years, as some states objected to this bias and called for promoting the idea of prevention of the causes of displacement and encouraging voluntary repatriation instead. This could be best elaborated by the assertion of the Australian Government in 1981 that considering the external settlement as the favored durable solution could not be justified on either humanitarian or political grounds.<sup>19</sup>

Subsequent to 1980 when although 'North' did not require the labor force anymore and refugees from the 'South' were still arriving therein, the need for altering the exilic bias of the refugee law and developing "a new approach to the refugee problem... based on human rights" was stressed.<sup>20</sup> It was in this sense that UNHCR declared the decade of 1990 as the decade of repatriation.<sup>21</sup>

It was admitted that exile to the country of first asylum or a third country is nonetheless the same, and is rightly described by Francesco de Vittoria as 'capital punishment'. Therefore, the earlier response of the international community to the events involving persecution in shape of external settlement seems obscure and is rightly transformed to repatriation as the favored solution.<sup>22</sup>

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<sup>19</sup> Gervase, *Approaching the Refugee Problem Today*, 348.

<sup>20</sup> Chimni, *From Resettlement to Involuntary Repatriation*, 58.

<sup>21</sup> *Ibid*, 59.

<sup>22</sup> Ragini, *Refugees and the Law*, 195.

Notwithstanding the fact that the reformation on the international arena signifies a modification in the favorability of the three durable solutions, i.e. voluntary repatriation, local integration and resettlement, they complement each other and when combined together form an exclusive strategy for dealing with the refugee problem.

As of now, apart from Universal Declaration of Human Rights 1948 (Art. 13 (2)) which is a non-binding instrument, the right to return is incorporated in various binding international human rights instruments, including the International Covenant on Civil and Political Rights (Art. 12 (4)), the International Covenant on the Elimination of all Forms of Racial Discrimination (Art. 5 (d) (ii))<sup>23</sup>, the Convention on the Rights of Child (Art. 10 (2))<sup>24</sup> and other regional human rights instrument and national legislation of various states.<sup>25</sup>

## 3.1.2 "Voluntary Repatriation, the Meaning:

Repatriation or return is perceived as the reverse condition of refuge, while refugees are seen as uprooted and displaced, returnees are considered to be naturally 're-rooted' and placed back in the right order of things.<sup>26</sup>

As already mentioned that international protection is awarded to refugees due to their inability or unwillingness to avail the protection of the country of origin and is, thus temporary, hence, Article 13 (2) of the Universal Declaration of Human Rights

<sup>23</sup> UNHCR, *Handbook, Voluntary Repatriation, International Protection* 1996, 8.

<sup>24</sup> Action for the Rights of Children, *Module 2: Foundation: Durable Solutions, Voluntary Repatriation*, 9. See, <http://www.unhcr.org/publ/PUBL3bfe68d32.pdf> (last accessed 24.11.08).

<sup>25</sup> For instance: the African Charter on Human and People's Rights 1981 (Art. 12 (2)) and American Convention on Human Rights 1969 (Art. 22 (5)). See, *UNHCR Collection of texts on Refugees and Displaced Persons*, 2:18 and 2:141 respectively.

<sup>26</sup> Tania Ghanem, *When Forced Migrants Return 'Home': The Psychosocial Difficulties Returnees Encounter in the Reintegration Process* (Oxford: Refugee Studies Centre (RSC), 2003), 3.

(UDHR)<sup>27</sup> asserts that "Everyone has the right to leave any country, including his own, and to return to his country".<sup>28</sup> Accordingly, everyone enjoys the fundamental right to leave his homeland and to return to it whenever he wants, besides, it is obvious that the term "everyone" includes a refugee.<sup>29</sup>

Majority of asylum countries declare the voluntary repatriation to be the most desirable long-term solution,<sup>30</sup> therefore, refugees seek asylum near the border of their homeland to be able to return as quick as possible and resume their life contributing to rehabilitation of their homeland.<sup>31</sup> Respecting this fact, the statute of UNHCR identifies "assisting governmental and private efforts to promote voluntary repatriation" among two of UNCHR's principal activities.<sup>32</sup> The states parties to the 1951 Convention, furthermore, are required by virtue of Article 35 to co-operate with UNHCR in fulfilling its functions and are therefore bound to assist the High Commissioner in promoting Voluntary Repatriation as a principal solution to the refugee problems.<sup>33</sup>

Further, as discussed in the initial part of this chapter, the emphasis of the international community, in recent years, shifted from an exile-bias approach to voluntary repatriation as the most preferred solution and "voluntary repatriation with safety and dignity" was considered as the standard criterion for return.<sup>34</sup>

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<sup>27</sup> Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution # 217 A (III) of 10<sup>th</sup> December 1948

<sup>28</sup> For full text of the Declaration see, <http://www.un.org/Overview/rights.html> (last accessed 11.11.08).

<sup>29</sup> Ragini, *Refugees and the Law*, 195.

<sup>30</sup> UNHCR, *Handbook, Voluntary Repatriation, International Protection*, 1996, 4.

<sup>31</sup> Kate Jastram, and Ms. Marlyn Achiron, *Refugee Protection, a Guide to International Refugee Law, Handbook for Parliamentarians* (UNHCR and Inter-Parliamentary Union, 2005), 76.

<sup>32</sup> See Clauses 8 and 1 of the Statute.

<sup>33</sup> *Discussion Note on Protection Aspects of Voluntary Repatriation*, 1, available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae68cd314> (last accessed 19.11.08)

<sup>34</sup> Ragini, *Refugees and the Law*, 195.

The word "Voluntary" is usually annexed to the term "repatriation" as the preferred solution, thus, accentuating the notion that every repatriation in order to qualify as the ultimate solution must be voluntary and not a consequence of use of forceful methods by the host state or others, because a repatriation that is voluntary is most likely to be lasting and sustainable than the later,<sup>35</sup> and hence admirable.

As regards repatriation, an assumption persists on international level that besides being voluntary the repatriation must be assisted and monitored by governments and international agencies in accordance with the terms of the tripartite agreement concluded between United Nations High Commissioner for Refugees (UNHCR) on one hand and the governments of the country of origin and the host country on the other. Moreover, that complete 'safety' and socio-economic integration of the refugees should be assured.<sup>36</sup>

The fundamental requirements of voluntary repatriation are enumerated in Conclusion 18 (XXXI)<sup>37</sup> and 40 (XXXVI) which, *inter alia*, asserts that the refugees must choose to repatriate of their own will and must be able and assisted to do so in 'safety' and 'dignity'.

Now, when substantial theoretical framework for the cooperation of states in the promotion of Voluntary repatriation was provided by existing provisions and the

<sup>35</sup> *Protecting Refugees, a Field Guide for NGOs*, produced jointly by UNHCR and its NGO partners (Geneva: United Nations Publications, 1999), 60. (Hereinafter, *Protecting Refugees, a Guide*).

<sup>36</sup> Barry N. Stein and Fred C. Cuny, "Repatriation under Conflict", in *International Refugee Law, a Reader*, ed. B.S. Chimni (New Delhi: Sage Publication, 2002), 374.

<sup>37</sup> Conclusion# 18(XXXI) of the Ex-Com Reads as: "The Executive Committee, a. recognized that voluntary repatriation constitutes generally, and in particular when a country accedes to independence, the most appropriate solution for refugees problems, b. Stressed that the essentially voluntary character of repatriation should always be respected." See, *A Thematic Compilation of Executive Committee Conclusions* (DIP, UNHCR, March 2001), 300-1

international practice, Conclusion 40 (XXXVI) of 1985<sup>38</sup> was adopted to consolidate existing principles and practical experience into a single document.

Both the conclusions read together and in summary confer that while refugees have a right to return voluntarily to their country of origin, concentrated efforts are essential to remove the root causes of displacement. The notion of voluntariness of refugees could be expressed only by virtue of freely expressed wish of the refugees themselves.

Voluntary repatriation must be carried out under conditions of 'safety' and 'dignity', preferably to the refugee's place of residence in the country of origin; therefore only crossing of the border into the country of origin is not sufficient for a repatriation plan to be successful.

In addition, international action in favor of voluntary repatriation should receive the full support and cooperation of all states involved, including countries of origin and of asylum, but also of the international community generally, on the basis of their respective responsibilities. UNHCR, nonetheless, has a legitimate interest in the consequences of return and, thus, should be fully involved at the outset in assessing feasibility and in planning, implementing and monitoring voluntary repatriation. For the abovementioned mandate to fulfill, it should, where necessary, establish and implement assistance programs for returnees and should have direct and unhindered access to returnees in order to monitor their overall situation, particularly as regards fulfillment of the amnesties, guarantees or assurances on the basis of which the refugees have returned.<sup>39</sup>

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<sup>38</sup> Conclusion 40 (XXXVI) reads as: *The basic rights of persons to return voluntarily to the country of origin is reaffirmed and it is urged that international co-operation be aimed at achieving this solution and should be further developed. b. The repatriation of refugees should only take place at their freely expressed wish, the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin, should always be respected. See, A Thematic Compilation of Executive Committee Conclusions, 301-2*

<sup>39</sup> UNHCR, *Discussion Note on Protection Aspects of Voluntary Repatriation*, 1 April 1992, 1. See, <http://www.unhcr.org/refworld/docid/3ae68cd314.html> (last accessed 19.11.08).



UNHCR as the principal forum coping with refugees, learnt from its experience of involvement, apart from individual returns, in large scale voluntary repatriation programs that regardless of its size or character certain fundamental prerequisites are extremely essential for success of any voluntary repatriation program and they include:

- **First matters first, dialogue between the major parties,**

This condition signifies that a comprehensive dialogue must take place regarding each phase of the refugees' return. A dialogue, as such, ensures proper promotion and creates favorable conditions of the return, explores practical feasibility of the program and helps in implementing the plan, besides; it could help in provision of reintegration assistance upon return. This goal could be well-achieved through establishment of "tripartite" or "quadripartite" commissions composed of both the countries of asylum and origin, UNHCR and if appropriate, representatives of the refugee communities,<sup>40</sup> it would however be preferable if refugee *should* always be made part of these arrangements, because they are to be affected by the decision.

- **All parties must be committed to respect fully the voluntary character of the repatriation,<sup>41</sup>**

This requirement signifies that in order to enable the refugees to make an acquainted choice and feel confident about their return, they must have sufficient unbiased and unprejudiced information presented through reliable sources. In this regard, agreements between the concerned parties to sanction visits of the representatives of refugees to their homeland and apprehend the situation therein, under appropriate arrangements and guarantees, proved a useful tool.<sup>42</sup>

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<sup>40</sup> *Ibid*, p. 3.

<sup>41</sup> *Protecting Refugees, a Guide*, 61.

<sup>42</sup> *Discussion Note on Protection Aspects of Voluntary Repatriation*, 4. See,

To this end, verification of the voluntary nature of repatriation is an essential prerequisite to any repatriation program. Participation of regional and/or international bodies, including UNHCR and NGOs, in a meaningful dialogue with refugees on the situation in their country of origin and their decision to return can serve well the purpose.

- an overall, general improvement in the situation in the country of origin must be observed so that return in 'safety' and with 'dignity' becomes possible for the majority of refugees:<sup>43</sup>

Keeping in view the fact that premature return of refugees could lead to yet another man-made catastrophe worsening the already subtle situation of the homeland, it could not be regarded as a solution to the problem. Hence, the basis of the repatriation must be an improvement in the general situation of the country of origin so that return of the refugees in 'safety' and 'dignity' is both possible and desired. The socio-economic impact of a rapid return of thousands of repatriants on the country of origin must also be given due consideration. Most important of all, psychological readiness of persons to return to places from which they had felt forced to flee is necessary for a successful repatriation.

As regards improved conditions prevalent in the country of origin, it denotes ideally, the cessation of the circumstances leading to the departure initially, through social or political changes of a profound and enduring nature. This condition, i.e. of a complete and full-fledged change in the homeland, however, is not met in reality as usually the decision to repatriate is made by the refugees and the agreements among the states concerned are made subsequent to some changes and not after cessation have been met.

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<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae68cd314> >  
(last accessed 19.11.08).

<sup>43</sup> *Protecting Refugees, a Guide*, 61.

<sup>44</sup> Attainment of independence, for instance, becomes the sufficient condition or change in the situation of the country of origin, both removing the cause of flight and permitting repatriation.<sup>45</sup>

- **Return must be orderly and in 'safety' and 'dignity',**

Meeting the current condition, this in practice depends on many factors including the capacity of the country of asylum to process departures and of the country of origin to absorb arrivals, arrangements made to protect vulnerable groups among the refugees, i.e. children, women and elderly, measures adopted to ensure 'safety' and non-discrimination during departure and subsequent to it, the possibilities for ensuring humane departure and reception conditions, arrangement for access of UNHCR or other humanitarian organizations and reintegration assistance.<sup>46</sup>

In shorter words, return in 'safety' means that refugees return in conditions of legal 'safety' and physical, material security<sup>47</sup> and reconciliation.<sup>48</sup> Aspects of legal 'safety' include, *inter alia*, the adoption and implementation of amnesty laws to ensure protection of the returnees from discrimination or punishment merely because they had fled the country, legislation to ensure a returnees' citizenship status, in addition to access to documentation related to personal status and measures should be taken to ensure recovery of property or, in case of any problem, entitlement to sufficient compensation.<sup>49</sup>

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<sup>44</sup> *Ibid*, 3.

<sup>45</sup> Gill, *The Refugee in International Law*, 220.

<sup>46</sup> UNHCR, *Discussion Note on Protection Aspects of Voluntary Repatriation*, 4.

See, <http://www.unhcr.org/refworld/docid/3ae68cd314.html> > (last accessed 19.11.08).

<sup>47</sup> *Protecting Refugees, a Guide*, 61.

<sup>48</sup> UNHCR, *Handbook for Repatriation and Reintegration Activities* (Geneva, 2004), 3. Available online at: <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?page=search&docid=416bd1194> (last accessed 19.11.2008).

<sup>49</sup> *An Introduction to International Protection, Protecting Persons of Concern to UNHCR*, (IPD, UNHCR 2005), 140.

Physical security is, but is not restricted to, protection from armed attacks and mine-free routes or at least demarcated settlement sites, while material security signifies for instance access to land or a means of livelihood, and income generation<sup>50</sup> opportunities.<sup>51</sup> Reconciliation, on the other hand, implies promotion of equity between displaced persons and local residents in addition to development of structures and mechanism to promote confidence building and co-existence.<sup>52</sup>

While return in 'dignity'<sup>53</sup> denotes that refugees must not be manhandled and ill-treated, that they can return unconditionally and that if they are return is spontaneous, they can do so at their own pace, that they are not arbitrarily separated from family members, and that they are treated with respect and full acceptance by their national authorities, including having their rights fully restored.<sup>54</sup>

- The basic terms and conditions of the return should be the subject of a formal agreement elaborating the responsibilities of the major concerned parties and an agreement thereupon.

As mentioned in the first prerequisite, a dialogue among the concerned parties regarding each phase of the repatriation is essential to the success of the repatriation program, the dialogue then usually, as a current development and a standard practice of UNHCR, leads to drawing up of a Memorandum of Understanding (MOU) which provides exclusive framework of the operation.

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<sup>50</sup> It seems that while economic conditions could not serve as the cause of refuge, they can serve as cause for extending the term of refuge, as refugees could not be returned to a place where they would have to live without means of subsistence and income generation opportunities.

<sup>51</sup> *Protecting Refugees, a Guide*, 61.

<sup>52</sup> *Handbook for Repatriation and Reintegration Activities*, 4.

<sup>53</sup> The dictionary meaning of the term contains elements of Serious, composed, worthy of honor and respect.

<sup>54</sup> *Handbook, Voluntary Repatriation, International Protection*, 1996, 11.

Moreover, the responsibilities of country of asylum and country of origin must be fully elaborated in the MOU and agreed upon by the states concerned. The country of origin should principally accept, as of the MOU, the responsibility for its nationals, duty to put efforts for alleviating the causes of flight and facilitation of orderly, safe and dignified return. Orderly, safe and dignified return could be assured through assurance of 'safety' after return through, *inter alia*, proclamation of amnesties for returnees, waiver of prosecution, repealing of harsh and discriminatory laws, enactment of new laws and measures to encourage reconciliation between rival groups.<sup>55</sup>

UNHCR and countries of asylum admire a durable solution to the problem, hence, UNHCR establishes, if necessary, a presence in the country of origin for a two-fold purpose of assistance and protection until a satisfactory level of integration is achieved. It provides integration assistance, puts efforts to ensure non-discrimination among the returnees and fulfillment of other fundamental human rights. It could also serve as a bridge of communication between the opposing parties in case a country is still observing some internal polarization.<sup>56</sup>

The obligations of the host state or the country of asylum, in brief, are that the country of asylum must feel bound by the fundamental principle of *non-refoulement* and is further obliged to treat refugees in accordance with the internationally accepted standards as long as they are on its territory.

It should, further, allow and facilitate UNHCR fulfill its leading role in promoting, facilitating and coordinating the repatriation and to ascertain the voluntary nature of the return in the exercise of its international protection functions, to supervise the well-being

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<sup>55</sup> 99th Conference of the Inter-Parliamentary Union (IPU) also discusses the conditions asserting: "The conference calls on governments and parliaments to facilitate the early and voluntary return, the resettlement and the rehabilitation of refugees and displaced persons, the disarming, demobilization and subsequent training and reintegration of former combatants, especially child soldiers, into civilian life, and the rehabilitation of traumatized populations, in particular women and children".

<sup>56</sup> Discussion Note on Protection Aspects of Voluntary Repatriation, 4.

of refugees. Similarly, it should ensure that adequate and objective information on conditions in the country of origin is communicated to refugees. Every host state is required to contribute to the promotion of voluntary repatriation as a durable solution.<sup>57</sup>

Voluntary Repatriation could be broadly divided into two categories<sup>58</sup>:

- i. Organized Repatriation<sup>59</sup> (return by means of UNHCR organized transport and possibly linked with other assistance), and
- ii. Spontaneous Repatriation (return by refugees' own means)<sup>60</sup>.

A voluntary repatriation promoted by UNHCR is usually an organized repatriation, which is characterized by complete cessation of the cause(s) of displacement, and Repatriation takes place following agreements concluded among the countries of asylum and origin and UNHCR. The agency, further, encourages the refugees to return following a registration process undertaken by it and provision of transportation facility and other assistance for safe return, in addition, it establishes its presence in the regions of the return.

A spontaneous voluntary repatriation, on the other hand, is characterized by lack of any formal agreements and is carried out prior to the cessation of hostilities, with lack of registration procedures and of organized international assistance<sup>61</sup>.

It is important to note that UNHCR's responsibilities for refugee protection and assistance in voluntary repatriation are called into action regardless of the fact that

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<sup>57</sup> *Handbook, Voluntary Repatriation, International Protection*, 1996, 12.

<sup>58</sup> *Protecting Refugees, a Guide*, 63.

<sup>59</sup> Ragini, *Refugees and the Law*, 196.

<sup>60</sup> *Handbook, Voluntary Repatriation, International Protection*, 1996, 19.

<sup>61</sup> *Protecting Refugees, a Guide*, p. 63.

refugees are returning in an "organized" manner under UNHCR auspices or "spontaneously" on their own.<sup>62</sup>

### 3.13 Repatriation and *Non-Refoulement*:

This discussion on repatriation and the essence of voluntary character leads us to the point that voluntariness is the cornerstone of international protection with respect to the return of refugees. The refugees are the main actors to signify their "voluntariness" and "readiness" for the repatriation. They are the main decision makers and must participate in modalities of movement and the condition of reception. Refugees are required to apply their own criteria to their situation in exile and the conditions in their homeland and will return home if it is, in their belief, safe and better to return.<sup>63</sup>

A state which returns "refugee" to a territory which itself produces refugees, have a consistent poor record of human rights or is passing through a civil war or a situation of disorder, must therefore, justify its acts in light of the conditions prevailing in the country of origin. The very existence of a program of involuntary return should shift the burden of proof to the returning state when the facts indicate the possibility of some harm befalling those returned for any of the above reasons. Moreover a state may be held liable for a breach of the duty of *non-refoulement* regardless of notions of fault, either directly for the acts and omissions of its officials or indirectly where it's legal and

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<sup>62</sup> *Handbook, Voluntary Repatriation, International Protection* (1996), 19. In situations of spontaneous returns, UNHCR strives to put a fine line between promoting and facilitating return and although it will not ask refugees to return it may ask them not to, but will assist those returnees who opt to return on their own wish. It will also continue its attempts to promote the condition of safe return and secure guarantees for protection of those returning. See, Ragini, *Refugees and the Law*, 197.

<sup>63</sup> Barry N. Stein, Fred C. Cuny, *Repatriation under Conflict* (USCR, World Refugee Survey, 1991), 2. <<http://www.msu.edu/course/pls/461/stein/uscr91-98.htm>> (last accessed 22.12.2008).

administrative systems fail to provide a remedy or guarantee which is required by an applicable international standard.<sup>64</sup>

The issue of voluntary repatriation, although not discussed directly in the 1951 Convention, stems of the principle of *non-refoulement*. Meaning, if refugees are repatriated against their will to territory of a state where they apprehend persecution, would amount to *refoulement* which is violation of the Article 33 of the convention and a principle of customary international law. In other words, a person retaining a well-founded fear of persecution is a refugee and could not be compelled to repatriate.<sup>65</sup>

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<sup>64</sup> Goodwin Gill, "Non-refoulement and the New Asylum Seekers", in *International Refugee Law, a Reader*, ed. B.S. Chimni, 110.

<sup>65</sup> UNHCR, *Handbook, Voluntary Repatriation, International Protection*, 1996, 10.



### 3.2 AFGHANISTAN, POST US OCCUPATION:

#### 3.2.1 Background:

Since the mid-19th century up to Afghanistan's independence in 1919, contentions between Britain and Tsarist Russia led to three wars in Afghanistan as the Afghan masses heroically fought against the British. Following the death of Stalin, the revisionists seized power in the USSR and the Soviet Union began working to gain influence in Afghanistan. Soviet-backed Afghan forces took power in a coup in 1978,<sup>66</sup> and USSR invaded Afghanistan in December 1979 when government of their allies collapsed.<sup>67</sup> The U.S. and other Western powers supported the Afghan resistance movement and armed them against the USSR leading the Afghan movement to a victory in 1992, subsequent to which the world community including U.S. placed the Afghan issue at the backseat until 11<sup>th</sup> September 2001.

Using the attack of September 11, 2001 as a pretext, the U.S. in alliance with UK attacked Afghanistan on 7<sup>th</sup> October 2001. Among the aims was to pave the way for expanding American domination in Central Asia and the Middle East, but events proved the US administration wrong in underestimating the response they will get.<sup>68</sup>

As a result of the Bonn Agreement of December 2001, an Interim Administration (IA) headed by Hamid Karzai took office. In June 2002, the United Nations administered an emergency *Loya Jirga* (Grand Assembly), presided over by the formerly exiled King Zahir Shah, which appointed the Transitional Administration to rule Afghanistan for a further two years.

<sup>66</sup> *After the U.S. Invasion: The Nightmare in Afghanistan*, (2003), see, <http://revcom.us/a/1214/awtwafghan2.htm> (last accessed 22.12.08).

<sup>67</sup> *World Refugee survey*, 2000, for full report: <http://www.refugees.org/countryreports.aspx?VIEWSTATE=dDwtOTMxNDcwOTk7O2w8Q291bnRyeUREOkdvQnV0dG9uOz4%2BUwqzZxiYLI0SfZCZue2XtA0UFEQ%3D&cid=404&subm=&ssm=&map=&searchtext=>> (last accessed 29.11.08).

<sup>68</sup> *After the U.S. Invasion: The Nightmare in Afghanistan*.

The President of Afghanistan<sup>69</sup>, Hamid Karzai, in his decree issued in 2001 declared the Bonn Agreement of 5 December 2001 to have “laid down the foundation for lasting peace, stability and social and economic progress in Afghanistan”, the decree further recognized the right of the returnees to establish residence freely and on behalf of AIA guaranteed their ‘safe’ and ‘dignified’ return<sup>70</sup>. It also presented gratitude to every country hosting Afghan refugees during the difficult times over the past years.

The president expressed the hope that Afghans will be given the opportunity to decide *freely* whether to move back to their homeland in conformity with the principle of “voluntary repatriation”.<sup>71</sup>

Further, the AIA expressed willingness to provide protection to the returnees, and hence an influx of refugees started to return to the Afghanistan, their homeland.

In this part of the thesis, we would shed light on the history of repatriation from Pakistan, with focus on the return in 1992, 1996, 2002 and 2007 and the prevalent political, social, economic conditions of Afghanistan and the respect for human rights therein during those years.

### 3.2.2 History of Return from Pakistan:

Afghanistan is the homeland to a community of well-known protracted refugees with every one in three Afghans experiencing the bitter life of displacement, internally,

<sup>69</sup> Previously, selected as the President of the Afghan Interim Administration (AIA).

<sup>70</sup> A same kind of decree was issued by the Islamic Government of Afghanistan in 1997, but assured the protection to the returnees within the area under their control. It, nonetheless, called for voluntary repatriation to take place in ‘safety’ and ‘dignity’. For full decree see, *Statement of the Islamic Government of Afghanistan Concerning Invitation of Afghan Refugees to Return to their Homeland (Afghanistan)*, 16<sup>th</sup> August 1997, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b52723> > (Last accessed 19.11.08)

<sup>71</sup> *Decree of the President of Afghan Interim Administration*, Ref# 207, dated: 13.03.1380 (03 June 2001), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=3f5d990c4> > (last accessed 22.12.2008).

internationally or both with a majority being displaced more than once. The first phase of Afghan displacement was consequent to the Saur revolution and Soviet invasion of the country in 1979, soon after the last soviet soldier withdrew from Afghanistan and the *mujahedeen* forces conquered Kabul in 1992, approximately 1.2 million refugees repatriated to their homeland.<sup>72</sup> Unfortunately, a civil war broke out among the Afghan factions to control the capital, compelling Afghans to opt for refuge once again.

For the first time in 1988 the framework for repatriation of Afghan refugees was set in the Geneva Accords signed by Afghanistan and Pakistan.<sup>73</sup> Therefore, UNHCR started an assisted repatriation program in Pakistan in July 1990 and later extended it to Iran.<sup>74</sup> Approximately 2 Million Afghan refugees repatriated from Pakistan between the year 1989, when the Soviet troops withdrew, and 1995.<sup>75</sup> By the end of 1996 total repatriation had reached 3.84 million refugees mostly assisted by Quick Impact Projects with 120,700 repatriating in the same year.<sup>76</sup> The introduction of the Taliban movement into the arena gave a hope to the Afghans that the civil war had come to an end and hence a flow of

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<sup>72</sup> *Finding Durable Solutions in Contested Transitions: The Case of the Afghan Refugee Population*, see, [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/2/5/2/8/5/p252859\\_index.html](http://www.allacademic.com/meta/p_mla_apa_research_citation/2/5/2/8/5/p252859_index.html) (last accessed 28.11.08). The ratio of Afghan refugees' arrival in Pakistan, according to the census of 2007, indicates that 76.8% refugees arrived in Pakistan during the Soviet Occupation (1979-88), 5.5% during the Najibullah regime (1989-92), 3.5% of the arrived during the inter-*Mujahedeen* war (1993-95), 5.1% took refuge during the Taliban regime (1996-2001) while 9.1% of the refugees arrived in Pakistan during the post-Taliban period (2002+). See, UNHCR, SAFRON, NADRA, *Registration of Afghans in Pakistan* (2007), 13. (Hereinafter, *Registration 07*).

<sup>73</sup> SDPI, *Report on Stakeholder Consultations on the Future of Afghan Refugees in Pakistan*, presented to UNHCR Islamabad (September 2006), 12. See, <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.pdf?tbl=SUBSITES&id=462cb46b5> (last accessed 22.12.2008).

<sup>74</sup> The Library of Congress Country Studies, *Afghanistan: Refugees and Repatriation* (CIA World Fact Book), 1. [http://www.photius.com/countries/afghanistan/society/afghanistan\\_society\\_refugees\\_and\\_repatriation-33.html](http://www.photius.com/countries/afghanistan/society/afghanistan_society_refugees_and_repatriation-33.html) (last accessed 10.09.2008)

<sup>75</sup> *World Refugee Survey*, 1998.

<sup>76</sup> U.S. Library of Congress, *Refugees and Repatriation*, see, <http://countrystudies.us/afghanistan/80.htm> (last accessed 28.11.08), 1.

return started once again. The number of returnees from Pakistan dropped to 81,000 refugees in the year 1997.<sup>77</sup>

Due to the Taliban offensive and insecurity in parts of Afghanistan, UNHCR did not promote repatriation during 1996 but did facilitate the return<sup>78</sup> by providing cash-grants or in-kind support and transportation assistance.<sup>79</sup> It is also worth mentioning that refugees arriving due to the civil war usually returned home after short periods, while refugees arriving during the 80s did not return home, moreover, a generation of Afghans born in Pakistan had never been “home” and probably did not have a desire to “return”.<sup>80</sup>

Following the take over by Taliban of Kabul, the capital city, the repatriation flow decreased dramatically while, despite a restrictive policy adopted by the GoP on the border, the arrival of refugees to Pakistan increased once again.<sup>81</sup>

According to UNHCR, approximately 93,000 Afghan refugees repatriated during the year 1998<sup>82</sup>, while 92,000 of them returned home during 1999<sup>83</sup> with a drop in the number of returnees in 2000 to 76,000 refugees<sup>84</sup> and in 2001 to 65000 Afghans.<sup>85</sup>

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<sup>77</sup> *World Refugee Survey*, 1998.

<sup>78</sup> The difference between circumstances for Promotion and facilitation of return are described in UNHCR, *Handbook on Voluntary Repatriation* (1996). In brief, “where peace and reconciliation are durable, UNHCR promotes voluntary repatriation, while under less ideal conditions e.g. when the sustainability of the peace process is not assured but refugees are returning on their own, UNHCR may facilitate the return process. See, UNHCR *Mandate for Voluntary Repatriation and Reintegration*, one.3. Visit online at <http://www.unhcr.org/home/PARTNERS/411786694.pdf> > (last accessed 03.02.09).

<sup>79</sup> *World Refugee Survey* 1997.

<sup>80</sup> *World Refugee Survey*, 1998.

<sup>81</sup> *Finding Durable Solutions in Contested Transitions: The Case of the Afghan Refugee Population*. [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/2/5/2/8/5/p252859\\_index.html](http://www.allacademic.com/meta/p_mla_apa_research_citation/2/5/2/8/5/p252859_index.html) > (last accessed 22.12.2008).

<sup>82</sup> *World Refugee Survey*, 1999.

<sup>83</sup> *World Refugee Survey*, 2000.

<sup>84</sup> *World Refugee Survey*, 2001.

<sup>85</sup> *World Refugee Survey*, 2002.

Following the events of 9/11 and the subsequent US occupation of Afghanistan, the repatriation flow was very rapid than presumed by UNHCR and international Community, meaning that since the establishment of an internationally recognized government in December 2001 to the end of 2002, almost 1.8 million Afghans returned Home<sup>86</sup> from Iran, Pakistan and the Central Asian Republics, with assistance from UNHCR, the Afghan Ministry of Refugees and Repatriation (MoRR) and the Governments of the neighboring countries, the number was certainly besides those going back “spontaneously”, with no assistance from anyone.<sup>87</sup>

Nearly 1.7 million more Afghan refugees returned home in 2003, 1.56 million of them with assistance from UNHCR and 150,000 on their own<sup>88</sup> while the number of returnees is recorded at 343,100 refugees in the year 2004.<sup>89</sup> 142,700 refugees repatriated to Afghanistan during 2006<sup>90</sup>, as compared to 374,000 refugees returning in 2007<sup>91</sup>.

Registration of Afghan refugees was conducted by UNHCR in collaboration with SAFRON and NADRA from October 2006 till February 2007, registering 2,153,088 Afghan refugees out of an estimated 2.46 million Afghans<sup>92</sup> residing in the country, legalizing stay of the first category in Pakistan till December 2009.<sup>93-94</sup> A grace period of

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<sup>86</sup> 1,560,000 of them returned from Pakistan, this was four times the number that UNHCR had originally anticipated. See, UNHCR, *Voluntary Repatriation to Afghanistan* (last accessed 18.04.08) and *World Refugee Survey* (2003).

<sup>87</sup> Sarah Russell, and Ragnhild Ek, *Return to Afghanistan* (2002), <[www.unhcr.org](http://www.unhcr.org)> (last accessed 09.09.08).

<sup>88</sup> *World Refugee Survey* (2003), Online at: <[http://www.soros.org/initiatives/bpsai/articles\\_publications/publications/uscir\\_20031215](http://www.soros.org/initiatives/bpsai/articles_publications/publications/uscir_20031215)> (last accessed 22.12.2008).

<sup>89</sup> *World Refugee Survey*, 2004.

<sup>90</sup> *World Refugee Survey*, 2007.

<sup>91</sup> UNHCR, 2007: *Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (June 2008), 9.

<sup>92</sup> *Registration 07*, 5-6.

<sup>93</sup> *World Refugee Survey* 2007.

<sup>94</sup> However, as of 13<sup>th</sup> March 2009 the GoA and UNHCR signed a new agreement on the stay of Afghan refugees in Pakistan, extending their stay till December 2012. The move was regarded by

45 days, 1<sup>st</sup> March to 15<sup>th</sup> April, was granted to unregistered and hence non holders of Proof of Registration (PoR) cards in order to leave Pakistan or else face prosecution on account of illegal entry therein, thus, of the 357,859 returnees, 205,997 were unregistered refugees utilizing the grace period.<sup>95</sup>

It was also discovered during the registration process that 84.2% (393,844 families) did not intend or volunteer to return to their homeland the primary reasons for the said decision being, security (41.6%), shelter (30.7%), livelihood (24.4%), personal enmity (0.9%) and others (2.4%).<sup>96</sup>

It must be noted that through the Afghanistan Compact, a framework agreed upon in January 2006 by the GoA and the international community to work toward five-year benchmarks on (1) security, (2) governance, rule of law and human rights and (3) economic and social development,<sup>97</sup> but the actual achievements require some serious consideration.

We have come across various phases of repatriation programs launched by UNHCR, GoP and other NGOs for return of Afghan refugees since 1990, the withdrawal of soviet forces from the country, till 2007, we thus intend to inquire whether the prerequisites mentioned for the return to be “voluntary” conducted with ‘safety and dignity’ were met or else?

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UNHCR a “responsible” one. For full report see, *UNHCR and Pakistan Sign New Agreement on Stay of Afghan Refugees*. Online at:

<http://www.unhcr.org/cgi-bin/texis/vtx/afghan?page=news&id=49ba5db92> > (last accessed 20.03.09). UNHCR reiterated that it will support the “voluntary, safe, dignified and gradual repatriation of Afghans from Pakistan”. See, *UNHCR and Pakistan Government Sign Letter of Mutual Intent*. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/afghan?page=briefing&id=49ba3df02> > (last accessed 20.03.2009).

<sup>95</sup> *Registration 07*, 8.

<sup>96</sup> *Ibid*, (Chapter on *Primary Reasons for Not Intending to Return to Afghanistan*), 144.

<sup>97</sup> Amnesty International, *Briefing Paper, Afghanistan: No More Empty Promises in Paris*, (AI Index: ASA 11/007/2008 (Public) Date: 11 June 2008), 1. See, [http://www.amnesty.org/en/library/asset/ASA11/007/2008/en/d7b61613-37d1-11dd-9ec6-1d6085451ee8/asa\\_110072008eng.pdf](http://www.amnesty.org/en/library/asset/ASA11/007/2008/en/d7b61613-37d1-11dd-9ec6-1d6085451ee8/asa_110072008eng.pdf) > (last accessed 17.12.2008).

### 3.2.3 Afghan Repatriation and Problems in the Country:

It is inferred from the discussion on the voluntary nature of a repatriation project that it should be carried out with “safety and dignity” subsequent to its being carried in result of the refugees’ will and choice.<sup>98</sup> The voluntary character of repatriation further demands that refugees are well-informed about the prevalent situation in the country of origin and for this purpose are sanctioned to pay “go and see” or even “go and work” visits.<sup>99</sup> Hence, push factors in the country of refuge such as arrests, extortion, torture, restriction of movement and other methods to compel the refugees opt for a return amounts to *refoulement* and are hence prohibited in accordance with the principle of *non-refoulement*. Inadequate protection and assistance awarded to refugees prompting them to return to an insecure situation at their homeland could not be regarded as exercise of free choice by them.<sup>100</sup>

#### 3.2.3.1 Security Problems:

In brief, the modern history of the Afghan conflict could be divided into five distinct phases: the 1979 invasion of the country by the Soviet Union and the decade of war that followed until the Soviet departure in February 1989, three years of armed conflict between the *mujahedeen* and the Soviet supported communist government until its collapse on 27<sup>th</sup> April 1992, two years of civil war among Afghan factions, and seven years of fighting between the Northern Alliance and the Taliban.

Taken together, these conflicts have killed an estimated 1.7 million people, permanently disabled another 2 million and driven more than 5 million from their

<sup>98</sup> See the discussion on “Voluntary Repatriation, the Meaning” at 3.1.2 *infra*.

<sup>99</sup> Global Consultations on International Protection, EC/GC/02/5, *Voluntary Repatriation* (25<sup>th</sup> April 2002), 2.

<sup>100</sup> *From Resettlement to Involuntary Repatriation*, 67.

homes,<sup>101</sup> and the country was practically divided into distinct units each ruled by a different power even with a different currency being used. Further, the *mujahedeen* rule only brought more war and devastation and the fighting among various fractions erupted into a full-scale civil war. The existing better-than-nothing infrastructure in Kabul was demolished or looted and the capital was transformed into a “cultural wasteland”.<sup>102</sup>

Soon after the appointment of Rabbani as president of Afghanistan in 1992, rival factions commenced frequent rocket attacks which reduced Kabul to rubble, the U.N. reported that 1,800 civilians died in those attacks between May and August that year while 500,000 people fled the city.<sup>103</sup> The war resulted in 50,000 civilian casualties<sup>104</sup> 25000 of them in 1994 only most of them civilians killed in rocket and artillery attacks<sup>105</sup> and new refugee flows. With no electricity almost anywhere in the country, all the factories in the country were either destroyed or stopped working. Schools and colleges closed and education on all levels came to a standstill. Water, power, the telephone system, roads and airports were heavily damaged or completely ruined in the fighting with no capacity and equipment to repair the damage.<sup>106</sup>

This was exactly the time when Taliban movement emerged in Afghanistan and a new phase of conflict commenced and soon after their control of the Capital city,

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<sup>101</sup> ICRC, *People on War, Country Report Afghanistan*, ICRC Worldwide Consultation on the Rules of War, Report by Greenberg Research, Inc. (Geneva: ICRC, November 1999), 4.

<sup>102</sup> Centre for Economic and Social Rights, <[www.cesr.org](http://www.cesr.org)> *Human Rights and Reconstruction in Afghanistan* (CESR May, 2002), 69.

<sup>103</sup> *Afghanistan Civil War*, <[http://en.wikipedia.org/wiki/Afghan\\_Civil\\_War](http://en.wikipedia.org/wiki/Afghan_Civil_War)> (last accessed 22.12.2008).

<sup>104</sup> See, <[www.afghan-info.com/politics/afghan\\_mujahedeen/Warlords/](http://www.afghan-info.com/politics/afghan_mujahedeen/Warlords/)> (last accessed 22.12.2008).

<sup>105</sup> *Afghanistan Civil War*.

<sup>106</sup> *Human Rights and Reconstruction in Afghanistan*, 69. Available online at:

<<http://www.reliefweb.int/rw/RWB.NSF/db900SID/OCHA-64CL98?OpenDocument>> (last accessed 22.12.2008). For detailed account of the Human Rights violations and the aftermaths of the war, see, *Afghanistan Civil War*.



Pakistan albeit softly commenced arguing that Afghanistan was a safe territory and thus the refugees must return home.<sup>107</sup>

The State Department estimated that 400,000 Afghans were killed or wounded by landmines till the year 1999 and Afghanistan continued to sustain high casualties from antipersonnel landmines.<sup>108</sup> Landmine Monitor Report 2000, which documents landmine use, stockpiles, transfer, production, and casualties on behalf of the International Campaign to ban Land mines reported the following: "An estimated five to ten people were injured or killed by mines every day in 1999, compared to an estimated ten to twelve people in 1998 and an estimated twenty to twenty-four people in 1993"<sup>109</sup> while as of present, this contamination causes the death or injury to more than 100 Afghans a month.<sup>110</sup>

Inside the country, the two-decade long war destroyed the infrastructure and institutions of the state to a larger extent. According to the UN, the socio-economic conditions of the population are amongst the worst in the world. Healthcare was really simple and available to very few people. Thousands of children died from malnutrition and respiratory infections every year. Maternal mortality was one of the highest in the world. Literacy rates were extremely low and were estimated to have dropped to as low as four per cent for women. Afghanistan was ranked bottom of the UN gender development index.<sup>111</sup>

<sup>107</sup> Hiram Ruiz, *Afghan Refugees in Pakistan at Risk* (USCRI 1<sup>st</sup> August 2001), 4. See online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c58099a15> (last accessed 13.09.08)

<sup>108</sup> Women's Health and Human Rights in Afghanistan, *Background*, 2.

<sup>109</sup> *Ibid.*

<sup>110</sup> Kristen West and Rachel Canfield, [Mine Action Information Center], *Afghanistan*. Available at, <http://maic.jmu.edu/journal/10.2/profiles/afghanistan/afghanistan.htm> (last accessed 20.12.2008)

<sup>111</sup> Amnesty International, *Afghanistan: Refugees from Afghanistan: the World's Largest Single Refugee Group* (AI November 1999), 1.

The final phase of the conflict has been the one following events of 9/11 in New York and Washington DC and subsequent US occupation of Afghanistan in 2001 till the present day. Prior to these attacks, Afghanistan was attacked in 1998 when President Clinton held Osama bin Laden responsible for attacks on US embassies in Kenya and Tanzania. Afghanistan was attacked with over 200 cruise missiles under "Operation Infinite Reach" killing 34 people but not bin Laden or his associates.<sup>112</sup>

Based on the same allegations, i.e. harboring bin Laden, UN Security Council Resolution 1267 imposed economic sanctions on Afghanistan in October 1999. But the fund freeze, according to report of the UN Humanitarian Coordinator for Afghanistan, had a minimal impact on the Taliban while it "had a tangible negative effect on the Afghan economy and on the ability of humanitarian agencies to render assistance to people in the country." Due to Taliban's continued "support for terrorism and narcotics cultivation" more sanctions were imposed against them in December 2000.<sup>113</sup> In addition to these sanctions and their impacts, a prolonged drought hardened the life of ordinary Afghans throughout the country.

According to a United Nations estimation of winter 2001, up to 8 million Afghans were feared to starve due to a shortage of food, made all the more severe by the intentional U.S. disruption of humanitarian aid, and bombing of Red Cross and other humanitarian aid facilities inside the country. At least hundreds, and more likely thousands, have been killed by U.S. bombs. Hundreds of thousands of land mines and

[http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:4042](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:4042) (last accessed 03.02.09).

<sup>112</sup> The Center for Economic and Social Rights, *Afghanistan Fact Sheet # 2: A Brief History Focusing On 1979-2001*, 2. See,

<http://cesr.org/filestore2/download/436/Afghanistan%20Fact%20Sheet%202.2.pdf> (last accessed 22.12.2008).

<sup>113</sup> *Ibid.*

unexploded cluster bombs were lying scattered across the nation's landscape<sup>114</sup> in addition to hundreds of thousands more mines and unexploded ordnances carpeted around the villages and on the roads of the country during the ongoing conflict, which according to ICRC report caused 2,812 casualties, half of them children, during the period March 1998 to December 2000.<sup>115</sup>

This short account of events highlights the security condition of the country since the fall of Najeeb Ullah's government and the establishment of mujahedeen government in 1992 till the ouster of Taliban regime in the last days of 2001.

Moreover, it is obvious that apart from physical security, the rule of law in the country of return is of significance and have direct impact on the consistency and persistency of the return, thus, as per the report of UNHCR, monitoring the return to Afghanistan from January 2002 to March 2003, the security-related incidents were aggravated by the absence of the rule of law, limited influence of the central authority beyond Kabul City, and by both limited interventions and escalating counterterrorist operation by the coalition forces.<sup>116</sup> The unrest, according to the report, is due to the existence and authority of local commanders using military power to commit acts of extortion, looting, harassment, arbitrary and private detention, kidnapping and sexual abuse of women, these factors are in addition to lack of effective legislation, administrative and judicial structures in rural areas.<sup>117</sup>

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<sup>114</sup> Adam Ritscher, *A Brief History of Afghanistan*,  
<http://www.afhangovernment.com/briefhistory.htm> (last accessed 22.12.2008).

<sup>115</sup> Amnesty International, *Afghanistan, Protect Afghan Civilians and Refugees*, ASA/11/012/2001, 2. See,  
<http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/2c9beb2a1b67bf4185256ae000690f0d>  
 > (last accessed 22.12.2008).

<sup>116</sup> UNHCR, *Returnee Monitoring Report, Afghanistan Repatriation, January 2002 - March 2003*, 7. See,  
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f1bbde74&page=search>  
 (last accessed 03.02.09).

<sup>117</sup> *Ibid.*

Apart from the atrocities committed by the local commanders, Amnesty International in its investigation of the conduct of the Operation Allied Force, found instances in which NATO forces violated the laws of conduct of war leading to incidents of civilian casualties and further that NATO did not always meet its legal obligation in selecting targets and in choosing and methods of attack.<sup>118</sup>

As a side effect of the Coalition forces' search for insurgents in mainly Pashtoon dominated southern provinces, the security situation deteriorated, and many returnees reported incidents of armed robberies along the major roads while return, indicating lack of security on the roads.<sup>119</sup>

While in north of the country, the existence of strong competing factions endangered the environment, frequent clashes occurred affecting the entire population. While the minority group, the Pashtoons, is the most affected, their representatives have made specific requests for their political and military participation. Civilians continued to face deliberate abuse, including beating, kidnapping, rape, forced conscription, force eviction, extortion and threats to prevent groups from reporting abuses<sup>120</sup> while no information have been received regarding any type of prosecution taking place against the soldiers or the commanders accused of the violations.<sup>121</sup>

Keeping in view the above-mentioned developments, a human rights watchdog criticized UNHCR for its promotion of voluntary repatriation to Afghanistan in 2002 terming it a misleading message, because according to the report, Afghanistan was unsafe

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<sup>118</sup> Amnesty International, *Afghanistan, Protect Afghan Civilians and Refugees*, 2.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, 10.

<sup>121</sup> *Ibid.*, 2.

for refugee return at the time.<sup>122</sup> It added "... preconditions clearly have not been met in Afghanistan" and "By advocating for repatriation, UNHCR is sending the message to governments that conditions in Afghanistan are sufficiently stable for a large-scale return. This is misleading and is contradicted by conditions on the ground".<sup>123</sup>

It was asserted in 2003 that the international community failed to deliver two essential elements of post-war reconstruction and sustainable refugee reintegration: security beyond Kabul and sufficient reconstruction assistance.<sup>124</sup> While some said that Afghanistan was not at all a "post conflict situation" in the said year hence considering the return "unsustainable".<sup>125</sup>

The landmines and unexploded ordnance (UXO) continued to pose a serious threat to Afghan civilians, the Mine Action Program for Afghanistan (MAPA) stated that 700 sq km of land are contaminated by landmines and UXO,<sup>126</sup> of which 590 sq km have been designated high-priority land. However, some parts of the country are, nonetheless, inaccessible and MAPA states that the "full extent of the problem in Afghanistan is yet to be determined."<sup>127</sup>

Year 2007 witnessed the highest number of security incidents since the fall of Taliban with central and eastern regions facing a deteriorating security situation in addition to the

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<sup>122</sup> Human Rights Watch, *Afghanistan Unsafe for Refugee Returns, UN Refugee Agency Sending Misleading Message* (Jul 23, 2002). See, <http://www.hrea.org/lists/refugee-rights/markup/msg00117.html> (last accessed 03.02.09).

<sup>123</sup> *Ibid.*

<sup>124</sup> Hiram Ruiz, *South and Central Asia, 1.8 Million Refugees Return Home, But International Community Fails to Deliver Promised Aid, Security* (USCR May 2003), 1. <http://www.refugees.org/newsroomsub.aspx?id=1066> (last accessed 03.02.09).

<sup>125</sup> Amnesty International, *Afghanistan: Out of Sight, Out of Mind: the Fate of Afghan Returnees* (AI Index: ASA 11/014/03), 21. [http://www.amnesty.org/en/library/asset/ASA11/014/2003/en/dom-ASA11014\\_2003en.pdf](http://www.amnesty.org/en/library/asset/ASA11/014/2003/en/dom-ASA11014_2003en.pdf) (last accessed 22.12.2008).

<sup>126</sup> E-Mine (Electronic Mine information Network), *Afghanistan (Islamic Republic of)*. Available online at: <http://www.mineaction.org/country.asp?c=1> (last accessed 20.12.2008)

<sup>127</sup> Journal of Mine Action, *Profile: Afghanistan* (MAIC updated: 20.12.2003). See, <http://maic.jmu.edu/journal/5.3/profiles/afghanistan.htm> (last accessed 20.12.2008).

south and southeastern region already in trouble.<sup>128</sup> Growing insecurity and violence linked to armed conflict continued to cause internal displacement in the south, particularly Kandahar, Uruzgan and Helmand. There have also been limited instances of battle-induced displacement in the eastern, the northeast, the northwest and the central region.<sup>129</sup> Amnesty international expressed its concern over the increasing number of civilian casualties in both, Taliban attacks and US, NATO aerial and land campaigns against the former.<sup>130</sup>

While in 2008, as of UNHCR, major parts of Afghanistan are insecure,<sup>131</sup> to put in short: All districts of Hilmand (11,133 families)<sup>132</sup>, Kandahar (20,512), Uruzgan (904), Zabul (2567) and the highways to these provinces and also from Kandahar to Nimroz through Delaram, all districts of Paktika (3957), Khost (3109), Paktia (26,826) and the

<sup>128</sup> UNHCR, *Afghanistan Situation Operational Update* (September 2007).

<sup>129</sup> UNHCR, *Afghanistan Situation Operational Update* (September 2008). See, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=SUBSITES&id=48f8a3902> > (last accessed 22.12.2008).

<sup>130</sup> Amnesty International, *Public Statement, Afghanistan: Mounting Civilian death Toll- All Sides Must Do More to Protect Civilians* (ASA 11/006/2007 (public)), 1. See, <http://www.amnesty.org/en/library/asset/ASA11/006/2007/en/dom-ASA110062007en.pdf> > (last accessed 19.12.2008). For more on violations of humanitarian law in Afghanistan, see, AIHRC, *Violations of International Humanitarian Law in Afghanistan, Practices of Concern and Example Cases*, (07). [http://www.aihrc.org.af/IHL\\_practices\\_and\\_examples\\_final\\_Coalition\\_Vioalatioin.pdf](http://www.aihrc.org.af/IHL_practices_and_examples_final_Coalition_Vioalatioin.pdf) > (last accessed 03.02.09).

<sup>131</sup> Insecure according to UNHCR's report denotes a territory where apprehension exists of "Systematic acts of intimidation, involving arbitrary killings, abductions and other threats to life, security and liberty, by anti-government elements and by regional warlords, militia commanders and criminal groups. UNHCR considers that Afghans should not be expected to travel through unsafe areas to reach their final destination in view of the increased insecurity even on main arterial routes.

- Attacks by anti-government elements, including foreign fighters inter alia through the increased and consistent use of asymmetric tactics (IED on the roads, missile attacks, bombs and suicide bomb attacks), attacks on "soft targets" such as schools and teachers, religious figures, health community (health centers and staff) and aid workers,
- Military operation in places where the AGE have been reported or have established a known presence,
- Religious and tribal conflicts, conflicts over the use of pasture land and inadequate responses by the central government to address violence and protect civilians.
- Illegal land occupation and confiscation with limited possibilities for redress". See, UNHCR, *Afghanistan Security Update Relating to Complementary Forms of Protection*, (updated on 6<sup>th</sup> October 2008). See, <http://www.unhcr.org/refworld/category.policy/48ea34872.0.html> >, (last accessed 14.10.08).

<sup>132</sup> Registration 07, Province of Origin in Afghanistan, [Chapter on number of the families of each province living a refugee life in Pakistan], 76.

highways to these provinces, the whole province of Kunar (21,791) except Asad Abad (the provincial capital), The whole province of Nooristan (428) except Paroon (the provincial capital), The whole province of Laghman (22,171) except central and eastern parts of Mehtarlam (the provincial capital), the whole province of Farah (464) except Farah city is assessed as being insecure.

The highways from Hirat to Farah, from Nimroz to Farah and from Farah to Kandahar; The whole province of Ghor (283) except Chakhcheran city (the provincial capital); The whole province of Nimroz (85) except Zaranj city and the highways from Hirat to Nimroz and Farah to Nimroz, The entire province of Ghazni (7,302) including the highways from Kandahar to Ghazni and from Kabul to Ghazni are assessed as insecure. The entire province of Logar (26,953) apart from the highway from Kabul to Gardez and the entire province of Maidan-Wardak (Wardak-5,867) and the highways within the province are assessed as being insecure.<sup>133</sup>

During the year, according to the UNHCR, only 55%, if more specific the number could be around 30%, of the country is actually accessible for the UN. Thirty three humanitarian aid workers lost their lives in Afghanistan during the first 10 months of 2008<sup>134</sup> while civilian had to suffer the scourge of an increase in suicide attacks<sup>135</sup> and US and NATO airstrikes throughout the year.<sup>136</sup>

<sup>133</sup> *Ibid.* It must not, however, be inferred that the security situation in the rest of the country is trustworthy but only the "entirely insecure" provinces are mentioned while the rest could be seen on the link provided above.

<sup>134</sup> UNHCR, *Afghanistan Situation Operational Update*, September 2008.

<sup>135</sup> Amnesty International, Public Statement, *Afghanistan: Civilian Suffer the Brunt of Rising Suicide Attacks* (AI index: ASA 11/006/2008), 1. See, <http://www.amnesty.org/en/library/asset/ASA11/006/2008/en/a09f845f-33ec-11dd-a097-6931d72158b2/asa110062008eng.pdf> (last accessed 19.12.2008).

<sup>136</sup> Human Rights Watch, *Afghanistan: Civilian Deaths from Airstrikes* (HRW September 2008). Available online at: <http://www.hrw.org/en/news/2008/09/07/afghanistan-civilian-deaths-airstrikes> (last accessed 17.12.2008).

It is indeed peculiar that although UN closed its repatriation centre in eastern Afghanistan due to “worsening security” still are refugees asked to return to Afghanistan<sup>137</sup> and the GoP is considering provincial plans to close a number of Afghan refugee camps, 11 of which are said to be located in NWFP<sup>138</sup>, it however needs to be seen what role UNHCR plays in this regard while it has already reported that “Afghanistan’s absorption capacity is reaching saturation point”.<sup>139</sup>

### 3.2.3.2 Human Rights Situation:

Due to lack of a unified and organized system of government run by qualified executives, the condition of human rights during the period of *Mujahedeen* and Taliban could be described “very poor”. During the former period, Afghanistan was ruled by various lords actually presenting a division on the political and social level. The problems emerged between Pashtoon and Dari speaking Afghans specifically among Pashtoos and *Hazaras*.

As far as the Taliban regime is concerned, the U.S. State Department Report 2000 describes the overall human rights situation extremely poor because, according to the report, the Taliban committed numerous serious and systemic abuses. Afghan citizens were unable to change their government or choose their leaders through peaceful means.

The Taliban carried out summary justice in the areas they controlled, and reportedly were responsible for political and other extra-judicial killings, including targeted killings, summary executions, and deaths in custody. Prison conditions were poor. The Taliban arbitrarily arrested and detained persons and infringed on citizens' privacy rights. Taliban

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<sup>137</sup> Martin Patience, *UN Closes Afghan Refugee Centre*, (BBC News Kabul, 12 May 2008). Visit online at: [http://news.bbc.co.uk/2/hi/south\\_asia/7395611.stm](http://news.bbc.co.uk/2/hi/south_asia/7395611.stm) (last accessed 29.05.2008)

<sup>138</sup> IRIN Asia, *Pakistan: Government Aims to Close More Afghan Refugee Camps in 2008*. See online at: <http://www.alertnet.org/thenews/newsdesk/IRIN/2d272aaa6f23a982097b2cfe3fe6c019.htm> (last accessed 20.06.2008).

<sup>139</sup> UNHCR, *Return to Afghanistan* (last accessed 29.05.2008).



forces were responsible for indiscriminate bombardment of civilian areas. Civil war conditions and the unfettered actions of competing factions effectively limited the freedoms of speech, press, assembly, and association. Freedom of movement was also limited. All factions have harassed domestic and international NGO's.

Violence against women remained a problem throughout the country. Females were not allowed to attend formal education and to work, nonetheless, several organizations were able to run elementary schools and home schools with girls in attendance despite the formal prohibition. The Taliban were said to have detained persons because of their ethnic origins. Worker rights were not defined and Child labor persisted.

The human rights situation in areas outside of Taliban control also remained extremely poor, the Northern Alliance members committed numerous and serious abuses. Kabul was frequently hit by Northern Alliance forces' rocket attacks and civilians were targeted indiscriminately undermining the notion of citizens' privacy rights. Armed units of the Northern Alliance, local commanders, and rogue individuals were responsible for political killings, abductions, kidnappings for ransom, torture, rape, arbitrary detention, and looting.

The conditions of human rights in Afghanistan, following the installation of AIA, remained unsatisfactory as UNHCR's exercise of monitoring the return to the areas of high return indicated two main categories of protection concerns and human rights issues. The first relates to physical security and rule of law and according to the refugees is the most significant factor influencing their decision to return, while the second category relates to the broader range of protection and human rights issues. These issues

are of particular relevance to the returnees, because they affect the sustainability of their return to homeland.<sup>140</sup>

It, therefore, means that the conditions does not indicate improvement in overall situation, and the growing insurgency reflects a collective failure on the part of international community to tackle the root causes of violence.<sup>141</sup>

### 3.2.3.3 Economic, Civil and Political Rights:

Afghanistan is, as a member of International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), under obligation to honor the requirements of both the covenants and according to ICESCR, ensure the satisfaction of, at the very least, minimum essential levels of each of the rights contained in the Covenant, for all persons equally.

Unfortunately, the concept of economic, social, civil and political rights seemed meaningless during the phase of USSR occupation and civil war in Afghanistan, while the same is true for the Taliban regime. Moreover, constant violations of fundamental rights and a continued war-like situation across the country can indicate and illustrate the notion of acceptance and respect for the “luxurious” economic, civil and political rights.

As far as the post Taliban period is concerned, the existence and strength of local commanders, according to UNHCR’s repatriation monitoring report, had both direct and indirect impact on civil and political rights of individuals and the delivery of humanitarian assistance, thus hindering the reintegration and reconciliation process.<sup>142</sup>

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<sup>140</sup> *Returnee Monitoring Report*, 6.

<sup>141</sup> International Crisis Group (ICG), *Security in Afghanistan*, see, <http://www.crisisgroup.org/home/index.cfm?id=3071> > (last accessed 17.12.2008).

<sup>142</sup> *Ibid.* 8.

Moreover, in central and eastern provinces, the land occupation and landlessness are identified as the main problem most commonly encountered by returnees. In short, the current government is extremely unpopular because of abuses, corruption and lack of security.<sup>143</sup>

According to a report by AIHRC, Findings indicate that the GoA continued to face major challenges during 2007 in discharging its obligations under the International Covenant on Economic Social and Cultural Rights.<sup>144</sup>

### 3.3 CAPABILITY OF THE COUNTRY OF ORIGIN TO OFFER PROTECTION TO RETURNEES:

The High Commissioner has proposed an integrated approach in post-conflict situations in countries of origin known as “Repatriation, Reintegration, Rehabilitation and Reconstruction (4Rs)”.<sup>145</sup> For a successful and “durable” return, therefore, the agency and the Country of origin must undertake the function of reintegration and must not ignore the returnees to face an exilic life after returning from situation of the same kind.

On the other hand, of importance in repatriation is the capacity of the country of origin to absorb and offer protection to the returnees, because at last the ‘homeland’ is a country surviving a conflict.

As far the security situation is concerned, as discussed above, even urban areas, including the Capital Kabul, could not have been considered secure or stable to satisfy

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<sup>143</sup> Human Rights Watch, *Afghanistan: Paris Donor Conference Should Prioritize Human Rights* (HRW June 2008). See, <http://www.hrw.org/en/news/2008/06/09/afghanistan-paris-donor-conference-should-prioritize-human-rights> > (last accessed 03.02.09).

<sup>144</sup> AIHRC, *Economic and Social Rights in Afghanistan II* (August 2007).

<sup>145</sup> UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (Geneva: Core Group on Durable Solutions UNHCR, 2003), 5.  
See, <http://www.unhcr.org/partners/PARTNERS/3f1408764.pdf> > (last accessed 19.11.08).

the requirements of return in 'safety' and 'dignity' in 2003 when the repatriation flow was at its peak. Keeping in view the capacity of the newly established Transitional government in Afghanistan, GoP through a series of informal tripartite consultations acknowledged the limited capacity of the GoA to deal with massive repatriation and agreed to a gradual return.<sup>146</sup>

The extent of integration support provided by the GoA to the returnees could be gauged from the fact that albeit their return "home", some refugees are still living under tents as refugees at a place known *Mohajir Qeshlaq* or "refugee village" in the Dari language.<sup>147</sup> So it is really unfortunate that the label of "refugee" have stick to the refugees even after their return.

In 2008, according to Refugees International, the humanitarian situation is worsening in Afghanistan. Millions of Afghans live with poor standard of life and require help rebuilding their lives and country. While all Afghans suffer from the government's poor capacity and lack of services, Afghan refugees and returnees have been neglected and are particularly vulnerable.<sup>148</sup>

The UN High Commissioner for refugees Antonio Guterres while addressing a conference expressed that "the number [of returnees] have decreased sharply in recent years and at the same time the number of Afghans leaving the country mostly because of unemployment are also rising".<sup>149</sup> This fact indicates that the absorbing capacity of Afghanistan has fallen short to accommodate the already returned refugees let alone new repatriation promoted by UNHCR. He hence added that although a huge number of

<sup>146</sup> Salma, *Impact of International Jurisdiction on Afghan Refugee Rights*, 6.

<sup>147</sup> *Afghanistan at the Crossroads: Afghans Return Home to Live under Tents*.  
<http://www.reliefweb.int/rw/rwb.nsf/db900sid/EGUA-7LGPYP?OpenDocument>  
 (last accessed 22.12.2008).

<sup>148</sup> Refugees International, *Afghanistan, Invest in People* (10 July 2008), [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SHIG-7GEHKQ-full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/SHIG-7GEHKQ-full_report.pdf/$File/full_report.pdf) (last accessed 22.12.2008).

<sup>149</sup> [http://www.dailytimes.com.pk/default.asp?page=2008%5C11%5C20%5Cstory\\_20-11-08\\_pg4\\_12](http://www.dailytimes.com.pk/default.asp?page=2008%5C11%5C20%5Cstory_20-11-08_pg4_12)  
 (last accessed 20.11.08).

refugees reside outside Afghanistan, it would pose a challenge for “destitute Afghanistan” to deal with such high number of returnees.<sup>150</sup>

The problem is how to cope with humanitarian needs of returnees and other vulnerable Afghans consequent to UN structure in Afghanistan? Although UNAMA’s primary mandate is to support GoA, the government is unfortunately living a war in various fronts with different elements, UN humanitarian agencies, therefore, experience great difficulty in accomplishing their mandate.<sup>151</sup>

### 3.3.1 Management of Returnees from Pakistan

As mentioned earlier, Afghanistan as a country with no infrastructure to support and absorb such a huge repatriation in 2002-03 could not provide land, shelter and water to the returnees besides the IDPs and general population. Therefore, people expressed “regret” on their return and some 300,000 returnees were reported to have made their way back to Pakistan either to stay for winter or forever again.<sup>152</sup>

Afghan returnees identified lack of land, shelter and water as their basic problems on return, in addition many returnees do not have access to health facilities and there are limited livelihood opportunities. Children cannot easily access education. Many returnees live in “dire” conditions. Further, land disputes are unattended since long, and returnees in eastern and central region could not confirm their land ownership and are hence landless, while “UNHCR is not able to deliver long term assistance such as water and sanitation”.<sup>153</sup>

<sup>150</sup> *Ibid.* see also, Anand Gopal, *Afghanistan: Unable to Cope with Returning Refugees* (IPS).

<http://ipsnews.net/news.asp?idnews=41450> > (last accessed 03.02.09).

<sup>151</sup> Refugees International, *Afghanistan, Trust in People* (10 July 2008), 4.

<sup>152</sup> Hiram Ruiz, *South and Central Asia, 1.8 Million Refugees Return Home, But International Community Fails to Deliver Promised Aid, Security* (USCR, May 2003), 1.

<sup>153</sup> UNHCR, *Afghanistan Situation Operational Update*, September 2007, <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.pdf?tbl=SUBSITES&id=470383e32> > (last accessed 22.12.2008).

Although National Land Allocation Schemes are launched by the government managed by MoRR<sup>154</sup> but the problem is their location in 'desert' miles away from the closest town "despite UNHCR objections", hence, refugees prefer to live in towns where they feel secure than the land allocated to them.<sup>155</sup>

A report by AIHRC and UNHCR highlighted the challenges the returnees and internally displaced people returning to their homes had to encounter. According to the report, a majority (60%) of the returnees live in absolute poverty, earning less than a dollar a day. Respondents also reported chronic food shortages and a lack of access to basic services such as clean drinking water, health care and education.<sup>156</sup>

Moreover, returnee children were reported to have lost their lives in result of extreme hot weather in Ningarhar province. The report added that returnees belonging to Kunar province onboard 180 trucks encountered insulting and inhumane treatment of the Ningarhar security personnel, they requested to unload, as vowed by Gul Agha Sherzai the Provincial Governor, at Qasim Abad desert of Behsood District, but authorities denounced their request asserting that the returnees may occupy the government property forever.<sup>157</sup>

During 2008, a majority of the returnees in 2007 to the eastern region faced reintegration problems in acquiring livelihood, shelter and water and thus the working-age family members are being sent to Kabul or Peshawar (Pakistan) to look for job in order to support the family.<sup>158</sup>

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<sup>154</sup> UNHCR, *Afghanistan Situation Operational Update*, September 2006, <http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.pdf?tbl=SUBSITES&id=451a47ec2> (last accessed 22.12.2008).

<sup>155</sup> *Afghanistan, Trust in People* (10 July 2008), 4.

<sup>156</sup> <http://www.afghanconflictmonitor.org/2007/09/afghan-returnee.html> (last accessed 29.11.2008).

<sup>157</sup> <http://www.benawa.com/kandahar/>

<sup>158</sup> UNHCR, *Afghanistan Situation Operational Update*, September 2008.

Growing insecurity and food crises dominated developments in the region in 2008. Anti-government attacks rose sharply in both Afghanistan and Pakistan, while the 28000 returnees this year are living in five spontaneous settlements in Eastern Afghanistan, unable to return to their places of origin due to insecurity, landlessness, personal enmity or lack of livelihood opportunities.<sup>159</sup>

This fact is admitted even by UNHCR, as High Commissioner Guterres told a conference that consequent to increase in Taliban-led insurgency, insecurity, food shortages, lack of access to land, shelter and education were discouraging people from settling in Afghanistan.<sup>160</sup>

### 3.3.1.1 The *Pashtoon* Returnees in the Northern Afghanistan and the Case of Returnees in *Takhar* Province:

Experience has shown that if housing and property issues are not attended adequately, the voluntary repatriation operations are likely to be less successful, and particularly if refugees are not able to recover their houses and property in the country of origin. It is therefore that the “right to return to one’s own country is increasingly seen as closely linked with the right to adequate housing”.<sup>161</sup>

In the year 2002, the Pashtoons residing in the north of the country as the minority group were vulnerable to frequent armed clashes, their representatives made specific

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<sup>159</sup> *Ibid.*

<sup>160</sup> [http://www.dailytimes.com.pk/default.asp?page=2008%5C11%5C20%5Cstory\\_20-11-08\\_pg4\\_12](http://www.dailytimes.com.pk/default.asp?page=2008%5C11%5C20%5Cstory_20-11-08_pg4_12) > (last accessed 20.11.08).

<sup>161</sup> UNHCR *Global Consultations on International Protection, EC/GC/02/5, Voluntary Repatriation* (25<sup>th</sup> April 2002 EC/GC/02/5), 5. See, <http://www.unhcr.org/refworld/docid/3d62695d4.html> > [accessed 22 December 2008]

requests for their political and military participation, the restitution of their land and property and equal access to resources such as water and other social services.<sup>162</sup>

While recently, the media covered the issue of approximately 700 Pashtoon returnees from Pakistan arriving at their property, which was initially a non-agricultural and as per the former King Zahir Shah's decree was made cultivable by these Pashtoons,<sup>163</sup> Uzbek residents of the same property did not allow them to enter therein, besides, they detained them<sup>164</sup> and were threaten to leave the area within a week or they would face armed reaction from the local Uzbeks.<sup>165</sup>

The aim of mentioning this issue here is but to highlight the ethnic problems existing between Afghans, the international community represented by UNHCR, and the GoP must take in consideration the circumstances the returnees would have to encounter prior to launching a repatriation project in the future.

### 3.4 CONCLUSION:

We have seen that since the 1980s onwards, voluntary repatriation has been promoted by governments, NGOs and UN agencies as the ultimate solution to refugees' displacements, however, for a repatriation initiative to be sustainable and persistent, the pull factors in the country of origin need to be more powerful than push factors in the host country. And when the decision to 'return' has been by refugees and only by refugees, their return must take place in 'safety' and 'dignity'.

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<sup>162</sup> *Returnee Monitoring Report*, 10.

<sup>163</sup> *Do you know what is Taking Place in Khruja Bahauddin District?* (Pashto). Visit online at: <http://www.benawa.com/kandahar/fullstory.php?id=20675> > (last accessed 02.02.09).

<sup>164</sup> *Takhar: Hundreds of Pashtoon Women and Children Detained* (Pashto). Available online at: <http://www.tolafghan.com/home/detail/10762> > (last accessed 02.02.09).

<sup>165</sup> *Qazi Kabir: If Pashtoon Returnees Do Not Leave the Area, They would be Killed* (Pashto), see, <http://www.tolafghan.com/home/detail/10812> > (last accessed 02.02.09).



Going through the above-given data and information regarding the situation in Afghanistan since 1990 to 2008, few questions come to mind: would refugees 'voluntarily' decided to return to such conditions? What part did refugees play in the decision making regarding their repatriation? How can repatriation start consequent to formal tripartite agreements between UNHCR and GoP and GoA? Why would UNHCR promote their return despite its statement that:

*"... While voluntary repatriation is expected to continue, certain groups of Afghans continue to have a well-founded fear of persecution for reasons outlined in Article 1A(2) of the 1951 Geneva Convention Relating to the Status of Refugees. Others originating from particularly affected parts of the country – might be in need of international protection because of the indiscriminate effects of widespread violence and disorder?"*<sup>166</sup>

In order to successfully accomplish its function of 'protecting refugees' UNHCR needs to monitor conditions and developments inside refugee camps and in spontaneously settled communities which could affect the voluntary character of the decision to repatriate. Therefore, its continuation of the repatriation program till 2007-08 despite the fact that "Afghanistan has been struggling to absorb these massive returns"<sup>167</sup> could not fit well into its legal obligations.

What could be the reason of cutting down the budget for refugee education institutions?<sup>168</sup> Pushing them to return? Further, would cases of camp closures<sup>169</sup> by

<sup>166</sup> UNHCR, *Update of the Situation in Afghanistan and International Protection Considerations* (Jul 2003), 32. at, [http://www.tekenvoorrechtvaardigheidin Nederland.nl/uploads/july\\_2003\\_unhcr.pdf](http://www.tekenvoorrechtvaardigheidin Nederland.nl/uploads/july_2003_unhcr.pdf) (last accessed 20.12.2008).

<sup>167</sup> UNHCR, *Afghan Returns in 2008 Pass Quarter Million Marks*, available online at, <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MYAI-7K79U8?OpenDocument> (last accessed 22.12.2008).

<sup>168</sup> Atle Hetland, *Refugee Education Crisis, Past Experience, Current Situation and Consequences for the Future*, (Ockenden International, 31 May 2005), <http://www.reliefweb.int/rw/RWB.NSF/db900SID/RMOI-6CX4HA?OpenDocument> (last accessed 22.12.2008). It must be taken into account that, by doing so, Pakistan violated its obligation under Ex-Com conclusion# 47, Refugee Children, 1987, which calls for intensifying the

bulldozing the houses fit into the notion of “voluntary return”? Moreover, notwithstanding the huge repatriation figures presented by GoP and UNHCR, why the commonly expressed sentiments of the returnees in 2002 were “we wish now we hadn’t returned, if we had known the real situation we wouldn’t have come back”?<sup>170</sup> How can old refugees (those in Pakistan for several years) ‘willfully’ repatriate despite some claims that the new waves of refugees are not ‘humanitarian’ but ‘economic migrants’ or refugees compelled by severe drought to leave Afghanistan? Would not the return in ‘safety’ and ‘dignity’ denote return to a place where one can, as a minimum requirement, find some food to serve? Dehumanizing refugees by calling them “militants”, root cause of problem and security threat is sufficient for repatriating them? Would not these accusations require trial to prove? Of course it needs it, because a clean sweep statement is never enough for considering them a threat to security of the state.<sup>171</sup>

To sum up the discussion, as the President of Afghanistan acknowledged that the US and NATO did not make the life better during the preceding seven year of conflict,<sup>172</sup> the fact is now very highlighted that Afghanistan is still going through a situation where the international community is unable to safeguard the return of refugees in ‘safety’ and with ‘dignity’, thus any attempt made, by UNHCR or any government, to repatriate refugees, being involuntary and insecure, would amount to *refoulement* violating the fundamental principle of *non-refoulement*. In sum, the return in such a situation could not be termed voluntary.

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efforts “to ensure that all refugee children benefit from primary education of a satisfactory quality”.

<sup>169</sup> *Afghanistan, Trust in People* (July 2008), 2.

<sup>170</sup> Amnesty International, *Afghanistan: Out of Sight, Out of Mind: the Fate of the Afghan Returnees*, 17.

<sup>171</sup> Human Rights Watch’s opinion is that the relocation conducted during November 2001 was not carried in accordance with international standards of voluntariness that included adequate and impartial information and the absence of push factors. See, Human Rights Watch, *Afghan Refugees in Iran and Pakistan*, 39. The question is if UNHCR itself, mandated to protect the rights of refugees, does not meet its responsibilities what could be the position of states?

<sup>172</sup> *Afghan Leader Complains US, NATO Aren’t Succeeding* (Nov 2008), available online at: <http://www.afghanconflictmonitor.org/2008/11/index.html> (last accessed 29.11.2008).

## CONCLUSION AND RECOMMENDATIONS:

### 3.5.1 Conclusion:

Keeping in view the findings of the thesis, it could be summed up that the *travaux préparatoires* of the refugee regime and the later developments in the fields of human rights law, the initially-moral obligation of *non-refoulement* has qualified to be regarded and respected as a rule of customary international law, hence, it binds all members of international community irrespective of their accession to the 1951 Convention or the 1967 Protocol.

Therefore, it binds Pakistan, which although not a party to the 1951 protocol or its related 1967 Protocol is a member of the Ex-Com and has hosted millions of Afghan refugees since the USSR occupation of Afghanistan in 1978-9. It further has some moral values and norms to follow besides the religious obligation that is incurred upon every Muslim state. Having said that, the recent decision of the GoP in collaboration with UNHCR and GoA to return Afghan refugees from Pakistan in spite of continuing deteriorating security and human rights situation in Afghanistan violates the principle of *non-refoulement* in its letter and spirit and thus has to stop with immediate effect.

In addition, Pakistan has violated its obligation of *non-refoulement* in the past time and again. It is mentionable, however, that despite the UNHCR's activity in the field, it even with protests and efforts on various levels was unable to effectively protect the refugees from being returned. In our humble opinion, neither GoP nor UNHCR and GoA can give coherent reasons for carrying the huge repatriation projects in such situations.

**3.5.2 Recommendations:**

**3.5.2.1 To the Government of Pakistan:**

1. One cannot ignore the commendable job done by Pakistan through sheltering millions of Afghan refugees on its territory for the last 30 years without being a party to the Convention relating the Status of Refugees 1951 or its related Protocol 1967. Keeping in view its efforts and the burden that it has to undergo, the most essential job that Pakistan needs to fulfill is to ratify the 1951 Convention and the 1967 Protocol.

2. Following the said ratification, Pakistan has to adopt national asylum procedures and incorporate international treaty obligations into its municipal law, which as already mentioned, does not recognize any sort of difference in the treatment of illegal aliens and refugees on any level.

3. The GoP must, respecting its obligations under treaty and customary law and moral and Islamic values, avoid expulsion of the Afghan refugees from Pakistan. It must further ensure human treatment of refugees in all the cases within its territory. Serious endeavors are essential to stop the police targeting of the Afghan population throughout Pakistan.

**3.5.2.2 To the Government of Afghanistan:**

4. As a responsible government, the GoA must prior to commencing a repatriation program assess its capacity of absorbing the returning community and take concrete steps for integrating them in a way that they feel protected. In the present case, Afghan returnees require immediate focus on their employment and the fact that majority of the refugees (70.3%) are illiterate, hence they are not rather should not be interested in the 'development' unless gross-root-level improvement is observed. They demand

establishing vocational institutions and immediate expansion of the development projects to the *Pashtoon* areas, the areas of high return.

5. In case of the Afghan repatriation since 2002, the world community have pledged to and actually provided billions of USD for reconstruction of the war-ravaged country, the reconstruction cannot be regarded as persistent and reliable unless the un-protected Afghan population is welcomed into the country and are dealt with safety and dignity, thus, the repatriation programs fit very well into the notion of reconstruction. UNHCR must ask for a sufficient share from these pledges for carrying out such projects and GoA must, fulfilling its obligations, approve and assist in providing the resources.

#### 3.5.2.3 To the UNHCR:

6. UNHCR as the principle forum mandated to support and protect refugees and work for finding durable solutions must always ensure participation of the refugees in their decisions and agreements. The mere agreement of governments must not be trusted upon and UNHCR should strictly monitor the projects commenced with its support and in cases any sort of violation taking place at any level should address the issues at all possible forums and may look into cessation of its activity in case the violation continues.

7. The tripartite agreements, although efficient means for channelizing the repatriation programs, could not be taken to their ideal end unless the refugees are given opportunity to have their say. Therefore, the governments must first sincerely consult the refugees as they are the ones that would suffer the decision of the parties. The agreements in their present form, as giving deadlines and then expanding it severely disturbs the refugee population and keeps them in consistent trauma which almost hinders their life.

8. The deadlines announced for refugees create an environment of psychological stress and disturb the life of refugees living in a specific area, specifically if the deadlines are extended and curtailed, hence, UNHCR must strive to have full-fledge trustworthy information and assessments of the capacity of the concerned parties in dealing with any decision that they tend to take.

9. In addition to providing in-cash support, UNHCR, GoA and GoP must stress on institution building in Afghanistan, so to establish a cycle of employment and income generation, this includes, starting new projects employing the returnees in the field of their expertise, establishing small and medium industry such as plumbing, carpets weaving, mechanical works, as this would, on the one hand, provide a place for the returnees to work and on the other, they would have played role in reconstruction of the country.

10. Seems ideal, nonetheless, UNHCR must in post-conflict situations work and focus with the help of international community utilizing the UN forum on peace and stability, as we have found that the desire to return to homeland remains within the refugee community, so once peace and stability prevail, they would happily return even without any support, the spontaneous returns pointed-at in UNHCR and USCRI reports approve this view. In sum, peace and return have direct link affecting each other. In case of Afghanistan, the ideal repatriation would have been if the refugees from the relatively calm and peaceful northern Afghanistan were repatriated prior to others.

# THE PRINCIPLE OF *NON-REFOULEMENT*

## IN

### U.N. RESOLUTIONS:

#### 1. PRINCIPLE OF NON-REFOULEMENT

The first provision reproduced below sets out the principle of *non-refoulement* and the second recalls that the principle of *non-refoulement* is not subject to derogation. The third provision reaffirms the importance of respect for the principle of non-refoulement.

#### GENERAL ASSEMBLY RESOLUTIONS

8(X), OP(c)(ii) 12 Feb 1946

(c) recommends to the Economic and Social Council that it take into consideration in this matter the following principles:

...

(ii) no refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge of the facts, including adequate information from the governments of their countries of origin, expressed valid objections to returning to their countries of origin and who do not come within the provisions of paragraph (d) below, shall be compelled to return to their country of origin. The future of such refugees or displaced persons shall become the concern of whatever international body may be recognized or established as a result of the report referred to in paragraphs (a) and (b) above, except in cases where the government of the country where they are established has made an arrangement with this body to assume the complete cost of their maintenance and the responsibility for their protection.

52/132, PP12 12 Dec 1997

*Distressed* at the widespread violation of the principle of *non-refoulement* and of the rights of refugees, in some cases resulting in loss of refugee lives, and at reports indicating that large numbers of refugees and Asylum-seekers have been *refouled* and expelled in highly

## THE PRINCIPLE OF NON-REFOULEMENT

### IN

#### EXECUTIVE COMMITTEE CONCLUSIONS:

##### Appeal to States

*The Executive Committee,*

##### No. 1 (XXVI) - 1975

(b) *Fully endorsed* the proposal that at an appeal be made urging States Members of the United Nations and non-member States to conform fully with the humanitarian principles governing the protection of refugees and, in particular, to abide by the provisions of the 1951 Convention relating to the Status of Refugees and of its 1967 Protocol and scrupulously to observe the principle whereby no refugee should be forcibly returned to a country where he fears persecution;

##### No. 17 (XXXI) - 1980

(d) *Called upon* States to ensure that the principle of *non-refoulement* is duly taken into account in treaties relating to extradition and as appropriate in national legislation on the subject;

(e) *Expressed* the hope that due regard be had to the principle of *non-refoulement* in the application of existing treaties relating to extradition;

##### No. 29 (XXXIV) - 1983

(c) *Noted* with satisfaction that many States in different areas of the world and in particular in developing countries faced with serious economic problems have continued to apply recognized international humanitarian standards for the treatment of refugees and to respect the principle of *non-refoulement*;

##### No. 50 (XXXIX) - 1988

(g) *Recalled* its Conclusions No. 6 (XXVIII) and 7 (XXVIII) respectively on *non-refoulement* and expulsion and expressed deep concern that the fundamental prohibitions against expulsion and *refoulement* are often violated by a number of States and appealed to all States to abide by their international obligations in this regard and to cease such practices immediately;



No. 52 (XXXIX) - 1988

(5) *Invited* all States to continue actively to support the protection functions of the High Commissioner through all appropriate means, both bilateral and multilateral, as well as to abide by their own humanitarian responsibilities towards refugees, including, particularly, to safeguard the right to seek and enjoy asylum from persecution and to ensure full respect for the principle of *non-refoulement*.

No. 55 (XL) - 1989

(b) *Expressed* deep concern that refugee protection is seriously jeopardized in some States by expulsion and *refoulement* of refugees or by measures which do not recognize the special situation of refugees and called on all States to refrain from taking such measures and in particular from returning or expelling refugees contrary to fundamental prohibitions against these practices;

No. 62 (XLI) - 1990

(a) *Takes note* of the High Commissioner's emphasis in the Note on International Protection on the following:

(iii) the difference between refugees and persons seeking to migrate for economic and related reasons, and the need for any refugee policy to respect fundamental distinctions between the two categories of people, and be fully consonant with the principles particular to, and essential for, the protection of refugees, including first asylum and *non-refoulement*;

No. 65 (XLII) - 1991

(b) *Emphasizes* the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection and encourages States to intensify their efforts to protect the rights of refugees, to prevent them from becoming the object of armed attacks in camps or settlements, to avoid unnecessary and severe curtailment of their freedom of movement, to ensure conditions of asylum compatible with recognized international standards, and to facilitate their stay in countries of asylum, including through the issue of necessary personal documentation and permission to return after travel abroad;

No. 68 (XLIII) - 1992

(e) *Renews* its expressions of deep concern regarding persistent problems in some countries or regions seriously jeopardizing the security or well-being of refugees,

including numerous incidents of *refoulement*, expulsion, physical attacks on refugees and detention under unacceptable conditions, and calls upon States to take all measures necessary to ensure respect for the fundamental principles of refugee protection;

No. 71 (XLIV) – 1993

(g) *Calls upon* States to uphold asylum as an indispensable instrument for the international protection of refugees and to respect scrupulously the fundamental principle of *non-refoulement*;

No. 74 (XLV) – 1994

(g) *Calls* again upon States to uphold and strengthen asylum as an indispensable instrument for the international protection of refugees, to respect scrupulously the fundamental principle of *non-refoulement*, and to make every effort to ensure the safety and well-being of refugees within their jurisdiction;

No. 77 (XLVI) – 1995

(a) *Distressed* at the continued suffering of refugees for whom a solution has yet to be found; reaffirms that respect for fundamental humanitarian principles, including safeguarding the right to seek and enjoy in other countries asylum from persecution, and full regard for the principle of *non-refoulement*, is incumbent on all members of the international community; and urges the continued commitment of States to receive and host refugees and ensure their protection in accordance with accepted legal principles;

No. 81 (XLVIII) – 1997

(h) *Reaffirms* Conclusion No. 80 (XLVIII), and notes that a comprehensive approach to refugee protection comprises, *inter alia*, respect for all human rights; the principle of *non-refoulement*; access, consistent with the 1951 Convention and the 1967 Protocol, of all asylum-seekers to fair and effective procedures for determining status and protection needs; no rejection at frontiers without the application of these procedures; asylum; the provision of any necessary material assistance; and the identification of durable solutions which recognize human dignity and worth;

No. 82 (XLVIII) – 1997

(d) *Reiterates*, in light of these challenges, the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects:

(i) the principle of *non-refoulement*, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have been formally granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;

No. 85 (XLIX) - 1998

(q) *Strongly* deplores the continuing incidence and often tragic humanitarian consequences of *refoulement* in all its forms, including through summary removals, occasionally en masse, and reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining their status and protection needs;

No. 91 (LII) - 2001

(a) *Acknowledges* the importance of registration as a tool of protection, including protection against *refoulement*, protection against forcible recruitment, protection of access to basic rights, family reunification of refugees and identification of those in need of special assistance, and as a means to enable the quantification and assessment of needs and to implement appropriate durable solutions;

No. 94 (LIII) - 2002

(c) *Recommends* that action taken by States to ensure respect for the civilian and humanitarian character of asylum be guided, *inter alia*, by the following principles;

(i) Respect for the right to seek asylum, and for the fundamental principle of *non-refoulement*, should be maintained at all times;

No. 99 (LV) - 2004

(l) *Expresses concern* at the persecution, generalized violence and violations of human rights which continue to cause and perpetuate displacement within and beyond national borders and which increase the challenges faced by States in effecting durable solutions; and *calls* on States to address these challenges while ensuring full respect for the fundamental principle of *non-refoulement*, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs;

No. 103 (LVI) - 2005

(m) *Affirms* that relevant international treaty obligations, where applicable, prohibiting *refoulement* represent important protection tools to address the protection needs of persons who are outside their country of origin and who may be of concern to UNHCR but who may not fulfil the refugee definition under the 1951 Convention and/or its 1967 Protocol; and *calls upon* States to respect the fundamental principle of *non-refoulement*;

### Comprehensive Approach

*The Executive Committee,*

No. 68 (XLIII) - 1992

(r) *Recognizes*, in this regard, that new approaches should not undermine the institution of asylum, as well as other basic protection principles, notably the principle of *non-refoulement*;

No. 71 (XLIV) - 1993

(l) *Emphasizes* that such procedures, measures and agreements must include safeguards adequate to ensure in practice that persons in need of international protection are identified and that refugees are not subject to *refoulement*;

No. 80 (XLVII) - 1996

(e) *Encourages* States, in coordination and cooperation with each other, and with international organizations, if applicable, to consider the adoption of protection-based comprehensive approaches to particular problems of displacement, and identifies, as the principal elements of such approaches:

(iii) respect for the institution of asylum, including the fundamental principle of *non-refoulement*, and ensuring international protection to all those who need it

No. 81 (XLVIII) - 1997

(h) *Reaffirms* Conclusion No. 80 (XLVIII), and notes that a comprehensive approach to refugee protection comprises, *inter alia*, respect for all human rights; the principle of *non-refoulement*; access, consistent with the 1951 Convention and the 1967 Protocol, of all asylum-seekers to fair and effective procedures for determining status and protection

needs; no rejection at frontiers without the application of these procedures; asylum; the provision of any necessary material assistance; and the identification of durable solutions which recognize human dignity and worth;

### Definition / Character of Principle

*The Executive Committee,*

No. 15 (XXX) – 1979

*Considered* that States should be guided by the following considerations:

(b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of *non-refoulement*;

No. 17 (XXXI) – 1980

(b) *Reaffirmed* the fundamental character of the generally recognized principle of *non-refoulement*;

No. 19 (XXXI) – 1980

(a) *Reaffirmed* the need for the humanitarian legal principle of *non-refoulement* to be scrupulously observed in all situations of large-scale influx;

No. 22 (XXXII) – 1981

*Noting* with appreciation the report of the Group of Experts on temporary refuge in situations of large-scale influx, which met in Geneva from 21-24 April 1981, adopted the following conclusions in regard to the protection of asylum seekers in situations of large-scale influx.

#### I. General

2. Asylum seekers forming part of such large-scale influx situations are often confronted with difficulties in finding durable solutions by way of voluntary repatriation, local settlement or resettlement in a third country. Large-scale influxes frequently create serious problems for States, with the result that certain States, although committed to obtaining durable solutions, have only found it possible to admit asylum seekers without

undertaking at the time of admission to provide permanent settlement of such persons within their border.

No. 25 (XXXIII) – 1982

(b) *Reaffirmed* the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law;

No. 42 (XXXVII) – 1986

(c) *Recognized* that these instruments incorporate fundamental principles of refugee law including the principle of *non-refoulement* and lay down minimum standards for the treatment of refugees and thus constitute the corner-stone of international protection;

No. 53 (XXXIX) – 1988

*Recommended* that States and UNHCR take into account the following guidelines when dealing with actual cases of stowaway asylum-seekers:

(1) Like other asylum-seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.

No. 58 (XL) – 1989

(f) Where refugees and asylum-seekers nevertheless move in an irregular manner from a country where they have already found protection, they may be returned to that country if (i) they are protected there against *refoulement*

No. 65 (XLII) – 1991

(b) *Emphasizes* the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection and encourages States to intensify their efforts to protect the rights of refugees, to prevent them from becoming the object of armed attacks in camps or settlements, to avoid unnecessary and severe curtailment of their freedom of movement, to ensure conditions of asylum compatible with recognized international standards, and to facilitate their stay in countries of asylum, including through the issue of necessary personal documentation and permission to return after travel abroad;

No. 68 (XLIII) – 1992

(f) *Reaffirms* the primary importance of the principles of *non-refoulement* and asylum as basic to refugee protection;

No. 74 (XLV) - 1994

(r) *Considers* that temporary protection, which has been described by the High Commissioner in the context of the Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia as including admission to safety, respect for basic human rights, protection against *refoulement*, and safe return when conditions permit to the country of origin, can be of value as a pragmatic and flexible method of affording international protection of a temporary nature in situations of conflict or persecution involving large scale outflows;

No. 79 (XLVII) - 1996

(i) *Distressed* at the widespread violations of the principle of *non-refoulement* and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been *refouled* and expelled in highly dangerous situations; recalls that the principle of *non-refoulement* is not subject to derogation

(j) *Reaffirms* the fundamental importance of the principle of *non-refoulement*, which prohibits expulsion and return of refugees, in any manner whatsoever, to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have formally been granted refugee status, or of persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture, as set forth in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

No. 81 (XLVIII) - 1997

(i) *Recognizes* the fundamental importance of the principle of *non-refoulement*, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have formally been granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

No. 82 (XLVIII) – 1997

(d) *Reiterates*, in light of these challenges, the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects:

(i) the principle of *non-refoulement*, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have been formally granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;

No. 85 (XLIX) – 1998

(aa) *Stresses* that, as regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, will ensure effective protection against *refoulement*, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum;

No. 87 (L) – 1999

(j) *Reiterates* that the institution of asylum is of crucial importance to the international protection of refugees; re-emphasizes the importance of ensuring access to asylum procedures; recalls Conclusions No. 15 (XXX) of 1979 and No. 58 (XL) of 1989 on refugees without an asylum country and irregular movement of asylum-seekers; and affirms, in this regard, that notions such as “safe country of origin”, internal flight alternative” and “safe third country”, should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*;

No. 100 (LV) – 2004

(i) *Emphasizes* that such comprehensive plans of action in a mass influx situation should assist States and UNHCR and other relevant actors in dealing with the immediate



humanitarian emergency in a more effective, predictable and equitable manner, in achieving standards of treatment for those in need of international protection which fully respect international refugee, humanitarian and human rights law, including in particular the fundamental principle of *non-refoulement*, and in identifying and promoting durable solutions adapted to the particular characteristics of the situation;

No. 103 (LVI) – 2005

*Reaffirming* that the 1951 Convention relating to the Status of Refugees together with its 1967 Protocol continue to serve as the cornerstone of the international refugee protection regime; and *noting in this regard* the fundamental importance of their full application by State Parties, including that of the fundamental principle of *non-refoulement*,

(l) *Notes* that temporary protection, without formally according refugee status, as a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, should be clearly distinguished from other forms of international protection;

(m) *Affirms* that relevant international treaty obligations, where applicable, prohibiting *refoulement* represent important protection tools to address the protection needs of persons who are outside their country of origin and who may be of concern to UNHCR but who may not fulfil the refugee definition under the 1951 Convention and/or its 1967 Protocol; and *calls upon* States to respect the fundamental principle of *non-refoulement*;

Disregard of Principle / Violations of Rights / Personal Security

*The Executive Committee,*

No. 3 (XXVIII) – 1977

(a) *Was gravely preoccupied* that in a number of cases the basic human rights of refugees had still not been respected, that refugees had been subjected to physical violence, to unjustified and unduly prolonged measures of detention and to measures of forcible return in disregard of the principle of *non-refoulement*.

No. 11 (XXIX) - 1978

(b) *Recalled* the Conclusions adopted at the twenty-eighth session concerning the importance of the observance of the principle of *non-refoulement* and was gravely preoccupied that this principle had, in a number of cases, still been disregarded;

No. 14 (XXX) - 1979

(c) *Noted* with concern that refugees had been rejected at the frontier or had been returned to territories where they had reasons to fear persecution in disregard of the principle of *non-refoulement* and that refugees arriving by sea had been refused even temporary asylum with resulting danger to their lives and had in many cases perished on the high seas;

No. 15 (XXX) - 1979

(b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of *non-refoulement*;

No. 16 (XXXI) - 1980

(e) *Expressed* serious concern that there were still cases in which the fundamental principle of *non-refoulement* had been disregarded or in which refugees had been exposed to physical danger or violence;

No. 21 (XXXII) - 1981

(f) *Noted* with particular concern that in certain areas refugees have been refused asylum, have been rejected at the frontier or subjected to measures of expulsion or forcible return in disregard of the fundamental principle of *non-refoulement* and that asylum seekers had been the victims of physical violence;

No. 25 (XXXIII) - 1982

(c) *Expressed* concern that the problems arising in the field of international protection had increased in seriousness since the Committee's thirty-second session and that the basic rights of refugees and asylum seekers had been violated in different areas of the world, *inter alia*, through military attacks on refugee camps and settlements, acts of piracy and forcible return of refugees and asylum-seekers to their countries of origin;

No. 33 (XXXV) - 1984

(c) *Noted* with concern that in different parts of the world the fundamental principle of *non-refoulement* had been violated;

No. 41 (XXXVII) - 1986

(j) *Noted* with concern that in different areas of the world, the basic rights of refugees and asylum-seekers have been seriously violated and that refugees and asylum-seekers have been exposed to physical violence, acts of piracy and forcible return to their country of origin in disregard of the principle of *non-refoulement*;

No. 46 (XXXVIII) - 1987

(b) *Noted* with particular concern the continued violation of the principle of *non-refoulement* in various parts of the world;

No. 61 (XLI) - 1990

(c) *Expresses* strong concern that refugee protection continues to be seriously jeopardized in many States, including through expulsion, *refoulement* and other threats to the physical security, dignity and well-being of refugees;

No. 68 (XLIH) - 1992

(e) *Renews* its expressions of deep concern regarding persistent problems in some countries or regions seriously jeopardizing the security or well-being of refugees, including numerous incidents of *refoulement*, expulsion, physical attacks on refugees and detention under unacceptable conditions, and calls upon States to take all measures necessary to ensure respect for the fundamental principles of refugee protection;

No. 71 (XLIV) - 1993

(c) *Notes* however with concern that the protection of refugees continues to be seriously jeopardized in certain situations as a result of denial of access, expulsion, *refoulement* and unjustified detention, as well as other threats to their physical security, dignity and well-being.

No. 72 (XLIV) - 1993

*Reaffirming* the responsibility of States to respect and ensure the fundamental human rights of refugees and asylum-seekers to life, liberty and security of person as well as to freedom from torture or other cruel, inhumane or degrading treatment or punishment,

No. 74 (XLV) – 1994

(f) *Deplores* the fact that in certain situations refugees, as well as returnees and other persons of concern to UNHCR, have been subjected to armed attack, murder, rape and other violations of or threats to their personal security and other fundamental rights and that incidents of *refoulement* and denial of access to safety have occurred;

No. 85 (XLIX) – 1998

(b) *Deplores*, in particular, that in certain situations, refugees, as well as returnees and other persons of concern to UNHCR, have been subjected to armed attacks, murder, rape and other serious violations of or threats to their personal security, including through denial of access to safety, *refoulement* or expulsion to highly dangerous situations;

(q) *Strongly deplores* the continuing incidence and often tragic humanitarian consequences of *refoulement* in all its forms, including through summary removals, occasionally en masse, and reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining their status and protection needs;

No. 89 (LI) – 2000

*Welcoming* the continued grant of asylum to large numbers of refugees by many States but deeply disturbed by violations of internationally recognized rights of refugees which include *refoulement* of refugees, militarization of refugee camps, participation of refugee children in military activities, gender-related violence and discrimination directed against refugees, particularly female refugees, and arbitrary detention of asylum-seekers and refugees; also concerned about the less than full application of international refugee instruments by some States Parties;

No. 102 (LVI) – 2005

(j) *Recalls* its Conclusions No. 6 (XXVII) and 7 (XXVIII), as well as numerous subsequent references made in its other Conclusions to the principle of *non-refoulement*; *expresses* deep concern that refugee protection is seriously jeopardized by expulsion of refugees leading to *refoulement*; and *calls on* States to refrain from taking such measures and in particular from returning or expelling refugees contrary to the principle of *non-refoulement*.

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