

POLICY BRIEF, JULY 2024

# Options for Pakistan: Inter-relationship between Refugee Law and Human Rights Law

## **Options for Pakistan: Inter-relationship between Refugee Law and Human Rights Law**

### **Executive Summary**

In recent times, there has been an increase in the intersection between refugee law and International Human Rights Law (IHRL). The aim is to extend protection for all individuals. Refugee law is considered to be restrictive and is supplemented with IHRL which offers more comprehensive border safeguards. However, this intersection comes as a challenge for Pakistan to balance IHRL obligations, especially regarding *non-refoulement* (NR) where there is a threat of torture or cruel, inhumane, or degrading punishments (PTCI). PTCI is now recognized as customary international law and has worked to expand the scope of NR beyond refugee law offering protection even in the absence of refugee status. The Human Rights Committee (HRC) has imposed NR based on the risks of PTCI and based on IHRL conventions. In such a situation, NR has a chance to reach the stage of customary international law. Such a situation poses international law challenges for Pakistan as its sovereignty may come under threat.

Following are the brief recommendations:

- The Foreign Ministry of Pakistan must explicitly state its position on the customary evolution of IHRL regarding NR through its spokesperson and UN Missions, ensuring alignment with the Refugee Convention 1951 definition of persecution.
- Pakistan must issue statements from the Foreign Office and UN Missions discouraging the creation of NR obligations arising from ambiguous circumstances, such as generalized violence, as observed in the OAU treaty.
- Pakistan must reserve the right to voluntarily repatriate refugees while signing future human rights treaties and explore diplomatic mechanisms to amend existing treaties like ICCPR, CRC, CAT, and CEDAW to exclude NR obligations derived from IHRL instruments

## **Options for Pakistan: Inter-relationship between Refugee Law and Human Rights Law**

### **Introduction**

In the 20<sup>th</sup> Century, it is increasingly observed that the refugee law started to co-exist with International Human Rights Law ('IHRL') which emphasizes 'all human beings' and 'everyone'. It is argued that refugee law is a limited law and IHRL should be the main basis for refugee protection as technicalities of refugee law will render IHRL supplementary to refugee law. However, it could be construed now that refugees benefit from both legal regimes as IHRL goes further than refugee law in terms of protection. IHRL has also developed to the point where States can no longer legitimately claim that human rights violations are a domestic matter as it has an important interconnection with refugee law. Many international treaties further establish this assertion as Article 14(1) of the Universal Declaration of Human Rights ('UDHR') states that the right to asylum should be enjoyed by everyone since it is based on the protection of all persons from persecution. UDHR considers many areas especially important if they are related to the experiences of refugees such as non-discrimination and recognition as a person before the law. In such a situation, Pakistan is faced with a crisis in which it is difficult for the country to exercise the sovereign right to expel refugees if the country deems that the situation in the home country of refugees has improved. Pakistan must protect its national interests and sovereignty as any expansive overreach of the IHRL shall expose the country to unnecessary international law obligations of *non – refoulement* ('NR'). However, it is also essential to understand the extent and *modus operandi* of the IHRL's obligations to prescribe appropriate solutions under international law to buffer the impact of IHRL.

### **Prohibition of Torture or Cruel, Inhuman, or Degrading Punishments**

Like any customary law, establishing NR as customary international law requires the crystallization of state practice and *opinio juris*. If the customary legal nature of NR is to be derived from the context of human rights ("HR"), the scope of the prohibition of torture or cruel, inhuman, or degrading punishments ("PTCI") is of extreme importance. PTCI is a customary international law and the relationship of PTCI with NR is an important debate in legal academia. PTCI has a broad formulation and appears as a single prohibition with no distinctions between them or any difference in legal status among them. Thus, many instruments such as Article 5 of the Universal Declaration of Human Rights ('UDHR'); Article 3 of the European Convention of Human Rights ('ECHR'); Article 7 of the International

Covenant of Civil Political Rights ('ICCPR'), and Article 5(2) of African Convention of Human Rights ('ACHR') have incorporated PTCI within them with all its shades. Human Rights Committee ('HRC') in its General Comment No.24 (52) (1994) has also recognized the universal and customary nature of this provision and has disallowed any reservation on it since it has evolved into a 'peremptory norm'. Recognition of this PTCI in United Nations General Assembly ('UNGA') resolutions, legal commentaries, and ratification of instruments by States that bind them with the obligation of PTCI further corroborate the fact that PTCI has a strong chance of acquiring the status of customary international law.

### **Convention Against Torture and NR**

Articles 1 and 2 of CAT do not allow *refoulement* where there is substantial ground for torture and the State has considered account of the consistent pattern of flagrant, gross, or mass violations of human rights. The fundamental presence of NR concerning PTCI is primarily established from Article 3 of the Convention against Torture ('CAT') which explicitly prohibits States from exercising NR if there is a real risk of PTCI. The approach of CAT was also used in the *Chahal* case wherein the European Court of Human Rights did not allow a Sikh separatist to be deported to India on such concerns that he may be subjected to PTCI under the government of Indira Gandhi.<sup>1</sup> ECHR extended PTCI explicitly to all cases of expulsion from a territory without any distinction to 'any' territory where such risk arises and in such a way the status of the person whether it is of refugee or otherwise becomes irrelevant.

### **Refugee Law and ICCPR**

Article 7 of ICCPR has had a considerable influence in extending the scope of *non-refoulement*. HRC in the General Comment: 20 (1992) stated that Article 7 of ICCPR states that there should be no kind of expulsion that exposes a person to a risk of PTCI. The test for determining PTCI is that there should be "substantial grounds for believing that a person would face a real risk of prohibition of torture or cruel, inhuman, or degrading punishments"<sup>2</sup>. HRC in the interpretation of the provisions of ICCPR has further noted that State parties should not only ensure covenant rights, especially of Articles 6 and 7 within their territory but also ensure that they do not put any person to irreparable harm when such a danger exists. However, it must be established with a high threshold that a 'real risk of irreparable harm would entail.'

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<sup>1</sup> *Chahal v United Kingdom*, 23 EHRR 413

<sup>2</sup> General Comment No. 20: 'Prohibition of torture or other cruel, inhuman or degrading treatment or punishment' (article 7) (1992)

Many cases presented before HRC further corroborate this observation and affirm NR if there is a real risk of PTCI and do not even allow any exceptions or exclusions based on national security. In *X v. Denmark*, there was an Eritrean national who faced fear of ill-treatment in Eritrea because he refused to perform military service due to his religious beliefs. The HRC stated that a return would violate Article 7 of ICCPR since there are credible sources that describe that such a situation will occur.<sup>3</sup> Similarly, in *ML v Sweden*, the HRC reasoned that the return of a lesbian woman to Bangladesh would violate Article 6(1) and Article 7 of ICCPR since there are laws that criminalize homosexuality in Bangladesh which results in obstacles to prosecution of any crimes committed against LGBTI.<sup>4</sup> In *Chaudhary v Canada*, HRC considered fear of ill-treatment because of a *fatwa* from Sunni extremist groups on blasphemy sufficient to violate Article 7 of ICCPR if returned to Pakistan although the asylum application was rejected on a credibility basis.<sup>5</sup> In *Hamida v Canada*, the HCR even allowed an argument that Article 7 shall be violated although the applicant was excluded from the Refugee Convention under Article 1 (F) (a) (c) as he was involved in a government crime unit that practiced torture.<sup>6</sup>

In *Ahani v Canada*, HRC again required compliance with Article 7 of ICCPR as it was absolute without consideration although the applicant sought to be deported on national security concerns as he was found working for the Iranian Ministry of Intelligence.<sup>7</sup> ICCPR provides protections where a refugee application is rejected on credibility or is caught in some exclusion clause or limitation of non-refoulement. While the refugee convention requires a certain category of classes of refugees to be protected from persecution, IHRL protects an individual from a real risk of PTCI without any specific classification and forbids States. It even puts on States such a responsibility when they have ‘effective control over a territory’ or a conduct that could be attributable to a State.<sup>8</sup>

## **Refugee Law and OAU Treaty**

Qualifications on account of reasons mentioned in Article 33(1) of the Refugee Convention are gradually becoming less qualified. For *non-refoulement* under Article 33(1) of the Refugee Convention, if a person is facing some objectively discerning threat of persecution on account of reasons other than those specified, it is advised to view the matter more broadly

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<sup>3</sup> Human Rights Committee, *X. v Denmark*, Communication No. 2007/2010

<sup>4</sup> *Miller v. Sweden*, ECHR Application no. 55853/00

<sup>5</sup> *Chaudhary v. Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700

<sup>6</sup> Human Rights Committee, *Hamida. v Canada*, Communication No. 1544/2007

<sup>7</sup> *Ahani v. Canada*, 2002 SCC 2

<sup>8</sup> *Time for Reform? Asylum Seekers, Refugees, and protection under International Human Rights Law* – Colin Harvey, pp. 1-6, 9

and precise identification of threat is not material. This approach aligns with the United High Commission for Refugees ('UNHCR') mandate which is not limited to specified classes or rigid interpretation of the words of the Refugee Convention. In this way, the evolution of NR from refugee convention to human rights convention is allowing space for people to flee from generalized violence which is disturbing the peace. This was referenced in the Organization of African Unity ('OAU Treaty') and Cartagena Declaration. However, the determination of the refugee under the Refugee Convention still revolves around Article 1A (2) and continues to hold importance.<sup>9</sup>

### **How NR Impacts Pakistan**

Pakistan, as a dedicated signatory to multiple international human rights treaties, including the 1951 Refugee Convention and its 1967 Protocol, upholds the principle of *non-refoulement* as a fundamental aspect of its humanitarian and legal responsibilities. Given that Pakistan hosts one of the largest refugee populations globally, particularly from Afghanistan, this principle is of paramount importance on the international stage. However, it is essential to strike a balance that respects the sovereignty and security of the nation. Consequently, this obligation profoundly influences Pakistan's domestic and international policies, guiding its approach to refugee management while balancing national security imperatives with the protection of vulnerable populations.

### **Human Rights Approach Towards Defining Persecution**

The Human Rights Approach also takes a different approach to define the element of serious harm for establishing persecution. They usually form a combined reading of many instruments such as ICCPR and CAT. This approach has considerable benefits as HR offers consistency and is uniquely suited to the task of defining risks that involve unacceptable forms of serious harm. It also provides normative legitimacy as States themselves have defined and subscribed to the rule inherent in them. In this context, the Human Rights approach defines persecution as the denial of fundamental rights and the measures sufficiently serious by its nature or repetition to constitute a severe violation of HR. Considering this explanation, three categories of rights could be adduced that result in serious harm, i.e., risks to physical security, threats to liberty, and infringements of autonomy and self-realization.<sup>10</sup>

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<sup>9</sup> E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non - refoulement', pp. 144-162

<sup>10</sup> J. C. Hathaway, M. Foster, *The Law of Refugee Status* (Second ed.), Cambridge (2015), pp. 69,75,76,77,92 and 103

The International Convention for the Protection of All Persons from Enforced Disappearance 2006 provides similar observations regarding *refoulement* to a place where there is a substantial risk of enforced disappearance. Convention on the Elimination of Discrimination against Women ('CEDAW') also has a provision like ICCPR which makes it obligatory for States to protect women from being exposed to real, personal, and foreseeable risks of serious harms of gender-based violence. Committee on the Elimination of Racial Discrimination has considered special interest in the racial discrimination that refugee faces after entry into the country or when they are granted a temporary status not equal to a refugee. As noted in *Shava v Denmark* and *AAM v. Switzerland*, the committee requires no discrimination of refugees by States.<sup>11</sup> Protection of refugees under the Convention on the Rights of Children ('CRC') is reflected in the *ZH case* wherein Lady Hale required the UK government to take account of the best interests of children as mentioned in Article 3(1) of CRC while deciding the refugee status of their mother.<sup>12</sup>

### **Less State Control in the Human Rights Regime**

Refugee law is informed by human rights law when the relevance of the latter is questioned. The evolution of the principle of *non-refoulement* is considerable. NR as customary international law under the human rights regime, as opposed to the refugee convention, does not allow derogations or limitations if there is a real risk of PTCI. However, in cases of threats of persecution or danger to life, liberty, or physical integrity which does not come within the ambit of PTCI, overriding concerns of national security or public safety can allow *refoulement*. The use of IHRL as an overriding way to impose *non – refoulement* can expose Pakistan to unnecessary international law obligations. United Nations Security Council ('UNSC') 1373 also allows a State to take protective measures in terms of granting refugee status if the applicant has a human rights record related to terrorism.<sup>13</sup> This reiterates that even the UNSC provides considerable leeway to state autonomy in these issues of granting refugee status.

### **Recommendations**

- The Foreign Ministry of Pakistan should clearly define its position on *non-refoulement* by aligning its refugee policies with customary international law and the Refugee Convention 1951, emphasizing that it views persecution strictly within the scope of Article 33(1) of the Refugee Convention, and not necessarily linked to broader concepts

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<sup>11</sup> Time for Reform? Asylum Seekers, Refugees, and protection under International Human Rights Law – Colin Harvey Page-18-20

<sup>12</sup> *ZH Tanzania v Secretary of State* [2011] UKSC 4

<sup>13</sup> United Nations Security Council ('UNSC') Resolution 1373 (2001), Para 3(f)

like PTCL. This stance should be communicated explicitly through diplomatic channels and reflected in state practice.

- The Foreign Office spokesperson and United Nations missions should highlight in their communications that the new NR obligations are harmful to the security concerns of Pakistan as observed in the OAU treaty.
- Pakistan needs to make reservations in the future while signing human rights treaties that any right within the treaty does not infringe on Pakistan's decision to voluntarily repatriate refugees. In the currently active treaties such as ICCPR, CRC, CAT, and CEDAW, Pakistan needs to explore diplomatic mechanisms to allow space for negotiating legal solutions that exclude the use of IHRL instruments for applying the principle of NR.



## Recommendations and Action Matrix

### Legal Options for Government

| Recommendations                        | Pathways to Solution   | Implementation of Solution   | Actors Responsible  | Implementation Timelines  |
|--|--|--|---|---|
| <b>Unitary Position</b>                | Pakistan must unequivocally affirm its commitment to Article 33(1) of the 1951 Refugee Convention.                                       | The Ministry of Foreign Affairs spokesperson and the United Nations mission must release corresponding statements attesting Pakistan's position on obliging by the Refugee Convention.   | 1. Ministry of Foreign Affairs<br>2. Permanent Missions of Pakistan to the United Nations                                   | 2-4 Months for the Implementation   |
| <b>Countering Legalese</b>             | Ensuring that Pakistan is not placed in a position where it must comply with stringent policies arising from ambiguous circumstances     | The Foreign Office spokesperson and United Nations mission must also release statements that safeguard Pakistan against the creation of <i>non-refoulement</i> obligations on a vague basis.   | 1. Ministry of Foreign Affairs<br>2. Permanent Missions of Pakistan to the United Nations                                   | 6-12 Months for the Implementation.   |
| <b>Legal and Diplomatic Mechanisms</b> | Ensuring that Pakistan maintains a robust legal stance that precludes the obligation to accept <i>non-refoulement</i> in future contexts | A review committee is to be brought up to review current treaties to lobby spaces of reservations in IHRL instruments on customary law. Future treaties must be reviewed to ensure that Pakistan's sovereign right to repatriate refugees is not infringed upon. | 1. Ministry of Foreign Affairs<br>2. Ministry of Law and Justice<br>3. Permanent Missions of Pakistan to the United Nations | 4 Months for the broad review.<br>6 Months tentatively for the lobbying efforts |



