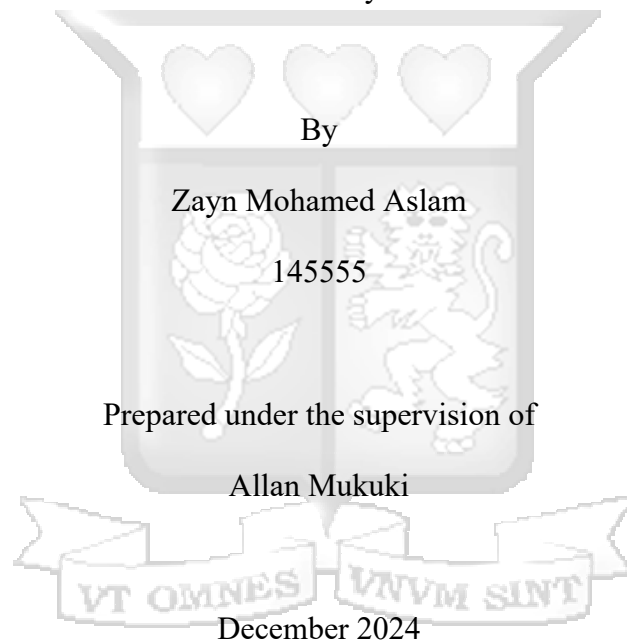


# **Afghan Refugee Exodus: Exploring the Legality of Forced Expulsions in Pakistan Under the Juridical Lens of Islamic Legal Doctrine**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School



Word count: 18,651

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# Acknowledgements

I extend my deepest gratitude to my father. I appreciate – more than I can say – his support, care, and guidance, which have been indispensable in the completion of this work. He has more than fulfilled his mandate as a father, provider, friend, and mentor. His encouragement, prayer and, most especially, the values he instilled in me, have been the foundation of my personal and academic journey, making this achievement possible.

Equally, I am extremely grateful to my mother for her boundless support, care, and assistance through out my life. The values she has imparted have been instrumental in shaping my dedication, without which this milestone would not have been attainable. To fill her memory with pride, through this work, has been a constant motivator. In truth, I am at a loss of words on how to express my acknowledgement of her impact.

I also wish to thank my aunt, Nadira, whose consistent words of encouragement sustained me during moments of self-doubt, inspiring me to persevere when my resolve wavered. Her persistent encouragement and steadfast support have been a guiding force throughout the authorship of this dissertation. I am extremely appreciative of her.

I also acknowledge my brother and sister, Aasim and Hannan, without whose support, care, and assistance this would not be possible. In their way, they were most instrumental in keeping me grounded, offering words of encouragement when I needed them most, and humbling me with our quintessential brand of sharp wit and playful banter. May they find fulfilment and happiness through my prayers, as I have found through theirs.

To my friend, Mark, whose camaraderie has cemented allowed perseverance throughout law school. I am especially grateful for his role as my first sounding board for all my academic ideas, offering insight, encouragement, and thoughtful feedback that helped shaped my thinking. His presence has been invaluable, and I am truly fortunate to call him my friend.

Finally, but certainly not least, my supervisor, mentor, and friend, Allan Mukuki. In the last four years, one consistent source of guidance, expertise, opportunity and mentorship have come through him. He has been invaluable throughout this process. As both a supervisor and a mentor, he has exemplified excellence and inspiration, while his friendship has provided a sense of reassurance and encouragement during challenging times (such as the occasional 7 AM meetings). I thank him immensely for keeping Monday, half past ten in the morning, free so that we could meet, exchange ideas, and brainstorm together. I am deeply grateful.

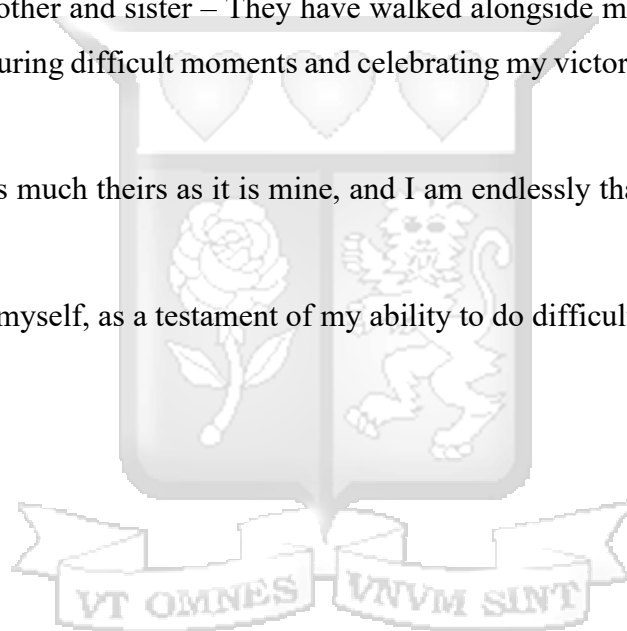
# Dedication

This work is dedicated to my family:

- To my father, whose tireless hard work and sacrifices have afforded me the opportunity to complete my studies – an achievement he was not granted the luxury to pursue. His resilience and determination continue to inspire me every day.
- I also dedicate this to my mother, whose boundless love, support, and unshakeable faith in my potential have been a constant source of strength throughout this journey. Her selflessness and encouragement have guided me through challenges, and for that, I am forever grateful.
- Finally, my brother and sister – They have walked alongside me through this journey, lifting me up during difficult moments and celebrating my victories as if they were their own.

This achievement is as much theirs as it is mine, and I am endlessly thankful for the bond we share.

I also dedicate this to myself, as a testament of my ability to do difficult things well.



# Declaration

I, ZAYN MOHAMED ASLAM, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.



Signed: .....

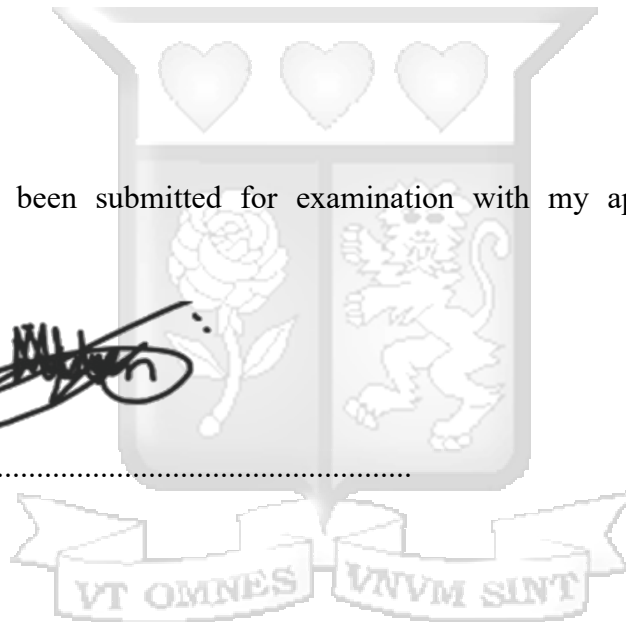
Date: 9 December 2024

This dissertation has been submitted for examination with my approval as University Supervisor.



Signed: .....

Allan Mukuki



# Abstract

*On 3<sup>rd</sup> October 2023, the Pakistani Government instituted a measure that resulted in the forced expulsion of Afghan refugees.*

*Against this backdrop, the study scrutinizes the recent Pakistani government's decision to expel what it terms 'illegal immigrants,' identified by human rights organizations as refugees fleeing Taliban persecution. Given Pakistan's status as an Islamic Republic constitutionally bound by Islamic Shariah Law, the research explores the legal implications and the measure's conformity with Islamic law, questioning the alignment between national and international standards. The study hypothesizes a breach of constitutional duty to adhere to Islamic Law by Pakistan, and poses critical questions addressing the historical trajectory, alignment of Islamic law with international standards, the constitutional basis for Islamic Refugee Law, and the legal ramifications of the forced expulsion. This investigation aims to fill the existing lacuna in understanding the legality of such measures within the framework of Islamic Shariah Law and Pakistan's national legal context.*

*Thus, this study will analyse the extent to which Islamic law on refugees and asylum seekers aligns with international standards; examine the legal and constitutional basis for the place of Islamic Refugee Law within Pakistan; and analyse the legal implications of the current forced expulsion within the frameworks of Islamic law.*



# 1.0 An Introduction to the Study: Setting the Scene & Laying the Foundation

## 1.1 Introduction

The world, though considered sacrosanct, harbours elements that compel individuals to abandon their places of livelihood and seek refuge in other nations. In cognisance of this, refugee's world-over are offered solace within the borders of countries who have opened their doors to them. To exemplify this, there are well over a 100 million people who stand displaced.<sup>1</sup> Of particular interest to this study, North of five-and-a-half million of those, are Afghan refugees world-wide.<sup>2</sup> This number no doubt exacerbated by the now not-so-recent consolidation of power by the Taliban, from whose terror many Afghans are fleeing.<sup>3</sup> Pakistan holds one of the largest refugee populaces in the World, with a number nearing the 2 million mark.<sup>4</sup> In the latest estimates from the United Nations High Commission for Refugees (UNHCR), albeit those going back to 2018, the number of Afghan refugees finding solace with Pakistani borders edges out at 1.5 million.<sup>5</sup>

A refugee, under international law, is anyone who:

*owing to well-founded fear of being persecuted for reasons of race, religion... is outside the country of his nationality and is unable... 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, is unable or, owing to such fear, is unwilling to return to it.*<sup>6</sup>

The tale of Afghan refugees in Pakistan is one that is not recent, but part of a protracted history tracing its origins as far back as the 1970s.<sup>7</sup> From fleeing Soviet invasions in the late 70's,<sup>8</sup> to

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<sup>1</sup> United Nations High Commission for Refugees, *Global trends: Forced displacement*, 2022, 2.

<sup>2</sup> United Nations High Commission for Refugees, *Global trends*, 3.

<sup>3</sup> United Nations High Commission for Refugees, *Global trends*, 19.

<sup>4</sup> United Nations High Commission for Refugees, *Global trends*, 3.

<sup>5</sup> United Nations High Commission for Refugees, *Pakistan*, available at —<  
<https://www.unhcr.org/countries/pakistan>> on 11 December 2023.

<sup>6</sup> Article 1(A) (2), *The Geneva Convention 75 UNTS 31*, (1950).

<sup>7</sup> See generally, Eisenberg J, "The Boatless People: The UNHCR and Afghan Refugees 1978-1989", 14(1) *International History*, 2013.

<sup>8</sup> Noor S. "Afghan Refugees After 9/11." 15(1) *Pakistan Horizon*, 2006, 60.

fleeing Soviet withdrawals by the late 80's,<sup>9</sup> to fleeing America's 'war-on-terror' brigade at the turn of the century,<sup>10</sup> and most recently the reconsolidation of power at the hands of the Taliban, the Afghan-Pakistan refugee story is long and treacherous, and the consequence of which has seen the displacement of millions since.<sup>11</sup>

Concomitantly, the CoP unequivocally, by way of Article 2, avers that Islam shall be the official religion of the aptly named *Islamic Republic*.<sup>12</sup> An inquiry into what this means, substantively, would require a keen analysis into the religious affiliations of the Country, which would necessitate a disposition of the Country's secular stance – something that this study shies away from at this juncture due to the complexity of that matter unto itself. Nonetheless, from a very direct and obvious reading of the text, it is clear that Islam is not peripheral to the running of affairs within Pakistan; it is very much central to the textual nature of the Constitution.<sup>13</sup> This centrality is visible throughout the Constitution, and it goes as far as to say that laws contrary to the Islamic faith shall be invalid.<sup>14</sup> And to ensure that this is the case, the Islamic Council was constituted to ensure that measures are assessed to ensure conformity with the Islamic faith.<sup>15</sup> So sacrosanct Islam appears to be, that the Constitution places claw back clauses whereby it restricts rights in the interest of the glory of Islam.<sup>16</sup> In fact, the CoP dedicates a whole part, Part IX, to the "Islamic Provisions".<sup>17</sup>

That said, even if not much is clear yet, it must be clear that Pakistan is an Islamic Republic, indeed, and that arguments from Islamic faith must be taken seriously in a discourse regarding Pakistan, including a discussion on the validity or lack thereof in regard to a measure taken, or a law assented to. Any measure, thereafter, must conform to Islamic Law, too.

Of critical import to this particular study, is the recent measure taken by the government regarding the Afghan refugees. On October 3<sup>rd</sup>, 2023, the Pakistan government announced that

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<sup>9</sup> Eisenberg J, "The Boatless People: The UNHCR and Afghan Refugees 1978-1989", 14(1) *International History*, 2013.

<sup>10</sup> Alessandro M, "Afghan Migratory Strategies and the Three Solutions to the Refugee Problem", 27(1) *Refugee Survey Quarterly*, 2008.

<sup>11</sup> United Nations High Commission for Refugees, *Global trends*, 3.

<sup>12</sup> Article 2, *Constitution of the Islamic Republic of Pakistan* (1973).

<sup>13</sup> There are an exceptional number of references to the religion in the Constitution. See for instance, the 4<sup>th</sup> and 5<sup>th</sup> Recital, Article 2, Article 19, Article 31, Article 40, Article 203, among many others. See, generally, *The Constitution of Pakistan* (1973).

<sup>14</sup> Article 227, *Constitution of the Islamic Republic of Pakistan* (1973).

<sup>15</sup> Article 228, *Constitution of the Islamic Republic of Pakistan* (1973).

<sup>16</sup> Article 19, *Constitution of the Islamic Republic of Pakistan* (1973).

<sup>17</sup> Part IX, *Constitution of the Islamic Republic of Pakistan* (1973).

it would be expelling what it termed ‘illegal immigrants’ from within its borders.<sup>18</sup> What Pakistan is terming as ‘illegal immigrants’, the rest of the World’s human rights organisations are terming, ‘refugees’, who are fleeing persecution at the hands of the infamous Taliban.<sup>19</sup> Since then, scores of Afghan refugees have been seen departing the Country, and heading back home to Afghanistan.<sup>20</sup>

On the face of it, it seems unclear what the implications of this forced mass exodus may be. What is even less clear at this point in time, is where such a measure lies on the spectrum of illegality, under both, Islamic law and the national law of Pakistan (by extension). A perusal of the literature unveils a lacuna that is in need of filling.

This study will endeavour to assess the legal framework within which refugees are situated, and conduct a keen analysis of the extent to which Islamic law on refugees and asylum seekers aligns with international standards. After doing so, the study will examine the legal and constitutional basis for the place of Islamic Refugee Law within Pakistan. Finally, the crux of the study will assess the legal implications of the forced expulsion within the frameworks of international law and shariah law.

## 1.1 Background

The narrative of Afghan refugees in Pakistan is one deeply entrenched in decades of conflict, political upheaval, and humanitarian crises. Going as far back as 1975,<sup>21</sup> successive waves of Afghan nationals have sought asylum within Pakistan's borders, escaping not only Soviet aggression but also subsequent civil wars, Taliban rule, and the protracted US-led intervention. At this very juncture, one may venture to question the details of the very background of this occurrence. In other words, considering the recent developments, including the Pakistan government's 2023 expulsion order aside, how exactly did the refugee situation in Pakistan reach this junction? This background furnishes a foundational context to examine these

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<sup>18</sup> Amnesty International, *Pakistan: Halt mass detentions and deportations of Afghan refugees*, 10 November 2023.

<sup>19</sup> See for instance, Amnesty International, *Pakistan: Halt mass detentions and deportations of Afghan refugees*, 10 November 2023 —<<https://www.amnesty.org/en/latest/news/2023/11/pakistan-halt-mass-detentions-and-deportations-of-afghan-refugees/>> on 16 December 2023; see also, United Nations High Commission on Refugees, *UNHCR concerned at adverse effects of Pakistan orders for undocumented foreigners to leave* —<<https://www.unhcr.org/news/unhcr-concerned-adverse-effects-pakistan-orders-undocumented-foreigners-leave>> on 16 December 2023.

<sup>20</sup> Gul A, *Deportation Deadline Triggers Exodus of Afghans from Pakistan*, VOA News, —<<https://www.voanews.com/a/7334327.html>> on 18 December 2023.

<sup>21</sup> Eisenberg J, "The Boatless People: The UNHCR and Afghan Refugees 1978-1989", 14(1) *International History*, 2013.

multifaceted issues, addressing critical gaps in the extant literature and underscoring the pertinence of this study.

A fundamental preface to keep in mind is that throughout the protracted years of conflict in the region, Pakistan has consistently hosted the largest number of refugees worldwide, despite grappling with its own economic and social challenges.<sup>22</sup> A second equally crucial fact to keep in mind is that Pakistan has historically maintained a very ‘hospitable’ attitude toward refugees, welcoming them quite openly. Rather than perceiving them as victims to be accepted under humanitarian law, Pakistan initially regarded these refugees as beneficiaries of traditional Islamic hospitality, viewing them through the lens of being *Ansar*, or helpers; going as far as terming them ‘cousin’.<sup>23</sup> Knowledge of this fact begs the question ever more: where did it change? This answer to this question necessitates a historical inquiry.

The Afghan refugee problem first came into the fold as early as 1975 when it is said to have first appeared on the radar of the UNHCR.<sup>24</sup> This is said to be the first of four phases of mass exodus.<sup>25</sup> During this time, there is evidence of communication between the UNHCR Secretary General, Kurt Waldheim, as he then was, and the Pakistani Prime Minister Zulfikar Bhutto, the latter of whom expressed the recent movement of Afghans into Pakistan.<sup>26</sup> The influx of Afghan refugees into Pakistan began at a large scale in 1978, after Nur Mohammed’s coup, seeking to establish Afghanistan as a Communist State, only to be exacerbated by the Soviet invasion in 1979 in the heat of the prevailing Cold War.<sup>27</sup>

As the Cold War of yesteryear hit high gear and the East and West were at odds, the proxy that was Afghanistan, was disinclined to categorise its rapidly expatriating citizens as refugees.<sup>28</sup> In an attempt to reverse this phenomenon, the Afghan government implored the UNHCR to assist extraterritorial Afghans by encouraging their repatriation, so Afghanistan could maintain

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<sup>22</sup> UNHCR, UNHCR in Pakistan — <<https://www.unhcr.org/pk/unhcr-in-pakistan>> on 1 August 2024.

<sup>23</sup> Centlivres P and Centlivres-Demont M, 'The Afghan Refugee in Pakistan: An Ambiguous Identity' 141(1) *Journal of Refugee Studies*, 1988, 144, 145, and 150.

<sup>24</sup> Eisenberg J, "The Boatless People: The UNHCR and Afghan Refugees 1978-1989", International History Working Paper Number 14, 2013, 6.

<sup>25</sup> Noor S, 'Afghan Refugees After 9/11', 59(1) *Pakistan Horizon*, 60.

<sup>26</sup> UNHCRA, Folio 1: "United Nations NV/409 of Zulfikar Ali Bhutto, Prime Minister of Pakistan, to UN Secretary-General (SG) Kurt Waldheim," 23 January 1979, Fonds 11 Series 2, 100.AFG.PAK [Vol. 1] 1975- 77.

<sup>27</sup> Eisenberg J, "The Boatless People: The UNHCR and Afghan Refugees 1978-1989", 7.

<sup>28</sup> Eisenberg J, "The Boatless People: The UNHCR and Afghan Refugees 1978-1989", 7.

a stable reputation amongst its international peers.<sup>29</sup> The government even extended offers of full amnesty and land grants to these refugees.

However, in order to actually help in anyway, the UNHCR would have to conduct an individual Refugee Status Determination process.<sup>30</sup> This was impractical, since the challenge of the endeavour would essentially have been more work than it would have been worth.<sup>31</sup> Instead, the UNHCR would determine that all Afghans outside Afghanistan claiming refugee status were to be “considered, prima facie, refugees under UNHCR mandate unless, upon individual interview, found otherwise.”<sup>32</sup> As a consequence, by April 1979, Pakistan informed the UNHCR that approximately 80,000 Afghans fleeing the Communist regime had taken up residence within its borders. By late 1979, this figure had escalated to nearly 400,000 Afghan refugees in Pakistan alone.<sup>33</sup> In 1980, this conflict would drive North of a million people to Pakistan, with no suggestion of slowing down the exodus.<sup>34</sup> However, by 1992, Afghans would find reprieve, as the last Soviet-backed leader would be overthrown.<sup>35</sup>

No sooner than the overthrow of Najibullah, the country – and Kabul in particular – was swiftly engulfed in conflict between its former mujahideen liberators.<sup>36</sup> For many Afghans, this period is remembered as even more devastating than the Soviet war, characterised by severe human rights violations, including executions, imprisonment, sexual violence, abduction of women, and forced marriages.<sup>37</sup> This devastating war had the effect of initiating a renewed exodus of refugees.<sup>38</sup> And, in 1996, the group whose infamy has known no bounds, the Taliban, took over control of Afghanistan.<sup>39</sup> Their control of Afghanistan saw the introduction of various

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<sup>29</sup> UNHCRA, Folio 229: “Note of Evlogui Bonev, United Nations Development Programme (UNDP) Resident Representative in Kabul, to SG Waldhiem, High Commissioner for Refugees (HC) Poul Hartling, and others”, 18 December 1979, Fonds 11 Series 2, 100.PAK.AFG [Vol. 6] 1979-82, 2.

<sup>30</sup> Eisenberg J, “The Boatless People: The UNHCR and Afghan Refugees 1978-1989”, 8.

<sup>31</sup> See generally, Ivor J, *The refugee concept in group situations*. Vol. 3, Martinus Nijhoff Publishers, 1999.

<sup>32</sup> UNHCRA, “Cable from UNHCR Geneva to MM/MS Bari, Carpenter, Jackson, Jahn, Meijer, Krens, Makhoully, Sampatkumar, Willday”, 2 January 1981, Fonds 11 Series 2, 600.INS 1974-84.

<sup>33</sup> UNHCRA, A/AC.96/577 – 14 August 1980, 31st Session Executive Committee, Report on UNHCR Assistance Activities in 1979-1980 and Proposed Voluntary Funds Programmes and Budget for 1981, para. 602, p. 175.

<sup>34</sup> UNHCR, *The State of the World's Refugees 2000: Fifty years of humanitarian action*, Oxford, Oxford University Press, 2000, 119.

<sup>35</sup> See generally, Smith, S, ‘Afghanistan after the Occupation: Examining the post-Soviet withdrawal and the Najibullah regime it left behind, 1989–1992’ 76(2) *The Historian*, 2014.

<sup>36</sup> European Union Agency for Asylum, *Country Guidance: Afghanistan*, Luxembourg: Publications Office of the European Union, 2023, 156.

<sup>37</sup> European Union Agency for Asylum, *Country Guidance: Afghanistan*, 156.

<sup>38</sup> Kronenfeld D, ‘Afghan Refugees in Pakistan: Not All Refugees, Not Always in Pakistan, Not Necessarily Afghan?’, 21(1) *Journal of Refugee Studies*, 2008, 47.

<sup>39</sup> Ruttig T, ‘Have the Taliban changed’, 14(3) *Combating Terrorism Center Sentinel*, 2021, 7.

oppressive laws. For instance, as soon as they would take over a region, Taliban commanders historically exhibited a proclivity to systematically close down schools, particularly those educating girls, in the territories under their control.<sup>40</sup> As a result, In the decade before the turn of the century, this number would catapult into 3,253,000.<sup>41</sup>

Following 9/11, the fourth phase of Afghan mass migration occurred in 2001, catalysed by the US-led global war on terrorism in Afghanistan and the intense combat between Taliban forces and the USA-led coalition.<sup>42</sup> The onslaught of US air strikes in Afghanistan exacerbated the volatile situation, compelling scores of destitute Afghans to resort to mass migration as their only viable option.<sup>43</sup>

All this time, between the Soviet invasion, until the turn of the century, the position of the Pakistani authorities has been termed as hospitable.<sup>44</sup> Yet, there is a consensus of sorts, that there was a transition along the way from an open-door policy to a more restrictive stance toward Afghan refugees, and in doing so, Pakistan has shifted from a hospitable host to a nation increasingly reluctant to accommodate the remaining refugee population.<sup>45</sup> Consequently, Afghan refugees in the country are encountering escalating challenges as new developments, such as the closure of camps and educational institutions, unfold.<sup>46</sup>

Even more concerningly, the October 3<sup>rd</sup>, 2023 measure, that Afghan refugees would be expelled, is a marked shift from the policy of the initial movement between the two nations. However, outside of the humanitarian concern, there is a Constitutional, and consequently, Shariah law issue that has nary been discussed in the academic sphere. This is exactly what this study will endure to accomplish – to examine the legality of this measure within the lens of Islamic Shariah Law, to which the Pakistani Constitution expressly subscribes.

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<sup>40</sup> Ruttig T, 'Have the Taliban changed', 8.

<sup>41</sup> UNHCR, *The State of the World's Refugees 2000: Fifty years of humanitarian action*, Oxford, Oxford University Press, 2000, 119.

<sup>42</sup> Borthakur A, 'Afghan Refugees: The Impact on Pakistan', 48(3) *Asian Affairs*, 2017, 490.

<sup>43</sup> Noor S, 'Afghan Refugees After 9/11', 59(1) *Pakistan Horizon*, 60.

<sup>44</sup> Centlivres P and Centlivres-Demont M, 'The Afghan Refugee in Pakistan: An Ambiguous Identity' 141(1) *Journal of Refugee Studies*, 1988, 144, 145, and 150.

<sup>45</sup> Ghufuran N, 'Afghan Refugees in Pakistan Current Situation and Future Scenario', 3(2) *Policy Perspectives*, 2006, 83.

<sup>46</sup> Khattak, S, 'Living on the edges: Afghan women and refugee camp management in Pakistan' 32(3) *Signs: Journal of Women in Culture and Society*, 2007, 575.

## 1.2 Statement of Problem

Pakistan, as an Islamic Republic, is Constitutionally governed by Islamic Shariah Law, which prohibits the expulsion of refugees. Despite this, Pakistan recently expelled Afghan refugees raising significant legal concerns under both Islamic Shariah Law and International Refugee Law. This study examines the legality and implications of this measure, considering the principles of non-refoulement – a jus cogens norm under International Law – and how it intersects with the obligations imposed by Islamic Shariah Law.”

## 1.3 Research Objectives

The main objective of this study will be to show that Pakistan, in causing the exodus of Afghan refugees back to Afghanistan

1. To assess the legal framework within which refugees are situated.
2. To analyse the extent to which Islamic law on refugees and asylum seekers aligns with international standards.
3. To examine the legal and constitutional basis for the place of Islamic Refugee Law within Pakistan.
4. To analyse the legal implications of the current forced expulsion within the frameworks of Islamic law.

## 1.4 Research Questions

1. How has the legal framework surrounding refugees developed within the historical context of refugee movement?
2. To what extent does Islamic law on refugee align with international law standards?
3. What is the legal and constitutional basis of Islamic Refugee Law within Pakistan?
4. What is the legal implication of the most recent measure to expel refugees back to Afghanistan, *vis a vis* Islamic Shariah Law?

## 1.5 Hypothesis

This study hypothesises that Pakistan have breached their Constitutional duty to abide by Islamic Shariah Law which unequivocally disallows the expulsion of refugees.

## 1.6 Justification

The study is easily justified by the magnitude of the forced exodus which has been illustrated in the background. Afghanistan is currently at the helm of an indiscriminately cruel Taliban which has shown extensively that it has the propensity to forego human rights. Thus, this study will be infinitely beneficial to, among others, the Afghan refugees being expelled, as well as the policy makers who can use this study to assess the legality of the measure, so as to correct the same. Furthermore, as a novel study, this will contribute to the discourse on refugee law and contribute to the understanding of the implication of the measure.

## 1.7 Conceptual Framework

### *i. Aman*

*Aman* is a concept in Islamic Shariah Law that pertains to asylum and refugees and is underpinned under the Islamic perception that all those forced to flee their land must be granted refuge if they seek it.<sup>47</sup> Its importance can no better be explained than by its appearance in the Qur'an over twenty times.<sup>48</sup> In fact, the term "*Aman*" translates directly to "protection, safety, or protection".<sup>49</sup> The more fundamental understanding regarding *Aman* is that it is underscored in the Qur'an where God says: "and if anyone... seeks your protection, then grant him protection...".<sup>50</sup> The term "*Aman*" embodies a covenant between the government and a refugee, guaranteeing the safeguarding of the rights of an asylum seeker. Herein, it is clear that the apex document in Islamic Shari'ah law underpins the importance of protection, which includes, but is not limited to, non-refoulement.<sup>51</sup>

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<sup>47</sup> Elmadad K, "An Arab Convention on Forced Migration", 54.

<sup>48</sup> *The Holy Qur'an*, King Fahd Glorious Quran Printing Complex, Riyadh.

<sup>49</sup> Schacht J, "Aman" in Bearman P, Bianquis T, Bosworth C, and Heinrichs W (eds) *Encyclopaedia of Islam, Second Edition*, Brill Publishers, Leiden, Netherlands, 2012, Aman.

<sup>50</sup> *The Holy Qur'an*, King Fahd Glorious Quran Printing Complex, Riyadh, 9:6.

<sup>51</sup> Islam strongly preaches the principle of non-refoulement, to the extent that it has been claimed that Islam pioneered the concept. See, Mahmassani S, *The Principles of International Law in the Light of Islamic Doctrine*, Brill Publishers, Netherlands, 1966, 256. The concept of non-refoulement is as a fundamental principle of international law, preventing states from repatriating individuals to locations where they may be subjected to torture or persecution. See, Article 33, *United Nations Convention on Refugees* (1951). See also, Duffy A, 'Expulsion to Face Torture? Non-refoulement in International Law', 20(3) *International Journal of Refugee Law*, 2008, 373. Equally, Courts of good standing have entrenched the principle in their jurisprudence. See, for instance, generally *Alan v. Switzerland*, CAT/C/16/D/21/1995, ECtHR Judgement of 8 May 1996: *Tahir Hussain Khan v Canada*, Committee Against Torture, No. 15/1994, UN Doc A/50/44.

Moreover, the Prophet emphasised in Islamic Law that when someone seeks *Aman* and is permitted by even a junior authority, it becomes obligatory, even for the highest commander-in-chief, to allow them to thrive in the territory without hindrance.<sup>52</sup>

Generally, whenever *Aman* is granted, it is binding on all the persons within the territory, whether the granting of *Aman* is beneficial or not.<sup>53</sup> This binding nature is not, by any measure, superficial. The Prophet is reported to have said that where *Aman* is given, and then violated, the violator is cursed by God, His angels, and all the people.<sup>54</sup> Elsewhere, it has been commented that it is *haram* (forbidden) to interfere in the *Aman* given to a person.<sup>55</sup>

This study will use the framework of *Aman* to illustrate the implications of the expulsion of Afghan refugees from Pakistan. Within this framework, it would appear that the Pakistani State having provided protection (*Aman*) to Afghan refugees, then had a duty to ensure that the *Aman* must continue to exist.

## 1.8 Literature Review

### *i. Pakistan's Constitution Subscribes to Islamic Shariah Law*

Mehdi's work is a good place to start, given that he compendiously summarises the state of the Constitution. The current Constitutional disposition of Pakistan is under the ambit of its 1973 document. Since then, much has been amended in the spirit of modernising the Constitution, to the extent that some claims have been averred questioning whether indeed, the document is still the same.<sup>56</sup> Nevertheless, concerning the most pivotal aspects of this study, one can comfortably conclude that those specific elements remain unaltered.<sup>57</sup> The centrality of Islamic law to Pakistan is no better put than by Afak Haydar who underscored the very objective of the foundation of Pakistan: a homeland for the Muslim populace wherein *all* laws were Islamic

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<sup>52</sup> Al-Hilli A, *Muntaha al-matlab fi tahqiq al-madhhab*, Majma' al-Buḥūth al-Islāmīyah, Tehran, Vol. 2, 1971, 914.

<sup>53</sup> Juzi M, *Qawaneen al-Ahkam al-Shar'iyya wa mas'il al-furu' al-fiqhiyyah*, Dar al-Elm Lil Malayeen, Beirut, 173.

<sup>54</sup> Al-Nisapuri M, *Sahih Muslim*, Dar Ehya al-Torath al-Arabi, Beirut, 2:999, Hadith No. 1371. See also, Al-Bukhari M, *Sahih Bukhari*, Dar ibn Kathir, Beirut, 1987, 3:1160, Hadith No. 3008. See also, Hajr A, *Fath al-Bari Sharh Sahih al Bukhari*, Dar Marifah, Beirut, 1379, 4:81.

<sup>55</sup> Hajr A, *Fath al-Bari Sharh Sahih al Bukhari*, 4:86.

<sup>56</sup> Mehdi R, *The Islamization of the Law in Pakistan*, Routledge Publishing, United Kingdom, 2015, 71.

<sup>57</sup> Lau M, 'Sharia and national law in Pakistan' in Ott J (ed), *Sharia Incorporated: A comparative overview of the legal systems of twelve muslim countries in past and present*, Leiden University Press, 407-408.

Laws.<sup>58</sup> In his part, Faisal Dewji boldly asserts that no country other than Pakistan has made religion the solitary basis of Muslim Nationality.<sup>59</sup>

Of course, Nations undergo change, and since then, Pakistan has continued to pluralize its religiosity through various attempts to modernise and integrate positivistic rules within its juridical dictum.<sup>60</sup> This attempt at pluralization resulted in the formation of a chaotic malaise of juxtapositions between the two legal systems, owing to the opposing and tensed interplay between politics, society, norms and practices.<sup>61</sup> In any case, what remains settled and trite, is that Islamic precepts are a “basic norm”.<sup>62</sup> Peripherally, it is contextually important to understand that the pivotal nature of Islam to Pakistan finds further historic credence in the early adoption of Afghan refugees as a means of providing a dwelling place for Afghans and aiding in the formation of the Mujahideen to combat the communist adversaries of Islam.<sup>63</sup> Pakistan, therefore, is, by its own admission, bound to follow the teachings and the laws of Islam.

This study will use such literature to satisfy a premise: that Pakistan is a country that subscribes to Islamic Shariah Law.

#### *ii. Pakistan’s Outlook and Attitude Towards Refugees*

Valentina Hiegemann makes an excellent case for Pakistan’s recent attitude towards refugees (particularly Afghans), in their paper *Repatriation of Afghan Refugees in Pakistan: Voluntary?* They make the case, therein, that evidence point to the fact that numerous refugees have faced pressure to depart from Pakistan, notwithstanding the unsafe and unfavourable conditions prevailing in Afghanistan.<sup>64</sup> Grounded in pertinent international legal principles, they advocated for an immediate inquiry into the repatriation initiatives led by the Pakistani government, the international community, and UNHCR. Marjoleine Zieck has previously argued that it has always been the Pakistani stance, that “voluntary” repatriation was the

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<sup>58</sup> Haydar A, ‘From the Anglo-Mohammadan Law to the Shariah: The Pakistan Experiment’, 10(4) *Journal of South Asian and Middle Eastern Studies*, 1987, 34.

<sup>59</sup> Devji F, *Muslim Zion: Pakistan as a political idea*, Harvard University Press, Massachusetts, 2013, 5.

<sup>60</sup> Yefet K, “What’s the Constitution Got to Do With It-Regulating Marriage in Pakistan” 16(1) *Duke Journal of Gender, Law and Policy*, 2009, 348.

<sup>61</sup> Yilmaz I, ‘Nation Building, Islamic Law and Unofficial Legal Pluralism: the Cases of Turkey and Pakistan’ in Oberauer N, Prief Y, and Qubaja U (eds), *Legal Pluralism in Muslim Contexts*, Brill Publishing, 2019, 111.

<sup>62</sup> Lau M, ‘Sharia and national law in Pakistan’, 410.

<sup>63</sup> Lau M, ‘Sharia and national law in Pakistan’, 398.

<sup>64</sup> Hiegamann V, “Repatriation of Afghan Refugees in Pakistan: Voluntary?”, 4(1) *Oxford Monitor of Forced Migration*, 2013, 42-45.

optimal solution.<sup>65</sup> Noting that Pakistan is not a signatory to the 1951 Refugee Convention, Hiegemann adamantly argues that the conditions within which refugees are placed has continuously resulted in their repatriation, calling into question the extent to which Afghan refugee departure is “voluntary”.<sup>66</sup> The utility of their paper is well founded, given that, as they suspected, there may have existed a potential violation of international refugee rights and a breach of the legal principle of non-refoulement. However, the framework they employ is strictly within the confines of international law.

Such literature will be employed to suggest a rationale as to why the measure is being employed in its current capacity

### *iii. Islamic and International Law on Refugees*

International law defines a refugee as a person who, owing to a substantiated apprehension of persecution rooted in various factors such as nationality, or political standing beyond the borders of their native land, an individual finds themselves incapable or disinclined to seek refuge in their country of nationality.<sup>67</sup> Otherwise, a person, possessing a specific nationality and situated outside their country of residence due to aforementioned circumstances, is hindered or unwilling to undertake the journey back.<sup>68</sup>

Khadija Elmadad notes, in Islam, this definition is broadened substantially, and the religion bestows and offers the seeker of refuge a *right* to be granted asylum a *duty* on the State to grant asylum; something absent from international law, which prefers this as a right only enjoyed by the state.<sup>69</sup> Within Islamic jurisprudence, there is a notable emphasis on providing enhanced protection to asylum-seekers and refugees, referred to as *mustaminun*, as compared to international law.<sup>70</sup> According to Abou-El-Wafa, the concept of asylum is deeply rooted in Shari'a Law, where the fundamental principle is that every human being is entitled to

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<sup>65</sup> Zieck, M, *UNHCR and voluntary repatriation of refugees: A legal analysis*, Martinus Nijhoff Publishers, Leiden, 1997.

<sup>66</sup> The UNHCR Manual on Voluntary Repatriation of 1996 unequivocally asserts that the repatriation of refugees should be characterized by spontaneity, occurring at their individual pace and volition. See, Chapter 1, *the UNHCR Manual on Voluntary Repatriation*, 1996. See also, Hiegemann V, “Repatriation of Afghan Refugees in Pakistan: Voluntary?”, 4(1) *Oxford Monitor of Forced Migration*, 2013, 43.

<sup>67</sup> Elmadad K, “An Arab Convention on Forced Migration: Desirability and Refugee La”, 3(3) *International Journal on Refugee Law*, 1991, 469.

<sup>68</sup> Elmadad K, “An Arab Convention on Forced Migration”, 469.

<sup>69</sup> This, here, means that international law proffers the right to grant asylum squarely on the State. On the other hand, Islam grants this right to the asylum seeker, and the corresponding duty to the State. For evidence on this, see Elmadad K, “Asylum in Islam and in Modern Refugee Law”, 27(2) *Refugee Survey Quarterly*, 2008, 53.

<sup>70</sup> Mohamed M, “Refugee Law in Islam.” 4(2) *Journal of Social Sciences*, 2011, 10.

protection, particularly when confronted with persecution.<sup>71</sup> Islam imposes upon host societies the obligation to extend a generous reception to asylum-seekers, with the promise of eventual reward for the hosts.<sup>72</sup> This duty is codified in the fourth surah of the Qur'an, which states: "He who emigrates in the path of God will find frequent refuge and abundance."<sup>73</sup> This grace is ubiquitous in that it extends unto all who seek *aman* (protection) – this is not a qualified right, whether by religion, or legality of entrance.<sup>74</sup>

Already, at the international level, there has been evidence, at least at an academic arena, that deploying Islamic concepts of *hijrah* to international law provides genuine good<sup>75</sup>. For example, Nicolson proposes the embrace of the Islamic understanding of protection and asylum, contending that it is more explicit and encompassing compared to the corresponding concepts in international law.<sup>76</sup> Munir, on his part argues that Islam had historically been at the forefront of providing a comprehensive refugee framework, but years gone by have seen the same take a considerable back seat.<sup>77</sup> It seems pretty straightforward, when all evidence is examined, why the authors make the case; after all, fundamentally, not only does Islamic refugee law conform to international law standards, but through the lens of empathy (favoured by Islamic thought), Islamic refugee law goes further in offering protection to refugees.<sup>78</sup>

In his treatise, Abou El Wafa confirms that the right to non-refoulement,<sup>79</sup> as found in international law falls squarely within Islamic thought, too.<sup>80</sup> Sobhi Mahassamani's earlier works found an equally interesting conclusion, that the very principle of non-refoulement finds its origin in Islamic Shariah Law.<sup>81</sup> It is on this basis that Abou El Wafa tritely writes that non-

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<sup>71</sup> Abou-El-Wafa A, "*The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*" Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. 43.

<sup>72</sup> Alsubaih M, *The Refugee in Islamic and International Law: A Comparative and Practical Study on Refugees in Saudi Arabia and Australia*, PhD Thesis, Victoria University, Australia, 2021, 11

<sup>73</sup> 4: 100, *The Holy Qur'an*.

<sup>74</sup> Abou-El-Wafa A, "*The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*" Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. 69.

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<sup>76</sup> Johan V, "Reconciling Notions of Asylum and Refugees in Islam and International Law A Case Study of Afghan Refugees in Pakistan" Master's Thesis, University of British Columbia, 2009.

<sup>77</sup> Mohamed M, "Refugee Law in Islam." *Journal of Social Sciences*, 4(2), 2011, 10.

<sup>78</sup> Alsubaih M, *The Refugee in Islamic and International Law: A Comparative and Practical Study on Refugees in Saudi Arabia and Australia*, PhD Thesis, Victoria University, Australia, 2021, 13.

<sup>79</sup> 'Non-refoulement' is a principle in international law, considered a *jus cogens* norm that prohibits countries from returning asylum seekers back to countries where they may face persecution. See, for instance, Allan J, "The *jus cogens* Nature of non-refoulement", 13(4) *International Journal of Refugee Law*, 2001, 534.

<sup>80</sup> Abou-el-Wafa A, *The Right to Asylum between Islamic Shari'ah and International Refugee Law: A Comparative Study*, Naif Arab University for Security Sciences Press, Riyadh, 2009, 53.

<sup>81</sup> Mahmassani S, "The Principles of International Law in the Light of the Islamic Doctrine" 117 (1) *Cours de l'Académie de Droit International de La Haye*, 1966, 256.

refoulement is found within Islamic customary law,<sup>82</sup> as well as the sunnah of the Prophet.<sup>83</sup> And given the importance of this principle in custom, it becomes, essentially, trite and hard law, Islamically, that it is emphatically forbidden to repatriate a refugee to a locale where concerns persist about jeopardising their fundamental freedoms and rights.<sup>84</sup>

From the foregoing preliminary review of the literature, there seems to be an emergent pattern regarding the existence of literature. From the same, one can tell that the state of the literature is limited, merely, to: Pakistan being an Islamic Republic; that it is bound by the laws of Islamic Shariah law; the Islamic Shariah Law provides for how the issue on refugees must be looked at. The literature exists to this very extent, in its individual facets. But there is precisely no written work on the legality, or lack thereof, of the most recent measure to expel Afghan refugees from Pakistan. It is this lacuna that this study intends to fill.

This equates to the more substantive part of the literature. Therefore, the reconciliation of the two types of systems is imperative to the way the study will reach its conclusion

## 1.9 Methodology

This study employs a legal doctrinal research methodology. A combination of primary and secondary sources will be used. The primary sources in this study are the Constitution of Pakistan, the Holy Qur'an, and the *Sunnah*. The secondary sources relied upon are books and journal articles on matters regarding refugee status, non-refoulement, and Islamic Shariah Law's conception of refugee matters, especially expulsion.

The study will also conduct a comparative analysis between Islamic Shariah Law and International Law, to ascertain the conformity of the former to the latter, given that if Islamic Shariah Law breaches International Law, any argument from that perspective will be deemed void.

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<sup>82</sup> Abou-el-Wafa A, *The Right to Asylum between Islamic Shari'ah and International Refugee Law*, 53.

<sup>83</sup> The *sunnah* is a lesser-known part of Islamic law which entails a word spoken, or an act done, or a confirmation given by the Holy Prophet, or his rightly guided Caliphs (see *Hadith 28, 40 Hadith an-Nawawi*). Sunnah is a critical facet of Shariah Law. In fact, the Qur'an makes various mentions of this. To mention a few: "Believe in Allah and His Messenger and the light which He sent down"; "Believe in Allah and His Messenger, the unlettered Prophet." (Qur'an, 7:158); "Take what the Messenger brings you", (see Qur'an 33:62.) among many other commands from God (see, for instance See for instance, The Holy Quran, Chapter 48, Verse 8-9; The Holy Quran, Chapter 33, Verse 21; The Holy Quran, Chapter 33, Verse 21; etc). Sunnah, therefore, is taken to be an extension of the Qur'an. In fact, the very word chosen, sunnah, literally translates to 'the path' or 'the way' and has been used in the Qur'an to mean 'the ways of God' (see for instance, The Holy Qur'an, Chapter 33, Verse 62). This, then, is the importance placed on the sunnah of the Holy Prophet Muhammad.

<sup>84</sup> Al-Farghani and Hassan A, *Fatawa Qadhikhan*, 385.

## **1.10 Limitations**

Due to time, monetary, and geographical constraints, this study is limited insofar as its ability to conduct interviews and surveys with the Afghan refugees, which would have resulted in direct sources. This would have provided a more holistic and accurate representation of the issue.

To cure this, the study will attempt to find more literature from newspaper articles that have presented the direct views of Afghan refugees.

## **1.11 Chapter Breakdown**

This study will have 6 Chapters. Chapter One will introduce the study by giving the background, the problem statement, the research questions, and the justification.

Chapter Two will assess the historical and current legal framework within which refugees are situated.

Chapter Three will analyse the extent to which Islamic law on refugees and asylum seekers aligns with international standards.

Chapter Four will examine the legal and constitutional basis for the place of Islamic Refugee Law within Pakistan.

Chapter Five will analyse the legal implications of the current forced expulsion within the frameworks of Islamic law.

Chapter Six will conclude the study by providing a conclusion and recommendations.

## **1.12 Timeline**

Chapter 1 – 15 August 2024

Chapter 2 – 15 September 2024

Chapter 3 – 15 October 2024

Chapter 4 – 15 November 2024

Chapter 5 – 15 December 2024

Chapter 6 – 15 December 2024

# 2.0 International Refugee Law: An Overview of the Key Principles

## 2.1 Introduction

The recent forced repatriation of Afghan refugees in Pakistan is quintessentially representative of the often-fraught tangle of national sovereignty, religious imperatives, and international legal norms. This study examines the legal implications of Pakistan's recent orders to expel Afghan refugees from two different but complementary perspectives: Islamic jurisprudence and international law. The consequent attention will fall upon the legality of such practices within a state that, through constitutional imperatives, is obliged to adhere to Islamic principles. Any questions relating to refugees, in today's world, should, of necessity, spring from an understanding of the international system in place to manage and control refugees and their rights. It is this lattermost need that this Chapter shall endeavour to satisfy. The chapter begins with an analysis of the international legal framework underlying refugee protection, laying an essential foundation for understanding how international commitments both shape and should shape Pakistan's policies with respect to refugees.

With consideration of relevant international standards and principles relative to the protection of refugees, this chapter aims to demonstrate the degree to which the recent actions of Pakistan represent a convergence with or divergence from established global norms, placing specific emphasis on the principle of non-refoulement—a key stone of international refugee protection. Indeed, the principle of non-refoulement is one of the most significant principles in international refugee law and generally regarded universally as one of the foundational pillars of protection.

This principle, barring the return of refugees to territories where they may face serious threats to life or liberty, has gone beyond formal treaties and conventions.<sup>85</sup> It has risen to the level of *jus cogens*,<sup>86</sup> a peremptory norm binding on all states as a principle of customary international law. The chapter shall explore the origin, evolution, and practice of non-refoulement and explore the behaviour of Pakistan in relation to this binding obligation. More particularly, the

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<sup>85</sup> Duffy A, 'Expulsion to Face Torture? *Non-refoulement* in International Law', 20(3) *International Journal of Refugee Law*, 2008, 373.

<sup>86</sup> Allain, J 'The *jus cogens* Nature of non-refoulement' 13(4) *International Journal of Refugee Law*, 2001, 533-558.

study will interrogate whether, in view of Pakistan's pressing security concerns alongside the global imperatives of human rights, its recent policy directives are consistent with the principle of non-refoulement in refugee protection. The chapter shall begin by considering the key international instruments concerning refugees, namely the 1951 Refugee Convention and its 1967 Protocol, with a view to establishing a framework within which the broad-ranging rights and protections contemplated for refugees under international law may be set.

Although these instruments allow Pakistan, as a non-signatory, some latitude in crafting refugee policies, this section will proceed to discuss the extent to which Pakistan remains obligated by these principles through other international obligations and customary international law. Through the inspection of these international frameworks, this chapter will also examine how these standards bestowed by international law were followed in conflict or consistency by refugee policies in Pakistan, thereby laying the groundwork for further discussion in Chapter 3 on how Pakistan should meet its commitments based on both international and Islamic law. Finally, this chapter endeavors to bring about a clear understanding of the extent to which Pakistan, as an independent sovereign in an interdependent world system, carries the responsibility of maintaining refugee safeguards and honoring the rights of Afghan refugees under its custody.

## 2.2 The Refugee Convention

The 1951 Refugee Convention (hereinafter “Convention” or “1951 Convention”) is the foundational treaty governing refugee protection.<sup>87</sup> Certain scholars, including Sabyasachi Basu Ray Chaudhury, have invoked the Kelsenian concept of the grundnorm to characterize the 1951 Convention precisely in this way – asserting it as the grundnorm of the international refugee law regime.<sup>88</sup>

A principal reason underpinning the Convention’s profound significance lies in the number of States that have ratified it. At present, 149 State parties have ratified and implemented the 1951 Convention Relating to the Status of Refugees, along with its 1967 Protocol.<sup>89</sup> This widespread

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<sup>87</sup> E Feller, 'The Refugee Convention at 60: Still Fit for Purpose? Protection Tools for Protection Needs' in S Kneebone, D Stevens and L Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014) 60.

<sup>88</sup> S Chaudhury, 'The Test of Time: Reconceiving the Limitations of the 1951 Refugee Convention' in S Chaudhury (ed) *Revisiting the 1951 Refugee Convention: Exploring Global Perspectives*, Wiley, Durham University Press, 2022,

<sup>89</sup> United Nations High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, available at <http://www.unhcr.org/3b73b0d63.html> [accessed 4 November, 2024].

acceptance has, moreover, inspired regions around the world to develop their own conventions, tailored to regional needs. Notably, the Organisation of African Unity adopted the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, reflecting the influence of the 1951 Convention in shaping regional approaches.<sup>90</sup> Naturally, these regional instruments incorporate context-specific amendments, adapting the foundational principles of the Convention to address the unique circumstances and challenges faced within each area.

Among the most quintessential features of the Convention is its articulate definition of a refugee. This definition is well described in the subsequent sub-chapter of this study. Another critical contribution of the Convention lies in its codification of essential elements within the international legal regime, which have since become indispensable. Foremost among these is the principle of non-refoulement, a safeguard that has achieved the status of a *jus cogens* norm.<sup>91</sup> The significance of the Convention is profound; in its absence, the protection framework would be deprived of one of its core regulatory pillars, likely resulting in a pronounced rise in disorderly migration patterns.<sup>92</sup> Without the fundamental principles that anchor the refugee regime, it is highly probable that there would be a significant and uncontrolled escalation in refugee movements, coupled with ineffective mechanisms for managing such influxes and heightened tensions among states as they grapple with the increased pressures of migration.<sup>93</sup>

As it may already have become clear, the Convention's significance lies in two distinct aspects. First, its formalizing of protection for individuals fleeing persecution, specifically for reasons such as race, religion, nationality, membership in a particular social group, or political opinion.<sup>94</sup> This is connected to the act of defining the term "refugee". By defining "refugee" status, the Convention created a legal framework and a set of minimums within which states are expected to offer asylum and uphold specific rights, including access to courts, education, and employment.<sup>95</sup> A second critical aspect of unparalleled importance, is the introduction of the concept of non-refoulement.

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<sup>90</sup> The Organization of African Unity Convention: Governing Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 10 UNTS 45.

<sup>91</sup> Allain, J 'The jus cogens Nature of non-refoulement' 13(4) *International Journal of Refugee Law*, 2001, 533-558.

<sup>92</sup> J McAdam, 'The Enduring Relevance of the 1951 Refugee Convention' 29(1) *International Journal of Refugee Law*, 2017, 1.

<sup>93</sup> V Türk, 'Prospects for Responsibility Sharing in the Refugee Context', 45(4) *Journal on Migration Human Security*, 2016, 47.

<sup>94</sup> Sainz-Pardo PV, 'The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees' 6(2) *The International Journal of Human Rights*, 2002, 23-34.

<sup>95</sup> Sainz-Pardo PV, 'The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees', 32.

As a result, the importance of the international refugee law framework lies in these two ambits.

## 2.3 What is a refugee?

The definition of a refugee, though it may appear unremarkable in its present form, is steeped in a remarkable history that traces its modern evolution as far back as the First World War.<sup>96</sup> During this time, large-scale displacements required the establishment of international norms to address the needs of those forced to flee.<sup>97</sup> Initially, the definition centred and curated for the resolve of a European problem.<sup>98</sup> However, this foundational definition later evolved to remove geographical and temporal limits, adapting to a changing world that continued to experience refugee crises. The definition of a refugee was necessitated to describe anyone who had crossed international borders due to well-founded fears of persecution related to race, religion, nationality, or political opinion, as formalized in the 1951 Refugee Convention. The Convention thus defines a refugee thusly: i.e, anyone who,

*owing to well-founded fear of being persecuted for reasons of race, religion... is outside the country of his nationality and is unable... 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, is unable or, owing to such fear, is unwilling to return to it.*<sup>99</sup>

However, debates during the drafting process highlighted ambiguities around terms like “persecution” and “political opinion,” and the definition eventually took a restrictive form, narrowing the criteria for refugee status.<sup>100</sup>

In light of this definition of ‘refugee’, a concise, quadripartite, conjunctive test has been formulated to assess the veracity of a claim for refugee status, and has been expressed thusly:

*“(1) They are outside their country of origin; (2) they are unable or unwilling to seek or take advantage of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being*

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<sup>96</sup> Steinbock, D. J. (1998) ‘Interpreting the refugee definition’. *University of California Los Angeles Law Review*, 45(3), 763.

<sup>97</sup> Banko L, Nowak K, Gatrell P, “What is refugee history, now?” 17, *Journal of Global History*, 2022, 2.

<sup>98</sup> Wood T, ‘The International and Regional Refugee Definitions Compared’ in Costello C, Foster M and McAdam J (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press, 2021,

<sup>99</sup> Article 1(A) (2), *The Geneva Convention 75 UNTS 31*, (1950).

<sup>100</sup> Guy S. Goodwin-Gill and Jane McAdam with Emma Dunlop, *The Refugee in International Law* (Fourth Edition), 2021, 26.

*persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion”*.<sup>101</sup>

In the case of the Afghan refugee crisis, the first two components of the test are easy to dispense, as is the conceptual case, owing to the phraseology of the test.<sup>102</sup> Indeed, Afghans in Pakistan are outside their country of origin, and they are unable to seek protection of their country of origin. In order to assess and then satisfy the third and fourth ambit of the test, there exists what is termed as a Refugee Status Determination (RSD).<sup>103</sup> Whilst who the inquiry of who a refugee is pertains squarely to a matter of law, the RSD process is a procedure of great consequence.<sup>104</sup>

Establishing a well-founded fear of persecution necessitates a prospective assessment of the likelihood of harm that may befall the applicant upon return.<sup>105</sup> In essence, it requires that a refugee face a genuine prospect – a “well-founded fear” – of enduring grave harm, or persecution, if repatriated to their country of origin or any locale where they confront such risk. A “real chance” of persecution is characterized as significant, entailing a reasonable degree of probability, extending beyond a mere remote possibility.<sup>106</sup> Notably, a real chance need not be more probable than not; it is not an empirical inquiry.<sup>107</sup> The concept of serious harm – “*being persecuted*” – is typically interpreted within the framework of international human rights law, whereby a “sustained or systemic violation of basic human rights indicative of a failure of State protection” constitutes persecution.<sup>108</sup> This definition encompasses threats to life or freedom, as articulated in the 1951 Convention’s non-refoulement provision, as well as other forms of serious violations of human rights.<sup>109</sup>

In applying this to the Afghan situation, it becomes clear that the Afghan refugees in Pakistan do indeed meet these conjunctive criteria. A considerable number of Afghan refugees have fled

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<sup>101</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) ch 2, 2.

<sup>102</sup> Wood T, ‘The International and Regional Refugee Definitions Compared’ in Costello C, Foster M and McAdam J (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press, 2021, 627

<sup>103</sup> Here, the author does not claim that Refugee Status Determination (RSD) methods do not assess the first and second elements; only that the third and fourth appear most consequential to the process in the authors view, with a nod to Woods.

<sup>104</sup> See, <https://www.unhcr.org/refugee-status-determination.html>, (accessed 29<sup>th</sup> September, 2024)

<sup>105</sup> James C Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed, CUP, 2014, Chapters 2 and 3.

<sup>106</sup> University of Michigan Law School, *The Michigan Guidelines on Well-Founded Fear*, 2004—<https://www.refworld.org/docid/467fa3fb22.html> on 24 September 2024. See also, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol*.

<sup>107</sup> Andreas Zimmerman and Claudia Mahler, ‘Art. 1 A para. 2’ in Andreas Zimmerman (ed), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 342

<sup>108</sup> James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 112.

<sup>109</sup> Refugee Convention, art 33 and UNHCR Handbook, para 51.

their homeland driven by a well-founded fear of persecution, a fear that is credible in light of Afghanistan's recent history.<sup>110</sup> Even the grounds for persecution feared by Afghan refugees align with categories recognized under the very definition. Among these, both threats to life and freedoms are prevalent in Afghanistan, with a special focus on women who appear to be facing the wrath of the sitting Taliban more frequently.

And so, by virtue of this definition, it is clear that Afghan refugees do fall under the definitional ambit of a refugee under international law.

The universal definition of a refugee has, at times, faced critique for its perceived “Eurocentric” orientation and its alleged obsolescence in addressing contemporary drivers of displacement, such as climate change and social inequality.<sup>111</sup> As such, there have been suggestions by some authors, such as Allan Mukuki, who have vouched for the expansion of the definition.<sup>112</sup> Nonetheless, it may interest one to note that subsequent, regional instruments such as the 1969 OAU Convention in Africa have broadened the definition, encompassing those fleeing generalized violence and events disturbing public order.<sup>113</sup> This expansion, seen as more responsive to complex refugee scenarios, inspired inclusive refugee protections within national laws across African states. While this broadened definition better aligned with humanitarian needs, it introduced interpretive challenges, that fall outside the scope of the study, since this Chapter has demonstrated beyond doubt that Afghans in Pakistan fall squarely under the definition of a refugee.

## 2.4 The Sacrosanct Non-Refoulement

Article 33 of the 1951 Convention pronounces itself – with regards to non-refoulement – thusly:

*“No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on*

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<sup>110</sup> Human Rights Watch, 'Pakistan: Afghans Detained, Face Deportation', 31 October 2023—<https://www.hrw.org/news/2023/10/31/pakistan-afghans-detained-face-deportation> on 31 October 2024.

<sup>111</sup> Wood T, 'The International and Regional Refugee Definitions Compared' in Costello C, Foster M and McAdam J (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press, 2021, 629.

<sup>112</sup> Mukuki A, 'Re-Imagining the Concept of Forced Migration in the Face of Climate Change' 7(1) *Groningen Journal of International Law*, 2019, 73-98. Mukuki, as summed by his abstract, 'An all-inclusive refugee definition under international law, to include climate change as a Convention ground for people to seek refugee status is argued for herein. Judicial expansion of the definition and the development of soft law principles to cater for climate migrants is also discussed.'

<sup>113</sup> George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) *20 Refugee Survey Quarterly* 79, 90.

*account of his race, religion, nationality, membership of a particular social group or political opinion”.*<sup>114</sup>

The principle of non-refoulement has served as a guiding tenet of refugee law since its initial appearance in the 1933 Convention Relating to the International Status of Refugees.<sup>115</sup> Essentially, therefore, the principle of non-refoulement prohibits states from returning individuals to territories where they face a genuine risk of persecution or harm. Non-refoulement is rightly regarded as the cornerstone of the international refugee protection regime, as it establishes a minimum threshold of safety that states must observe, thereby ensuring that vulnerable individuals are not consigned to the perils from which they have fled.<sup>116</sup> In fact, so sacrosanct is non-refoulement, that it has been described as having been elevated to being a *jus cogens* norm of international law.<sup>117</sup> This means that the norm is one from which no derogation is permitted and which may be modified solely by the establishment of a subsequent norm possessing the same peremptory character.<sup>118</sup> According to Allain, non-refoulement is therefore a part of customary international law, which effectively disallows all states, whether or not a signatory to a Convention, from abrogating the same.<sup>119</sup>

The import of non-refoulement may be further appreciated through its alignment with essential human rights, notably the right to life and protection from torture.<sup>120</sup> By situating non-refoulement within a broader human rights framework, one discerns its expansive protective function, which serves not solely to shield refugees but also to safeguard all persons imperilled by grave human rights violations. This perspective illuminates the humanitarian character of non-refoulement, suggesting that states are bound by an ethical, as well as a legal, imperative to honour this principle as part of a universal commitment to uphold human dignity and fundamental rights.

However, it must be noted that Article 33 of the 1951 Convention does allow for some exceptions with regards to non-refoulement. In particular Article 33(2) pronounces thusly:

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<sup>114</sup> Article 33(1), *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.

<sup>115</sup> Duffy A, ‘Expulsion to Face Torture? *Non-refoulement* in International Law’, 20(3) *International Journal of Refugee Law*, 2008, 373.

<sup>116</sup> UNHCR, ‘UNHCR Note on the Principle of Non-Refoulement’, November 1997 — <https://www.refworld.org/policy/legalguidance/unhcr/1997/en/36258> on 4 November 2024

<sup>117</sup> Allain, J ‘The *jus cogens* Nature of non-refoulement’ 13(4) *International Journal of Refugee Law*, 2001, 533-558.

<sup>118</sup> Linderfalk U, ‘The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?’ 18(5) *European Journal of International Law*, 2007, 855.

<sup>119</sup> Allain, J ‘The *jus cogens* Nature of non-refoulement’ 13(4) *International Journal of Refugee Law*, 2001, 538.

<sup>120</sup> Marks S and Clapham A, *International Human Rights Lexicon*, Oxford, 2005, 373.

*“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 been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”<sup>121</sup>*

In particular context to the present study, a cursory observer may then claim that Pakistan’s move to expel Afghan refugees is one that is being perpetuated toward the end of eradicating a form of security threat. Broadly, put differently, that they are simply exerting the exception of Article 33(2). This idea can be very easily dispensed with Hathaway and Harvey’s work.<sup>122</sup>

They conceive of a test dual in nature. First, a rigorous standard of proof is mandated to establish that a refugee constitutes a danger to the security of the host state. The asylum state must demonstrate “reasonable grounds” to conclude that the individual’s continued presence presents a security threat. Second, non-refoulement protections may be withheld if the refugee has been convicted of a “particularly serious crime”,<sup>123</sup> and thereby poses a danger to the community. Hathaway and Harvey further make two important points. One, that it is invoked solely upon a final conviction, whereby all avenues of legal appeal have been exhausted; second, that for this exemption to apply, a substantive link must exist between the gravity of the crime and the threat posed by the individual’s presence.

In the prevailing circumstances in Pakistan, it is unclear, nor does there exist any evidence that this test of duality has been fulfilled. While indeed, Pakistan has stated that the fight against terror is the primary reason for the institution of the expulsion measure, it has not substantively shown that indeed, such a risk exists. In 2016, Pakistan also expelled Afghan refugees under this very guise; a measure termed by Human Rights Watch as the “the world’s largest unlawful mass forced return of refugees in recent times”.<sup>124</sup> Therefore, it could be said, at least on some level, that the expulsion of the Afghan refugees at present, is of a similar vain.<sup>125</sup>

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<sup>121</sup> Article 33(2), *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.

<sup>122</sup> Hathaway J and Harvey C, ‘Framing Refugee Protection in the New World Disorder’, 34 *Cornell Journal of International Law*, 2001, 290.

<sup>123</sup> Here, Hathaway and Harvey refer to the preparatory documents which seem to illustrate what constitutes a “serious crime” – rape, homicide, armed robbery, and arson. See Hathaway J and Harvey C, ‘Framing Refugee Protection in the New World Disorder’, 34 *Cornell Journal of International Law*, 2001, 292.

<sup>124</sup> Human Rights Watch, ‘Pakistan Coercion, UN Complicity: The Mass Forced Return of Afghan Refugees’, February 13 2017 — <https://www.hrw.org/report/2017/02/13/pakistan-coercion-un-complicity/mass-forced-return-afghan-refugees> on 5 November 2024,

<sup>125</sup> At least until evidence to the contrary is provided.

## 2.5 Conclusion

In summation, this chapter has undertaken a critical examination of the international legal framework governing refugee protection, with particular attention to the principle of non-refoulement – a cornerstone safeguard within the corpus of international refugee law. Through an analysis of pivotal instruments, notably the 1951 Refugee Convention and its 1967 Protocol, this chapter has illuminated the intricate obligations imposed upon states in upholding both refugee rights and the principle of non-refoulement. Although Pakistan is not a party to the 1951 Convention, it remains bound by the principle of non-refoulement due to its status as customary international law and its elevation to *jus cogens*, compelling observance from all states.

This chapter further emphasizes the dual nature of the non-refoulement principle, which serves not only to safeguard refugees but also to accommodate the security concerns of host states. Exceptions to non-refoulement, as articulated in Article 33(2) of the Refugee Convention, permit states to exclude individuals who pose a grave threat to the host community. Yet, these exceptions are bound by rigorous conditions, requiring a substantial burden of proof and a demonstrable link between the crime and the perceived threat posed by the individual to the state. In Pakistan's recent expulsions of Afghan refugees, it remains ambiguous whether these stringent criteria have been adequately met, thus casting doubt upon the legitimacy of such actions under the aegis of international law.

Through this analysis, the chapter establishes the foundational legal and ethical responsibilities that Pakistan, as a sovereign entity, bears within the context of refugee protection. This discourse prepares the ground for the subsequent chapter, wherein an exploration of Pakistan's alignment with Islamic jurisprudence shall ensue, further assessing the extent to which its refugee policies harmonize with both constitutional and international obligations.

## 3.0 Islamic Shariah Law vs International Law of Refugees: Convergence or Divergence?

### 3.1 Introduction

This chapter seeks to explore the alignment between Islamic law and international law concerning the treatment of refugees and asylum seekers. The guiding research question for this chapter – “To what extent does Islamic law on refugees align with international law standards?” – will be addressed by analyzing the principles and doctrines embedded in Shariah law and comparing them with the established norms and obligations of international law. By understanding these intersections and divergences, the chapter aims to highlight how Islamic teachings influence refugee protection and assess whether these alignments offer additional insights or alternative approaches to modern refugee issues.

Shariah law, the comprehensive legal system derived from the teachings of the Quran, the Hadith (traditions of Prophet Muhammad), and centuries of scholarly interpretations, governs not only individual conduct but also broader social and political relations. Shariah encompasses a diverse range of legal, ethical, and moral codes that are applied in various contexts, including the treatment of refugees and those seeking asylum. Central to Islamic law are principles of justice, compassion, and the protection of human dignity, which form the foundation for many of its legal precepts. The concept of *Aman* (protection or asylum), for instance, illustrates the strong emphasis Islam places on providing safety and support to those who seek refuge from persecution or harm.

International refugee law, on the other hand, is primarily defined by instruments such as the 1951 Refugee Convention and its 1967 Protocol, which establish a comprehensive framework for protecting individuals who flee persecution based on race, religion, nationality, political opinion, or membership in a particular social group. The principle of non-refoulement, which prevents the return of individuals to places where they may face serious threats to their life or freedom, is considered a cornerstone of international law and is echoed across multiple human rights treaties.

To provide a coherent analysis, this chapter will first delve into the key precepts of Islamic law that pertain to the treatment of refugees and asylum seekers. This includes examining the Quranic injunctions, Hadiths, and juristic interpretations that lay the foundation for Islamic

asylum principles. The study will explore the concept of *Aman* and other related doctrines, such as *Dhimma* (protection of non-Muslims) and the rights of *Musta'min* (temporary residents), which collectively shape the Islamic perspective on offering protection and refuge.

Subsequently, this chapter will compare these Islamic principles with international standards, focusing on common themes such as the duty to provide protection, non-discrimination, and the prohibition against refoulement. The analysis will look at how Shariah law's inherent moral obligations to protect the vulnerable align with international law's codified rights and protections. The chapter will address whether Islamic precepts align with international norms in terms of obligations, exceptions, and implementation, as well as discuss potential areas of divergence that may arise due to interpretative or contextual differences.

In addressing these issues, this chapter will consider whether Islamic teachings provide an equivalent or even superior framework for refugee protection compared to international standards. This comparison will be particularly relevant for understanding the role of Islamic law in countries like Pakistan, where Shariah principles influence constitutional mandates and policymaking. By critically examining the compatibility and potential conflicts between Islamic and international legal frameworks, the chapter aims to offer a comprehensive view of how Islamic law complements or challenges the prevailing international standards for refugee protection.

Ultimately, this chapter seeks to shed light on whether Shariah law offers a congruent or alternative model for refugee protection that resonates with international norms. This analysis will form the basis for understanding how Islamic principles can contribute to contemporary refugee policies and will prepare the ground for the concluding chapters, which synthesize these findings within the context of Pakistan's obligations and practices regarding Afghan refugees.

### **3.2 What is Shariah Law?**

In order to fully comprehend the matter of this Chapter, one must appreciate and understand what Shariah Law is. While the term is used quite widely, where it originates, what it means and what it entails are lesser-known facts.

There are indeed various sources of Shariah Law. However, the Holy Qur'an is the sacred scripture of Islam and stands as the foremost, original, and eternal source of Shariah.<sup>126</sup> It

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<sup>126</sup> Kunhibava S, 'Understanding the Sources of Law that Governs Islamic Banking', *Law Review*, 2009, 13.

comprises the divine messages that the Muslim God, *Allah*, revealed to the Muslim Prophet, Muhammad (PBUH) for the guidance of all humankind.<sup>127</sup> These messages are universal in their scope, eternal in their relevance, and fundamental to the principles and practice of the faith.<sup>128</sup> The Qur'an, self admittedly, is thought to be a direct revelation from God, to the Prophet Muhammad, and has within it guidance, law, and is self-assertive about its providential and divine origin.<sup>129</sup> In fact, it is the very belief in the divinity of the Book, especially with regard to it having been authored by God Himself, that Muslims find it most difficult to derogate from the words of the Quran.<sup>130</sup> The Qur'an can be thought of, if one were to situate it within a modern system, as the Constitution, or the Kelsenian Grundnorm, from which all other authority arises. While this conceptualisation appears to be one that author employs, it gets credence from the Qur'an, wherein God says:

*“And now, We have set you (O Muhammad, and sent you) to help establish a way of religion (complete) constituting rules of religion; so you follow that way and do not yield to the desires of those who are ignorant (of the truth)”*.

Here, God appears to give Muhammad an almost Constitutionally assigned power to also create ‘rules’ or laws. As such, the second source of Shariah then must undoubtedly be the Prophet Muhammad’s teachings. These teachings, or as the Quran put it, “establishments” are what form the Hadith.<sup>131</sup> The following of the *sunnah* of the Prophet cannot be understated, and must be thought similar to that of a law passed by a legislative organ – they bind all Muslims; after all, God says thusly: “And obey Allah and the Messenger that you may obtain mercy”.<sup>132</sup> Therefore, these initial sources of Shariah are of exceptional importance, since God has declared them to be as such in the Quran. To mention a few: “Believe in Allah and His Messenger and the light which He sent down”; “Believe in Allah and His Messenger, the unlettered Prophet.” (Qur’an, 7:158); “Take what the Messenger brings you”, (see Qur’an 33:62.) among many other commands from God (see, for instance See for instance, The Holy

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<sup>127</sup> *The Holy Quran*, 2:185.

<sup>128</sup> See generally, Laldin MA, *Introduction to Shariah and Islamic Jurisprudence*, Cert Publications, Kuala Lumpur, 2006.

<sup>129</sup> *The Holy Quran*, 2:2

<sup>130</sup> See Hamid’s work generally, where he claims that this fact is what makes Islam and the Quran so exceptional. Hamid S. “*Islamic Exceptionalism: How the Struggle Over Islam Is Reshaping the World*”, St. Martin's Griffin; Reprint edition, 2017; and Hamid S. “How Islam Is Different from Other Religions”, *The Times*, 2 June 2016 — <https://time.com/4353838/islamic-exceptionalism/> on 12 September 2024.

<sup>131</sup> ‘Hadith’ refer to the sayings of Prophet Muhammad as reported by his close companions. See, *Encyclopedia Britannica*, online Edition at — <https://www.britannica.com/topic/Hadith> on 12 September 2024. Islamically speaking, the teachings of the Hadith, are called *sunnah*. Scholars say that everything about Islamic rulings are either found in the Quran or the *Sunnah*. And so, citing the Hadith’s offer a strong source

<sup>132</sup> *The Holy Quran*, 3: 132.

Quran, Chapter 48, Verse 8-9; The Holy Quran, Chapter 33, Verse 21; The Holy Quran, Chapter 33, Verse 21; etc). Sunnah, therefore, is taken to be an extension of the Qur'an. In fact, the very word chosen, sunnah, literally translates to 'the path' or 'the way' and has been used in the Qur'an to mean 'the ways of God' (see for instance, The Holy Qur'an, Chapter 33, Verse 62). This, then, is the importance placed on the sunnah of the Holy Prophet Muhammad.

A third source is what is known as *ijma*, or consensus, according to the majority of Muslim jurists signifies the collective agreement of all qualified jurists within the community during a specific era on a particular Shariah ruling that is open to *Ijtihad* (independent reasoning).<sup>133</sup> This process is understood to be conducted following the death of the Prophet (SAAS - peace and blessings be upon him).<sup>134</sup> In this regard, *Ijma* may arise from, say, the Caliphs of Islam, *Tab'een*, and the *Tabi-Tab'een*. These are people who took over following the death of the Prophet, learnt directly from the Prophet, and their teachings hold hefty credence even in the Islamic world today. This claim is rooted in the Prophetic Hadith where he said: 'so it is upon you to be upon my Sunnah and *the Sunnah of the Rightly Guided Caliphs*'.<sup>135</sup>

That said, then, a thorough, foundational understanding of what Shariah law entails is indispensable for grasping its application and import, particularly in the context of juxtaposing its principles with those of international law. The Qur'an, as the supreme and divine source, functions as the ultimate constitution of Islamic jurisprudence, from which all subsequent legal tenets and doctrines draw their legitimacy. The Hadith, encapsulating the teachings and actions of the Prophet Muhammad (peace and blessings be upon him), serve as an extension of the Qur'anic text, reinforcing and elucidating its guidance. Collectively, these two sources constitute the bedrock of Islamic legal and ethical standards. Moreover, the concept of *Ijma* (consensus) exemplifies the adaptive nature of Shariah, illustrating how Islamic jurisprudence evolves through the concord of learned scholars in the post-Prophetic era.

This synthesis of divine revelation, Prophetic instruction, and scholarly consensus forms a comprehensive legal system imbued with principles of justice, compassion, and the welfare of the community. With this foundational comprehension of Shariah established, the subsequent analysis will explore, more intimately, what Islamic Shariah law – the Quran, the Sunnah, and

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<sup>133</sup> Lone MA, 'Role of Ijma in the contemporary Muslim world: An analysis' 3(5) *International Journal of Humanities Social Science and Management*, 2023.

<sup>134</sup> Al-Halabi A, *Al-Taqrir wa al-Tahbir ala al-Tahrir fi Usul al-Fiqh*, Dar al-Kutub al-Ilmiyyah, Beirut, 1999, 102; Al-Razi A, *Al-Mahsul fi Ilm al-Usul*, Dar al-Kutub al-Ilmiyyah, Beirut, 1999, 3-4; Al-Nasafi A, *Kashf al-Asrar Sharh al-Musannaf Ala al-Manar*, vol. 2, Dar al-Kutub al-Ilmiyyah, Beirut, 1990, 179-180.

<sup>135</sup> Al Nawawi Y, *An-Nawawi's Forty Hadith*, 28,

the Ijma – says about Refugee’s and their rights. Finally, there will be an equally thorough investigation of the extent to which these principles align with or diverge from international standards governing refugee and asylum law, thereby providing insights into the compatibility and potential areas of conflict between these two distinct legal paradigms.

### 3.3 What Does Islam say About Refugees?

Shariah law encompasses a rich tradition of refugee and asylum protection rooted in Islamic teachings and historical practice.<sup>136</sup> In Islamic jurisprudence, the principles of Shariah law provide a profound and comprehensive framework for the protection of refugees and asylum seekers, at times more than the protection international law grants<sup>137</sup> Rooted in divine teachings, the sources of Shariah law collectively outline a tradition of asylum that is both deeply ingrained and historically significant.

Central to Islamic refugee law is the concept of *hijrah* (migration) and *aman* (assurance of safety).<sup>138</sup> These principles stem from this migration from Mecca to Medina in 622 C.E., an event that marks the beginning of the Islamic calendar and exemplifies the duty to seek and provide protection.<sup>139</sup> The duty of refugee protection is well entrenched in the Quran, where God commands Muslims to offer protection to those seeking refuge, as demonstrated in verse 9:6: *”And if anyone of the polytheists seeks your protection, then grant him protection so that he may hear the Word of Allah and then escort him to where he can be secure.”*<sup>140</sup> This directive highlights the inclusive and non-discriminatory nature of Shariah’s approach to asylum.

Equally critical to Islamic protection for refugees is the principle of *aman* which emphasises that protection must be extended to any individual – regardless of their religion or status – seeking safety from persecution or harm.<sup>141</sup> Historically, this commitment is further reflected in the practice of Prophet Muhammad, who sent his followers to seek refuge and *aman* in Abyssinia, a Christian kingdom, when they faced persecution in Mecca.<sup>142</sup> Therefore, the duty

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<sup>136</sup> Elmadad K, “Asylum in Islam and in Modern Refugee Law”, 27(2) *Refugee Survey Quarterly*, 2008, 52.

<sup>137</sup> Mohamed M, “Refugee Law in Islam” 4(2) *Journal of Social Sciences*, 2011, 2.

<sup>138</sup> Turk V, ‘Reflections on Asylum and Islam’ 27(2) *Refugee Survey Quarterly*, 2008.

<sup>139</sup> Suhrke A, “Refugees and Asylum in the Muslim World,” in *The Cambridge Survey of World Migration*, Robin Cohen (ed), Cambridge University Press, 1995, 457.

<sup>140</sup> *The Holy Quran* 9:6.

<sup>141</sup> Mohamed M, “Refugee Law in Islam”, 4.

<sup>142</sup> Safieddine S, ‘Migration to Abyssinia’, 12(2) *Message of Thaqaalayn*, 2011, 83-102.

to offer this protection falls upon the believer, since the acts of Prophet Muhammad form part of the Shariah.

Aman is a concept in Islamic Shariah Law that pertains to asylum and refugees and is underpinned under the Islamic perception that all those forced to flee their land must be granted refuge if they seek it.<sup>143</sup> In fact, the term “Aman” translates directly to “protection, safety, or protection”.<sup>144</sup> The more fundamental understanding regarding Aman is that it is underscored in the Qur’an where God says: “and if anyone... seeks your protection, then grant him protection...”.<sup>145</sup> The term “Aman” embodies a covenant between the government and a refugee, guaranteeing the safeguarding of the rights of an asylum seeker. Herein, it is clear that the apex document in Islamic Shari’ah law underpins the importance of protection.

Furthermore, the Prophet in his part, discussed the critical import of the concept in Islamic Law, when he unequivocally stated that where a person sought Aman, and the person was allowed, by even a junior person with authority, to seek protection in the territory, it becomes ‘compulsory’, including on the highest commander-in-chief to allow them to flourish in the territory without abeyance.<sup>146</sup>

Generally, where Aman is granted, it is binding on all the persons within the territory, whether the granting of Aman is beneficial or not.<sup>147</sup> This binding nature is not, by any measure, superficial. The Prophet is reported to have said that where Aman is given, and then violated, the violator is cursed by God, His angels, and all the people.<sup>148</sup> Elsewhere, it has been commented that it is *haram* (forbidden) to interfere in the Aman given to a person.<sup>149</sup>

Thus, the concept of Aman is essential in Islam, and it has been commented on by scholars, all of whom find the importance of its discussion squarely within the Qur’an.

Islamic refugee law places an obligation on both state and individuals within the Muslim community to provide sanctuary. Unlike modern international law, where the authority to grant

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<sup>143</sup> Elmadad K, “An Arab Convention on Forced Migration”, 54.

<sup>144</sup> Schacht J, “Aman” in Bearman P, Bianquis T, Bosworth C, and Heinrichs W (eds) *Encyclopaedia of Islam, Second Edition*, Brill Publishers, Leiden, Netherlands, 2012, Aman.

<sup>145</sup> *The Holy Qur’an*, King Fahd Glorious Quran Printing Complex, Riyadh, 9:6.

<sup>146</sup> Al-Hilli A, *Muntaha al-matlab fi tahqiq al-madhab*, Majma’ al-Buhūth al-Islāmīyah, Tehran, Vol. 2, 1971, 914.

<sup>147</sup> Juzi M, *Qawaneen al-Ahkam al-Shar’iyya wa mas’al al-furu’ al-fiqhiyyah*, Dar al-Elm Lil Malayeen, Beirut, 173.

<sup>148</sup> Al-Nisapuri M, *Sahih Muslim*, Dar Ehya al-Torath al-Arabi, Beirut, 2:999, Hadith No. 1371. See also, Al-Bukhari M, *Sahih Bukhari*, Dar ibn Kathir, Beirut, 1987, 3:1160, Hadith No. 3008. See also, Hajr A, *Fath al-Bari Sharh Sahih al Bukhari*, Dar Marifah,, Beirut, 1379, 4:81.

<sup>149</sup> Hajr A, *Fath al-Bari Sharh Sahih al Bukhari*, 4:86.

asylum lies exclusively with the state, Shariah empowers any member of the community to extend *aman* to those in need.<sup>150</sup> Islamic asylum is therefore a right not only for the refugee but also a duty for the community; this is a far broader, consequential inclusive approach than modern international frameworks, which vest the power to grant asylum solely with the state.<sup>151</sup> There is therefore a communal responsibility that may arise in Islamic Shariah Law, reflecting the humanitarian values embedded in Islam, where the welfare of the vulnerable is a shared moral and social duty.

The rights afforded to refugees under Islamic law are extensive and align closely with contemporary notions of human rights. Once *aman* is granted, refugees are entitled to a range of protections, including the right to safety, free movement, work, education, and family reunification.<sup>152</sup> This protection endures as long as the refugee wishes to stay, aligning with the concept of voluntary repatriation found in modern refugee law.<sup>153</sup> Furthermore, Shariah law emphasizes that asylum should be granted without requiring the refugee to first prove persecution; the act of seeking refuge itself suffices to invoke protection, barring exceptions for those who have committed serious crimes.<sup>154</sup>

Once granted, *aman* is comprehensive and typically not limited by time, allowing refugees to remain as long as needed, akin to the principle of voluntary repatriation in international law.<sup>155</sup>

Syahrin's analysis of the Quranic verse in 59:9 reveals interesting requirements expected of host communities.<sup>156</sup> He says that that Chapter espouses a total of five principles that host communities must show refugees.<sup>157</sup> First, a welcoming disposition towards refugees is a principle that Muslims ought to embody, embracing the arrival of those in need and extending assistance with sincerity and grace. The needs of refugees should be prioritized above those of the host community, exemplifying the virtue of selflessness and compassion central to Islamic teachings. Acceptance and support must be rendered without discrimination, ensuring that aid is extended irrespective of the refugees' wealth or social standing, thereby upholding the foundational tenet of equality before God. Furthermore, the duty to provide assistance must not falter in times of adversity; even when faced with their own trials, hosts are called to extend

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<sup>150</sup> Elmadad K, "Asylum in Islam and in Modern Refugee Law", 54.

<sup>151</sup> Elmadad K, "Asylum in Islam and in Modern Refugee Law", 56.

<sup>152</sup> Elmadad K, "Asylum in Islam and in Modern Refugee Law", 54.

<sup>153</sup> Mohamed M, "Refugee Law in Islam", 4.

<sup>154</sup> Mohamed M, "Refugee Law in Islam", 8.

<sup>155</sup> Mohamed M, "Refugee Law in Islam", 8.

<sup>156</sup> *The Holy Quran*, 59:9

<sup>157</sup> Syahrin M, 'The Rohingya Refugee Crisis: Legal Protection on International Law and Islamic Law' 192 *Advances in Social Science, Education and Humanities Research*, 2018, 97-99.

their support steadfastly. The host community should regard their land as a sanctuary, a refuge where those fleeing peril find not only safety but also the promise of protection and the opportunity for integration. This ethos underscores the profound obligation of providing territorial asylum, a reflection of both the moral and communal responsibility incumbent upon the faithful to safeguard the dignity and welfare of all who seek shelter.

### **3.4 Reconciling Islamic Refugee Law & International Refugee Law**

The next section takes up, in comparison, the protective scope of Islamic Shari'ah and international law, liberal citations from the work of Professor Abou-El-Wafa. According to both regimes, the right to seek asylum is considered an essential guarantee of human dignity and safety. While Shari'ah law emanates from the Divine guidance from the Qur'an and the teachings of the Prophet Muhammad, it also articulates well-established principles for humane treatment and protection for refugees and provides them with refuge. On the other hand, positivistic international law has codified these obligations in formal documents upon refugees, such as the Refugee Convention of 1951 and the Universal Declaration of Human Rights. Amongst these areas of convergence and divergence, special attention will be given to commitment to non-refoulement, protection extended to all groups within a community, duties on the host state, and duties on individuals. Through that, this section tries to shed light on how Islamic precepts resonate with, supplement, or differ from international legal norms of refugee protection. The right to seek asylum is a basic principle of protection under both Islamic Shari'ah and international law.

This is enshrined in Islamic tradition as being the most important divine charge placed upon a person for giving refuge to a distressed individual. The verse from *Surat al-Anfal*, as it is dubbed in the Quranic Arabic idiom, states, “*Those who believed and emigrated, and strove in the cause of God, as well as those who hosted them and gave them refuge... have deserved forgiveness and a generous recompense*”.<sup>158</sup> This verse exemplifies the sanctity of protection and the helping of those who seek refuge as something which merits a reward from God. Heaven, or divine reward, is the ultimate end in Islam, and God says that giving refuge is worthy of such an ultimate end. This principle is summed up in Article 14 of the Universal Declaration of Human Rights: by its own admission, it declares that “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”<sup>159</sup> This shared foundational

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<sup>158</sup> *The Holy Quran*, 8:74.

<sup>159</sup> Article 14, *Universal Declaration of Human Rights*, 10 December 1948, UNGA Res 217 A (III).

belief underscores the intrinsic value placed upon human life and safety, hence dubbing asylum not as a privilege but as a right that states must maintain.

Another critical convergence, according to the literature, between Islamic Shari'ah and international refugee law, is the principle of non-refoulement. Islam prohibits the forced return of individuals to a territory where they would face a genuine risk of persecution or harm. The concept, thus, is enmeshed in the very fiber of Islamic morality and law; it 'categorically disallows', in the words of Abou El Wafa, the return of a refugee to a place where he or she may fear for his life.<sup>160</sup> In fact, it has been said that before International Law codified the principle of non-refoulement, Islam had already entrenched the same into the prism of its doctrine.<sup>161</sup> In Islam, refoulement of a refugee is often seen as an act of treachery, and is, as such, strictly prohibited, even in circumstances of exchanging prisoners of war.<sup>162</sup> Prof. Abou-El-Wafa's study properly concluded, in a multi-page analysis of the Islamic literature, that 'the return, or refoulement, of the asylum seeker was prohibited by virtue of Shari'ah.'<sup>163</sup> This implies, among other things, an awareness that protection granted cannot be withdrawn if doing so would place a person in harm's way. This also precisely aligns with Article 33 of the 1951 Refugee Convention, which equally prohibits refoulement.<sup>164</sup> It is on this basis that the principle of non-refoulement became, as has earlier been said, one of the cornerstones of modern international refugee protection in echoing Shari'ah's commitment to protecting individuals from persecution and harm. Since the earlier Chapter discussed this at length, to do so again would be to sound akin to a broken record and hence quite unnecessary.

Both Islamic Shari'ah and international refugee law pay great attention to the protection of life and dignity, at least with regard to how one should treat a seeker of refuge. This is in tandem with the Islamic tradition, whereby clear directives have been laid down through the Qur'an on the provision of safety and preservation of dignity. This is exemplified in *Surat Al-Tawba*, which states: "And if anyone... seeks your protection, then grant him protection... and then escort him to where he will be secure".<sup>165</sup> The verse mandates not only the acceptance of those seeking refuge but goes a step further to direct that they be kept safe in a place of security and

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<sup>160</sup> Abou-El-Wafa A, "The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study" Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009. 53.

<sup>161</sup> Mahmassani S, "The Principles of International Law in the Light of the Islamic Doctrine" 117 (1) *Cours de l'Académie de Droit International de La Haye*, 1966, 256.

<sup>162</sup> Shibani, *Sharh as-siyar al-kabeer*, Institute of Manuscripts, League of Arab States, Cairo, 1972, 1612-1614.

<sup>163</sup> Abou-El-Wafa A, "The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study", 5

<sup>164</sup> Article 33(1), *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.

<sup>165</sup> *The Holy Quran*, 9:6.

protection.<sup>166</sup> This protection is mirrored in international refugee law, which insists that the protection of refugees encompasses ensuring their safety and treating them with respect, recognizing their vulnerability and humanity.<sup>167</sup> The 1951 Refugee Convention and related instruments emphasize the duty of states to uphold the life and dignity of refugees as a fundamental aspect of international human rights norms.

Another important consensus between Islamic Shari'ah and international law is that the universality of protection granted to all refugees is paramount. Whereas one might believe that refuge provided to people in Islam pertains exclusively to those of the faith, a perfunctory look at certain literatures proves otherwise. Prof. Abou-El-Wafa's work covers discussion on how Islamic jurisprudence dictates that refuge should not be discriminatory in nature. The concept of "*aman*" means safety for all humankind irrespective of belief.<sup>168</sup> This inclusivity is evidenced by the Qur'anic guidance that commands Muslims to grant safety even to disbelievers seeking protection so that they may be secure and hear the word of God.<sup>169</sup> Such teachings are supported for protection on humanitarian grounds without religious or social discrimination. International law also speaks about the principle of non-discrimination. The Universal Declaration of Human Rights and other international conventions have pointed out with strength that all have equal rights to apply for asylum, whereas protection should be provided based on race, religion, or nationality.<sup>170</sup> It is this common commitment underlining the fact that both frameworks establish the universality of human rights.

The duty of the host community to provide for and protect refugees is a principle enshrined in both Islamic Shari'ah and international refugee law. The Qur'an portrays a profound example of this in *Surat Al-Hashr*, which recounts the altruism of the people of Medina who welcomed those who sought refuge among them: "*But those who, before them, had homes (in Medina) and had adopted the Faith, show their affection to such as came to them for refuge... even though poverty was their (own lot)*".<sup>171</sup> This verse illustrates that the provision of refuge was not only expected but also seen as a meritorious act, even when resources were scarce. This

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<sup>166</sup> Gutierrez A, 'Foreword' in Abou-El-Wafa A, "*The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*" Riyadh, Printing Press of Naif Arab University for Security Sciences, 2009, 3.

<sup>167</sup> See very generally, Weis P, 'The Refugee Convention 1951: The Travaux Préparatoires Analysed with a Commentary' – <https://www.unhcr.org/sites/default/files/legacy-pdf/4ca34be29.pdf> on 6 November 2024.

<sup>168</sup> Abou-El-Wafa A, "*The Right to Asylum between Islamic Shari'ah and International Refugee Law A Comparative Study*", 71.

<sup>169</sup> Foudi S, *Bayan wajoub al-hijrah a'ala al-'ibad wa bayan wajoub nasb imam wa iqamat al-jihad*, University of Khartoum publishing House, 1977, 124.

<sup>170</sup> Article 9, *Universal Declaration of Human Rights*, 10 December 1948, UNGA Res 217 A (III).

<sup>171</sup> *The Holy Quran*, 59:9.

ethos is mirrored in international law, particularly through the obligations imposed by the 1951 Refugee Convention, which urges state parties to cooperate with the UNHCR and other organizations to facilitate the reception and care of refugees.<sup>172</sup> Both legal traditions acknowledge that the host community must go beyond mere acceptance; it must actively contribute to the welfare and integration of refugees, ensuring their well-being and safety.

Through this comparative analysis, it becomes evident that there exists a notable convergence of principles and practices between Islamic Shari'ah and international refugee law. Therefore, it is unfounded to say that Islamic Refugee Law contrives the international framework. In fact, both prisms uphold the inherent right to seek asylum, firmly entrench the principle of non-refoulement, and advocate for the inclusive and dignified treatment of those in search of refuge. Islamic Shari'ah, rooted in divine mandates and centuries-old traditions, extends protection to individuals irrespective of religious or ethnic backgrounds, reflecting an ethos of universal compassion and justice. This commitment aligns with international human rights standards, which seek to protect the vulnerable and uphold their dignity without discrimination.

### 3.5 Conclusion

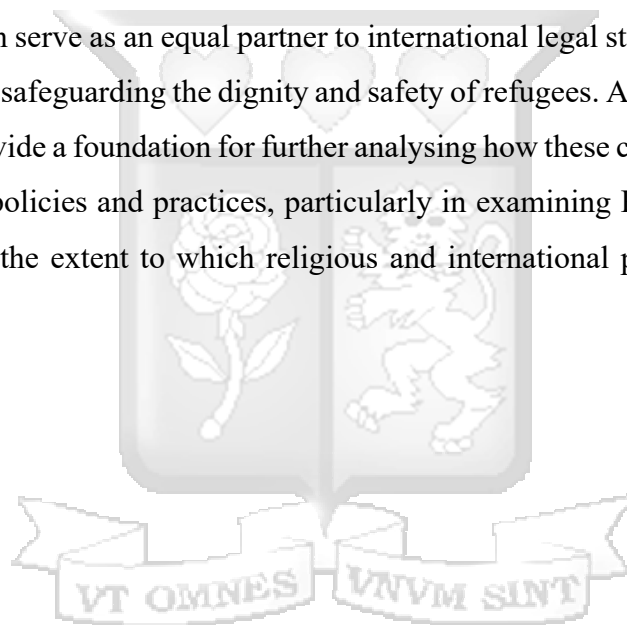
In conclusion, this chapter has examined the alignment between Islamic Shari'ah and international refugee law, revealing a rich convergence of shared principles, distinct characteristics, and points warranting further reflection. The exploration of Shari'ah law has illuminated its foundational roots in the Qur'an, Hadith, and juristic consensus, all of which are steeped in a commitment to justice, compassion, and the sacred duty to protect those who are vulnerable.

Central to this commitment are the Islamic principles of *hijrah* (migration) and *aman* (safety), which together form a comprehensive moral and legal framework for granting asylum, emphasizing that protection must be extended without regard to religious affiliation or social status. This perspective is in strong accord with international legal standards as encapsulated in instruments like the 1951 Refugee Convention. The comparative analysis in this chapter has demonstrated that both Islamic Shari'ah and international law prioritize the principle of non-refoulement as an inviolable obligation and advocate for non-discrimination in the treatment of refugees.

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<sup>172</sup> Article 35(1), *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.

The findings of this chapter are pivotal for various reasons. First, they illustrate that Islam does not diverge with international law standards. Why is this important? Well, simply, it is important in order to legitimise the Shariah law framework within what is internationally acceptable. After all, were the principles of Islamic Refugee Law overarchingly divergent, then it would be remiss to ask Pakistan to act in accordance with Islamic Refugee Law. Similarly, this Chapter is important for its own sake, especially in understanding the potential that Shari'ah law holds for reinforcing and complementing international refugee norms. Recognizing the shared humanitarian objectives and the moral imperatives embedded in both systems offers a pathway for bridging the divide between religious doctrines and international obligations, thus presenting a more integrated and holistic approach to refugee protection. This alignment reinforces the idea that Islamic law, when interpreted and applied in line with its original principles, can serve as an equal partner to international legal standards, enhancing the global commitment to safeguarding the dignity and safety of refugees. As this study progresses, these insights will provide a foundation for further analysing how these converging frameworks are mirrored in state policies and practices, particularly in examining Pakistan's treatment of Afghan refugees and the extent to which religious and international principles influence its approach.



# **4.0 The Impugned Measure Under the Microscope: Evaluating the Compliance with Shari'ah Principles and International Law**

## **4.1 Introduction**

This chapter endeavors to elucidate the legal and constitutional foundation underpinning Islamic refugee law within the context of Pakistan, paying particular heed to the ways in which religious doctrines are interwoven into the legislative and policy frameworks of the state. The central research question steering this analysis is thus: What constitutes the legal and constitutional basis of Islamic refugee law in Pakistan? This inquiry assumes paramount importance as it unveils the distinctive convergence of religious tenets and state law in a nation where Islam exerts profound influence over legal and societal norms. Comprehending this intersection is indispensable for discerning the broader ramifications of religiously inspired legal structures on refugee protection and for assessing their concordance with or divergence from international standards.

The discourse shall commence with an examination of the essential premise that Pakistan is an Islamic republic. The Constitution of Pakistan reinforces this identity, mandating that all laws align with the teachings of Islam, as derived from the Qur'an and the Sunnah. This foundational principle permeates the entire legal architecture of the nation, where religious injunctions ascend beyond mere moral guidelines to attain the stature of constitutional obligations. Article 2 of the Constitution proclaims Islam as the state religion, while Article 227 compels that all laws be congruous with Islamic precepts. These constitutional provisions set the stage upon which the state's policies concerning refugees and associated legal interpretations are constructed and enacted.

This exploration holds significance as it provides a meticulous inquiry into how Pakistan's status as an Islamic state informs its approach to the protection of refugees. While international refugee law, notably articulated through instruments such as the 1951 Refugee Convention and its 1967 Protocol, establishes global norms, Pakistan's non-signatory status to these accords accentuates the enigma of the debacle. The analysis presented herein shall appraise whether Islamic jurisprudence, as interpreted and operationalized in Pakistan, constitutes a

comprehensive and efficacious framework for refugee protection and how it correlates with international norms.

The chapter will, in its initial stages, delineate the constitutional framework that incorporates Islamic principles within Pakistan's legal system. It shall scrutinize pertinent constitutional articles, legislative enactments, and judicial exegeses that reference or are inspired by Shari'ah law. Following this, the analysis will turn to how these religiously embedded legal provisions are put into practice within the realm of refugee protection, with particular focus on core Islamic concepts such as *aman* (protection) and their manifestations within contemporary policy measures.

Furthermore, this chapter will undertake a critical evaluation of the practical repercussions of these laws and their efficacy in addressing the exigencies faced by refugees. It will probe whether the application of Islamic refugee law by Pakistan provides a sound and independent system of protection or whether lacunae exist that necessitate the supplementation of international principles. Such an analysis shall illuminate the strengths and limitations inherent in a religiously informed legal paradigm for refugee protection and assess its capacity to uphold human rights in consonance with both Islamic values and international standards.

In conclusion, this chapter aspires to present a comprehensive understanding of the legal and constitutional scaffolding that underpins Islamic refugee law in Pakistan. It will elucidate how Shari'ah principles are enshrined within the nation's legal edifice and will scrutinize their function in shaping refugee protection, offering a discerning perspective through which to gauge their sufficiency and their congruence with global practices in refugee law.

## **4.2 Is Pakistan an Islamic Country?**

Pakistan's current Constitution is entrenched in a document dating back to 1973. Today, some question whether, the document is still the same, and whether the spirit of the Constitution still remains ever present.<sup>173</sup> As such, the question of whether Pakistan is still an Islamic country, and more crucially, whether it is yet governed by Islamic law, is a pressing concern generally, no less in the context of this study. In any case, as this section will aptly show, the overarching

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<sup>173</sup> Mehdi R, *The Islamization of the Law in Pakistan*, Routledge Publishing, United Kingdom, 2015, 71.

theme in the literature reflects Pakistan's endeavour to maintain its identity as an Islamic state while addressing modern governance, legal challenges, and socio-economic requirements.

It may be apt to begin by setting, as a premise, that that it appears to be scholarly consensus that the original objective of the foundation of Pakistan, was that it be a haven for the Muslim populace wherein *all* laws were Islamic Laws.<sup>174</sup> This is no more clearly outlined than in the Objectives Resolution of 1949 which, inter alia, stated that Pakistan shall be a State in which "Muslims shall be enabled to organize their lives in accordance with the teachings and requirements of Islam as set out in the Quran and the Sunnah"; that "the representatives of the people of Pakistan will manage the affairs under the universal ideology... with the spirit of an Islamic framework".<sup>175</sup> While the changing nature of Pakistan's Constitution is well evidenced by the plethora of amendments it has seen since its inception, one unfaltering feature is the basic premise of the Constitution: Islam.<sup>176</sup> Equally, that, no country other than Pakistan, has made religion the solitary basis of Muslim Nationality;<sup>177</sup> and that, one can comfortably conclude that those basic Islamic premises remain unaltered.<sup>178</sup>

With the positive nod from the literature secured, it behoves one to dive into the Constitution of Pakistan, to investigate the veracity of the claims held by authors earlier cited.

Even a cursory glance of the Constitution reveals that the same is littered with a multitude of references to Islam in one way or another. The preamble of the Constitution itself commences with the solemn invocation, "*In the name of Allah, the most Beneficent, the most Merciful,*" affirming that the sovereignty of the universe resides exclusively with Almighty Allah.<sup>179</sup> This foundational preamble establishes the philosophical bedrock of the document, underscoring that the governance of Pakistan ought to embody and reflect the tenets of Islam as delineated in the Holy Qur'an and the Sunnah.

Article 2 proclaims that Islam is the state religion, thereby cementing the pivotal role that Islamic principles play in defining the national identity and governance of Pakistan.<sup>180</sup> And so, even if it were true, that Pakistan has attempted to pluralize its society through various attempts

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<sup>174</sup> Haydar A, 'From the Anglo-Mohammadan Law to the Shariah: The Pakistan Experiment', 10(4) *Journal of South Asian and Middle Eastern Studies*, 1987, 34.

<sup>175</sup> *The Objectives Resolution*, 1949.

<sup>176</sup> Lau M, 'Sharia and national law in Pakistan', 410.

<sup>177</sup> Devji F, *Muslim Zion: Pakistan as a political idea*, Harvard University Press, Massachusetts, 2013, 5.

<sup>178</sup> Lau M, 'Sharia and national law in Pakistan' in Ott J (ed), *Sharia Incorporated: A comparative overview of the legal systems of twelve muslim countries in past and present*, Leiden University Press, 407-408.

<sup>179</sup> Preamble, *The Constitution of Pakistan* (1973).

<sup>180</sup> Article 2, *The Constitution of Pakistan* (1973).

to enact positivistic rules within its juridical dictum, as, for instance, Yefet claims, Pakistan is still governed by Islam as its state religion<sup>181</sup> Further, that this declaration is so clear, that any attempt to whittle this proposition fails *ab initio*. This commitment finds further expression in Article 31, which enjoins the state to ensure that the lives of Muslims in Pakistan, whether viewed individually or collectively, are in consonance with the essential principles and edicts of Islam.<sup>182</sup> It further obliges the state to provide educational avenues that integrate Islamic teachings, encourage the correct recitation and understanding of the Qur'an, and promote the inculcation of Islamic virtues.

Part IX of the Constitution, styled "Islamic Provisions," expounds on the legislative and consultative apparatus designed to infuse Islamic law within Pakistan's legal corpus. Article 227 mandates unequivocally that all extant laws be conformed to the injunctions of Islam as prescribed in the Qur'an and Sunnah and forbids the enactment of any statute contravening these sacred mandates.<sup>183</sup> To ensure such conformity, Article 228 prescribes the formation of the Council of Islamic Ideology, comprised of scholars and jurists proficient in Islamic jurisprudence, tasked with advising on the harmonization of laws with Islamic principles.<sup>184</sup> The subsequent Articles 229 through 231 further delineate the Council's advisory responsibilities, imparting it with a consultative role in legislative scrutiny for Shariah compliance.<sup>185</sup>

Last, but certainly not least, Pakistan's constitutional framework constitutes the *Federal Shariat Court* as articulated in Article 203C.<sup>186</sup> This Court holds the authority to adjudicate upon whether any law or provision stands in contradiction to the Qur'an and Sunnah. Article 203D amplifies this jurisdiction, empowering the Court to issue binding decisions on such matters.<sup>187</sup> This institutional apparatus is fortified by the Objectives Resolution,<sup>188</sup> enshrined as Article 2A, which proclaims that all exercises of governance within Pakistan are a sacred trust, to be executed within the bounds ordained by Almighty Allah.<sup>189</sup>

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<sup>181</sup> Yefet K, "What's the Constitution Got to Do With It-Regulating Marriage in Pakistan" 16(1) *Duke Journal of Gender, Law and Policy*, 2009, 348.

<sup>182</sup> Article 31, *The Constitution of Pakistan* (1973).

<sup>183</sup> Article 227, *The Constitution of Pakistan* (1973).

<sup>184</sup> Article 228, *The Constitution of Pakistan* (1973).

<sup>185</sup> Article 229 and 231, *The Constitution of Pakistan* (1973).

<sup>186</sup> Article 203C, *The Constitution of Pakistan* (1973).

<sup>187</sup> Article 203D, *The Constitution of Pakistan* (1973).

<sup>188</sup> *The Objectives Resolution*, 1949.

<sup>189</sup> Article 2A, *The Constitution of Pakistan* (1973).

With the Constitution now out of the way, it perhaps remains important to exemplify the nods to the Islamic faith found within other corpuses of law, such as Statute. One particular instance of this, is especially visible in the Penal Code, wherein blasphemy against the Muslim God and His Prophet are not only disallowed but carry the death penalty.<sup>190</sup> While there are many more, this example suffices in the authors opinion. For more, Abida Mumtaz, et al, in their paper further expound on this, and other laws that are inspired by Islam, or that exist to further the Islamic faith, including the Ordinances which serve to further 'Islamicization'.<sup>191</sup>

In concluding this section, it is evident that Pakistan's constitutional framework is deeply intertwined with Islamic principles, reflecting the country's foundational objective of being an Islamic state. The Constitution, from its very preamble, affirms the primacy of Islam as the guiding force for governance and legal practices.

This exploration is crucial for the current study as it underscores the basis upon which Pakistan's legal system integrates Islamic law. In fact, it not only integrates it, but holds it to the highest regard. The constitutional emphasis on Islamic principles demonstrates that Shari'ah is not only a cultural or religious ideal but a constitutional and legal mandate. This sets the stage for analyzing the role and application of Islamic refugee law within the Pakistani context and assessing its congruence with international legal norms. After all, if Islamic law is central, then so, too, ought the principles of Islamic Refugee Law. Understanding this foundation helps contextualize the challenges and opportunities in balancing religious mandates with contemporary legal and humanitarian obligations.

But, one question remains unanswered: what exactly is the Refugee Law of Pakistan presently? This will be tackled in the next section.

### **4.3 What is Pakistan's Refugee Policy?**

Over the decades, Pakistan has hosted a significant Afghan refugee population due to ongoing instability in Afghanistan. Since the 1970s,<sup>192</sup> the influx of refugees has resulted in Pakistan

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<sup>190</sup> Section 295, 295C, and 298, *Pakistan Penal Code* (Act XLV of 1860)

<sup>191</sup> Mumtaz A, Soomro AS, Laghari NA and Laghari AR, 'Islamic Law and Constitutionalism in Pakistan: Exploring the Role of Sharia in Constitutional Development' 1(1) *International Journal of Innovative Inventions in Social Science and Humanities*, 2024, 27-28

<sup>192</sup> See generally, Eisenberg J, "The Boatless People: The UNHCR and Afghan Refugees 1978-1989", 14(1) *International History*, 2013.

becoming one of the world's largest refugee-hosting countries, with over 1.4 million registered Afghan refugees and a similar number of undocumented refugees residing within its borders.<sup>193</sup>

Despite this, Pakistan has not signed the 1951 Refugee Convention or its 1967 Protocol, and as a result, there is no national legislation explicitly protecting refugees. This has meant that they are instead regulated by the Foreigners Act of 1946,<sup>194</sup> which provides limited recognition and protection for refugees, only going as far as differentiating between refugees and other foreigners.<sup>195</sup> What's more, the Act seems to take a pejorative view of foreigners, labelling them as 'illicit outsiders'.<sup>196</sup> Refugee issues are managed administratively by the Ministry of States and Frontier Regions (SAFRON) and the Chief Commissioner for Afghan Refugees, which coordinate with UNHCR and NGOs to assist and manage refugee populations.<sup>197</sup>

In practical terms, this policy vacuum has led to ad hoc approaches and temporary measures, such as the issuance of Proof of Registration (PoR) cards to Afghan refugees.<sup>198</sup> These cards provide limited legal standing and are periodically renewed, but they do not guarantee long-term rights or protections.

Despite its non-signatory status, Pakistan is bound by international law to observe aspects of international customary law, notably the principle of non-refoulement, which restricts the forced return of individuals to countries where they might face persecution. It is immaterial that Pakistan have not penned their signature upon the 1951 Convention. The fact remains that they are bound. Moreover, Pakistan has ratified broader human rights agreements, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), which provide indirect protection to refugees. And therefore, they are bound, this time by virtue of having signed these documents.

Overall, there is enough evidence that Pakistan have religiously followed the policy of repatriation for their refugee population.<sup>199</sup> Sometimes, there has been question as to whether

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<sup>193</sup> United Nations High Commission for Refugees, *Pakistan*, available at —<  
<https://www.unhcr.org/countries/pakistan>> on 11 December 2023.

<sup>194</sup> *Foreigners Act*, (1946)

<sup>195</sup> Zubair M, Khan M and Shah M, 'Analysis of Pakistan's Policy Towards Afghan Refugees: A Legal Perspective' 4(3) *Global Political Review*, 2019, 29.

<sup>196</sup> Zubair M, Khan M and Shah M, 'Analysis of Pakistan's Policy Towards Afghan Refugees', 30.

<sup>197</sup> Zubair M, Khan M and Shah M, 'Analysis of Pakistan's Policy Towards Afghan Refugees', 30.

<sup>198</sup> Zubair M, Khan M and Shah M, 'Analysis of Pakistan's Policy Towards Afghan Refugees', 30.

<sup>199</sup> Zieck, M, *UNHCR and voluntary repatriation of refugees: A legal analysis*, Martinus Nijhoff Publishers, Leiden, 1997.

this repatriation has been voluntary, given that scores of refugees have been made to depart from Pakistan following pressure to do so.<sup>200</sup>

#### 4.4 The Recent Impugnable Measure: Haraam?

Alas, meandering about the overarching question now must end; the premises settled, there is but one thing left to do: answer the question of whether the impugnable measure is indeed contrary to the Constitutional guarantee to adhere to Islamic Law.

This study is predicated on the decision of the Pakistani government, dated October 3rd, 2023, to force Afghan refugees to leave the country. The entire overarching objective has been to scrutinize this impugned measure through the dual prism of constitutional guarantees regarding Islamic Shariah Law by Pakistan and international law. The Constitution of Pakistan, framed in 1973, enshrines Islamic principles and teachings at its heart. Article 2 proclaims Islam as the state religion, while Article 227 prescribes that all laws should conform to Islamic injunctions. The law or policy enacted by the state should not be in conflict with the injunctions of Islam. Secondly, Part IX of the Constitution deals with “Islamic Provisions,” which further corroborates that laws within Pakistan derive deep underpinning from the righteous life envisaged for its citizens by Islam and as such Shariah represents the basic code governing the legal, social, and political functions within the country. By extension of this, the principles and laws of Shariah, overall, apply to Pakistan, including the tenets of Shariah refugee law.

Key in this regard, is *aman*. In this context, it translates to protection or most commonly referred to as safety. In Islamic law, *Aman* is not simply a discretionary act but a binding obligation, when it has been granted. As expressed by the Qur'an in *Surah At-Tawbah*, 9:6 “And if anyone...seeks your protection, then grant him protection”. This verse establishes a fundamental duty on the part of a Muslim state to protect whosoever seeks refuge, reinforcing thereby the inviolability of *Aman* once it has been accorded.

Abou Wafaa dedicates his treatise and makes it amply clear that *Aman* is not a mere symbol but an agreement in law and religion. The Prophet Muhammad made this clear when he stated that if *Aman* is given by the lowliest of persons, even the highest authority, including the ruler of the state, has an obligation to show respect for it. *Aman* violation is treated as a serious violation in Islamic jurisprudence.

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<sup>200</sup> Hiegamann V, “Repatriation of Afghan Refugees in Pakistan: Voluntary?”, 4(1) *Oxford Monitor of Forced Migration*, 2013, 42-45.

The principle of non-refoulement prohibits the expulsion or forced return of refugees to any territory where they would face a significant risk of persecution, and is considered one of the cornerstones of international refugee law. Islamic law embraces the same principle, rooted in Islamic teachings that put literally immense emphasis on empathy, protection, and sanctity of life. Taken together, the Qur'an and Hadiths do support the proposition that no human being shall be returned in circumstances where he is likely to be tortured, harmed, or persecuted. The principle forms part of Islamic customary law and finds its deeper entrenchment through the Sunnah of the Prophet as an extension of the Qur'anic commands.

Therefore, in the light of such an expulsion on October 3rd, it becomes clear that the action was murky at absolute best. This step seems to aim at refugees who have been living in Pakistan for years, if not decades, many times by fleeing persecution from the Taliban in their country. The current regime in Afghanistan had imposed repressive laws and perpetuated human rights violations, especially against women and minorities. This creates a situation in which returning Afghan refugees to their homeland poses a credible and serious risk to their safety.

In Islamic law, it is required that if a state has granted *Aman*, it does not withdraw the same except when there are clear and convincing evidences that indeed the person or group in question poses a real threat to it. Hence, the removal of refugees should be subjected to very rigorous conditions: proof of such threat, and exhaustion of all the other less severe measures. It is also pointed out that, though the expulsion by Pakistan falls under national security ground, that fact has not been supported by sufficient evidence to meet highly stringent standards set by Islamic jurisprudence.

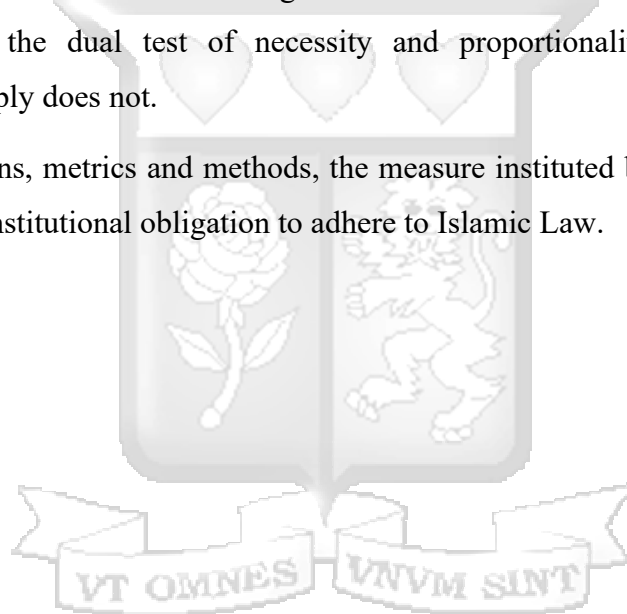
The Constitution of Pakistan has inculcated Islamic law as the foundation of its law. Article 227 not only confirms that laws enacted shall be in consonance with Islamic injunctions but also implies that anything done that is contrary to such dictates is not valid in law. With the requirement for compliance with Shariah in place, the Constitution, in effect, burdens the state with the duty to bring its policies in agreement with the teachings of Islam regarding asylum and protection of refugees.

The study explains that Pakistan is a bound entity through the constitutional incorporation of Shariah norms. Likewise, the Constitution decrees a religiously informed approach to governance, extending to humanitarian obligations. Therefore, in as much as the Afghan refugees, most of whom flee a hostile and dangerous environment, sending them back home seems at variance with the constitutional and religious commitments that Pakistan has made.

The principle of non-refoulement has its exception under international law as well as Islamic law at a point where one has substantial proof that refoulement will pose a serious threat to the security of the host country. This should not be interpreted in wide terms; it needs proof with clear, specific, and substantial evidence. The study then lists two conditions of Hathaway and Harvey's twin test in invoking the security exception, to wit: (1) strict proof of a security threat by the person concerned, and (2) a final conviction establishing that threat.

Arguments citing national security, thus, by Pakistan for the emission of Afghan refugees are not transparent and lack tangible evidence regarding any such threat by the refugees. In earlier mass expulsions, such as the one in 2016, the practice similarly lacked legal backing and was an example of human rights violations, referred to by Human Rights Watch as one of the “largest unlawful mass forced returns of refugees”. This leaves no doubt on whether the present expulsion can meet the dual test of necessity and proportionality under the Islamic jurisprudence – it simply does not.

Therefore, by all means, metrics and methods, the measure instituted by Pakistan is patently illegal under their Constitutional obligation to adhere to Islamic Law.



## 5.0 The Final Steps: A Conclusion

### 5.1 Conclusion & Recommendation

This study has provided an in-depth examination of the legality of Pakistan's recent forced expulsion of Afghan refugees through the dual lenses of Islamic Shariah law and international refugee law. The analysis began by situating the issue within its historical and legal context, tracing the evolving relationship between Pakistan and Afghan refugees. By evaluating the foundational principles of international refugee law, including the cornerstone norm of non-refoulement, alongside the robust protections enshrined in Islamic teachings, the study uncovered both alignments and divergences in these legal frameworks.

Key findings demonstrate that Islamic law, as applied to refugee protection, not only aligns with international norms but often exceeds them in its emphasis on compassion, inclusivity, and justice. The concept of Aman, deeply rooted in Islamic jurisprudence, mandates the safeguarding of all individuals seeking refuge, regardless of their faith or status, and mirrors international obligations such as the principle of non-refoulement. The historical practice of Islamic asylum, as modeled by the Prophet Muhammad, underscores a universal and enduring commitment to human dignity and protection.

However, the study also highlights significant gaps in Pakistan's application of these principles. Despite its constitutional adherence to Islamic law, Pakistan's recent policies appear to contravene both Shariah and international norms, raising profound legal and ethical questions. The expulsion of Afghan refugees, many of whom face persecution upon return, contradicts the spirit and letter of both legal frameworks, calling into question the legitimacy of such measures under Islamic law and international obligations.

In light of these findings, the study posits that Pakistan's actions represent a breach of its constitutional and moral duties, both as an Islamic state and as a member of the international community. By reconciling its national policies with its religious and international commitments, Pakistan can uphold the sanctity of refugee rights while embodying the compassionate ethos that lies at the heart of both Islamic and global refugee protection standards.

Ultimately, this research recommends one particular action: the halting of the expulsion with immediate effect. At the same time, the need for a more harmonized and humane approach to refugee policy – one that bridges the doctrinal insights of Islamic law with the universal

protections of international refugee law – is recommended for Pakistan to ensure a seamless, legal approach towards refugees. In doing so, Pakistan has the opportunity to reaffirm its identity as a protector of the oppressed and a beacon of justice in accordance with its constitutional and religious values.



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