

UNHCR in Pakistan: Analysing the Global Governance Regime – Repatriation of Afghan Refugees from Pakistan

Umar Rashid*

Abstract

The last few decades have witnessed a massive increase in the transfer of regulatory functions to international organisations, covering all areas of life. Without doubt, global governance institutions are essential for promoting global welfare through their ability to resolve coordination and cooperation problems amongst diverse actors. However, the proliferation of such global governance institutions has also raised significant concerns as to the fairness of their decision-making process, compliance with the principles of the rule of law, ‘democratic deficit’ in international organisations, and the protection of individual and collective rights. Within this context the paper looks at the vital role that United Nations High Commissioner for Refugees (UNHCR) plays in Pakistan in dealing with the four-decade long Afghan refugee crisis. UNHCR as a global governance institute is engaged in a specific form of global governance, viz. the direct exercise of public authority over individuals, such as the determination of their status in the host state, operations in the refugee camps and repatriation claims. Keeping in mind the challenges posed by global governance institutes and the more specific role played by UNHCR, notwithstanding the importance and indispensability of its work, it is important to analyse the global governance regime of UNHCR. This paper will analyse one aspect of the global governance regime of UNHCR in Pakistan: the repatriation programme, through the lens of Global Administrative Law (GAL). It will discuss the possible normative grounds for the implementation of administrative law obligations on international

* Assistant Professor University of Management and Technology, Lahore (UMT); Faculty Advisor Centre for Human Rights and Justice (CHRJ) UMT. Advocate High Court, LLB (Hons) University of London, LLM New York University School of Law. organisations to analyse UNHCR’s repatriation regime. It will then discuss whether UNHCR operations meet the requirement of these normative

grounds and, thus, analyse how far the criticism levelled against global governance institutions is true for the repatriation programme in Pakistan.

Keywords: UNHCR, Afghan Refugees in Pakistan, Repatriation of Refugees, Refugee Regime, Global Governance, Global Administrative Law

Introduction

Pakistan is host to one of the largest and most protracted refugee situations in the world. It has a registered Afghan refugee population of 1.3 million, with around 0.6 million unregistered refugees, even after reported repatriation of more than four million Afghans since 2002.¹ The situation is further exacerbated by the fact that Pakistan is neither a party to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees, nor does it have a national legal framework to deal with the refugees.² In the absence of such a framework, refugees are subject to the asylum framework established by UNHCR³ under its own Statute⁴ and the 1993 Cooperation Agreement between the Government of Pakistan and UNHCR. It cannot be denied that UNHCR's activities in Pakistan have been essential in managing one of the worst and most protracted humanitarian crisis in history, and as such should be lauded. In fact, UNHCR facilitates and assists in the largest 'voluntary'⁵ repatriation programme in its history. Therefore, these activities need to be analysed in order to determine how effective and accountable UNHCR is

¹ UNHCR, 'Factsheet Pakistan December 2017', (2017) <<http://unhcrpk.org/wp-content/uploads/2013/12/Factsheet-December-2017.pdf>>; UNHCR, 'Voluntary Repatriation of Afghans from Pakistan, April 2017 Update' (2017) <<http://unhcrpk.org/wp-content/uploads/2013/12/Voluntary-Repatriation-Summary-2017.pdf>> accessed 1 June 2019.

² UN High Commissioner for Refugees (UNHCR), *2015-2017 Protection Strategy Pakistan: External*, 3 (October 2015) <<Http://Unhcrpk.Org/Wp-Content/Uploads/2013/12/2015-2017-Protection-Strategy-External.Docx>> accessed 19 August 2019. [Hereinafter: Protection Strategy Pakistan: External].

³ The Office of the United Nations High Commissioner for Refugees.

⁴ Statute of the Office of the United Nations High Commissioner for Refugees adopted by the General Assembly Resolution 428 (V) of 14 December 1950.

⁵ There are grave concerns as to the voluntary nature of the repatriation programme, these are discussed in greater detail below see text from footnotes 43-48.

in the refugee regime⁶ in Pakistan. Using Global Administrative Law ('GAL'), the paper will analyse the 'voluntary' repatriation programme and UNHCR's role in it.

The first part of the paper will provide an introduction to the UNHCR governance activities in the refugee regime in Pakistan and an introduction to GAL which will inform the analysis of UNHCR's governance regime on repatriation. The second part will provide a brief factual overview of the Afghan refugee situation in Pakistan and UNHCR's governance regime on repatriation of Afghans. The third part will identify the normative grounds for administrative law obligations that should apply to UNHCR's activities within this repatriation programme. The fourth part will provide an overview of the types of administrative law norms and procedures that should apply to UNHCR's operations in the repatriation programme, and explain how the current role of UNHCR falls short of these obligations. This will be followed by the conclusion.

The UNHCR mission in Pakistan is amongst one of its biggest missions with a mandate covering 1.59 million individuals, and two groups of people.⁷ The first group comprises refugees, with an

⁶ The concept of regime is open to different interpretations. For example, it has been defined by Kratochwil and Ruggie as "governing arrangements constructed by states to coordinate their expectations and organize aspects of international behavior in various issue areas. They, thus, comprise a normative element, state practice and organizational roles" see: Friedrich Kratochwil & John Gerard Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 *International Organization* 753, 759. Regime has also been defined as "as explicit rules or implicit norms guiding the actions of states and individuals, together with institutions and organizations expressing these rules or norms" by Barnett, see: Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 *International Journal of Refugee Law* 238, 238. The refugee regime has also been described as "International Refugee Protection Regime", see: Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees: Ministerial Meeting of States Parties, Geneva, Switzerland, 12–13 December 2001, in Erika Feller, Volker Turk, & Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations On International Protection* (2003) 81, 82.

⁷ (n 1); See, UNHCR, Figures at a Glance, <<https://www.unhcr.org/figures-at-a-glance.html>> accessed 20 August 2019. Currently, Turkey hosts the largest refugee population. Before that, for the better part of 1980s, and then for entirety of 1990s to 2000s Pakistan had the largest refugee population.

overwhelming majority of Afghans, who have been coming to Pakistan since 1975. The second group is the Internally Displaced People (IDP), citizens of Pakistan who have been displaced as a result of the ongoing security operations in Federally Administered Tribal Areas (FATA) and Khyber Pakhtunkhwa.⁸ UNHCR's activities play a central role in all aspects of the refugee regime in Pakistan. In addition to its role in the repatriation programme, UNHCR conducts the refugee status determination (RSD) on *behalf* of the government of Pakistan, since there is no national legal framework.⁹ It provides basic health, education and non-food items aid to refugee camps, and legal assistance to refugees throughout Pakistan.¹⁰

These activities take place under the Solution Strategy for Afghan Refugees (SSAR).¹¹ The SSAR was developed by Afghanistan, Pakistan, Iran, and UNHCR to identify and implement comprehensive solutions for Afghan refugees in the region. SSAR includes five outcomes: support for voluntary repatriation, access to shelter and essential social services for refugees and host communities, improved and diversified livelihood opportunities and enhanced food security, social and environmental protection of refugees as well as assistance and support to host

⁸ UNHCR Factsheets on Pakistan <<http://unhcrpk.org/contacts/fact-sheets/>>; UNHCR Global Appeal 2015 Update Pakistan <<http://www.unhcr.org/5461e60916.pdf>> accessed 20 August 2019.

⁹ (n 2); UNHCR, 'Asylum System in Pakistan' <<http://unhcrpk.org/about/asylum-system-in-pakistan/>>. On UNHCR RSD procedures see: UNHCR 'Emergency Handbook, Refugee Status Determinations (RSD)' <<https://emergency.unhcr.org/entry/94899/refugee-status-determination-rsd>> accessed 20 August 2019.

¹⁰ UNHCR Factsheets on Pakistan (n 8); RAH, 'Refugee Affected and Hosting Areas Programme Brochure' (2016) <<http://unhcrpk.org/wp-content/uploads/2013/12/RAHA-Brochure-June-20161.pdf>> accessed 20 August 2019; UNHCR, 'Solutions Strategy For Afghan Refugees To Support Voluntary Repatriation, Sustainable Reintegration And Assistance To Host Countries, Portfolio Of Projects 2015-2016' (Pakistan 2016); UNHCR, 'Solutions Strategy For Afghan Refugees To Support Voluntary Repatriation, Sustainable Reintegration And Assistance To Host Countries, Portfolio Of Projects 2014' (Pakistan 2014); UNHCR, 'Refugee Affected And Hosting Areas Programme (RAHA)' (Pakistan 2013).

¹¹ Ibid; UNHCR, Solutions Strategy for Afghan Refugees Regional Overview Update 2015-2016 (2016); UNHCR, Solutions Strategy for Afghan Refugees Regional Overview 2014, (2014).

communities, and capacity development of national authorities, organisations and communities concerned with refugees and/or host communities.

The brief overview of UNHCR’s role in the Afghan refugee crisis illustrates the significance of international organisations in the resolution of international crisis and promotion of global welfare.¹² International organisations are often praised as representing the triumph of “legislative reason” over confrontation amongst states,¹³ and are considered essential to resolve coordination and cooperation problems amongst diverse actors.¹⁴ However, the growing competencies of international organisations and their ever-increasing role in all areas of life, have raised serious concerns over the global governance regime that these organisations now represent¹⁵ This is especially true where their activities directly affect various individuals and groups throughout the globe.¹⁶ The concerns range from the fragmentary nature of the global governance regime (result of the distinct and, at times, overlapping governance spaces of distinct international organisations); to concerns over credibility of decision making process in these organisations (such as fairness, due process, and democratic deficit), and the loss of state autonomy to international organisations dominated by the powerful nations.¹⁷ Thus, there has been a growing realisation that there is a need to limit and control international organisations through law based not just on their founding treaties and statutes, but on other principles as well.¹⁸ This paper will use GAL to analyse UNHCR’s repatriation regime, since GAL aims

¹² John Klabbbers, ‘The Life and Times of the Law of International Organizations’ (2001) 70 *Nordic J. Int’l L.* 287; Eyal Benvenisti, *The Law of Global Governance* (2014).

¹³ (n 12) 288.

¹⁴ (n 12) 18.

¹⁵ Sabino Cassese, *The Global Polity: Global Dimension of Democracy and the Rule of Law* (Global Press 2014), 15-22.

¹⁶ *Ibid.*

¹⁷ (n 12); Sabino Cassese et al., (eds), *Global Administrative Law: The Casebook*, (IRPA 3rd ed. 2012) [hereinafter GAL Casebook].

¹⁸ (n 17); Sabino Cassese, ‘Global Administrative Law: An Introduction’ (2005) 37(4) *Journal of International Law and Politics* 663; A. Von Bogdandy, et.al. (Eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer Science & Business Media 2010); *GAL Casebook*.

to monitor and control the exercise of power by public or private bodies engaged in global regulation and governance.

GAL provides remedies to the problems and risks arising out of the ever-expanding field of global governance.¹⁹ It places a strong emphasis on procedural rules to monitor and control the exercise of power by public or private bodies engaged in global regulation and governance.²⁰ It is basically about defining the constraints that should be imposed on international organisations, placing checks and balances on their exercise of power, and ensuring the adequate representation of all affected interests. Along with these considerations, it also stresses upon providing an equal ground to all the stakeholders and provides for protection to the global public.²¹ GAL provides administrative law mechanisms to understand and regulate global spaces, through identifying and analysing norms on transparency, participation, reasoned decision making, and review that should apply to global regulatory bodies, and therefore endeavours to hold the exercise of administrative power by such bodies accountable.²² Thus, GAL argues for the implementation of administrative

¹⁹ (n 12) 22; For general introduction to GAL see: Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 LCP 15; Daniel C. Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2005) 115 Yale L.J 1490; Benedict Kingsbury, 'The Concept of 'Law' in Global Administrative Law' (2009) 20 European Journal of International Law 23; Lorenzo Casini, 'Beyond the State: The Emergence of Global Administration', in Sabino Cassese et. al. (eds), *Global Administrative Law: The Casebook* (IRPA 3rd ed. 2012) 17; Sabino Cassese & Elisa D'Alterio, 'Introduction: The Development of Global Administrative Law', in Sabino Cassese (eds), *Research Handbook on Global Administrative Law* (2016) 1; Sabino Cassese, 'Global Administrative Law: The State of the Art' (2015) 13 I•CON 465.

²⁰ Ibid.

²¹ (n 12) 21-23.

²² René Fernando, & Urueña Hernandez, 'Global Administrative Law and the Global South' in Sabino Cassese (eds), *Research Handbook on Global Administrative Law* (2016) 392, 408. Substantive standards include rules explaining proportionality, means-ends rationality, avoidance of unnecessarily restrictive means and legitimate expectations: (n 19) 15, 27-28, 36-42. Generally the purpose of administrative law is to both explain and create a legal regime to effectively control power, see: Jerry L. Mashaw, 'Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development' (1990) 6 *Journal of Law, Economics, & Organization*, 267, 284. Administrative law represents the balance of power of different actors within an institution: Eyal Benvenisti, 'Public Choice and Global Administrative Law: Who's

laws that should bind international organisations. However, the field of global administrative law has to contend with the fact that most global regulatory bodies refuse to accept that they are bound by administrative law obligations and procedural norms, and rules beyond those in their founding documents or those they have voluntarily accepted.²³ GAL identifies possible normative grounds that may result in binding global regulatory bodies by such obligations beyond the scope of their mandates provided under the founding documents and other voluntary actions entailed therein. The possible grounds include the rule of law, human rights, and promotion of democracy.²⁴

Factual Overview

The Afghan refugees began to flee towards Pakistan in great numbers in 1979, and until about 1995, both the international community and Pakistan continued to provide substantial aid to these refugees. However, in 1995 humanitarian assistance to Afghan refugees decreased, and passbooks which had previously entitled them to food rations ceased to provide any assistance, forcing them to leave refugee camps to look for work elsewhere in Pakistan.²⁵ This situation did not catch the government's remedial action and was informally endorsed by the government, as evidenced by the letter of Secretary of Kashmir Affairs and Northern Areas and States and Frontier Regions Division, to the Secretary of the Ministry of the Interior, in which the former clearly recognised the necessity of Afghans working in Pakistan.²⁶ It was further evidenced by

Afraid of Executive Discretion, Institute for International Law and Justice' (NYU School of Law, Institute of International Law and Justice, 2004) <<http://www.iilj.org/wp-content/uploads/2016/11/Benvenisti-Public-Choice-and-Global-Administrative-Law-2004.pdf>> accessed 22 August 2019.

²³ (n 12) 87.

²⁴ (n 19) 30; (n 12) ch 3.

²⁵ D. Turton, & P. Marsden, 'Taking Refugees for a Ride?: The Politics of Refugee Return to Afghanistan' (2002) (Afghanistan Research and Evaluation Unit (AREU) 2002) 15-16; Waseem Ahmad, 'The Fate Of Durable Solutions In Protracted Refugee Situations: The Odyssey of Afghan Refugees in Pakistan' (2017) 15 *Seattle Journal for Social Justice* 591, 614-615.

²⁶ (n 25); Letter dated 25 July 1997 from the Secretary of Kashmir Affairs and Northern Areas and States and Frontier Regions Division, to the Secretary of the Ministry of the Interior cited in Turton, & Marsden.

the fact that the government did nothing to prevent Afghans from engaging in economic activity.²⁷ In fact, this was in line with the historical practice which had continued despite the Afghan war, where Afghans had continued to move freely in Pakistan (and India before partition) in search of work for countless generations.²⁸

This development, forcing Afghan refugees to look for work outside refugee camps, has had significant effect on the repatriation programme. The decrease in humanitarian assistance was accompanied with the decision of the Pakistani government to no longer consider Afghans entering the country after 1995 as ‘legal refugees’.²⁹ In November 2000, Pakistan officially closed its borders to Afghan Refugees, but it had no effect in practice in stopping the people from crossing the border; majority of whom were fleeing from the effects of draught, and Taliban’s assault on Tāloqān.³⁰ Instead of considering these people as refugees escaping war and effects of natural disaster, the government of Pakistan designated them as economic migrants: adversely affecting the rights they were entitled to as refugees.³¹ These rights include upholding the principle of non-refoulement,³² right to safe asylum, protection from treatment as illegal aliens, freedom of thought and movement, freedom from torture and degrading treatment, and access to

²⁷ Ibid: the cited letter illustrated the government policy to allow Afghan refugees to move freely and work in Pakistan.

²⁸ E. Stigter, ‘Livelihoods Upon Return: Afghan Migratory Strategies – An Assessment of Repatriation and Sustainable Return in Response to the Convention Plus’ (2006) 25(2) *Refugee Survey Quarterly* 117. From the authors own personal experience: I have heard stories from elders of my village located near Lahore about Afghan labourers who would come every winter to the village looking for work and return to Afghanistan in spring.

²⁹ S. Noor, ‘Afghan Refugees After 9/11’ (2006) 59(1) *Pakistan Horizon* 59, 64.

³⁰ Ibid 65; (n 25) 16; (n 25) 616.

³¹ Ibid.

³² The principle of non-refoulement forbids a country to return refugees/asylum-seeker to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”: Aoife Duffy, ‘Expulsion to Face Torture? Non-refoulement in International Law’ (2008) 20(3) *International Journal of Refugee Law* 373, 373. Also see: Seline Trevisanut, ‘International Law and Practice: The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea’ (2014) 27(3) *Leiden Journal of International Law* 661.

medical care, schooling and the right to work.³³ Thus, this situation exposed these Afghans to the rigours of the Foreigners Act 1946 and Foreigners Order 1951, under which all foreigners not in possession of a valid visa are considered illegal immigrants.³⁴ This opened Afghan refugees to increasing persecution from police in the form of arrests, detention, and harassment,³⁵ It also made it difficult for refugees to engage in work.³⁶ This continued till August 2001 when Pakistan and UNHCR agreed to screen Afghans to determine who was a refugee and who was an economic migrant.³⁷ This process however stopped within a couple of months as a result of the US bombing campaign in response to 9/11 terrorist attacks. Not only did the data collection efforts fail, but the start of US campaign in Afghanistan also gave rise to a large influx of new refugees into Pakistan.³⁸

This further exacerbated the problems that the refugees faced and it continued till 2004 when Pakistan finally signed a Memorandum of Understanding (MoU) with UNHCR to conduct a census of Afghans living in Pakistan.³⁹ Another MoU was signed in 2006 dealing with the

³³ UNHCR, Protecting Refugees: Questions and Answers <<https://www.unhcr.org/publications/brochures/3b779dfe2/protecting-refugees-questions-answers.html>> accessed 22 August 2019. Not all of the economic rights listed may be available to refugees, depending on the host state's economic capacity, but at the very least they should be protected from treatment as illegal aliens.

³⁴ Foreigners Act 1946, s. 3, 11, 13, 13A, 13B, 14, 14C, 14D and Foreigners Order 1951, s. 3, 14, 15, 16.

³⁵ Afghan refugees are very vulnerable to arrests/detentions. Every month a number of Afghans are arrested/detained, and then released, so for example for each month from January to April 2019 the following numbers of Afghans were arrested/detained and later on released: 64, 47, 150, and 147 respectively. See: UNHCR, UNHCR Factsheet Pakistan, January 2019; UNHCR, UNHCR Factsheet Pakistan, February 2019; UNHCR, UNHCR Factsheet Pakistan, March 2019; UNHCR, UNHCR Factsheet Pakistan, April 2019 <<https://unhcrpk.org/key-information/>> accessed 22 August 2019.

³⁶ (n 25); Human Rights Watch, 'Pakistan Coercion, UN Complicity: The Mass Forced Return of Afghan Refugees' (2017) <<https://www.hrw.org/report/2017/02/13/pakistan-coercion-un-complicity/mass-forced-return-afghan-refugees>> accessed 22 August 2019.

³⁷ (n 29) 64; (n 25) 16-17.

³⁸ Ibid.

³⁹ Memorandum of Understanding between the Government of the Islamic Republic of Pakistan (GOP) and the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Census and Registration of Afghan Citizens Living in Pakistan, 2004, <<http://www.unhcr.org/449aa9312.pdf>> accessed 22 August 2019.

registration of Afghans identified through the census conducted under the 2004 MoU.⁴⁰ This process culminated in the issuance of a basic documentation of Afghan refugees' identity in the form of Proof of Registration (PoR) cards.⁴¹ Today, more than 1.3 million Afghans living in Pakistan are PoR cardholders.⁴² Clause 3 sub-clause 4 of the 2006 MoU states that the PoR card will not entitle the Afghans to work in Pakistan. This should be contrasted with the stance of the government in 1997 which recognised the necessity of Afghans working in Pakistan.⁴³ Interestingly, the Ministry of States and Frontier Regions (SAFRON) Pakistan allows PoR cardholders to use their cards to open bank accounts,

⁴⁰ Memorandum of Understanding between the Government of the Islamic Republic of Pakistan (GOP) and the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Registration of Afghan Citizens Living in Pakistan, 2004, <<http://www.unhcr.org/subsites/afghancrisis/449aaa1a2/memorandum-understanding-government-islamic-republic-pakistan-gop-office.html>> accessed 22 August 2019.

⁴¹ PoR cards are a type of an identity card for Afghan refugees that grants them temporary legal stay in Pakistan, protection against refoulement, and protection from harassment from government agencies, though in practice harassment by police has become common since 2014 Peshawar school massacre: Christine Roehrs, 'The Refugee Dilemma: Afghans in Pakistan Between Expulsion and Failing Aid Schemes, Afghanistan Analysts Network' (March 9 2015) <<https://www.afghanistan-analysts.org/the-refugee-dilemma-afghans-in-pakistan-between-expulsion-and-failing-aid-schemes/>>; UNHCR Pakistan Website, Asylum System in Pakistan <<http://unhcrpk.org/about/asylum-system-in-pakistan/>>; Ministry of SAFRON, Brief on Afghan Refugees, <<http://www.safron.gov.pk/policiesDetails.aspx>>; Ministry of SAFRON, Official Policy of Government of Pakistan concerning Afghans, <<http://www.safron.gov.pk/frmDetails.aspx>>; Commissionerate Afghan Refugees website: <<http://kpkcar.org/carnewsite/CAR/index.php/blogs-k2/item/31-commissioner-afghan-refugees-kp-visit-to-turkman-refugee-camp>> accessed 22 August 2019.

⁴² UNHCR, Factsheet Pakistan October 2017.

⁴³ (n 25) 615; As stated in the letter sent by Secretary of 'Kashmir Affairs and Northern Areas and States and Frontier Regions Division', to the Secretary of the Ministry of the Interior' in 1997: "All along their stay, the Afghan Refugees have never been confined to the camps. The above is also necessitated by the fact that almost all the food and other assistance previously provided by the international agencies, has been discontinued w.e.f. October 1995. The Afghan Refugees have, therefore, to earn their livelihood outside the camps in Pakistan to support themselves as well as their families. The movement/presence of Afghan refugees outside the refugee camps is, therefore, legitimate."

receive driving licenses, and obtain SIM cards.⁴⁴ Such an ambiguity in the government's actions towards Afghan refugees also holds far-reaching implications for the repatriation policy. The 1997 Letter showed the government policy to allow Afghan refugees to move freely and work in Pakistan. This also showed acceptance of historical practice where Afghans moved freely in Pakistan (and India before partition) in search of work, a practice that continued when millions of Afghans fled to Pakistan starting in 1979. Therefore, the government of Pakistan showed no coherent policy to deal with the Afghan refugee situation, at times accepting the inevitable nature of allowing the refugees to move freely and work, at other times there were attempts to enforce the rigours of Foreigners Act, most significantly during the year 2000. The economic activity that Afghans have been engaged in since they came to Pakistan has created a situation where those who wish to go back to Afghanistan would have to give up their livelihoods without any security of income in Afghanistan. In fact, almost 70 percent of the PoR cardholders are currently living outside the camps, mostly as urban refugees, all of whom are somehow supporting themselves without any economic aid from Pakistan.⁴⁵ The UNHCR repatriation programme, thus, targets economically active refugees.

The first programme spanned from 1992 to 1999. The second programme which is one of the largest in UNHCR's history started in 2000 and continues till date. To get an idea as to the scope of the programme, one can look at the 2016 numbers when 600,000 Afghans went back to Afghanistan from Pakistan, including about 365,000 registered refugees and about 230,000 undocumented Afghans.⁴⁶ The repatriation programme in the 1990s was more akin to de-registration of the passbooks that the refugees had gotten, which entitled them to food aid, under which refugees could give back their books in return for a cash grant of USD100 and 300kg of wheat.⁴⁷ The aim was to delete Afghan

⁴⁴ The Ministry of States and Frontier Regions (SAFRON), 100 Days Achievement Report of Ministry of States and Frontier Regions (SAFRON) <<http://safron.gov.pk/frmDetails.aspx?id=6&opt=newsevents>> accessed 22 August 2019.

⁴⁵ (n 25) 636.

⁴⁶ (n 36).

⁴⁷ (n 25) 12 and 625.

families from aid books rather than to actually assist them to return.⁴⁸ This manifested in the fact that only one-third of those who en-cashed their passbooks returned to Afghanistan, and from amongst those who went back to Afghanistan many later returned to Pakistan.⁴⁹ When the second repatriation programme was launched in 2000, UNHCR faced a similar challenge of recyclers to its repatriation programme. These were Afghan refugees who had voluntarily repatriated after getting a cash grant but would re-enter Pakistan and claim the grant again. The way the current repatriation programme works in practice is as follows:⁵⁰ UNHCR Pakistan operates two Voluntary Repatriation Centres (VRC) in Quetta and Peshawar; families who want to repatriate are de-registered at the VRC, and their PoR card is cut in the corner; returnees receive a cash grant of approximately USD 200 per family member once they have reached one of the three UNHCR Encashment Centres in Afghanistan, and to stop the recyclers from getting multiple cash grants, a biometric system was introduced in the repatriation programme. Though this new programme with the biometric system has put a stop to people from getting cash grants again, it has not prevented repatriated Afghans to try to re-enter Pakistan.⁵¹ This willingness of repatriated Afghans to re-enter Pakistan also shows their attitude to the current repatriation system and also raises questions as to the voluntariness of repatriation.

These questions over the voluntary nature of the repatriation have become even more significant due to the fluctuating rates of repatriations reported in the last couple of years. For example, around 365,000 registered refugees were repatriated in 2016, 59,000 in 2017, and only 14,000 in 2018.⁵² The high rates were due to various ‘push factors’ which mostly arose after 2015, before that, the government of Pakistan had

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ UNHCR, Pakistan: Voluntary Repatriation of Afghans from Pakistan, April – October Update, (2017) <<http://unhcrpk.org/wp-content/uploads/2013/12/Voluntary-Repatriation-Summary-20171.pdf>> accessed 22 August 2019.

⁵¹ So for example in 2016 40000-60000 people would daily cross the Pak-Afghan border, majority into Pakistan see: Amina Khan, ‘Afghan Refugees in Pakistan’ (Institute of Strategic Studies, Islamabad, Issue Brief 2017) 3.

⁵² (n 36) 15; UNHCR, Pakistan: Voluntary Repatriation of Afghans from Pakistan Update, as 30th of April, 2019, <<https://data2.unhcr.org/en/documents/download/69624>> accessed 22 August 2019.

mostly closed its eyes to undocumented Afghans in Pakistan.⁵³ These push factors include:⁵⁴ first, a strict border management policy by the Government of Pakistan; second, short-term extensions of the validity of PoR cards resulting in heightened anxiety and lack of predictability; third, intensification of security operations in Pakistan targeting undocumented Afghan refugees under the National Action Plan (NAP) against terrorism; fourth, a deteriorating protection environment for Afghans in Pakistan; fifth, doubling of the voluntary repatriation and reintegration cash grant (which is no longer the case); and sixth, strong appeal for refugees return and proactive repatriation campaign by President Ghani's regime. All these factors pushed the number of Afghans repatriating to an all-time high but were not sustainable in the long run.⁵⁵ In fact, according to UNHCR's own surveys, most of the refugees who repatriate list abuse by police or state authorities as the most significant factors in their decision to return.⁵⁶

As detailed above, these push factors primarily arose due to the actions of the government of Pakistan. They have a direct bearing on the 'voluntary' nature of repatriation. And these actions should be contrasted with the government's policy that allows for certain types of Afghans to stay in Pakistan. Under this policy, Afghan students would be allowed to finish their education. Similarly, females who have lost their breadwinners would be allowed to stay in Pakistan, and Afghans who have or will invest 5 million rupees in Pakistan would also be allowed to stay in Pakistan.⁵⁷ Additionally, the policy – considering the effect of Afghan refugees on the labour market in Pakistan – allows for the issuance of visas to 150,000 skilled and unskilled Afghans living in Pakistan.⁵⁸

⁵³ (n 36) 31.

⁵⁴ (n 25) 640.

⁵⁵ Ibid.

⁵⁶ UNHCR, Afghanistan: Assisted Voluntary Repatriation, Return by Province of Destination Monthly Reports <<http://www.refworld.org/topic,50ffbce510,50ffbce537,,0,,,AFG.html>> accessed 22 August 2019.

⁵⁷ (n 25) 643.

⁵⁸ Ibid.

What can be observed from the preceding discussion is that the government of Pakistan's attitude towards Afghans has been plagued by ambiguity, further exacerbated by the fact that the policies undertaken by the government created a situation where, though Afghans were not legally assimilated into the local population, but for all practical purposes large numbers of Afghans did become part of the host state. This happened because of the neglect in providing them with aid during the 1990s and 2000s, and turning a blind eye towards the urbanisation of Afghan refugees through their movement out of camps in order to work and earn money, which resulted in a situation where Afghans play an undeniable role in the labour market of Pakistan. This is given credence by the fact that Pakistan is willing to grant work visas to such a huge number of Afghans. Against this context, the repatriation – especially for economically active Afghans – would be very difficult. Not only would they have to give up their work in Pakistan, but they would be doing it without any assurances of getting work once they return to Afghanistan. The situation created by the government of Pakistan's policies in recent years shows a desire to keep only those Afghans that are considered beneficial by the government while pushing others to leave, which is in direct contravention of Pakistan's humanitarian and international obligations and constitutional obligations as discussed in the following part of the paper. This gives rise to the criticism that repatriation of Afghan refugees from Pakistan is not voluntary and, thus, is contrary to the principle of non-refoulement. Especially since there is a severe lack of basic facilities such as shelter, food, health, education and jobs in Afghanistan for those returning, many returnees end up becoming IDPs in Afghanistan.⁵⁹

Normative Grounds

The repatriation of refugees from Pakistan occurs under a 'voluntary repatriation' programme, i.e., it is Afghan refugees who decide whether to go back to Afghanistan or not. Thus, it can be argued that since the decisions are being taken by individual refugees whether to go back, UNHCR has no responsibility over such actions and is, therefore, not engaged in any type of regulatory or governance activity. However, it is

⁵⁹ (n 36); (n 51) 5.

argued that there are at least five reasons why UNHCR plays a regulatory role in the repatriation programme. First, the current repatriation programme was devised under SSAR through a high-level consultation, in which UNHCR was involved in decision making alongside Pakistan, Iran and Afghanistan. Second, UNHCR is responsible for supervision of international refugee law and holding states accountable for their obligations, including compliance with the principle of non-refoulement.⁶⁰ Third, UNHCR itself is under an obligation to comply with the principle of non-refoulement.⁶¹ Fourth, UNHCR's attachment to the repatriation programme provides legitimacy to the entire programme. Lastly, it plays administrative roles in the logistical operation of programmes, such as funding, running of Voluntary Repatriation Centres, and provision of cash grants to refugees. These reasons show that UNHCR plays an important role in the repatriation programme – its activities are of regulatory nature, i.e., it participates in decision making and in actual implementation, and review of the programme. This leads to the question as to what type of administrative law rules should apply to UNHCR's regulatory actions. To answer this, one needs to identify and analyse the normative grounds that may provide a basis for the implementation of rules of administrative law to global governance bodies. The possible normative grounds identified by GAL are the rule of law, human rights, and promotion of democracy.

Rule of Law

The rule of law requires the regulatory power to be exercised within the ambit granted to the regulatory body; any action taken by the regulator that affects the rights of the individual should take place only if the affected people are provided with right to be heard and other due process

⁶⁰ Chris Woodruff, 'Refugee Law: Improving Oversight and Accountability' (2014) 29 *The Georgetown Immigration Law Journal* 147; James C. Simeon, 'Introduction Searching for ways to enhance the UNHCR's capacity to supervise international refugee law' in James C Simeon (eds), *The UNHCR And The Supervision Of International Refugee Law* (2013) 1, 21-36; James C. Simeon, *Monitoring and Supervising International Refugee Law: Building the Capacity to Enhance International Protection and Democratic Global Governance of the International Refugee Protection Regime*, in James C Simeon (eds), *The UNHCR And The Supervision Of International Refugee Law* (2013) 313.

⁶¹ UNHCR Statute, art. 1.

rights, along with the mechanism of review of its actions.⁶² This translates into the international arena with the requirement that global governance rules and decision making processes should be publicised and remain transparent; should involve reason giving and some form of participation by affected groups. The aim is to limit arbitrariness of decision making by using a predetermined criterion and prevent unfettered exercise of power.⁶³ Concerning UNHCR's activities within the repatriation programme, the rule of law would require that UNHCR's activities be within the ambit of powers granted to it by its constituting documents.⁶⁴ This would require that its activities should not fall foul of principles of refugee law provided in those documents, and its own publicised rules. It would also require that refugees' concerns regarding the repatriation programme should also be taken into account at both the development and implementation stage.

Constituting and Internal Documents of the Organisation

Rule of Law requires that regulatory bodies act in line with already existing and publicised rules. These rules can be found in UNHCR's constituting documents, which provide another normative ground for administrative law constraints on UNHCR. In this regard, Article 1 of UNHCR Statute provides for two options for durable solutions for refugees: first, voluntary repatriation, 'voluntary' being the operating word; second, assimilation into new national communities, either integration in the country of first asylum or resettlement in a third country.

⁶² (n 12) 90.

⁶³ Marco Macchia, 'The Rule of Law and Transparency in the Global Space' in Sabino Cassese (eds), *Research Handbook on Global Administrative Law* (2016) 261, 263-264; René Fernando & Urueña Hernandez, 'Global Administrative Law and the Global South' in Sabino Cassese (eds), *Research Handbook on Global Administrative Law* (2016) 392, 412; (n 12) 89-99.

⁶⁴ Convention Relating to the Status of Refugees, 1951 (The Refugee Convention) and the Protocol Relating to the Status of Refugees, 1967.

UNHCR's Handbook for Repatriation clarifies the meaning of voluntary repatriation.⁶⁵ The Handbook requires that for repatriation to be considered voluntary it needs to be judged according to the conditions in the home country of the refugee; and whether the decision can be termed as an 'informed decision'. The handbook requires that it is a core responsibility of UNHCR to initiate information campaigns that provide refugees full knowledge of the facts and objective information of their country of origin so that a refugee's decision to repatriate can be considered voluntary.⁶⁶ Similarly, voluntary repatriation also requires that the host country does not deprive refugees of the freedom of choice through outright coercion or measures such as reducing essential services or encouraging anti-refugee sentiment on part of the local population.⁶⁷ Additionally, the Handbook also stresses that the voluntariness of repatriation depends on the presence of positive pull-factors in the country of origin, such as security or assistance, which are an overriding element in the refugee's decision to return rather than push-factors in the host country.⁶⁸ This would require that UNHCR's own actions regarding repatriation be compatible with the principle of non-refoulement. UNHCR would also be required to supervise the host state, Pakistan, to determine the compatibility of her actions with the principle of non-refoulement.

Human Rights

Human rights law also provides normative justification for implementation of administrative law constraints on UNHCR's activities. UNHCR is an international legal person and is subject to principles of general International law⁶⁹, including international human rights law.⁷⁰ This idea

⁶⁵ UN High Commissioner for Refugees (UNHCR), 1996, Handbook – Voluntary Repatriation: International Protection <<http://www.refworld.org/docid/3ae6b3510.html>> accessed 22 August 2019.

⁶⁶ Ibid, 4.2.

⁶⁷ Ibid, 4.1.

⁶⁸ Ibid, 2.3.

⁶⁹ *Repatriation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) 1949 ICJ Reports 174, 179.

⁷⁰ P. Sands, & P. Klein, *Bowett's Law of International Institutions*, (2009) 463; Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2006) 37 *NYUJ Int'l. L. & Pol.*, 869, 871-876; Niamh Kinchin, 'UNHCR as a Subsidiary Organ of the UN: Plurality, Complexity and Accountability' 8-9 (IRPA Paper GAL Series No. 4/2013,

was reiterated by International Criminal Tribunal for Rwanda (ICTR). It held that “the United Nations, as an international subject, is bound to respect the rules of customary international law, including those rules which relate to the protection of fundamental human rights”.⁷¹ The question that what particular human rights obligations would bind a particular regulatory body does not have a clear answer since different organisations because of their mandate will have different obligations.⁷² This also affects the answer to the question what relevant procedural rules should bind the regulatory body as a result of its human rights obligations. The possible procedural rights that have been identified include right to information, right to individual development and self-determination, right to administrative justice, right to life, and right to home and family life.⁷³ In the case of UNHCR’s operations in Pakistan such rights can also be identified through legal principles that bind Pakistan’s actions as discussed below.

Legal Principles Obligating the Pakistani State

In addition, since UNHCR’s action occur within Pakistan and its actions are taken on behalf of the government of Pakistan (a form of delegation of authority),⁷⁴ it is argued that the legal principles that bind the government of Pakistan in its treatment of people on its territory should also inform UNHCR’s operations. Benvenisti argues that every sovereign state or any other body it creates or permits to act as an agent, including global governance bodies, are accountable to all those affected by its policies, and entails that such bodies should at the very minimum take into account

2013). For more on why HR obligations should bind international organisation, especially when they are exercising sovereign powers, Frederic Mégret, & Florian Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) *25 Hum.Rts.Q.* 314, 316-318.

⁷¹ *Prosecutor v Rawanakuba*, (Decision on Appropriate Remedy) Case No. ICTR-98-44C-T (2007) para. 48.

⁷² Niamh Kinchin, ‘The Implied Human Rights Obligation of UNHCR’ (2016) *28 International Journal of Refugee Law*, 251, 253.

⁷³ (n 12) 99-117.

⁷⁴ Words used by UNHCR: “In the absence of a national refugee legal framework, UNHCR conducts refugee status determination under its mandate... and on behalf of the Government of Pakistan...” UNHCR, Asylum System in Pakistan <<http://unhcrpk.org/about/asylum-system-in-pakistan/>> accessed 22 August 2019.

the interests of such affected groups.⁷⁵ Generally, UNHCR acts as an agent of sovereign states who created it; however, its actions in Pakistan show that it also acts on behalf of Pakistan, in addition to being an agent of Pakistan and Afghanistan. This argument is further strengthened by the fact that in their tripartite agreements, all parties agree to the supervisory role of UNHCR,⁷⁶ and assure that the repatriation should be in safety and dignity and should be voluntary.⁷⁷ Additionally, it has been stated by a number of writers that national law may be applicable to international organisations operating within a country, though they generally enjoy immunity in national courts.⁷⁸ It is argued that such immunity, though it protects an organisation from proceedings before a national court, does not prevent the relevant rules to inform their activities. In case of UNHCR, further authority for my proposition can be extracted from the agreements between UNHCR and Office of Internal Oversight Services (OIOS), during the review of allegations of sexual exploitation of female refugees by aid workers in three West African countries (Guinea, Liberia, and Sierra Leone). In this case, both the UNHCR and OIOS accepted that the legal framework to deal with cases of sexual exploitation should be informed by the penal laws of the three countries.⁷⁹ Similarly, the rules of administrative law that should apply to the operations of the UNHCR in Pakistan, should be informed by those legal principles that impose obligations on Pakistan to provide protection to not only citizens, but to any person present within its territory. These legal principles arise from

⁷⁵ For Benvenisti arguments on the trusteeship obligations of global governance bodies see: Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: on the Accountability of States to Foreign Stakeholders' (2013) 107 *AM. J. INT'L L.* 295; Benvenisti (n 12) 117-144.

⁷⁶ Agreement Between the Government of the Islamic Republic of Pakistan, The Government of the Islamic Republic of Afghanistan, and the United Nations High Commissioner for Refugees Governing the Repatriation of Afghan Citizens Living in Pakistan 2007, art. 11.

⁷⁷ *Ibid*, art. 6 and 8.

⁷⁸ (n 12) 87; August Reinisch, 'Accountability Of International Organizations According To National Law' (2005) 36 *Netherlands Yearbook of International Law* 119, 124-127. The Convention on Privileges and Immunities of the United Nations 1946 and The Convention on Privileges and Immunities of the Specialised Agencies 1947.

⁷⁹ The Secretary-General, 'Report of the Office of Internal Oversight Services on the Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa' (2002) 3 <<http://www.un.org/news/dh/infocus/a-57-465.pdf>> accessed 22 August 2019.

both the Constitution of Pakistan⁸⁰ and from Pakistan's obligations under the international law.

In this regard, Article 4 of the Constitution of Pakistan is central to the refugee protection which provides for rule of law and states:

(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, *and of every other person for the time being within Pakistan.*⁸¹

(2) In particular:

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

(c) no person shall be compelled to do that which the law does not require him to do.

This Article provides protection to every individual present in Pakistan, and not just citizens,⁸² and, thus, applies to Afghan refugees. Article 4 has been interpreted to provide procedural due process; right to be treated fairly at all times; right to procedural fairness and right to procedural propriety; protection against any act detrimental to life, liberty and property of 'any person'; it imposes duty on every public functionary to act in all matters justly, fairly and without arbitrariness and has been termed an inalienable right which also embodies the principles of good

⁸⁰ Constitution of the Islamic Republic of Pakistan 1973.

⁸¹ Emphasis is mine.

⁸² PLD 1998 Kar 180.

governance including check on discretionary, arbitrary and unreasonable use of power.⁸³

In addition to such constitutional protection, the courts in Pakistan have interpreted Pakistani laws in line with its obligations under International law.⁸⁴ This is especially true in cases concerning international human rights obligations. Thus, for example, the courts have imposed obligations on the government which are derived from international human rights treaties, even where those treaties have not been ratified by Pakistan.⁸⁵ Though these cases dealt with providing protection to citizens of Pakistan, it can be argued that if a particular provision applies to all, not just citizens, (such as Article 4 of the Constitution) such treaties would be relevant when the government is exercising its authority vis-à-vis non-citizens. As argued above, such human rights and due process obligations would also be relevant to the actions of UNHCR.

Though Pakistan is not a signatory to the Refugee Convention, other human rights treaties that Pakistan is a signatory to bind Pakistan's actions. As discussed above, Pakistani courts have used international law to regulate the actions of Pakistani government. Thus, these treaties should inform administrative law rules that should apply to UNHCR activities in Pakistan. The relevant human rights obligations concerning refugees in these treaties are:

- Articles 6, 9, 14, and 15 of Universal Declaration of Human Rights (UNDHR) provide for the right to life, liberty, security of person, right to be recognised everywhere as a person before law, freedom from arbitrary arrest, detention or exile, the right to seek asylum, and the right to a nationality.

⁸³ PLD 2014 SC 323; PLD 1998 Kar 180; PLD 2010 Lah 332; 2011 PLC (C.S.) 419; 2011 SCMR 1; PLD 2013 Bal. 75.

⁸⁴ An inexhaustive list of such cases is: PLC 2017 Sindh 157; PLD 2016 Lah 857; PLD 2014 SC 305; PLD 2007 SC 642; 2013 PLC (C.S.) 121; 2006 PLC (C.S.) 596.

⁸⁵ Ibid.

- Pakistan is also bound by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, which it has ratified. The Convention imposes obligations on Pakistan not to return anyone to states where they would be in danger of facing torture and other cruel, inhuman or degrading treatment or punishment.⁸⁶ Returning refugees to home state where they would be in danger due to violence or instable government and where they will have no access to economic activity would be returning a person to a place where they would face such inhuman or degrading treatment.
- Reports by different Committees established under various Human Rights treaties have pointed out Pakistan's failure to fulfil their obligations under those treaties, as a result of government of Pakistan's actions regarding refugees.⁸⁷

Similarly, Pakistan is bound by prohibition under customary international law on refoulement which imposes an obligation on Pakistan not to force

⁸⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, art. 3.

⁸⁷ The list of reports is: Human Rights Committee, 'Concluding observations on the initial report of Pakistan', August 2017, CCPR/C/PAK/CO/1, para 45; Committee on Economic, Social and Cultural Rights, 'Concluding observations on the initial report of Pakistan', July 2017, E/C.12/PAK/CO/1, para 25; Committee on the Elimination of Discrimination against Women, 'Concluding observations on the fourth periodic report of Pakistan', adopted by the Committee at its fifty-fourth session (11 February–1 March 2013), CEDAW/C/PAK/CO/4, para 35; Committee on the Rights of the Child, 'Concluding observations on the fifth periodic report of Pakistan', July 2016, CRC/C/PAK/CO/5, para 12, 28 and 65; Committee on the Rights of the Child, 'Fifty-second session, Consideration of reports submitted by States parties under article 44 of the CRC, Concluding observations: Pakistan', October 2009, CRC/C/PAK/CO/3-4, at para 18, 41, 76 and 78; Committee on the Rights of the Child, 'Thirty-fourth session. Consideration of reports submitted by states parties under article 44 of the CRC, Concluding observations: Pakistan', October 2003, CRC/C/15/Add.21727, para 6 and 65; Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined twenty-first to twenty-third periodic reports of Pakistan' October 2016, CERD/C/PAK/CO/21-23, at para 15, 23 and 37.

anyone to return to a place where they would face a real risk of persecution, torture or other ill-treatment, or a threat to life.⁸⁸

Thus, both the Constitutional Law and international laws binding on the government of Pakistan are relevant in assessing what type of administrative law rules should apply to UNHCR's activities. These rules would entail that the repatriation programme should not operate in a way that allows for a situation that exposes refugees to inhuman or degrading treatment and actions/circumstances detrimental to life, liberty and property.

Promotion of Democracy

Another normative ground is based on the need to increase democratic legitimacy of global regulatory bodies. This is achieved through increasing the participation of affected populations in the decision-making processes. Most proposals to increase participation rely on increasing transparency and access of documents,⁸⁹ and development of a mechanism that would allow for actual participation and representation of those affected by actions of global regulators.⁹⁰ This would require that decision making that takes place on the development of solutions for refugees involve some form of participation by refugees themselves.

The principles discussed in the preceding paragraphs provide strong normative grounds for imposition of administrative law rules on the

⁸⁸ (n 32).

⁸⁹ Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 *AJIL* 211, 215-216; 'The Concept of 'Law' in Global Administrative Law' (2009) 20 *EJIL* 23, 33, 39-41 48-50.

⁹⁰ For two such proposals see: Peter Bogason & Juliet A. Musso, 'The Democratic Prospect of Network Governance' (2006) 36 *American Review of Public Administration* 3, which tries to achieve this through supporting the development of affected populations "relational capacities" to become involved in networks when the need arise, rather than on to 'involve the disorganized many'. Another approach, the "democratic-striving approach" looks towards comprehensive participation and representation of those affected by actions of global regulators. Under this approach there is an ongoing and continuously revised endeavour to facilitate fullest possible participation of those affected in the decision making process: Grainne de Burca, *Developing Democracy Beyond the State* (2008) 46 *Colum. J. Transnat'l L.* 221, 237, 251-252, 253.

UNHCR. These principles are used in the next part to identify the type of GAL norms that will be relevant to judge the shortcomings of the UNHCR operations and the type of norms that should apply to its repatriation regime. However, this part will not provide detailed and comprehensive rules of administrative law that would allow for the formulation of a template for the governance structure for UNHCR; the exact rules that should apply to overcome the identified shortcomings and meet the obligations arising as a result of the normative grounds in a practical way is left for future research.

UNCHR's Operations in Comparison with the Normative Grounds

This part discusses whether the UNHCR operations in the repatriation programme meet the requirement of the normative grounds identified in part 3.

The normative basis for the review of governance regime of UNHCR gives rise to certain legal constraints on the process of decision making in which the UNHCR is involved. The first set of norms relate to decision making. In the case of the repatriation scheme operating in Pakistan, the decision making took place at the international level when the UNHCR, in agreement with the concerned countries, Afghanistan, Pakistan and Iran, devised the SSAR for Afghan Refugees and devised a repatriation programme under it,⁹¹ and at the local level, assistance to repatriate the refugees is provided once it is determined that the repatriation is voluntary.

⁹¹ UNHCR, 'Programme Outline: The Voluntary Return & Reintegration Programme' (July 2012) <<http://www.unhcr.org/4fedc64b9.html>> accessed 23 August 2019; UNHCR, 'Enhanced Voluntary Return and Reintegration Package (EVRRP): Funding Proposal' (March 2015) <<http://www.unhcr.org/562defe26.html>> accessed 23 August 2019; UNHCR, 'International Conference on the Solutions Strategy for Afghan Refugees, to Support Voluntary Repatriation, Sustainable Reintegration and Assistance to Host Countries' (May 2012) <<http://www.unhcr.org/afghanistan/solutions-strategy.pdf>> accessed 23 August 2019; UNHCR, 'The 10-Point Plan in Action, 2016 Update, Chapter 7: Solutions for Refugees' (December 2016) <<http://www.refworld.org/docid/583714a44.html>> accessed 23 August 2019.

At the international level, the SSAR regime formation, and repatriation programme developed under it, suffered from a failure to be transparent and open to public participation. Public participation in this regard should include mechanism for inclusion of the concerns of Afghan refugees concerning SSAR and its repatriation programme. The exact mechanism for participation is beyond the scope of this paper. But at the minimum it would have required that the opinions of Afghan refugees to be considered, through some form of consultative process, when the SSAR was being negotiated. Additionally, transparency would have required some form of open deliberation, or at the very least, access to outcomes of some meetings/deliberations during each stage of the SSAR negotiations and seeking feedback from different interest groups, such as human rights committees, relevant NGOs, and refugee representative on the policy. This would not entail that the opinions of such groups would be binding on the three states and the UNHCR, but rather to ensure that decision making takes interest of all relevant actors into account. If the UNHCR cannot convince sovereign states to allow for such participation, then the UNHCR itself would have to represent these interests in the negotiations. For this, it would have to evolve participation mechanism in its own internal decision-making processes so it can adequately represent the voices of actors identified above. Failure to do so means that the UNHCR failed to fulfil the requirements that the normative grounds impose on decision-making.

Additionally, the main focus in the decision making on the development of the repatriation programme should have been on prevention of exposing refugees to inhuman or degrading treatment and actions/circumstances detrimental to life, liberty and property. If the situation in Afghanistan is not conducive to a minimum standard of living, then repatriation should not be the focus as a durable solution. However, from the actions of the government of Pakistan and the heavy emphasis on the UNHCR's publications on the number of refugees repatriated in a situation where there are not enough pull factors from Afghanistan, provide support for the argument that this focus is missing.

At the local level, the UNHCR operates the Voluntary Repatriation Centres (VRC) that facilitate voluntary repatriation of refugees. Prima facie it may be argued that the UNHCR is not taking any decision affecting the rights of refugees when it operates these Centres, since it is

only facilitating the refugees in ‘voluntarily’ repatriating from Pakistan and back to their home country. However, such a reading hides the effect that these centres and the cash grant scheme has on the refugees. Keeping in mind the grave question marks on the character of recent repatriation raised not only in UNHCR’s own reports, but elsewhere as well,⁹² the decision to operate such centres is itself subject to several constraints. These constraints arise from the principles of prohibition on refoulement, other international law instruments identified above, the Constitutional measures identified above, and from the UNHCR’s own principles on voluntary repatriation (as stated in the Handbook and discussed above). These measures would require that the UNHCR must be convinced that the repatriation it is assisting, through funding and running of Centres, is truly voluntary and not because of harassment of refugees by the host state and negative push factors. The type of procedural rules that UNHCR would need to implement to fulfil its obligations, under the normative grounds identified above, concerning these Centres would need to include: mechanism to collect data from refugees who are repatriating, mechanism for collection of data on the actual activities of the host state impacting refugees, and mechanism to collect data on home state to identify if there are any positive pull factors. The data would be needed to understand the real reasons behind repatriation and to decide whether repatriations are truly voluntary.

If it becomes apparent that the repatriations are not voluntary, then the normative grounds identified above would require two further actions. First, the UNHCR should devise some mechanism for reporting the host state activities. The actual procedures of these reporting mechanisms could be informed by the reporting activities of other human rights bodies. Second, it would require that the UNHCR desist its support of such a repatriation programme, such as the running of the VRC. Even if it continues to assist individual refugees in their repatriation, it should make it very clear through well publicised statements that assistance is only being provided under humanitarian grounds and that repatriation is not voluntary and is being coerced by host state.

⁹² (n 36); The wave of repatriation since 2015 have been highlighted as being contrary to the principle of non- refoulement Human Rights Watch.

Furthermore, the normative grounds identified above (highlighting the right to life and human dignity and compliance with principle of non-refoulement) would require that where it is apparent to the UNHCR that the host state is pushing for repatriation, but there are no favourable pull factors from home-state, and repatriation could result in internal displacement, such information should be provided to the refugees in sufficient detail so that refugees have complete knowledge of the situation that they would face if they return. This would also require that the UNCHR to develop mechanisms to engage in advocacy to influence the host states' attitude towards refugees. At present, it is not clear how much information the UNHCR provides refugees about the situation in Afghanistan.

Additionally, under the current repatriation regime, the UNHCR sets cash grants for repatriation based on the funding available and transport costs for return trip. Such a decision should be based on a proper assessment of facts, weighing all relevant considerations. Though availability of funds is an important consideration, it should not be the only or the most important consideration for such a decision. Such decisions should also include the current expenses of average refugee household, the cost of travel, the time taken on average to become economically active on return, and money needed during that time to fulfil basic needs of the individual and family. Only after taking all these factors into account should the level of the cash grant be set. The current system gives the impression that importance is given to the actual numbers of refugees repatriated, on statistics, without considering whether the return would allow for returnees to be able to start a dignified life in their home state. In fact, many returnees to Afghanistan are becoming internally displaced within Afghanistan – thus, it simply shifts the problem from host state to home state without solving it.⁹³

⁹³ (n 36); United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), 'Afghanistan: Humanitarian Needs Overview' (2017) <https://www.humanitarianresponse.info/system/files/documents/files/afg_2017_hno_english.pdf> accessed 23 August 2019.

Conclusion

From the foregoing discussion certain conclusions can be drawn. International organisations are essential in managing international crisis, and the UNHCR has played an important role in providing assistance to millions of Afghan refugees in Pakistan. However, even where an international organisation's mandate includes providing humanitarian assistance, its actions can have a negative impact on the individuals. This can be observed in the repatriation programme for Afghan refugees. Though, repatriation has been promoted as a durable solution by the UNHCR and great emphasis has been placed on the number of Afghans repatriated from Pakistan, there are serious concerns as to the voluntary nature of the process, problem of repatriated Afghans coming back to Pakistan, and repatriated Afghans facing violence and internal displacement in Afghanistan.⁹⁴

This has been compounded by the acquiescence from the UNHCR to actions of the government of Pakistan towards Afghan refugees. The government's initial policy to allow Afghan refugees to move to cities and engage in economic activity created a situation where it is now very difficult for economically active Afghans to go back without assurance of economic security in Afghanistan. Similarly, the government's policy during certain years to push for repatriation, coupled with short-term extensions of validity of PoR cards, has created an environment of uncertainty and fear, and allowed for harassment of refugees at the hands of security forces. These factors have, at times, forced refugees to go back even when facing violence and displacement in Afghanistan, as direct violation of the principle of non-refoulement. Support of repatriation by the UNHCR in such a situation without highlighting the coercive nature of repatriation is violative of the normative grounds identified above.

A number of normative grounds provide for the imposition of GAL principles on UNHCR's activities. Rule of law, constituting documents of

⁹⁴ (n 36); Mahwish Qayyum, 'Why Afghan Refugee Women in Pakistan Fear Repatriation' (*Al-Jazeera*, 9 May 2019) <<https://www.aljazeera.com/indepth/features/afghan-refugee-women-pakistan-fear-repatriation-190508203445898.html>> accessed 23 August 2019.

an international organisation, human rights, need for democratic legitimacy, constitutional principles under national law – all provide for application of certain minimum administrative law rules on the activities of international regulatory bodies. In the case of the UNHCR's mandate on the repatriation programme in Pakistan, this would require that the following rules of administrative law apply. First, rules allowing for participation of affected individuals (refugees) in decision making. Second, rules allowing for transparency in decision making through some form of open deliberation or access to documents from each stage of decision making. Third, rules that allow for adequate representation of all relevant factors and voices, including an emphasis on factors that would prevent/reduce exposure of refugees to circumstances detrimental to life, liberty and property, as part of the decision-making process for finding a solution to the crisis. Fourth, rules that require UNHCR to be certain of the voluntary nature of repatriation, through mechanism on collection of data that allow for identification of reasons why refugees are going back. Fifth, rules that provide for development of mechanisms for reporting about host state's failure in its obligations under international refugee law and highlighting the non-voluntary nature of repatriation where applicable. Sixth, rules that require UNHCR to develop procedures for providing comprehensive information on the circumstances in the home states to refugees planning to return. Lastly, rules that require giving due weight to all relevant facts, considerations and factors in setting the level of cash grants for refugees returning to home states.

The discussion above makes it clear that there are many shortcomings in UNHCR's regulatory activities. It can also be observed that criticism levelled against global governance bodies as to fairness, due process, and democratic deficit are present in the UNHCR's activities in Pakistan. Further research would need to focus on two things within this particular regulatory regime. First, a more detailed factual analysis of the current repatriation programme; and, second, identification/development of more detailed and comprehensive administrative law rules that could be used to formulate a template for UNHCR's governance structure for the repatriation programme.