

Articles

In the Aftermath of Voluntary Repatriation: The Fate of Afghan Refugees in Pakistan

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For a quarter of a century Pakistan has been a generous host to the single largest refugee population in the world. The prospects of a durable beneficial change of circumstances in Afghanistan provided the incentive to organize the voluntary repatriation of the Afghan refugees. The duration of this UNHCR-assisted form of return on the basis of an agreement, initially set to last until March 2006, was extended to December 2006, and since 2002 some 3 million Afghan refugees have returned to their country of origin. One of the crucial questions that remain to be answered is the fate of those Afghan refugees, quite a substantial number, who have not so far opted to return to their country of origin. On account of the fact that Pakistan is not a party to the 1951 Convention relating to the Status of Refugees nor the 1967 Protocol thereto, the legal position of those who still remain in Pakistan is far from clear. This article attempts to identify this position on the assumption that the legal status of Afghan refugees will be determinative of their fate.¹

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I.

INTRODUCTION

After more than a quarter of a century, the Afghan refugee problem ranks as the largest so-called 'protracted refugee situation' in the world.² Afghanistan appeared to be in a continuous state of turmoil even though the events which caused this turmoil consisted of distinct epochs, the key ones of which are the cruel Marxist rule of Nur Mohammed Taraki and Hafizullah Amin, the Soviet invasion of the country in December 1979 and its aftermath of internecine conflict, the oppressive rule of the Taliban, and the American-led attacks on the country in the wake of 9/11 and ensuing war.³ The ongoing conflict during so many years has not just ruined the country and robbed it of any infrastructure but also caused many deaths and massive internal displacement and external flight. Over 6 million Afghans spent decades in exile. Along with Iran, Pakistan bore the brunt of the massive exodus of Afghan refugees.⁴ Afghan refugees found their way to North-West Frontier Province but also Baluchistan, Punjab and even as far south as Sindh.⁵ Actual numbers are hard to give for only those who were living in the hundreds of refugee camps, some 3.3 million, were registered but the many refugees who lived outside camps were not.⁶ Kaplan describes the change of Quetta from a quiet city with less than 500,000 inhabitants

² On protracted refugee situations, see *inter alia*, UN doc. EC/54/SC/CRP.14 (2004); Ch. 5 of UNHCR's *State of the World's Refugees 2006*.

³ Many books have been written about Afghanistan, outstanding ones are RAJA ANWAR'S, *THE TRAGEDY OF AFGHANISTAN; A FIRST-HAND ACCOUNT* (1988) and ROBERT KAPLAN, *SOLDIERS OF GOD; WITH ISLAMIC WARRIORS IN AFGHANISTAN AND PAKISTAN* (2002).

⁴ Afghans also sought refuge elsewhere. UNHCR estimates Afghans applied for asylum in some 90 states other than Iran and Pakistan, *UNHCR Note on Basic Considerations Regarding Returns to Afghanistan from Non-Neighbouring States*, 10 July 2002.

⁵ A book worth mentioning about the Afghan refugees that includes many (moving) portraits of refugees is FAZAL SHEIKH, *THE VICTOR WEEPS, AFGHANISTAN* (1998). A popular novel about flight from Afghanistan is KHALED HOSSEINI, *THE KITE RUNNER* (2003) (especially noteworthy for the pre-war life in Kabul it depicts). Khaled Hosseini – once an Afghan refugee (*sur place*) himself, was named a goodwill envoy to the UNHCR office in the United States last year, see *UNHCR, "Q&A: Khaled Hosseini, author of 'The Kite Runner', keen to help refugees"*, 16 February 2007.

⁶ Refugees moving to Pakistan's cities increased when a shortfall in funds induced the decision in 1995 on the part of UNHCR and WFP to halt food aid in the camps.

into a city with 1.2 million inhabitants, Afghan refugees far outnumbering the indigenous population.⁷

The long-awaited structural and beneficial change of circumstances in Afghanistan promised to materialize when the so-called ‘Bonn Agreement’ was signed.⁸ It induced the United Nations High Commissioner for Refugees (hereinafter: UNHCR) to prepare for the voluntary repatriation of Afghans to their country of origin.⁹ To that end agreements were concluded both with states in the region notably Iran¹⁰ and Pakistan, and a number of European states including Denmark, France, the Netherlands, Norway and the United Kingdom.¹¹ The agreement that was concluded with Pakistan – Agreement between the Government of Islamic Republic of Pakistan, the Transitional Islamic State of Afghanistan and UNHCR Governing the Repatriation of Afghan Citizens Living in Pakistan – was signed on 17 March 2003.¹² It was to remain in force until terminated by mutual agreement amongst the parties.¹³ It was nonetheless understood by the parties concerned to expire in March 2006. Strictly speaking, this is not correct: what the parties hinted at is the indication in the agreement that the repatriation programme would last three years:

“[...] after the completion of the UNHCR assisted voluntary repatriation program projected for the next three years [...]”.¹⁴

So when the Tripartite Commission, established on the basis of the agreement,¹⁵ decided to extend the duration of the agreement to December 2006 in order to give those Afghans still living in Pakistan more time to return home under the existing UNHCR repatriation programme,¹⁶ they

⁷ See Kaplan, *supra* note 3.

⁸ Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, 5 December 2001.

⁹ Not for the first time, see *infra* Part IV A.

¹⁰ See for the pertinent agreement(s), *infra* note 62.

¹¹ See for the pertinent agreements, *infra* note 62.

¹² On the agreements governing voluntary repatriation preceding this agreement, see *infra* Part IV A.

¹³ Art. 28.

¹⁴ Art. 6 paragraph 2.

¹⁵ Art. 1; on the composition of the Commission, see Art. 2; on the functions of the Commission, see Art. 3.

¹⁶ UNHCR News, 31 August 2005 (the decision was taken on 29 August 2005); see also UNHCR News Stories, *Pakistan, Afghanistan, UNHCR agree to extend deal on Afghan returns*, 30 August 2005 (in terms of ‘extending the agreement’); UNHCR, *Voluntary Repatriation from Pakistan 2005* at 10.

actually agreed to prolong the projected three year programme until the end of the year 2006. In view of the substance of the agreement, which extends beyond the scheduled period of actual return, it can not be maintained that the agreement expires along with the programme.¹⁷

Well in advance of the termination of the repatriation programme, the question arose as to the fate of those Afghans who would still be in Pakistan after it would have been ended in December 2006. This article addresses this question by focussing on the legal status and corresponding entitlements of those Afghans. In order to be able to analyse the status of Afghan refugees in Pakistan, recourse will be had to the various agreements the Government of Pakistan concluded regarding, or with a bearing on the plight of the Afghan refugees. All the agreements, with the exception of the agreement governing voluntary repatriation mentioned above, are bilateral agreements concluded with UNHCR. The agreements are reviewed in chronological order not just because it allows to sketch the unfolding events and hence provide the context of particular decisions made but, more pertinent to the question at hand, on account of the fact that the agreements are substantially interlocked with respect to the question regarding the status (and fate) of the Afghan refugees in Pakistan.

II.

THE 1993 COOPERATION AGREEMENT

A. *Introduction*

UNHCR has had an operational presence in Pakistan since August 1979 when it was requested by the Government to assist in coping with the influx of Afghan refugees.¹⁸ The possibility of a representative presence on the basis of need on the part of a government is provided in Article 16 of the

¹⁷ See, e.g. Art. 12 on international access before and *after* repatriation.

¹⁸ UNGAOR, 35th session, Suppl. No. 12 (A/35/12) para. 275. In addition to the Chargé de Mission's Office in Islamabad, UNHCR opened two sub-offices (resp. in Peshawar and Quetta) in order to "respond adequately to the needs in Pakistan", *ibid.*, para. 282. From 1979 until 2004, UNHCR spent \$ 1,161,500,000 on assisting refugees in Pakistan, UNHCR, *Searching for Solutions; 25 years of UNHCR-Pakistan Cooperation on Afghan Refugees*, June 2005 at 7.

Statute of the United Nations High Commissioner for Refugees (hereinafter referred to as: Statute)¹⁹ and UNHCR currently maintains such a presence in more than hundred states. A request is in principle sufficient – UNHCR never establishes a presence without the consent of the host state – but it is part of UNHCR’s policy to regulate its presence in states by means of a cooperation agreement – a form of host state agreement - detailing the rights and obligations of itself and the host state both in terms of privileges and immunities as well as in, from the point of view of UNHCR’s mandate, more substantive terms.

Such a cooperation agreement was – rather late – concluded with Pakistan in 1993.²⁰ A few provisions, that is, those which are geared to the actual work of UNHCR in the country, are worth quoting:

“The Government welcomes the establishment and maintenance of an office or offices in the country in order to provide international protection and humanitarian assistance to refugees and other persons of concern to UNHCR”.²¹

Article VI paragraph 1 provides that:

“The Government shall take all practicable measures to facilitate the activities of the UNHCR under this agreement and to assist UNHCR officials, experts on mission and persons performing services on behalf of UNHCR in obtaining the services required to carry out these activities”.

Last but not least, the following provision should be mentioned which details the cooperation between the government and UNHCR (in Article 3 paragraph 1):

“Cooperation between the Government and UNHCR in the field of international protection of, and humanitarian assistance to, refugees and other persons of concern to UNHCR shall be carried out on the basis of

¹⁹ Art. 16 runs as follows: “The High Commissioner shall consult the Government of the countries of residence of refugees as to the need for appointing representatives therein. In any country recognizing such need, there may be appointed a representative approved by the Government of that country. [...]”.

²⁰ Cooperation Agreement between the Government of the Islamic Republic of Pakistan and the United Nations High Commissioner for Refugees of 18 September 1993. It entered into force upon signature in accordance with Article XI paragraph 1.

²¹ Article IV paragraph 1.

the Statute of UNHCR and, of other relevant decisions and resolutions relating to UNHCR adopted by United Nations organs”.

B. *The Meaning and Significance of Article 3 Paragraph 1*

All states members of the United Nations are obligated to cooperate with the United Nations. This obligation derives from the Charter of the United Nations,²² and extends to all organs of the Organization including its subsidiary organs such as UNHCR.²³ An explicit obligation to cooperate with UNHCR is also comprised in the universal treaties regarding refugees. Article 35 paragraph 1 of the 1951 Convention relating to the Status of Refugees (hereinafter referred to as: 1951 Convention) requires this form of cooperation and so does Article 2 paragraph 1 of the 1967 Protocol relating to the Status of Refugees (hereinafter referred to as: 1967 Protocol). Pakistan is not, however, a party to either one of those treaties.²⁴

The obligation to cooperate with the United Nations including UNHCR, and the obligation to cooperate with UNHCR as provided in the instruments referred to have in common that they require the assistance of states. By way of illustration, the pertinent obligation as provided in the 1951 Convention runs as follows:

“The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions [...]”.

States are required to support UNHCR in order that the latter can exercise its functions, and those functions are and remain exclusively those of UNHCR. The requisite cooperation, put differently, does not oblige to anything other than support in the sense of enabling UNHCR to do what it has been charged to do.

²² See in particular Art. 1 paragraph 3; Art. 2 paragraphs 2 and 5; Art. 55; Art. 56 of the Charter of the United Nations; on this, see M.Y.A. Zieck, *UNHCR's Worldwide Presence in the Field: A Legal Analysis of UNHCR's Cooperation Agreements*, 2006 at 85-86.

²³ UNHCR was established by the General Assembly on the basis of Article 22 of the Charter of the United Nations (as of 1 January 1951), see UN doc. A/Res/319 (IV) (1949).

²⁴ The observation that Pakistan is bound to both the 1951 Convention and the 1967 Protocol made by Justice Burhanuddin Khan is, therefore, not correct, see *Afghan Refugees Problem in Pakistan*, 13 THESAURUS ACROASIMUM 1987, 761-783 at 771.

The cooperation envisaged in the cooperation agreement is of a very different nature: it extends well beyond ‘merely’ supporting UNHCR in the exercise of its functions. The cooperation required on the basis of the cooperation agreement (‘cooperation *between* the Government and UNHCR’) has the nature of a joint undertaking. Moreover, the relevant provision provides this form of cooperation with a normative content: the cooperation shall – imperative terms – be carried out on the basis of the Statute of UNHCR and other relevant decisions and resolutions relating to UNHCR adopted by United Nations organs.

The reference to the Statute is fairly clear. The reference to other relevant decisions and resolutions relating to UNHCR should be taken to refer in particular to those which are adopted by the General Assembly, the ECOSOC as well the Executive Committee of UNHCR, which is a subsidiary organ of the ECOSOC.²⁵ The General Assembly annually adopts resolutions relating to UNHCR, and those resolutions have expanded UNHCR’s mandate beyond the rather narrow confines of the definition of refugee laid down in the Statute to comprise a much broader category of refugees including those who flee situations of generalized violence and gross violations of human rights. The Executive Committee, of which Pakistan is a member, too adopts resolutions, they are usually referred to as ‘conclusions’. The Executive Committee has adopted many conclusions which address practically every aspect of the plight of refugees including asylum, voluntary repatriation, resettlement, cessation of refugee status, etc.²⁶

All the resolutions and conclusions referred to have in common that they are binding for UNHCR but not for states. They nonetheless constitute the normative substance of the cooperation to which UNHCR and the host state committed themselves on the basis of the cooperation agreement: the fact that the pertinent resolutions and conclusions would otherwise not be binding the host state is, as a result, legally irrelevant.²⁷

²⁵ By way of explanation of the emphasis given (“in particular”), see UNHCR’s Statute, Arts. 3 and 4.

²⁶ The complete collection of conclusions adopted by the Executive Committee is available at www.unhcr.org. (last visited on 15 August, 2007).

²⁷ It is imperative to observe that the inference made by the otherwise so accurate Human Rights Watch that conclusions of the Executive Committee are binding for Pakistan, that is, as such without reference to Article 3 paragraph 1 of the cooperation agreement, is mistaken, see Human Rights Watch, *Afghanistan, Iran, and Pakistan, Closed Door Policy: Afghan Refugees in Pakistan and Iran*, February

III.

THE 2001 'SCREENING' AGREEMENT

A. *Background*

Increasing frustration with what turned out to be an intractable problem, a continuing influx of new refugees owing to fighting in northern Afghanistan and a severe drought, and the sense of having been abandoned by the international community with respect to the care of Afghan refugees after the Soviet withdrawal from Afghanistan have been adduced to explain a hardening stance on the part of Pakistan.²⁸ As to the sense of abandonment referred to, High Commissioner Ogata's visit to Pakistan in 2000 is instructive:

“One major objective that I had entertained for my mission was to raise public attention on the continuing Afghan refugee crisis so that donors would provide more resources for the repatriation as well as reception of refugees. Here I failed dismally. In spite of the press reports that covered the plight of Afghan refugees in the camps as well as the process of return, there was virtually no response. I thought that Taliban or not, Afghanistan was a forgotten country and that Afghan refugees were nearly abandoned by the international community”.²⁹

The hardening stance on the part of the host state, qualified by the UNHCR representative in Pakistan as an “irreversible and qualitative”

2002 at 6, 31, 34, 40. For more elaborate analysis of Art. 3 paragraph 1 of the cooperation agreement, see M.Y.A. ZIECK, *UNHCR'S WORLDWIDE PRESENCE IN THE FIELD: A LEGAL ANALYSIS OF UNHCR'S COOPERATION AGREEMENTS*, 2006, Ch. 7.

²⁸ Cf. H.A. Ruiz, *Afghanistan: Conflict and Displacement 1978-2001*, *FORCED MIGRATION REVIEW*, June 2002 at 8-10; H.A. RUIZ, *PAKISTAN: AFGHAN REFUGEES SHUNNED AND SCORNED*, (USCR) 2001 at 23-25. As to tangible instances of this hardening stance, see *inter alia* Amnesty International, *Pakistan: Harassment and police brutality against Afghan refugees*, 29 June 2001 (AI Index ASA 33/016/2001).

²⁹ S. OGATA, *THE TURBULENT DECADE; CONFRONTING THE REFUGEE CRISIS OF THE 1990s*, 2005 at 293-294.

change,³⁰ manifested itself, *inter alia*, in the decision of the Government to close its borders to Afghan refugees in November 2000.³¹

To solve the resulting impasse, in particular to induce Pakistan to reopen its borders, the Government of Pakistan and UNHCR agreed to ‘screen’ those Afghan refugees who had, despite closed borders, managed to enter Pakistan.³² On 2 August 2001 an agreement to that effect was concluded: ‘Agreed Understandings for the Screening Process for Afghans in Jalozai makeshift camp, Nasir Bagh camp and Shamshatoo camp to Determine which persons are in need of international protection and which are not’,³³ usually referred to in abbreviated form as ‘the Screening Agreement’.

The conclusion of this agreement, at the initiative of UNHCR, signified that the long-standing practice of protecting Afghan refugees on the basis of *prima facie* recognition of their status was formally discontinued, moreover, those who arrived in Pakistan without proper travel documentation were considered to be illegal migrants.³⁴ The representative of UNHCR in Pakistan nonetheless hailed the agreement as a “a major breakthrough and a significant step forward, which will ensure proper protection of all those Afghans who deserve it”.³⁵ In view of the fact that the agreement explicitly

³⁰ Quoted in Ruiz, *Afghan Refugees Shunned*, *supra* note 28 at 4, 43.

³¹ UNHCR’s insisting on Pakistan’s opening its borders to fleeing Afghans has been criticized on account of the fact that it did neither take Pakistan’s legitimate security concerns into consideration nor its inability to absorb more refugees (also in view of the lack of support by the international community), and so was UNHCR’s reluctance to become involved in camps on the Afghan side of the border, see *UNHCR’s Real-time evaluation of UNHCR’s response to the Afghanistan emergency*, Bulletin no. 2, 6 December 2001 at 2-3.

³² NRC Handelsblad, *Pakistan geeft toe aan VN: Akkoord over Afghaanse vluchtelingen*, 4 August 2001; AFP, *Afghan refugees in Pakistan screened for asylum – UNHCR*, 7 August 2001; UNHCR Press Briefing Note, *Pakistan: Afghan screening 2nd phase to begin*, 28 August 2001; UNHCR News Stories, *Progress in Afghan refugee screening*, 11 September 2001.

³³ The Agreement was signed by the representative of UNHCR Pakistan and for Pakistan by the Additional Secretary Kashmir Affairs and Northern Areas and States and Frontier Regions Division. It turned out to be quite difficult to get hold of a copy of the text of this Agreement and the author is grateful to Mr. Haaris Ramzan, graduate from the Pakistan College of Law, who succeeded in retrieving the text.

³⁴ UNHCR, *Return to Afghanistan 2002* at 5; UNHCR, *Searching for Solutions; 25 years of UNHCR – Pakistan cooperation on Afghan refugees*, June 2005 at 17.

³⁵ Business Recorder, *Pakistan-UNHCR accord signed on screening Afghan displaced persons*, 6 August 2001; see also UNHCR, *Searching for Solutions; 25 years of UNHCR – Pakistan cooperation on Afghan refugees*, June 2005 at 18.

focused camps in the vicinity of Peshawar, the scope of the agreement was confined to a specific group of refugees. On account of the fact that Nasir Bagh camp was included within the territorial scope of the agreement, it was not, however, contrary to the earlier understanding, confined to new arrivals but included long-term residents. The reason the inhabitants of Nasir Bagh were included in the agreement had quite a mundane reason, to wit, an eviction order issued by the provincial government to clear the land for a new housing development.³⁶

The Agreement did not, however, secure open borders for they were reportedly closed once more in September for security reasons, at the request of the United States in the lead-up to its air strikes in Afghanistan.³⁷ On the basis of informal understandings not further specified ‘vulnerable cases and other refugees’ continued to be admitted through recognized border crossings.³⁸

B. *Terms of the Agreement*

The purpose of the Screening Agreement is clear: assessing the eligibility of Afghan asylum seekers to (international) protection. The eligibility criterion included in the Agreement confirms it: “the basic criteria will be UNHCR’s definition of a ‘refugee’”. A ‘refugee’ is subsequently defined as:

“any person who is outside his/her country of origin and who is unwilling or unable to return there or to avail him/herself of its protection because of (i) a well-founded fear of being persecuted for reasons of

³⁶ Integrated Regional Information Network (hereinafter: IRIN), *Pakistan: Screening of Jalozai refugees set to begin*, 20 June 2001 (the land apparently belonged to a cooperative housing society). (Nasir Bagh was eventually closed in May 2002, AFP, *Return of Afghan refugees reaches new heights*, 23 May 2002.)

³⁷ Human Rights Watch, *Afghanistan, Iran, and Pakistan, Closed Door Policy: Afghan Refugees in Pakistan and Iran*, February 2002 at 22 (4 November is mentioned as date of closure); UNHCR, *Searching for Solutions*, *supra* note 34 at 18; Ruiz, *Afghan Refugees Shunned*, *supra* note 28 at 1 (mentioning mid-September as the date of the request on the part of the United States). See also *UNHCR’s Real-time evaluation of UNHCR’s response to the Afghanistan emergency*, Bulletin no. 1 of 7 November 2001 at 9 (observing that UNHCR’s insistence on open borders is unlikely to be supported by UNHCR’s major donors for political reasons).

³⁸ *UNHCR’s Real-time evaluation of UNHCR’s response to the Afghanistan emergency*, Bulletin no. 2 of 6 December at 5. Between October 2001 and the end of February 2002, some 81,000 ‘vulnerable Afghans’ were admitted; later arrivals ended up stranded at the border, UNHCR, *Return to Afghanistan 2002* at 9.

race, religion, nationality, membership of a particular social group or political opinion; or (ii) a threat to life or security as a result of armed conflict and other forms of widespread violence which seriously disturb the public order”.³⁹

The fate of those deemed (in)eligible for refugee status are addressed in the Agreement under the heading of ‘solutions’. These are respectively:

“(a) *Voluntary repatriation*: The understanding is that those identified through a pre-screening option opting for voluntary repatriation would be assisted in doing so.

(b) *Return following screening*: The understanding is that UNHCR would not object to the immediate return of those screened out jointly by UNHCR and the Government. As regards particularly vulnerable cases, it is understood that return is the preferred solution, but may not be viable at the present time and that they would be returned through a phased process.

(c) *Temporary protection in Pakistan*: Temporary protection would be extended to those having been ‘screened-in’.

(d) *Resettlement*: It is understood that resettlement would be pursued by UNHCR as the solution for certain cases. These would come both from the ‘screened-in’ caseload and would include those in relation to whom UNHCR and the Government do not agree on the screening decision”.

Prior to the commencement of the screening exercise, the inhabitants of the three camps were to be informed of the “options available to them”. This may sound somewhat cryptic, but the Screening Agreement comprises two different procedures: a pre-screening process and a screening procedure. The pre-screening process is not described in the agreement but serves to identify those who opt to voluntary return to Afghanistan with a view to assisting them to actually return, immediately, that is, with the exception of particularly vulnerable persons who would return “through a phased process”.

The actual screening was to be undertaken by a large number of teams, each team consisting of one Pakistan Government official and one UNHCR staff member assisted by an interpreter (whereby the teams include female

³⁹ Art. 2 (a).

members in order to address the needs of female refugees).⁴⁰ A team had to interview individual applicants unless pre-screening identifies groups, such as families originating from the same village, whose screening would be undertaken “in tandem”. A decision as to eligibility should follow on the same day an interview takes place.⁴¹ Decisions would be joint ones reached by both parties on an equal footing. The procedure includes a review procedure in the form of a paper review of the negative decisions as well as those applications in which the first team could not reach consensus. A final decision would follow the review session. Upon completion of the review process, deportation “can follow promptly” for those screened out. In that respect, the agreement adds that UNHCR advocated to stop the practice of *ad hoc* deportations to underpin the credibility of the process. Those found eligible would be provided with a document “which would not formally confer refugee status” but would acknowledge them as “of concern” and given temporary protection.

The text is confusing in some respects. First of all, the inhabitants of three specific camps were to be screened, yet the agreement itself, including the eligibility criterion comprised in the agreement as well as the stipulation that the deportation of those not considered eligible for international protection would only follow after completion of the review,⁴² focuses exclusively on the inhabitants of only two camps, to wit, Jalozai and Nasir Bagh.

The procedure as laid down in the agreement is not very detailed. It applies to both the pre-screening procedure and the screening procedure itself. The combination of different procedures is quite unfortunate for it may well induce refugees to opt for – assisted yet premature – return just to avoid the risk of deportation following a negative decision in the actual screening procedure. As to the screening procedure, leaving pre-screening aside, it starts with an interview. Apart from the fact that the agreement does not indicate a set format of questions that should be posed, it fails to indicate if and how the interview is recorded. It probably should in view of the review procedure that is described as a “paper review”. As to the paper review, the agreement fails to indicate if the review is to be undertaken by

⁴⁰ All team members were trained in a three day training session by UNHCR prior to actual screening.

⁴¹ In case a decision is not taken on the same day, the screening team concerned had to report this to the Commissioner for Afghan Refugees in North West Frontier Province indicating the reasons for the delay, Art. 1 (b).

⁴² See Art. 2 (a) resp. Art. 1 (j).

other teams than those responsible for the initial phase of the procedure. The review team also decides on applications left undecided by the first team for want of consensus yet no review appears to be available regarding negative decisions reached by the review team even though technically speaking its decision is not one taken on appeal. If no decision can be reached it appears resettlement will be pursued for the person concerned.

Besides questions the procedure elicits, it is disturbing that those who are considered to be eligible, *i.e.* formally qualify for refugee status on the basis of the criteria included in the Screening Agreement, are nonetheless merely considered to be ‘persons of concern’ – whose concern, one wonders – who are entitled to temporary protection. In so far as that entitlement designates a stay short of what refugees are entitled to by virtue of their refugee status (protection that is not *a priori* temporally restricted), this grant of temporary protection contravenes those entitlements: refugee status remains valid until cessation and the time cessation is in order may take many years. ‘Temporary protection’ is usually granted when eligibility assessments, either collectively on a *prima facie* basis or individually by means of individual screening, are not made in order to ensure immediate protection from *refoulement*.⁴³

C. Actual Screening

Actual screening started in mid-August 2001 but was halted fairly soon after on 28 August when Pakistan, in violation of the Screening Agreement, forcibly returned 150 Afghan refugees who had not yet been screened.⁴⁴ Screening resumed on 3 September, lasted for 8 more days until the September 11 attacks on the world-trade centre in New York took place which led to American strikes on Afghanistan and, in turn, to a massive influx of new Afghan refugees in the country: it was not resumed again.⁴⁵

⁴³ Cf. UN doc. EC/55/SC/CRP.16 (2005) at 9; HCR/GIP/03/03 para. 24; on *prima facie* recognition of refugee status, see *infra* Part VII C ; on *non-refoulement*, see *infra* Part VII B.

⁴⁴ Voice of America, *Pakistan Halts Afghan Refugee Deportations*, 1 September 2001. On the actual screening, as well as the pre-screening and the complicating link with the possibility of voluntary repatriation, see Ruiz, *Afghan Refugees Shunned*, *supra* note 28 at 37-39.

⁴⁵ Human Rights Watch, *Afghanistan, Iran, and Pakistan*, vol. 14:2 (G), February 2002 at 22.

D. *Continuing relevance of the Screening Agreement*

Considering the fact that the implementation of the Screening Agreement was halted and was not anymore resumed that its primary focus is on assessing the eligibility of newly arriving Afghan refugees in designated camps, the question arises whether the Agreement is at present merely of historic interest. It is not, as is set out in the following paragraph.

IV.

THE 2003 VOLUNTARY REPATRIATION AGREEMENT

A. *Background*

Repatriation had been considered to be the solution to the problem of Afghan refugees, former High Commissioner Ogata observes, since the time the 'Geneva Accords', which paved the way for the withdrawal of Soviet troops from Afghanistan, were concluded under United Nations auspices on 14 April 1988.⁴⁶ The possibility of voluntary repatriation, though, had been tabled much earlier. Already in 1985 a draft agreement between Afghanistan and Pakistan on the voluntary return of Afghan refugees of Pakistan had been drawn up.⁴⁷ The Preamble to the draft agreement qualifies voluntary repatriation as "the most appropriate solution for the problem of Afghan refugees present in the Islamic Republic of Pakistan" and Article IV provides that mixed commissions shall be set up for the purpose of organising, coordinating and supervising the operations which should effect the voluntary, orderly and peaceful repatriation of Afghan refugees. Article VI indicates that UNHCR will, at the request of the governments concerned, cooperate and provide assistance in the process of voluntary repatriation of refugees and that special agreements may be concluded to that effect between UNHCR and the contracting parties. Another draft agreement between the same parties dates of 25 February 1987. This draft too provides

⁴⁶ Ogata, *supra* note 29 at 278.

⁴⁷ Probably one of the first drafts, apparently drawn up by UNHCR, is marked INST/3/Rev.1 and dates of 25 June 1985: reference is made to this particular draft agreement. The Director of UNHCR's division of refugee law and doctrine at the time observed as early as January 1983 that repatriation is the "most obvious" durable solution to the problem of Afghan refugees, quoted in *Refugees*, May 1988, no. 53 at 9.

for the establishment of mixed commissions as well as the assistance of UNHCR in a wording identical to the 1985 draft.

On 14 April 1988, the 'Geneva Accords' to which reference was made earlier, were concluded: a declaration and three agreements on the Settlement of the Situation Relating to Afghanistan. One of those agreements, concluded between Afghanistan and Pakistan, addresses the voluntary return of refugees along the lines of the drafts referred to: its Article IV provides for the establishment of mixed commissions and Article VI defines the role of UNHCR in the sense indicated in the preceding drafts.⁴⁸ Drafts of the bilateral agreements foreseen in Article VI between UNHCR and each of the two states involved were drawn up. The bilateral agreement with Afghanistan was concluded quickly on 28 April.⁴⁹ Reaching agreement on the text of the bilateral agreement with Pakistan took more time. Noteworthy in the present context are the negotiations on free and unhindered access of UNHCR to the refugees as provided in the first draft, and in particular the stipulation that UNHCR would continue to extend its assistance to those refugees who do not wish to avail themselves of the opportunity to return voluntarily to Afghanistan.⁵⁰ On 8 June 1988, the agreement between Pakistan and UNHCR was concluded: the provision on free and unhindered access was watered down to cooperation including access whilst the continued assistance for those who would not opt to return in essence disappeared in a formulation cast in terms of assistance to Afghan refugees pending their voluntary return to their homeland. The reason for this change was explained as follows:

⁴⁸ Article VI runs as follows: "At the request of the Governments concerned, the United Nations High Commissioner for Refugees will cooperate and provide assistance in the process of voluntary repatriation of refugees in accordance with the present Agreement. Special agreements may be concluded for this purpose between UNHCR and the High Contracting Parties".

⁴⁹ Although the first draft of 7 April 1988 provided that a 'basic agreement' (in current terminology: a cooperation agreement) would be concluded with Afghanistan prior to the implementation of the repatriation programme, this provision did not figure in the final text. In practice, no such agreement has ever been concluded with Afghanistan. UNHCR established a presence in Kabul as of 15 May 1988, UNHCR, *Voluntary Repatriation to Afghanistan, UNHCR Plan of Action for 1989* at 2.

⁵⁰ Articles III and IV respectively, draft of 7 April 1988.

“the gov [Government of Pakistan] does not wish to give at this stage an option to the refugees hence wording pending their voluntary return to their homeland”.⁵¹

UNHCR favoured the originally suggested wording,⁵² expressing its concern that the new wording, in conjunction with a provision pertaining to the duration of the agreement,⁵³ may imply continued assistance to Afghan refugees in Pakistan only until the end of the voluntary repatriation exercise.⁵⁴ By way of compromise, the issue of continued assistance was to be addressed in the form of an ‘understanding’ laid down, albeit obliquely, in an exchange of letters accompanying the agreement.⁵⁵

Differences between Afghanistan and Pakistan prevented setting up the envisaged mixed commissions that were to coordinate and supervise the repatriation.⁵⁶ Those differences, despite the understandings reached in the Agreement on the Principles of Mutual Relations, in particular on Non-interference and Non-intervention, one of the Geneva Accords,⁵⁷ probably

⁵¹ UNHCR telecommunications despatch, 11 May 1988.

⁵² “The Office of the United Nations High Commissioner for Refugees will continue, as required, to extend its assistance in cooperation with the Islamic Republic of Pakistan to those refugees who do not wish to avail themselves of the opportunity to return voluntarily to the Democratic Republic of Afghanistan”.

⁵³ “The present Agreement shall enter into force with immediate effect and shall remain in force for the period required for the effective voluntary return of the refugees. After that period the High Contracting Parties shall review the results of the repatriation and, if necessary, consider further arrangements that may be called for”.

⁵⁴ UNHCR telecommunications despatch, 11 May 1988.

⁵⁵ “... in continuing its assistance to the refugees in Pakistan ... the Office of the United Nations High Commissioner for Refugees will maintain close cooperation with the Government of the Islamic Republic of Pakistan in conformity with established practice”, UNHCR telecommunications despatches of 27 May 1988 and 1 June 1988.

⁵⁶ 45 YEARBOOK OF THE UNITED NATIONS 1991 at 161. Despite the fact that no mixed commissions were set up, repatriation started in July 1990 by UNHCR *et al.*, backed by the emergency relief programme for Afghanistan – Operation Salam, *ibid.* On Operation Salam, see Sadrudin Aga Khan, *Looking into the 1990s: Afghanistan and Other Crises*, INTERNATIONAL JOURNAL OF REFUGEE LAW 1990 (Special Issue), 14-28.

⁵⁷ The third one is the Agreement on the Interrelationships for the Settlement of the Situation relating to Afghanistan concluded between Afghanistan and Pakistan; the declaration – Declaration on International Guarantees – was signed by the United States and the Soviet Union.

also explain why two bilateral agreements were envisaged and concluded whereby UNHCR, as the party common to both, formed the link which could otherwise be had directly by means of concluding a tripartite agreement.⁵⁸

The next agreement which was concluded, on 17 August 1993, was a tripartite one, concluded between Afghanistan, Pakistan and UNHCR for the Repatriation of Afghan Refugees in Pakistan, after more than a million Afghan refugees had returned spontaneously in 1992.⁵⁹ A massive return followed by the conclusion of an agreement pertaining to voluntary repatriation was repeated a decade later: in 2002 massive return took place, arguably governed by the agreement of 1993,⁶⁰ and a new tripartite agreement on voluntary repatriation was concluded on 17 March 2003.⁶¹ The new agreement refers in the preamble not just to the Bonn Agreement

⁵⁸ It is worth adding that UNHCR had considered the establishment of mixed commissions as the direct link: UNHCR took Art. VI (for the text, see *supra* note 48) on its own role to signify its participation in those commissions: "It would appear from Article VI that UNHCR's participation in the mixed commission is contingent upon the signing of special arrangements with the high contracting parties". UNHCR observed in that respect, in a Note on Repatriation to Afghanistan – UNHCR's protection role, which includes comments on the draft of what became the bilateral agreement between Pakistan and Afghanistan pertaining to voluntary repatriation of Afghan refugees, one of the Geneva Accords: "UNHCR warmly welcomes the provisions made for the creation of mixed commissions, and the fact that the parties envisage a UNHCR participation in these commissions. Experience has shown that these bodies, often in the form of tripartite commissions involving the countries of origin and asylum and UNHCR are most suitable for securing general cooperation among all the parties concerned and for ensuring the fulfilment of the principle of voluntary repatriation. [...] They can also facilitate consultations between the main parties on any problem that may subsequently arise, and maintain the necessary level of contact among them".

⁵⁹ UNHCR's Special Envoy, Nicholas Morris, nonetheless observed that "[t]he situation in Afghanistan remains such that UNHCR will continue to facilitate, rather than to encourage and promote voluntary repatriation", UNHCR Information Bulletin, 12 January 1993. On the differences between facilitating and promoting voluntary repatriation, see M.Y.A. ZIECK, *UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES; A LEGAL ANALYSIS*, 1997 at 116-122.

⁶⁰ The tripartite agreement of 1993 was repealed on the day the new agreement was signed by virtue of Art. 23 paragraph 2 of the latter, but see UNHCR Islamabad, Press Releases, *First Meeting of Tripartite Commission on Afghan Refugees*, May 13, 2003 ("Despite the absence of a formal agreement, UNHCR last year operated a repatriation programme ..."). For an overview of the actual repatriation, see UNHCR, "Return to Afghanistan 2002".

⁶¹ The agreement was concluded after nearly a year of negotiation, UNHCR Islamabad, Press Releases, *First Meeting of Tripartite Commission on Afghan Refugees*, May 13, 2003.

of 5 December 2001 which “has laid the foundation for achieving lasting peace, national unity, reconciliation and social and economic development in Afghanistan” but in addition to the “exceptionally high number of Afghan citizens who voluntarily returned in safety and dignity to Afghanistan in 2002”.⁶² The reason for the comparative late conclusion of the new tripartite agreement apparently related to the question who were to benefit from the agreement:

“Given the lack of systematic registration of Afghan refugees in Pakistan and the change in government policy on newly arriving Afghans, negotiations on the scope of the agreement proved difficult”.⁶³

B. *Terms of the Agreement*

The preamble to the voluntary repatriation agreement of 2003 contains the usual references to the mandate of UNHCR that includes seeking durable solutions to the problem of refugees including the most preferred

⁶² UNHCR observed in 2002 that the “current changes are indeed generally conducive to the safe return of a broad spectrum of Afghans” and indicated that the conclusion of tripartite agreements for voluntary repatriation with non-neighbouring states would be explored, UNHCR Note on Basic Considerations Regarding Returns to Afghanistan from Non-Neighbouring States, 10 July 2002. The following agreements, in chronological order, were concluded: the Tripartite Agreement between the Government of the French Republic, the Government of the Islamic Transitional State of Afghanistan and UNHCR of 28 September 2002; the Tripartite Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland, the Transitional Administration of the Transitional Islamic State of Afghanistan and UNHCR of 12 October 2002; the Tripartite Memorandum of Understanding between the Islamic Transitional State of Afghanistan, the Government of the Netherlands and UNHCR of 18 March 2003; the Tripartite Memorandum of Understanding between the Islamic Transitional State of Afghanistan, the Government of Denmark and UNHCR of 18 October 2004; the Tripartite Memorandum of Understanding between the Government of Norway, the Islamic Republic of Afghanistan and UNHCR of 10 August 2005. With neighbouring Iran, many agreements have been concluded over the years, similar to Pakistan, see the Joint Programme between the Government of the Islamic Republic of Iran, the Interim Authority of Afghanistan, and UNHCR for Voluntary Repatriation of Afghan Refugees and Displaced Persons of 4 April 2002; the Joint Programme concluded between the same parties, same subject of 16 June 2003; the Joint Programme concluded between the same parties, same subject of 8 March 2006.

⁶³ K. Lumpp, S. Shimozaawa, P. Stromberg (UNHCR protection, repatriation and programme officers in Kabul), *Voluntary Repatriation to Afghanistan, Key Features*, 23 REFUGEE SURVEY QUARTERLY 2004, 149-171 at 155.

one of voluntary repatriation, the relevant conclusions of the Executive Committee pertaining to voluntary repatriation as well as the need to define the specific procedures and modalities for the voluntary repatriation and subsequent reintegration in Afghanistan of the Afghan citizens in Pakistan with the assistance of the international community through UNHCR.

Most of the envisaged procedures are to be developed by a tripartite commission established on the basis of Article 1 of the agreement,⁶⁴ consisting of representatives of the parties to the agreement, presumably – it is not stated as such in the agreement – on the basis of the agreement.

The substantive heart of the agreement starts with Article 6 paragraph 1:

“The Parties hereby reaffirm that the repatriation of Afghan citizens who have sought refuge in Pakistan shall only take place at their freely expressed wish based on their knowledge of the conditions relating to voluntary repatriation”.

Although the reference is not to Afghan ‘refugees’, the inclusion of Afghan ‘citizens’ irrespective, that is, of their legal status in Pakistan is generous considering the discussion about the personal scope of the agreement.⁶⁵

The returnees shall be free to return to their former places of origin or any other place of their choice within Afghanistan. Actual return shall take place in safety, freedom and dignity. A particular aspect of safety in Afghanistan is addressed in the form of assurances upon return:

“The Transitional Islamic State of Afghanistan shall, together with other relevant parties, take the necessary measures to ensure that Afghan citizens can repatriate without any fear of harassment, intimidation, persecution, discrimination, prosecution or any punitive measures whatsoever on account of their having left, or remained outside of Afghanistan”.⁶⁶

⁶⁴ On the functions of this commission, see Art. 3: the observations made by UNHCR on ‘mixed commissions’, quoted in *supra* note 58, have not lost any of their validity. The inaugural session of the commission took place on 14 May 2003. At its eighth meeting the commission decided to create a sub-commission on technical and operational issues to follow up on matters relating to repatriation and relocation, including camp closures; See UNHCR, VOLUNTARY REPATRIATION FROM PAKISTAN 2005 at 10.

⁶⁵ Cf. Lumpff *et al.*, *supra* note 63 at 155.

⁶⁶ Art. 9 paragraph 1.

The agreement recalls in that respect a decree issued by the Government of Afghanistan regarding the dignified return of Afghan refugees on 3 June 2002.⁶⁷ In addition, the government of Afghanistan accepts to recognize the legal status, including changes thereto, of Afghan citizens repatriating from Pakistan, including births, deaths, adoptions, marriages and divorces.⁶⁸

The agreement also details UNHCR's supervisory role:

"UNHCR's supervisory role in promoting, facilitating, coordinating and monitoring the voluntary repatriation of Afghan citizens in order to ensure that repatriation is voluntary and carried out in conditions of safety and dignity shall be fully respected by the Governments".⁶⁹

In order to be able to exercise this supervisory function as well as its statutory task of providing international protection, the agreement stipulates UNHCR's free and unhindered access to Afghan refugees in Pakistan and returnees in Afghanistan. A comparable form of access is stipulated for UNHCR's implementing partners though it has been made subject to prior consultation with the other parties to the agreement.⁷⁰

The agreement also comprises provisions regarding procedure: UNHCR shall provide the Afghan refugees with the requisite information on which they can base their decision to return to Afghanistan.⁷¹ In order to ensure the voluntary character of repatriation, UNHCR will use voluntary repatriation forms that will also function as valid identity documents in Pakistan and as travel documents in Afghanistan.⁷² The agreement in addition comprises provisions on the preservation of family unity, special measures for vulnerable groups as well as very practical ones regarding border crossing points, immigration, customs and health formalities, etc.

C. *The Residual Case-Load*

The agreement, as indicated earlier, envisaged the UNHCR-assisted voluntary repatriation programme to last for three years until March 2006. It

⁶⁷ Art. 9 paragraph 2; for the text of the pertinent decree, see the Annex attached to this article. The decree has been drafted in close cooperation with UNHCR, UNHCR, RETURN TO AFGHANISTAN 2002 at 13.

⁶⁸ Art. 10.

⁶⁹ Art. 11.

⁷⁰ Art. 12.

⁷¹ Art. 14.

⁷² Art. 15.

has meanwhile been extended to last until December 2006. The fate of those who do not opt to return under this programme is addressed in Article 6 paragraph 2 of the repatriation agreement as follows:

“Screening in accordance with the refugee definition agreed to in the Screening Agreement concluded between the Government of the Islamic Republic of Pakistan and UNHCR on 2 August, 2001 will be carried out for the residual caseload to identify Afghan citizens with a continued need of international protection and distinguish them from economic migrants. This exercise will only be implemented after the completion of the UNHCR assisted voluntary repatriation program projected for the next three years, subject to a yearly review by the Commission”.⁷³

In other words, the year 2007 appears to become a crucial one for those Afghan refugees who still remain in Pakistan – usually referred to with the unsympathetic designation of ‘residual caseload’- whose fate will be governed by the Screening Agreement once concluded for new arrivals in a few designated refugee camps. Other agreements, though, have meanwhile been concluded.

V.

THE 2004 CENSUS AGREEMENT

A. *Background*

Even prior to the expiry of the voluntary repatriation programme for Afghan refugees, the question of the actual number of Afghans residing in the country was raised with a view to addressing the fate of those who would still be in Pakistan following the assisted voluntary repatriation operation.⁷⁴ The actual number of Afghans residing in Pakistan had long been a matter of conjecture and widely diverging estimates. UNHCR estimated there were 1 million Afghans in Pakistan whilst the Government

⁷³ ‘The Commission’ should be taken to refer to the tripartite commission for the voluntary repatriation of Afghan citizens from Pakistan established by the same Agreement.

⁷⁴ UNHCR (Pakistan), *Voluntary Repatriation to Afghanistan 2004*, December 2004 at 13; UNHCR, *Searching for Solutions*, *supra* note 18 at 23. By way of illustration of the future planning, that is, beyond the scheduled time-frame of the voluntary repatriation programme, see e.g. UNHCR Discussion Paper, *Towards a comprehensive solution for displacement from Afghanistan*, July 2003.

estimated there were 3.2 million Afghans in the country.⁷⁵ Knowledge of the actual number was considered to be vital for future planning, and the Government of Pakistan and UNHCR decided to actually count the Afghans residing in Pakistan and concluded an agreement to that effect in December 2004. Apart from a plain census, the agreement appears to have settled another apparently thorny question, to wit, that regarding the responsibility for the Afghans in Pakistan. A press release of UNHCR formulates it as follows: “setting the terms of the census, UNHCR said it would accept the figures determined in the government exercise while the government of Pakistan said it agreed that not all Afghans in the country were of concern to the UN refugee agency”.⁷⁶ “UNHCR accepted the numbers, while Pakistan accepted that not all of these would be the concern of HCR”.⁷⁷

B. *Terms of the Agreement*

On 17 December 2004, following a preliminary understanding, the Government of Pakistan and UNHCR signed a Memorandum of Understanding on the Census and Registration of Afghan Citizens Living in Pakistan, that is, those Afghans who arrived in Pakistan after 1 December 1979.⁷⁸ The agreement indicates that the exercise will be conducted in three phases - a census, data analysis and planning, and registration⁷⁹ - which should be completed within a year from the date of signature, that is, on 17 December 2005. The census comprised more than a mere head count. The specific objectives of the exercise indicate that phase one, the actual census, should also yield basic demographic data to allow generating a preliminary profile of the composition of the Afghan population. The third phase, registration, was also to serve a more specific goal:

⁷⁵ UNHCR Pakistan, *Voluntary Repatriation to Afghanistan 2004*, December 2004.

⁷⁶ UNHCR News Stories (Pakistan), *UNHCR say census counts 3 million Afghans*, 2 May 2005.

⁷⁷ UNHCR, *Searching for Solutions*, *supra* note 18 at 24.

⁷⁸ Art. 1.2. The agreement comprises 7 annexes. Unfortunately, the present author did not succeed in obtaining copies of those annexes. The agreement has been signed on 17 December 2004 yet it seems that both parties went through the motions of signing the agreement on 11 January at the occasion of an official visit of High Commissioner Lubbers to Pakistan and Afghanistan, see UNHCR Press Release, *UNHCR and Government of Pakistan agree on census of Afghans in Pakistan*, 11 January 2005.

⁷⁹ Plans to register all Afghans living in Pakistan were supported by the respective governments as well as UNHCR, UNHCR News Stories, *Pakistan, Afghanistan, UNHCR agree to extend deal on Afghan returns*, 30 August, 2005.

“to register the target population and thereby provide the basis for the development of arrangements for the management of Afghan citizens who continue to live in Pakistan after the expiry of the present Tripartite Agreement in March 2006”.⁸⁰

In view of those future arrangements, paragraph 1.3 of the agreement is worth mentioning which confirms that UNHCR will accept the quantitative data generated by the census exercise whilst the Government of Pakistan will accept that not all Afghan citizens covered in it would be of concern to UNHCR.

Although the overall responsibility for the census, analysis and registration lies with the Government of Pakistan, the Government and UNHCR agreed to work together for the establishment of procedures. UNHCR would, moreover, provide technical and human resources to assist and monitor the professional conduct of the census and registration exercise.⁸¹ Preceding the start of the census and registration the Afghan citizens would be informed of “the objectives of the different exercises, their intended outcomes, and their obligations and responsibilities”.⁸² As to obligations: participation in the census was made mandatory.⁸³

C. *The Actual Census*

The actual census was conducted by the Pakistani authorities from 23 February to 11 March 2005. Apart from numbers, the ‘basic demographic data’ the census intended to yield should be taken in a very broad sense to include information about current residence, place of origin, date of arrival, source of livelihood and intention to repatriate in 2005:⁸⁴ “Where are they?, What are they doing?, When they came? Where are they from in Afghanistan?, Whether they intend to repatriate? How do they support

⁸⁰ Art. 2. The reference to “the present Tripartite Agreement” should be taken to refer to the tripartite agreement pertaining to voluntary repatriation discussed *ante* Part IV.

⁸¹ Art. 3.

⁸² Art. 4 paragraph 2.

⁸³ Art. 1 paragraph 2.

⁸⁴ UNHCR, *Searching for Solutions*, *supra* note 18 at 23. Obviously, such information could be of use to target assistance in Afghanistan to specific areas and thus contribute to realizing voluntary repatriation in the sense of a durable solution.

themselves in Pakistan?"⁸⁵ If the answer given to the question as to intention to return to Afghanistan by the end of 2005 was negative, the principal reasons for this decision – categorized as: security, shelter, personal enmity, lack of livelihood, other – were also asked.

The census results demonstrated there were 3,049,268 Afghans living in Pakistan, 80.1 percent of whom arrived in Pakistan between 1979 and 1985. A third of the Afghan population - 1,116,249 – lives in refugee camps.⁸⁶ As to the composition of the Afghan population, the large majority are Pashtuns (81.5 percent), and in terms of age, 19.4 percent are children under 5. As to the intention to return by the end of 2005, 17.4 percent of the Afghans stated they intended to return to Afghanistan in 2005 while the majority – 82.6% - indicated not to have the intention to return by the end of 2005.⁸⁷ As to the principal reasons adduced for the decision not to return before 2006, lack of shelter ranks highest (57.2%), followed by the lack of livelihood (18.2%) and security problems (17.8%).

D. *The Census Agreement and the Screening Foreseen in the Voluntary Repatriation Agreement*

Article 1 paragraph 3 of the Census Agreement stipulates that UNHCR will accept the number of Afghans established by the census as living in Pakistan whilst Pakistan, for its part, will accept that not all Afghans in the country are the concern of UNHCR, *i.e.* not those who crossed into Pakistan motivated by livelihood and economic opportunities rather than a fear of persecution.⁸⁸ Should this acceptance be taken to signify more than a mere understanding which is stating the obvious, *i.e.* UNHCR's concern does not, as a rule, extend to those who fail to satisfy its mandate *ratione personae*, it carries disconcerting implications if the division between those who do and those who do not fall within UNHCR's mandate is made on the basis of a

⁸⁵ UNHCR Pakistan, *Voluntary Repatriation to Afghanistan 2004*, December 2004.

⁸⁶ UNHCR, *Searching for Solutions*, *supra* note 18 at 23; UNHCR observed it had for the first time credible information on the number of Afghans in Pakistan, See UNHCR, *Executive Committee Summary, Country Operation Plan 2006: Pakistan* (updated August 2005) at 3.

⁸⁷ *Census of Afghans in Pakistan 2005*, Ministry of States & Frontier Regions Government of Pakistan, Population Census Organization Statistics Division Government of Pakistan, UNHCR Branch Office Islamabad.

⁸⁸ *Cf.* UNHCR, *Executive Committee Summary, Country Operation Plan 2006: Pakistan* (updated August 2005) at 1.

mere census. However, Article 1 paragraph 4 of the Census agreement provides that:

“The objectives, scope and mechanisms for the screening exercise foreseen in Article VI of the Tripartite Agreement signed in March 2003 will be agreed by UNHCR and the GoP [Government of Pakistan] based on the outcome of the census and registration”.

Although the relation between these two paragraphs of Article 1 is not set out in the agreement, it is likely that the identification of those who actually are the concern of UNHCR depends on screening, hence is postponed to the time the repatriation programme and the registration have been scheduled to end, *i.e.* December 2006.

VI.

THE 2006 REGISTRATION AGREEMENT

A. *Background*

On 19 April 2006, another agreement was concluded, a Memorandum of Understanding between the Government of Pakistan and UNHCR on the Registration of Afghan Citizens Living in Pakistan:⁸⁹ the goal of this agreement is to register those Afghans who were counted in the census conducted earlier on the basis of the December 2004 Memorandum of Understanding referred to in the preceding paragraphs,⁹⁰ with a view to permitting the development of arrangements for the Afghan citizens in Pakistan.⁹¹ A purpose worded in the information leaflet, an annex to the Agreement, as follows:

“The Government of Pakistan, assisted by UNHCR, will conduct Registration Exercise during the last quarter of 2006 of all Afghan citizens in Pakistan who arrived after 1 December 1979, and covered in the February 2005 Census exercise.

⁸⁹ See UNHCR, *DHC's Pakistan visit ends; breakthrough agreement on registration of Afghans*, 21 April 2006. The agreement comprises 9 annexes that form an integral part of the agreement, Art. 1 paragraph 6.

⁹⁰ Art. 1.1.

⁹¹ Annex 1 Proposal for Registration of Afghan Citizens Residing in Pakistan to the Memorandum of Understanding.

This exercise is to assist the Government of Pakistan and UNHCR to know more about different groups of Afghan citizens living in Pakistan, and develop policies that find comprehensive solutions to Afghan citizens who remain in Pakistan after the expiry of the Tripartite Agreement in December 2006”.⁹²

The exercise, including issuing proof of registration to each individual over five years of age, would take twelve months from the date of entry into force of the agreement. It should, therefore, be completed on 19 April 2007: the actual registration, though, was estimated to take only 60 days.⁹³

B. *Terms of the Agreement*

The Registration Agreement specifies the objectives of the registration: to issue basic identity documentation and to supplement ongoing data collection and analysis required for the further development of arrangements for the management of Afghan citizens temporarily living in Pakistan.⁹⁴ The agreement also provides that it will be clearly stated by both the Government of Pakistan and UNHCR that the exercise has no implications for assistance or for the status of Afghans in Pakistan.⁹⁵ Registration does, however, have implications for assistance in Afghanistan: returnees, whether they return assisted by UNHCR or ‘spontaneous’ will need to produce an invalidated Proof of Registration card (on which, see below) to access assistance and public services.⁹⁶ Registration is mandatory (for those counted in the census, that is),⁹⁷ and those who fail to register and are unable to demonstrate compelling circumstances for not doing so will be

⁹² Annex 8 Information Leaflet to the Memorandum of Understanding; see also Annex 1, Art. 1 paragraph 1 (“The *goal* of the registration exercise will be to contribute to the future development of arrangements for those Afghan citizens living in Pakistan that were enumerated in the census conducted between February and March 2005”).

⁹³ Art. 8 paragraph 1, Annex 1.

⁹⁴ Art. 1 paragraph 2.

⁹⁵ Art. 1 paragraph 5.

⁹⁶ Art. 7 paragraphs 1 and 2, Annex 1.

⁹⁷ Annex 5 (‘Non eligibility’); Annex 8 (Information Leaflet). Afghans who arrive in Pakistan after the registration will be permitted to have access to UNHCR should they wish to seek asylum, Art. 2, Annex 1.

subject to the relevant national laws, a fate that should be taken to entail qualification as ‘illegal immigrants’.⁹⁸

Those registered will be provided with a Proof of Registration Card that recognizes the bearer as an Afghan citizen temporarily living in Pakistan.⁹⁹ The validity of the card will be three years from the date of issuance, and it will be extendable based on consultation amongst the signatories of the tripartite agreement pertaining to voluntary repatriation.¹⁰⁰ Afghans who return to Pakistan will be deregistered. Deregistration can also follow by way of sanction for contravention of Pakistani laws.¹⁰¹

The registration includes, apart from the obvious data, also the answer to the question whether the holder intends to return to Afghanistan. In case of an affirmative reply, the year of scheduled return is to be added, in case of a negative reply, principal and secondary reasons will be registered (among the principal reasons: security, livelihood, shelter, personal enmity, other and the secondary reasons include mines, trauma, lack of access to land pasture occupied by others, and former persecutors still in power).¹⁰²

The overall responsibility for the registration rests with Pakistan and, similar to the census conducted earlier, the Government of Pakistan and UNHCR will work together for the establishment of procedures to conduct the registration exercise. In addition, UNHCR would provide operational support and oversight to assist and monitor the professional conduct of the registration.¹⁰³

C. *Actual Registration*

Actual registration started on 15 October 2006. On 22 November 2006 only 15% of all Afghans had been registered. The registration nonetheless gathered momentum and on 19 December 2006, over a million Afghans were registered.¹⁰⁴ Still much less than the number of Afghans counted in 2005 and also less than could be expected taking the number of those who

⁹⁸ IRIN, *Pakistan: Unregistered Afghans to be treated as illegal immigrants*, 22 November 2006 (who “will have to face the consequences”).

⁹⁹ Art. 3 paragraphs 1 and 2.

¹⁰⁰ Art. 3 paragraph 3.

¹⁰¹ Art. 4 paragraphs 1 and 2.

¹⁰² Annex 3 Proof of Registration Documentation.

¹⁰³ Art. 2.

¹⁰⁴ IRIN, *Pakistan: Afghan registration hits 1 million*, 19 December 2006.

had meanwhile returned to Afghanistan into consideration, a fact that induced UNHCR to discuss a possible extension of the 31 December deadline in order to register as many Afghans as possible.¹⁰⁵ On 20 December it was estimated that there were still 2.4 million Afghans in Pakistan,¹⁰⁶ which means that 1.4 million Afghans omitted to register themselves. The reason for the omission to do so: “Many Afghans in Pakistan appear to be suspicious of the registration drive, fearing it may be a prelude to forced repatriation”.¹⁰⁷

The initial deadline of 31 December was extended until 19 January 2007 and, once more, until 2 February.¹⁰⁸ Moreover, although the registration was initially confined to those who had been counted in 2005, in December 2006 it was decided that those who had not been counted could also register themselves provided they could submit documentary evidence of their presence in Pakistan at the time of the census.¹⁰⁹ Some 2.1 million Afghan have been registered.¹¹⁰

Those who did register were given the legal status of “Afghan citizen temporarily living in Pakistan” and provided with a Proof of Registration Card valid for a period of 3 years. According to a spokesperson from UNHCR, the registered Afghans will have to leave the country after expiry of the three year period.¹¹¹ This notwithstanding, UNHCR qualifies the registration a ‘protection tool’, “for identity purposes only, recognising the bearer as an Afghan citizen temporarily living in Pakistan. It is a protection tool against harassment, but will not confer any additional rights or

¹⁰⁵ UNHCR, *Registration of Afghans in Pakistan tops 1-million mark*, 19 December 2006.

¹⁰⁶ UNHCR, *Afghan brick-makers seek break from bonded labour*, 20 December 2006.

¹⁰⁷ IRIN, 22 November 2006; see also Daily Times, *Why are Afghan refugees reluctant to register?*, 5 November 2006: the fear extends beyond immediate deportation to the period following expiry of the three year period of stay granted upon registration, a fear that need not surprise in view of public statements by a spokesperson of the High Commissioner for Refugees to the effect that the Afghans have to leave the country upon expiry of the three year term.

¹⁰⁸ IRIN, *Pakistan: UN cautions on Afghan refugee camp closures*, 17 January 2007.

¹⁰⁹ IRIN, *Pakistan: Registration open to more Afghan refugees*, 4 January 2007 (statement of the UNHCR Assistant Representative in Pakistan).

¹¹⁰ UNHCR News Stories, *Pakistan, Afghanistan finalise camp closure plans*, 7 February 2007.

¹¹¹ NRC Handelsblad, *Pakistan telt Afghaanse vluchtelingen*, 16 October 2006.

status”.¹¹² Although this observation is in accordance with the terms of the Registration Agreement, it is noteworthy that UNHCR does not add a *caveat* to the effect that the registration does not affect the refugee status of Afghan refugees in the country either.

VII.

THE ENTITLEMENTS OF AFGHAN REFUGEES

A. Introduction

It is obvious that the problem of Afghan refugees (and non-refugees) in Pakistan is still a substantial one. The mere number testifies to that. It is similarly obvious that both the Government of Pakistan and UNHCR have anticipated the need to address this problem. A major obstacle for planning purposes has long been the fact that no data were available regarding those who were to benefit from such planning purposes. Rendering a problem more tractable by means of an identification of its scope in terms of hard data – such as those yielded by the census and again by the subsequent registration of Afghans in Pakistan – is arguably indispensable in order to be able to solve it.¹¹³ However, it is of a subsidiary nature for beyond satisfying such practical needs, lie primary questions of principle, legal principle that is. Those questions are addressed in the next paragraphs.

¹¹² Daily Times, 5 November 2006. It is worth emphasizing that this observation is undoubtedly true in view of the fact that Afghan refugees were never provided with any form of identification. By way of illustration, the comment of one Afghan refugee: “‘I have spent 24 years in Pakistan without any legal documents,’ Udin said. ‘Of course I’m pleased to have the PoR [Proof of Registration] cards for my entire family. In my town, I never had any problems with the local authorities or people, but I could not move freely out of town without any identity documents’”, UNHCR, *Mobile, mach-speed registration for Afghans in Pakistan*, 7 November 2006.

¹¹³ “The census results in June 2005, which for the first time provided credible information on the number of Afghans in Pakistan, will facilitate the formulation of concrete policies on future management frameworks and for comprehensive durable solutions for the Afghans remaining in Pakistan following the end of the Tripartite Agreement in March 2006. The registration (early 2006) is expected to further this process with more detail in addition to providing Afghans with documentation and improved protection”, UNHCR, *Country Operations Plan, Overview, Country: Pakistan, Planning Year 2006* (updated August 2005) at 3.

B. *Non-Refoulement*

As long as they are refugees, refugees are protected against forced return: return can consequently only be effectuated on a voluntary basis. The protection against forced return, *refoulement*, is the main and crucial entitlement of refugees. This protection is laid down in Article 33 paragraph 1 of the 1951 Convention:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

This prohibition corresponds with the definition of refugee comprised in Article 1(A)(2) of the 1951 Convention. Pakistan is not a party to the 1951 Convention (nor the 1967 Protocol) hence not bound to observe Article 33 paragraph 1 thereof. Pakistan could nonetheless be considered bound to observe the pertinent obligation in case it can be qualified to constitute a norm of customary international law. Whether it actually does can conveniently be left aside in view of the fact that Pakistan is bound to observe it by virtue of its acceptance of the solution of voluntary repatriation on the one hand, and the content of the cooperation with UNHCR on the basis of the Cooperation Agreement it concluded with UNHCR on the other. The substance of the cooperation comprises, as set out earlier, conclusions of UNHCR’s Executive Committee including one on the applicability of the prohibition of *refoulement* to situations of mass influx.¹¹⁴

The knowledge that Pakistan is bound to observe the prohibition of *refoulement* does not yet indicate the scope of this obligation. Article 33 paragraph 1 of the 1951 Convention corresponds with the definition of refugee given in the same Convention and does not extend beyond those who satisfy this definition.¹¹⁵ Pakistan implicitly accepted a much broader

¹¹⁴ See Conclusions no. 22 (XXXII – 1981) (in this conclusion the Executive Committee qualifies the prohibition of *refoulement* as a peremptory norm of international law); no. 25 (XXXIII – 1982); no. 100 (LV – 2004); see also UNHCR’s Note on International Protection, UN doc. A/AC.96/660 paragraph 1.

¹¹⁵ But see Sir Elihu Lauterpacht, D. Bethlehem, *The Scope and Context of the Principle of Non-Refoulement*, (Opinion for UNHCR’s Global Consultations) 20 June 2001 para. 128 *et seq.* who argue it actually on the basis of the observation that UNHCR’s mandate *ratione personae* has evolved to extend to a much broader category of refugees. The broadened mandate of UNHCR in the sense indicated cannot be brought to bear, however, on the interpretation of a treaty obligation of states with respect to well (and narrowly) defined refugees.

personal reach of the pertinent obligation.¹¹⁶ Apart from what may be derived from the substance of the cooperation to which Pakistan committed itself in the cooperation agreement,¹¹⁷ this may be inferred from the voluntary repatriation agreements it concluded. The agreements of 1988 and 1993 recognized the need for ‘voluntary’ repatriation of Afghan refugees in the country (who are not defined in either of the two agreements),¹¹⁸ and the agreement that was concluded in 2003 ‘reaffirms’ that the repatriation of “Afghan citizens who have sought refuge in Pakistan shall only take place at their freely expressed wish”.¹¹⁹ The principle of voluntary repatriation, in short, has never been predicated on a narrowly defined group. The inference drawn is confirmed by the broad definition of refugee which was introduced in the Screening Agreement concluded in 2001 to assess the eligibility of those who kept pouring into Pakistan which includes both the classical 1951 Convention definition and a much broader one that is comparable – not identical – to the one included in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter: 1969 OAU Convention).¹²⁰

On the basis of the above, it is clear that Pakistan is bound to observe the principle of *non-refoulement* with respect to those whom it admitted and whose presence it accepted on the basis of a *prima facie* recognition of their status and those whom it considered eligible following an individual assessment on the basis of the definition it adopted in 2001.

C. Refugee Status

The conclusion reached in the previous paragraph should not detract from the fact that *prima facie* recognition of refugee status, the mode of recognition practised by Pakistan for decades until it prescribed individual status determination in 2001 with respect to the population of a few

¹¹⁶ See *infra* Part VII C.

¹¹⁷ See Zieck, 2006, *supra* note 27 at 264-265.

¹¹⁸ Whatever inference can be drawn from the reluctance on the part of Pakistan to commit itself to protecting those who would opt not to return in 1988 – see *supra* note 51 – has been refuted by the conclusion of the 1993 and 2003 agreements on voluntary repatriation.

¹¹⁹ On the generosity of the designation ‘citizens’ in the 2003 agreement, see *ante* Part IV B.

¹²⁰ Art. 1 para. 2.

designated refugee camps,¹²¹ is not without conceptual problems.¹²² This collective recognition of refugee status is usually resorted to in cases of mass influx. It is, in addition, implied by the wording of refugee definitions as included in the 1969 OAU Convention and the Screening Agreement with their emphasis on general situations (“armed conflict and other forms of generalized violence which seriously disturbs the public order”)¹²³ rather than (solely) the plight of the individual:

“Group determination on a *prima facie* basis means in essence the recognition by a State of refugee status on the basis of the readily apparent, objective circumstances in the country of origin giving rise to the exodus”.¹²⁴

“[M]any States as well as UNHCR have applied group-based recognition of refugee status on a *prima facie* basis. This means that each individual member of a particular group is presumed to qualify for refugee status. This presumption is based on objective information on the circumstances causing their flight. *Prima facie* recognition is appropriate where there are grounds for considering that the large majority of those in the group would meet the eligibility criteria set out in the applicable refugee definition”.¹²⁵

Since *prima facie* recognition is not identical with a mere provisional grant of refugee status:

“*Prima facie* recognition of refugee status does not require subsequent ‘confirmation’, even if individual determination becomes feasible at a

¹²¹ See, e.g., UNHCR, *Return to Afghanistan 2002* at 5 (recounting that Pakistan declared in 2000 that Afghans would not henceforth have *prima facie* refugee status), but see R. Martin, *Regional Dynamics and the Security of Afghan Refugees in Pakistan*, 19 REFUGEE SURVEY QUARTERLY 2000, 71-78 at 74. It is also UNHCR practice to resort to *prima facie* recognition of refugee status in case of massive influxes. In that respect it is worth noting that, despite the original definition of refugee in its Statute which is formulated in individual terms, this practice corresponds with Art. 2 of its Statute which indicates that the work of the High Commissioner shall, as a rule, relate to groups and categories of refugees.

¹²² Compare UNHCR’s Agenda for Protection, October 2003 (3rd rev. ed.), Goal 1, Objective 10.

¹²³ Screening Agreement.

¹²⁴ UN doc. EC/GC/01/4 (2001) (Protection of Refugees in Mass Influx Situations: Overall Protection Network) paragraph 6 (emphasis added); see also *ibid.* paragraph 7.

¹²⁵ UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees, 7 February 2006 paragraph 9.

later stage. It remains valid and may be terminated only if it is established, in accordance with applicable standards and following proper procedures, that the circumstances justify its cessation, cancellation or revocation”.¹²⁶

The quoted passage leaves no doubt as to the entitlements of those whose refugee status has been recognized on a *prima facie* basis: group determination means that each individual member of the group is regarded a refugee in the absence of evidence to the contrary,¹²⁷ hence derives rights from the collective assessment. As indicated in the quoted passage, collective *prima facie* recognition does not require confirmation by means of a subsequent individual eligibility assessment. An individual status determination of refugees who have been recognized on a collective basis may nonetheless be warranted by way of exception with respect to those with respect to whom ‘evidence to the contrary’ can be adduced. Individual status determination following a collective recognition of refugee status should not, however, affect the entitlements of those whose *prima facie* recognition can be upheld in view of the cause of their flight at the time of flight: the assessment should, in other words, be *ex tunc*, *i.e.*, on the basis of the objective circumstances within the country of origin giving rise to flight at the time of flight.

D. *Counting and Registering does not Amount to Screening*

The counting and registration exercise served several purposes: to establish the actual number of Afghan citizens – refugees, migrants alike – residing in Pakistan and to settle the apparent outstanding issue of responsibility: UNHCR, which always underestimated the actual number of Afghans in the country, committed itself in the Registration Agreement to accepting the number yielded by the census whilst Pakistan, for its part,

¹²⁶ *Ibid.* paragraph 12; similarly HCR/GIP/03/03 para. 23. On cessation of refugee status, see *infra* Part VII E.

¹²⁷ See, *inter alia*, UNHCR’S HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (HCR/IP/4/Eng/REV.1), January 1992, paragraph 44; UNHCR’S RESETTLEMENT HANDBOOK, 1 November 2004, Ch. III paragraph 3.5; UNHCR, AN INTRODUCTION TO INTERNATIONAL PROTECTION. PROTECTING PERSONS OF CONCERN TO UNHCR. Self-study module 1, 1 August 2005 at 112.

accepted that not all those counted would be the concern of UNHCR.¹²⁸ Obviously a mere head count does not identify those who can and those who can not be considered to be the concern of UNHCR.

Earlier the observation was made that this settlement could be taken to boil down to a restatement of the obvious for UNHCR as a rule does not concern itself with those who do not fall within its mandate *ratione personae*. Economic migrants, for instance, do not come within the reach of this mandate. Assuming that two rational actors do not need to state the obvious in a binding agreement, the settlement acquires unsettling overtones in view of the fact that the census was not confined to a head count and retrieving basic demographic data such as place and time of birth, composition of family, etc. In that respect it should be emphasized that the counting and registration exercises, taking the additional individual information that was acquired explicitly into consideration, do not amount to screening in the sense envisaged in the Screening Agreement hence can not serve to identify the two categories. The potentially unsettling aspect of the settlement is, however, neutralized by the fact that all those who were counted were, regardless of legal status, provided with a Proof of Registration Card which entitles them to stay for another three years. In view of the publicly expressed conviction on the part of the host state that many of those who arrived comparatively recently are economic migrants rather than refugees,¹²⁹ this is a generous gesture of Pakistan which, after all, never intimated the intention to regularize the stay of economic migrants. However, this generosity with respect to migrants among the Afghans in Pakistan should not detract from the fact that refugees among them have different rights from those who are not refugees.

¹²⁸ It should be added that UNHCR has consistently recognized that many Afghans habitually cross borders to look for seasonal employment, to trade, to access services, and to maintain social and family connections, see e.g. UNHCR, *Afghanistan, Challenges to Return*, March 2004. By way of illustration of the normalization of the movement of people across the border, UNHCR mentions a survey at the Torkham border point which demonstrated that over 10,000 people were entering Pakistan daily, UNHCR, *Searching for Solutions*, *supra* note 18 at 25.

¹²⁹ Mr. Mohammad Haroon Shaukat, Director General, Ministry of Foreign Affairs, quoted in Ruiz, *Afghan Refugees Shunned*, *supra* note 28 at 23 (“[...] we believe that 75 percent are economic migrants, not refugees”).

E. *Cessation of Refugee Status*

The protection against forced return lasts until loss of refugee status is warranted. Loss of refugee status follows either when the refugee undertakes initiatives which warrant the inference that international protection is no longer needed: he, for instance, voluntarily re-avails himself of the protection of the country of his nationality; or, having lost his nationality, he has voluntarily re-acquired it, or, he has acquired a new nationality and enjoys the protection of the country of his new nationality, or he has voluntarily re-established himself in the country which he fled. The examples given are enumerated both in the Statute of UNHCR and in the 1951 Convention. Pakistan is not held to observe either one of those instruments but it is bound to take the Statute into consideration as part of the normative content of the cooperation with UNHCR on the basis of the Cooperation Agreement.

Apart from what may be derived from the Cooperation Agreement in this respect, it could be argued that observing the cessation clauses would make sense anyhow. After all, the pertinent clauses are nothing but the negation of the applicability of the refugee definition. Each of the clauses negates the criterion of unwillingness or inability to avail oneself of the protection of the country of origin. In view of the fact that Pakistan has agreed, initially implicitly and subsequently explicitly, to adhere to a particular definition, it makes sense to consider Pakistan released from protection obligations once the definition does no longer apply. Since Pakistan extends its protection to those who have so far *prima facie* satisfied a particular definition of refugee, Pakistan should not be considered bound to continue to protect those who themselves demonstrate they no longer satisfy that definition.

Loss of refugee status follows, alternatively, when the circumstances in the country of origin in connection with which the refugee has been recognized as such have ceased to exist and the refugee can no longer continue to refuse to avail himself of the protection of the country of nationality or origin. This particular cessation clause, usually abbreviated as the 'changed circumstances clause', corresponds too with the definition of refugee irrespective of whether this definition is the narrow one comprised in the 1951 Convention definition or the much broader one accepted both by UNHCR and Pakistan in the Screening Agreement. In every case, it signifies that reliance on the circumstances on which fear or threats to life or security were predicated can no longer be sustained. However, where the particular circumstances leading to flight have changed only to be replaced by

different circumstances which too justify refugee status, the pertinent cessation clause can not be invoked: “Thus in Afghanistan, where one type of civil war was replaced by another, the cessation clause could not be invoked despite a major political change”.¹³⁰

1. UNHCR’s Cessation Guidelines regarding the ‘ceased circumstances’ clauses

UNHCR issued guidelines on Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention in 2003.¹³¹ The Guidelines analyse what the change of circumstances should amount to in order to justify cessation of refugee status: the change should be of a fundamental character, the nature of the change should be an enduring one and should, moreover, entail effective and available protection of the country of origin:

“It requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood”.¹³²

The general human rights situation is mentioned as an important indicator in this respect. There is, however, no requirement that the standards of human rights achieved must be exemplary.¹³³

“What matters is that significant improvements have been made, as illustrated at least by respect for the right to life and liberty and the prohibition of torture; marked progress in establishing an independent judiciary, fair trials and access to courts: as well as protection amongst others of the fundamental rights to freedom of expression, association and religion. Important, more specific indicators include declarations of

¹³⁰ UN doc. EC/47/SC/CRP.30 (Note on the Cessation Clauses) (1997) para. 20.

¹³¹ HCR/GIP/03/03. Those guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary as well as UNHCR staff carrying out refugee status determination in the field, and they complement the Handbook mentioned in *supra* note 127.

¹³² HCR/GIP/03/03 para. 15.

¹³³ *Ibid.* para. 16.

amnesties, the repeal of oppressive laws, and the dismantling of former security services”.¹³⁴

The Guidelines indicate that UNHCR or states may issue formal declarations of general cessation of refugee status for a particular caseload.¹³⁵ With respect to the possibility of cessation of refugee status on account of changed circumstances with respect to refugees originating from Afghanistan, UNHCR has applied its general guidelines to Afghanistan as will be set out in the next paragraph.

2. UNHCR’s Guidelines on Cessation pertaining to Afghan Refugees

In a document entitled: “Considerations Relating to Cessation on the Basis of Article 1 C (5) of the 1951 Convention with Regard to Afghan Refugees and Persons Determined in Need of International Protection”,¹³⁶ UNHCR outlines the parameters for cessation of refugee status regarding refugees from Afghanistan.

With respect to the requisite ‘fundamental character of change’, UNHCR observes that the process of political transition in Afghanistan which began with the fall of the Taliban regime in late 2001 and the conclusion of the Bonn Agreement marked the beginning of a fundamental change in the country. The solidification of the change requires the successful completion of this transition process before assessing general cessation. A complete political change, an end to hostility and return to a situation of peace and stability are mentioned as important indicators of a fundamental change and therefore for the application of general cessation.

An important aspect of the requisite ‘enduring’ nature of change is the successful completion of the transition process through parliamentary elections and a significant reduction of violations of human rights by local

¹³⁴ Id.

¹³⁵ Id at para. 3.

¹³⁶ The document dates of 29 January 2005. Although it is consistent with the guidelines discussed in paragraph 7.5.1 *supra*, it is in the present context – bearing in mind that Pakistan is not a party to the 1951 Convention and hosts most of the Afghan refugees - remarkable that UNHCR refers exclusively to the cessation clauses as enumerated in the 1951 Convention rather than those comprised in its own Statute.

commanders and armed elements and an end to serious discrimination of ethnic minorities.

The restoration of national protection, lastly, requires respect for human rights in general but in particular a marked progress towards the re-establishment of functioning government and basic administrative structures including a justice system in the country which is accessible and able to operate without discrimination. The degree to which these structures extend beyond the central government level into the provinces is explicitly added.

The Guidelines omit to add the condition included in the General Guidelines quoted in the preceding paragraph to the effect that effective and available protection also requires the existence of an adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.

F. 'Screening' the Residual Caseload

Afghan refugees have been registered and provided with a Proof of Registration that entitles them to remain in Pakistan for the coming three years, so at least until 2010. At the same time, it appears the tripartite agreement has not expired and the voluntary repatriation programme it contains has been extended: the repatriation will resume in March 2007.¹³⁷ This seems to entail that the screening of the residual caseload foreseen in the tripartite agreement will not be resorted to yet. The question is whether the fate of the residual caseload, whenever it will be decided upon, should be determined by means of screening in the sense envisaged in the Screening Agreement. First of all, in view of the requisite *ex tunc* assessment, the *prima facie* recognition of the refugee status would be upheld in most cases. In those instances where it cannot be upheld, the fact that the persons concerned have been granted an extended stay of three years subsequent to registration – a stay to which all Afghans in Pakistan regardless of legal status are entitled – would bar drawing any other consequence than loss of refugee status: it would not affect the entitlement to stay which, again, has been granted to any Afghan citizen regardless of status. Since the decision has been taken to grant every Afghan citizen in Pakistan, provided they have registered themselves, extended stay for the coming three years, discarding the idea of screening therefore makes sense.

¹³⁷ UNHCR, *Pakistan: Afghan registration starts*, 13 October 2006.

An alternative course of action, one that corresponds with the entitlements of those – the majority – who have *prima facie* been recognized as refugees is to terminate that status when the circumstances in the country of origin so warrant, *i.e.* on the basis of the benchmarks indicated in the preceding sections.¹³⁸ Rather than screening individuals to identify an ongoing objective need for continued protection, individuals should be given the opportunity to contest the applicability of a decision regarding general cessation.¹³⁹ The decision could be contested on account of the fact that circumstances which induced flight have not ceased to exist with respect to particular individuals in which case cessation is not warranted and refugee status continues. The decision could also be contested on the basis of compelling reasons arising out of previous persecution, usually summarized in terms of ‘traumatic experiences’, which bar return to Afghanistan subsequent to loss of refugee status.¹⁴⁰ It appears that UNHCR¹⁴¹ has extended this rather specific exception with respect to Afghan refugees into a more general criterion of ‘humanitarian grounds’.¹⁴²

¹³⁸ Put differently, on the basis of an objective and verifiable assessment of the circumstances prevailing in Afghanistan relating to the enjoyment of basic human rights to an extent that warrants the inference that protection is actually available, a categorically different assessment from the political decision to cease refugee status on the basis of the coming into power of a particular faction or the mere fact of some order in (parts of) the country of origin.

¹³⁹ “Recognizes therefore that all refugees affected by a group or class decision to apply these cessation clauses must have the possibility, upon request, to have such application in their cases reconsidered on grounds relevant to their case”, Executive Committee Conclusion no. 69 (XLIII – 1992) sub (d). The same conclusion refers to the need for clearly established procedures. UNHCR’s guidelines on cessation reiterate the need for individual review but do not add specifics regarding procedures other than indicating that a review should have a staying effect until a final decision is taken, HCR/GIP/03/03 para. 25 sub (vii).

¹⁴⁰ Note though that the Executive Committee merely recommends that states consider an appropriate status for persons who have compelling reasons out of previous persecution (Conclusion no. 69 (XLIII – 1992) sub (e)). UNHCR opines that this exception reflects a “general humanitarian principle that is now well-grounded in State practice”, HCR/GIP/03/03 para. 21.

¹⁴¹ ‘UNHCR’ should be taken to refer in this instance as UNHCR’s Office in Afghanistan: the relevant document – see *infra* – has been written by ‘UNHCR Afghanistan’ on the basis of an intimate knowledge of the situation on the ground in Afghanistan against the background of durable solutions.

¹⁴² UNHCR doc. Humanitarian Consideration with regard to return to Afghanistan, May 2006. This document outlines which persons should not be returned to Afghanistan. Although it does not do so with a reference to the cessation clauses, with the exception of victims of serious trauma, but in the more undetermined terms of “exemptions to obligations to return” from a legal point of view those

This general criterion entails that the exception applies to extremely vulnerable cases, *i.e.* those for whom return would not constitute a durable solution and would endanger their physical safety and well-being, given their extreme vulnerability and nature of their special needs: individuals whose vulnerability is the result of a lack of effectively functioning family- and/or community support mechanisms and who can not cope, in the absence of such structures; and individuals who can not cope, either because such support structures are not available or because Afghanistan lacks the necessary public support mechanisms and treatment opportunities.¹⁴³ Examples of such extremely vulnerable cases are unaccompanied females; single parents with small children and without bread-winner; unaccompanied elderly persons; unaccompanied children; victims of serious trauma (including sexual violence);¹⁴⁴ physically disabled persons; mentally disabled persons; persons with medical illness (contagious, long term or short term). It is clear the notion of 'extreme vulnerability' need not invariably entail that return to Afghanistan is impossible. In some, not all though, of the enumerated instances the consideration that return is not possible is explicitly related to the current state of health services available in Afghanistan, which entails that return may be possible when those services improve.¹⁴⁵ For those refugees who can invoke humanitarian grounds which prevent return to Afghanistan subsequent to loss of refugee status an alternative durable solution should be found such as permanent integration in Pakistan or resettlement in a third country. It is remarkable that the quite extensive criterion of 'humanitarian grounds' does not even mention the questions that may be raised with respect to those whose return would only be a reflection of a nationality which is, at most, a nominal one: the second and third generation of Afghan refugees or parents and their children who know no other life than that spent in exile. Technically speaking, they would not even return – for they never left – to their country of origin but could merely 'enter' it. For all practical purposes their effective nationality is that of Pakistan: it is an open question whether the

considerations only make sense when coupled either to status determination – not at issue - or cessation of refugee status.

¹⁴³ UNHCR doc. Humanitarian Considerations with regard to return to Afghanistan, May 2006.

¹⁴⁴ Obviously, those victims need not rely on UNHCR's extended criterion but can invoke the accepted exception to cessation referred to earlier.

¹⁴⁵ The document enumerates the diseases which can currently not be treated in Afghanistan either on account unavailability of doctors, and/or instruments and/or medicines.

effectiveness of the latter should outweigh the formal, mere nominal nationality.¹⁴⁶

VIII.

THE FATE OF THE AFGHAN REFUGEES IN PAKISTAN

The fate of the Afghan refugees following the voluntary repatriation exercise was for a considerable time considered as one based and dependent on the outcome of ‘screening’: the voluntary repatriation agreement first suggested it as determinative of the fate of those who would not have opted to return to Afghanistan within the time frame set for the voluntary repatriation programme in the voluntary repatriation agreement. The census agreement continued to regard the fate of the Afghan refugees along the lines of ‘screening’ and carried it to the subsequent registration. The registration, however, resulted in the grant of a three-year stay for all Afghans in the country irrespective of status, regardless that is, of whether the beneficiaries are refugees or migrants. It signifies that any ‘screening’, leaving aside the fact that it would be a redundant exercise with regard to those who had been recognized as refugees on a *prima facie* basis and a disproportionate one if only undertaken to identify those with respect to whom evidence could be adduced that would warrant the inference that they are migrants rather than refugees, would not make any sense the coming three years. This conclusion is reinforced by the recent decision to prolong the voluntary repatriation programme, beyond just a resumption in March 2007, until December 2009: the tripartite commission – established on the basis of the 2003 voluntary repatriation agreement – decided at its 12th meeting “to amend and extend the Tripartite Agreement governing voluntary repatriation till December 31, 2009”.¹⁴⁷

¹⁴⁶ UNHCR’s Executive Committee merely recommends “appropriate arrangements” (“[...] and recommends also that appropriate arrangements, which would not put into jeopardy their established situation, be [...] considered by relevant authorities for those persons who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links there”, Executive Committee Conclusion no. 69 (XLIII – 1992) sub (e)), Pakistan would not, therefore be bound to actually provide such arrangements on the basis of the Cooperation Agreement.

¹⁴⁷ UNHCR News Stories, *Pakistan, Afghanistan finalise camp closure plans*, 7 February 2007. Afghans who did not register themselves in the registration exercise

A few inferences can be drawn from this decision which at the time of writing still requires the approval on the part of both Governments concerned. First of all, in terms of dates: the end of the voluntary repatriation programme coincides with the expiry date of the Proof of Registration cards: the cards were issued recently and entitle the holder to stay three years in Pakistan. This in turn entails that voluntary repatriation is until 31 December 2009 a truly voluntary option in the sense that it is demonstratively coupled to the option not to return by virtue of the entitlement to stay that derives from the Proof of Registration Card. The fate of the Afghan refugees in Pakistan is consequently secure until the end of the year 2009.¹⁴⁸

are given a period of grace: from March 1 to April 15 they may benefit from UNHCR-assisted repatriation, UNHCR News Stories, *Top UNHCR official outlines options for camp closure in Pakistan*, 21 February 2007.

¹⁴⁸ That should explicitly be taken to include those who live in camps near the Afghan border: calls for mandatory return followed when Pakistan was accused to knowingly allow its territory, including refugee camps, to be used for terrorist activities in Afghanistan, see in particular A. Tang, *Afghan President Lashes Out at Pakistan*, Washington Post, 14 December 2006. One way to end this problem, Pakistan's Prime Minister retorted, is the return of the "three million Afghan refugees still living in Pakistan to go home" (The New York Times, *Pakistan Premier Wants Afghan Refugees to Return Home*, 4 January 2007); "If Afghan refugees living in Pakistan return to their home country, 'this would remove the presence of Afghans close to the border, which appear to prompt the allegation from Kabul'" (spokeswoman from the Pakistan Ministry of Foreign Affairs, Tang, *loc. cit. supra*); "Four Afghan refugee camps in Pakistan are to be closed down and residents from two of them sent back to Afghanistan, Ambassador Mahmud Ali Durrani told the Washington Times. [...] 'However, this recent spate of criticism that has come towards Pakistan, we got fed up. We said, "If this is the problem, then let's remove it"', the envoy told" (Daily Times (site edition), *Pakistan to close down four Afghan refugee camps*, 17 January 2007); "The return of refugees is critical to controlling terrorism", Prime Minister Shaukat Aziz, *Zee News*, "Pakistan's PM says Afghan refugees must return home", 30 January 2007; "NATO and Pakistan agreed on Tuesday that three million Afghan refugees in Pakistan posed a security threat and needed to be repatriated. [...] 'The refugee camps pose a real threat', a NATO official said afterwards", Daily Times (site edition), *NATO, Pakistan say Afghan refugees must return home*, 1 February 2007. The tripartite commission decided at its 12th meeting to close four border camps (Katchagari, Jungle Pir Alizai, Jalozai and Girdi Jungle) giving their inhabitants the choice between UNHCR-assisted voluntary repatriation and relocation to other camps in Pakistan (UNHCR News Stories, *Pakistan, Afghanistan finalise camp closure plans*, 7 February 2007), to wit, camps in Dir and Chitral, UNHCR News Stories, *Top UNHCR official outlines options for camp closure in Pakistan*, 21 February 2007.

From a legal point of view expiry of the three years term of stay currently granted to those who hold a Proof of Registration Card does not entitle the Government of Pakistan to require all Afghans, irrespective of status, to leave the country. Afghan refugees are, regardless of the temporal limit attached to the stay granted upon registration, entitled to retain their refugee status and corresponding protection against forced return until their status can be ceased on account of changed circumstances in the country of origin. The natural next step would therefore be to analyse whether or not the situation prevailing in Afghanistan in 2010 warrants a general cessation of refugee status. If so, individual refugees should be allowed to contest the applicability of the pertinent cessation clause pertaining to changed circumstances in the senses indicated earlier. This course of action would signify that the fate of the Afghans concerned would be commensurate with their legal status: the status of refugee.

POSTSCRIPT

One of the agreements governing the fate of the Afghan refugees over a longer period of time is the voluntary repatriation agreement of 2003. It was due to expire in 2006 but the tripartite commission decided early February to extend it once more so that it, and the voluntary repatriation programme it contains, would last until December 2009.¹⁴⁹ Rather than extending the agreement, however, a new agreement governing the repatriation of Afghan citizens living in Pakistan was concluded on 2 August 2007.¹⁵⁰ The new agreement, which repeals the 2003 voluntary repatriation agreement,¹⁵¹ shall remain in force until 31 December 2009 unless it is terminated by mutual agreement amongst the parties prior to that date.¹⁵²

The new agreement retains the key characteristics of any voluntary repatriation agreement. The voluntary nature of repatriation is 'reaffirmed' and the repatriation of those who hold proof of registration "shall only take place on the agreed principles of voluntarism and gradualism and based on their knowledge of the conditions relating to voluntary repatriation".¹⁵³ 'Gradualism' is a newly coined term and should be taken to refer to the need to phase the pace of return, to accommodate the limitations of what is usually referred to as the 'absorption capacity' of the country of origin, which remains extremely limited.¹⁵⁴

Unlike the voluntary repatriation agreement of 2003, however, the new agreement fails to address the fate of those who may still be in Pakistan when the voluntary repatriation programme is terminated in December 2009 at the latest. Not a single provision is devoted to those who do not opt to return despite the fact that UNHCR's voluntary repatriation planning figures for the relevant years proceed from a mere 500,000 Afghans (200,000 in

¹⁴⁹ See *supra* note 41.

¹⁵⁰ UNHCR News Stories, *Agreement on Afghan repatriation from Pakistan extended three years*, 2 August 2007.

¹⁵¹ Art. 23 paragraph 2; paragraph 1 of the same article provides that existing agreements, arrangements or mechanisms of cooperation between the parties will neither be affected nor derogated from.

¹⁵² Art. 28.

¹⁵³ Art. 6.

¹⁵⁴ See Afghanistan Independent Human Rights Commission, *Economic and Social Rights in Afghanistan II*, August 2007.

2008 and 300,000 in 2009). UNHCR, put differently, expects that some 1.4 million registered Afghans will still be in Pakistan in December 2009.¹⁵⁵

It, in addition, appears to take as inevitable point of departure that all Afghans, regardless of legal status, will have to leave Pakistan before the end of the year 2009.¹⁵⁶ Its focus is not, however, geared to those 1.4 million Afghans it expects to be in Pakistan in December 2009 at large.¹⁵⁷ Instead, UNHCR is set on identifying those who are its concern before that time. The means chosen to do so is “profiling”, which is short for analysing the database that has been compiled in the registration exercise.¹⁵⁸

These developments are unsettling. First of all, the apparent acceptance of the fact that all Afghans should leave the country before or after December 2009 carries implications that fit uneasy with the voluntary repatriation programme, after all, if all Afghans have to leave the country in 2009 how voluntary is the voluntary repatriation programme that runs until that date? Not voluntary at all in the proper sense of the durable solution concerned since the choice inherent to this solution is reduced to mere practical considerations as to availability of travel grants and other forms of tangible assistance that are solely available under the repatriation programme.¹⁵⁹

¹⁵⁵ UNHCR Country Operations Plan 2008 Pakistan at 11. Pakistan for its part proceeds from other planning figures: 2.4 million before December 2009, *ibid.* at 10; UNHCR News Stories, *Afghans still in Pakistan face challenges to return*, 7 August 2007.

¹⁵⁶ *UNHCR Country Operations Plan 2008 Pakistan* at 1, 2 (“[...] we have to content [sic] with decisions that they all have to leave within three years”).

¹⁵⁷ The data yielded by the registration exercise indicate that 82% of the registered Afghans (2.153 million Afghans were registered) do not intend to return to Afghanistan in the near future on account of security concerns (41%), lack of shelter (30%), lack of livelihood (24%), lack of access to land (89% of the registered Afghans claim to be landless), Ministry of States & Frontier Regions Government of Pakistan National Database & Registration Authority (NADRA), UNHCR, “Registration of Afghans in Pakistan 2007.”

¹⁵⁸ See *UNHCR Country Operations Plan 2008 Pakistan* at 3, 5, 7, 8, 10.

¹⁵⁹ It makes one wonder what criteria UNHCR will apply when implementing Article 15 paragraph 1 of the agreement: “In accordance with its mandate, and in consultation with the other parties, UNHCR shall undertake verification of the voluntary character of the decision to return of Afghan citizens in Pakistan who are PoR holders” (“PoR” stands for ‘proof of registration’).

The second unsettling issue regards the identification of those who are in need of protection preceding the termination of the voluntary repatriation agreement and along with it, the voluntary repatriation programme, and expiry of the three year stay granted to holders of a proof of registration card, in particular the means chosen to do so: profiling of the registration database. It should be recalled that the registration agreement explicitly provides that registration will have no implications for the status of those registered.¹⁶⁰ To use the data yielded by the registration to identify those of concern to UNHCR *does* affect the status of all the refugees among the registered Afghans who are not identified as of concern to UNHCR by means of its profiling of the registration database. The envisaged profiling exercise tacitly converts the registration *ex post facto* into an eligibility assessment which it was not: registration is neither identical nor tantamount to status determination or ‘screening’.

Leaving aside any beneficial effects the profiling exercise – *e.g.* resettlement for extremely vulnerable refugees – may have: the assumption on which it is predicated is the third unsettling issue: rather than proceeding from the premise that all Afghans are refugees, in conformity with the *prima facie* recognition of their status by the host state, the converse has now been adopted as point of departure: the Afghan refugees are no longer in need of international protection and those who possibly still are - only a few according to UNHCR¹⁶¹ - will be identified by means of data that have been acquired for categorically different ends.

If UNHCR is indeed of the view that the Afghan refugees are no longer entitled to refugee status - and the mere fact that it recently concluded a voluntary repatriation agreement belies this view – it should consider ceasing refugee status on account of changed circumstances in the country of origin. If individual refugees are simultaneously given the opportunity to contest the applicability of a collective cessation of refugee status, those who are in need of ongoing international protection can easily be identified. However, as long as circumstances in the country of origin do not warrant a

¹⁶⁰ Art. 1 paragraph 5 of the 2006 Registration Agreement.

¹⁶¹ “Only a few suffer from genuine security issues and a fear of persecution upon return to their country”, UNHCR *Country Operations Plan 2008 Pakistan* at 11.

collective form of cessation,¹⁶² all Afghan refugees remain entitled to protection against forced return.

Lahore/Amsterdam, October 2007

¹⁶² The criteria that govern cessation are justifiably demanding, see on those criteria in particular *supra* note 132 and accompanying text.

Annexure.

DECREE OF THE
PRESIDENT OF THE AFGHAN INTERIM ADMINISTRATION

[Ref No.(297) Date: 13, 03, 1380 ON DIGNIFIED RETURN OF REFUGEES]

The Afghan Interim Administration, Confident that the Bonn Agreement on Afghanistan dated 14.09.1380 (5 December 2001) has laid down the foundation for lasting peace, stability and social and economic progress in Afghanistan, safeguards the right and freedom of all returnees, observes the freedom of returnees to establish residence, to participate in the process of reconstruction, consolidation of peace, democracy and social development, AIA[the Afghan Interim Administration] guarantees their safe and dignified return, expresses its gratitude and thankfulness to the countries that have given them refuge in the very difficult and hard days Afghanistan experienced, and expects that in conformity with the principle of voluntary repatriation, Afghans will be given the opportunity to decide freely to return to their country, and declares the following:

Article 1. Returning Afghan nationals, who were compelled to leave the country and found refuge in Iran, Pakistan and other countries of the world, will be warmly welcomed without any form of intimidation or discrimination.

Article 2. Returnees shall not be subject to harassment, intimidation, discrimination or persecution for reasons of race, religion, nationality and membership of a particular social group, political opinion or gender, and will be protected by the State.

Article 3. All returnees, irrespective of their political affiliations, are exempted from prosecution for all (with the exception of individual criminal accusations) criminal offences committed up to 01.10.1380 (22 December 2001), prior to, or in exile against the internal and external security of the country, according to enacted laws.

Article 4. The provisions of Article 3 of this decree will not apply to those returnees who have committed acts constituting a crime against peace or humanity, or a war crime, as defined in international instruments, or to acts contrary to the purpose and principles of the United Nations.

Article 5. The recovery of movable and immovable properties such as land, houses, markets, shops, sarai, apartments and etc. will be effected through relevant legal organs.

Article 6. All returnees will be guaranteed the same human rights and fundamental freedoms enjoyed by other citizens.

Article 7. The implementation of the provisions of this decree is the responsibility of the Ministry of Repatriation; law and order organs are obliged to assist the Ministry of Repatriation in this task.

Article 8. UNHCR and other relevant international agencies will be allowed to monitor the treatment of returnees to ensure these meet recognized humanitarian law and human rights standards, and to ensure that commitments contained in this decree are implemented.

Article 9. This decree is valid as of 1.10.1380 (22 December 2001) and will be printed in the Official Gazette.

Hamed Karzai,

President, Afghan Interim Administration