

The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises

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Abstract

Over 25 per cent of present day refugees enjoy asylum in Pakistan, most of them having been there for more than a quarter of a century. Pakistan is not, however, a party to either the 1951 Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees. The legal status of the Afghan refugees it hosts is therefore not a foregone conclusion, even though they were considered to be refugees on a *prima facie* basis during the first two decades of their exile in Pakistan. This article identifies the legal status of the Afghan refugees on the basis of a series of agreements Pakistan concluded with UNHCR and also occasionally with Afghanistan. By virtue of the last of the series of agreements, Afghan refugees can return to Afghanistan under a UNHCR-assisted voluntary repatriation programme until December 2009. In view of the fact that all Afghans have been granted leave to stay in Pakistan until the same date, many are expected to stay in Pakistan rather than return with the assistance of UNHCR. Unlike the preceding agreements, the last one does not address the fate of those who will still be in Pakistan upon completion of the voluntary repatriation programme. It seems therefore imperative to identify the legal status and corresponding entitlements of the Afghan refugees. It is argued that the *prima facie* recognition of refugee status can be sustained on the basis of the agreements referred to. In addition it is argued that the current 'profiling' exercise of UNHCR, even while presumably beneficial for the most vulnerable refugees, is irreconcilable with the status and entitlements of the Afghan refugees, and the same holds true with respect to the usual practice of 'screening' those refugees who have opted not to return under a voluntary repatriation programme. An alternative that would be reconcilable is a collective cessation of refugee status if and when the situation in the country of origin so warrants, provided individual refugees may contest this.

1. Introduction

Afghan refugees first entered Pakistan in 1979 in response to what turned out, with hindsight, to be the first of a series of (foreign-backed) regime-changes. The result was invariably a repressive government that, in turn, triggered an armed response. This led to what appeared to be an everlasting, internecine conflict that left the country bereft of any infrastructure and caused massive displacement. Afghan refugees found their way to almost a hundred different states but most of them, some 6 million,

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sought refuge in Iran and Pakistan. In fact, it is Pakistan that hosts the world's largest single population of refugees, Afghan refugees, who have been arriving during the past quarter of a century, a situation not without reason qualified as a protracted one.

Pakistan is neither a party to the 1951 Convention relating to the Status of Refugees¹ (hereinafter: 1951 Convention) nor the 1967 Protocol relating to the Status of Refugees² (hereinafter: 1967 Protocol): the legal status of Afghan refugees in Pakistan is therefore not obvious. With respect to states who are not parties to any of the relevant refugee law instruments, it seems that the question of refugee definition is circumvented in practice. Instead the focus appears to be on the need for international protection,³ whereby recourse is usually had to rules of customary international law, notably the prohibition of *refoulement*, to secure the protection of refugees in those states.⁴ Additional entitlements may be derived from human rights treaties to which the host state is a party. It would seem that such redirected activity is nonetheless not required with respect to Pakistan since it granted Afghan refugees *prima facie* refugee status.⁵

It is not an unusual form of status determination and is one that is frequently resorted to whenever numbers make individual status determination impossible.⁶ This collective form of recognition on the part of Pakistan was abandoned, reflecting a change in policy,⁷ in August 2001, when an individual status determination procedure was introduced with respect to newly arriving Afghan refugees in designated camps, and possibly earlier.⁸

¹ 189 UNTS 137.

² 606 UNTS 267.

³ By way of illustration, reference can be made to the Vietnamese boat refugees, most of whom were stranded on shores of states not parties to any of the relevant instruments, as well as the Cambodian refugees in Thailand - not a party to the relevant instruments either - who were intentionally not designated in terms denoting refugee status by the host state. Their status as refugees was only made explicit in Part V of the 1991 Paris Agreement and the tripartite agreement that was concluded between Thailand, the SNC and UNHCR relating to the voluntary repatriation of 'Cambodian refugees and displaced persons from Thailand' that was concluded shortly thereafter in Nov. 1991.

⁴ In view of the agreements that were concluded, no resort needs to be taken to customary international law, in particular the prohibition of *refoulement*. In that respect it is worth adding that serious doubts have been expressed with respect to *non-refoulement* as a norm of customary international law, see, in particular, J.C. Hathaway, *The Rights of Refugees under International Law* (2005), 363-7.

⁵ See *inter alia*, UNHCR, 'Return to Afghanistan 2002' at 5; UNHCR, 'Searching for Solutions; 25 Years of UNHCR - Pakistan Cooperation on Afghan Refugees', June 2005 at 17.

⁶ However, Conclusion no. 22 of the Executive Committee, which addresses the phenomenon of 'mass influx' (for a definition, see conclusion no. 100 sub (a)), proceeds from the premise that the countries of refuge are party to either the 1951 Convention/1967 Protocol or the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. (UNHCR traditionally resorts to *prima facie* or collective assessment of refugee status when faced with large numbers with a view to determining whether the refugees concerned fall within its competence *ratione personae*.)

⁷ A change induced by a combination of factors including a sense of abandonment on the part of the international community regarding the care for Afghan refugees, compare, S. Ogata, *The Turbulent Decade; Confronting the Refugee Crisis of the 1990's* (2005), 293-4.

⁸ UNHCR, above n. 5, mentioning the years 2000 and 1999 respectively as the year Pakistan declared it would no longer grant refugee status on a collective basis.

If so, a gap exists between the time collective recognition was abandoned and an individual status determination procedure was introduced. In addition, the individual status determination introduced in the summer of 2001 was aborted very soon after it had been initiated.

The designation of the collective appraisal of refugee status known as '*prima facie*' assessment is not unambiguous: does the '*prima facie*' qualification of the determination exclusively refer to the manner of assessment, that is, does it mean a recognition of refugee status that is of a provisional nature and subject to subsequent individual eligibility determination?; does it mean recognition of refugee status subject only to review on an individual basis when contrary information becomes available?; does it entail a status that can only be terminated on the basis of, or analogous to, the cessation provisions exhaustively enumerated in UNHCR's Statute and the 1951 Convention and/or 1967 Protocol? More generally, on the basis of which yardstick is a collective eligibility assessment made in countries of refuge that are not parties to any of the relevant instruments? The definition to which logically reference should be made is rarely formulated: it seems to be the suppressed, tacitly held, premise of the syllogistic reasoning involved.⁹ The same applies to Afghan refugees in Pakistan: although *prima facie* recognized as refugees, the definition used was not disclosed.

Referring to the practice of many states, as well as its own, of applying 'group-based recognition of refugee status on a *prima facie* basis', UNHCR observes that:

[t]his 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.¹⁰

The UNHCR 2006 Guidelines clearly presume an applicable refugee definition. Despite the absence of any applicable treaty based refugee definition, the Afghan refugees in Pakistan were collectively recognized as refugees.

As far as the nature of the collective assessment is concerned, UNHCR adds that it is conclusive for:

[p]*prima facie* recognition of refugee status does not require subsequent 'confirmation', even if individual determination becomes feasible at a later stage. It remains

⁹ The absence of an applicable definition is simply overlooked: illustrative is the reference to '*prima facie* determination or acceptance on a group basis because of the obvious refugee character of the individuals concerned' coupled to the observation that it is widely applied in Africa, Latin America and South Asia despite the absence of relevant instruments (EC/GC/01/04, paras. 4, 7). Similarly Rutinwa relates *prima facie* recognition to 'definitions found under the relevant instruments', B. Rutinwa, '*Prima Facie* Status and Refugee Protection', Working Paper no. 69, 2002 at 14.

¹⁰ 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 Feb. 2006, para. 9.

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.¹¹

This view of *prima facie* recognition means that collective recognition results in the same entitlement as individual status determination, that is, the status of refugee, which lasts until cessation is warranted. The possibility of eventual cessation of refugee status also requires identification of the definition used to collectively grant refugee status to the Afghans in Pakistan.

In order to be able to identify the applicable definition of refugee, recourse will be had to the agreements Pakistan concluded over the years, mainly, albeit not exclusively, with UNHCR. The agreements are first considered in chronological order to briefly review the main concerns they address in relation to the legal status of the Afghan refugees in Pakistan. Secondly, the legal implications of the respective agreements are concatenated to determine their purport regarding the refugee status granted to Afghan refugees in Pakistan.

Proceeding from the observations of UNHCR quoted above, *prima facie* granted refugee status may only be terminated when circumstances in the country of origin justify its cessation. UNHCR's strategy with respect to the Afghan refugees appears nonetheless to be a different one that is at variance with what UNHCR maintains regarding the entitlements of those who are recognized as refugees on a collective basis: 'profiling' previously collected data in order to identify those with a continued need for international protection preceding the termination of the voluntary repatriation programme, supplemented, presumably, with 'screening' the so-called 'residual case-load' following the completion of that programme.

2. Eight agreements

2.1 The first agreement: Agreement Between the Islamic Republic of Pakistan and the Office of the United Nations High Commissioner for Refugees on the Voluntary Return of Refugees (1988)¹²

Each major political change in Afghanistan induced the conclusion of an agreement pertaining to the voluntary repatriation of Afghan refugees from Pakistan. The first one, concluded between UNHCR and

¹¹ Ibid. para. 12; see also UNHCR's 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/03 para. 23.

¹² Text on file with the author.

Pakistan regarding the voluntary return of Afghan refugees in Pakistan, dates from 8 June 1988. It implements one of the Geneva Accords on the Settlement of the Situation Relating to Afghanistan, which paved the way for the withdrawal of Soviet troops from Afghanistan, to wit, the Bilateral Agreement between Afghanistan and Pakistan on Voluntary Return of Refugees.¹³

The (implementing) agreement refers to the voluntary repatriation of 'Afghan refugees'. However, contrary to the implication that those who are entitled to voluntary repatriation are refugees whose status can only be relinquished by the refugees themselves, *in casu* by means of voluntary repatriation and subsequent reintegration in the country of origin,¹⁴ the agreement fails to provide for those who are by the same logic entitled to refuse to seize the option of voluntary repatriation:

The Office of the United Nations High Commissioner for Refugees will continue, as required, to extend its assistance to Afghan refugees pending their voluntary return to their homeland.¹⁵

This provision was introduced by the Government of Pakistan which 'does not wish to give at this stage an option to the refugees',¹⁶ despite attempts on the part of UNHCR to secure the protection of those who would not return voluntarily.¹⁷ UNHCR was concerned that this particular formulation could be taken to imply continued assistance to Afghan refugees in Pakistan only until the end of the duration of the voluntary repatriation programme.¹⁸ A concern that was reinforced by the fact that the agreement was to remain in force for the period required for the effective voluntary return of the refugees.¹⁹ This issue was addressed in an exchange of letters, and the Government of Pakistan suggested the following text: '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 the established practice'.²⁰

¹³ Text in *Refugees*, May 1988 at 12. Obviously, this agreement and the implementing agreement could be counted as two different agreements. In view of the fact that the one implements the other, the two agreements are considered to constitute a substantive unity.

¹⁴ See, M.Y.A. Zieck, *UNHCR and Voluntary Repatriation of Refugees. A Legal Analysis* (1997), 105-15.

¹⁵ Art. III.

¹⁶ UNHCR cable, 9 May 1988.

¹⁷ Various cables of May 1988.

¹⁸ UNHCR telecommunications despatch, 11 May 1988.

¹⁹ Art. V.

²⁰ UNHCR cable, 1 June 1988.

2.2 The second agreement: Agreement Between the Government of the Islamic State of Afghanistan, the Government of the Islamic Republic of Pakistan and the United Nations High Commissioner for Refugees for the Repatriation of Afghan Refugees in Pakistan (1993)²¹

In the wake of a substantial spontaneous return following the fall of the Government of Najibullah, the second agreement regarding voluntary repatriation of Afghan refugees was concluded on 17 August 1993: this time a tripartite agreement, including Afghanistan among the signatory parties. The beneficiaries of the agreement were 'Afghan refugees'. The agreement is confined to emphasizing the voluntary nature of return in the usual phrases. No provisions are included with a bearing on the fate of those who would not opt to return, the final clauses of the agreement in that respect merely and inconclusively indicate that the agreement will remain in force until the parties agree the objectives of the Commission have been achieved. The principal objective of the Commission, a tripartite commission established on the basis of the agreement, consists of facilitating the safe, orderly and voluntary return of Afghan refugees and their successful reintegration in Afghanistan.²² When the objectives have been achieved, the parties shall review the results of the repatriation and, if necessary, consider any further arrangements that may be required.²³ No further arrangements appear to have been made, the agreement simply remained in force for a decade.

2.3 The third agreement: Cooperation Agreement Between the Government of the Islamic Republic of Pakistan and the United Nations High Commissioner for Refugees (1993)²⁴

On 18 September 1993 UNHCR and Pakistan formalized the presence of UNHCR in Pakistan with the conclusion of a cooperation agreement, rather late considering the continuing presence of UNHCR in the country since 1979. A cooperation agreement is a form of host state agreement and it details the rights and obligations of both parties mainly in terms of privileges, immunities and facilities. A cooperation agreement can be distinguished from an ordinary host state agreement by the fact that it details the substantive purpose of a physical presence in the host state, *in casu* that of UNHCR – as a result of which the host state part of the cooperation agreement manifestly turns into a means serving a particular explicitly stated end – as well as the cooperation between host state and UNHCR to accomplish that goal. The goal is the international

²¹ Text on file with the author.

²² Art. 2.

²³ Art. 10.

²⁴ 1733 UNTS 79 (text also available in UNJY 1993, 156-60).

protection of, and humanitarian assistance to, refugees and other persons of concern to UNHCR. The cooperation is in addition provided with a normative content, cast in imperative terms:

Co-operation 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 the Statute of UNHCR and, of other relevant decisions and resolutions relating to UNHCR adopted by United Nations organs.²⁵

This form of cooperation should be distinguished from the obligation to cooperate with UNHCR that can be derived from other instruments, including the Charter of the United Nations, which require the assistance on the part of states to enable UNHCR to exercise its functions, the wording of Article 35 paragraph 1 of the 1951 Convention is an unambiguous illustration. The cooperation laid down in the cooperation agreements UNHCR concludes with host states, including the one under review, is of a different nature, to wit, that of a joint undertaking. This particular obligation, a standard one in UNHCR's cooperation agreements,²⁶ is of special relevance when UNHCR operates in host states that are not parties to the relevant refugee law instruments. The formulation of the pertinent obligation is in that respect self-evident: the cooperation to which both parties commit themselves extends to, in short, anyone falling within the broad(ened) mandate *ratione personae* of the High Commissioner ('refugees and other persons of concern to UNHCR') that includes, besides those who fear persecution, those who flee situations of generalized violence and gross violations of human rights. Secondly, cooperation with regard to those persons shall be carried out not only on the basis of UNHCR's Statute but also on the basis of any other decision and resolution relating to UNHCR, provided they have been adopted by United Nations organs. The most relevant of which are, besides the resolutions of the General Assembly – the vehicle for the extended personal scope of UNHCR's mandate as incorporated in the obligation to cooperate – the conclusions which have been adopted by UNHCR's Executive Committee, a subsidiary organ of the Economic and Social Council of the United Nations. The fact that most of the relevant decisions and resolutions are not legally binding for states is irrelevant, that is, it has been relegated to the realm of legal irrelevance because they constitute the substance of the binding obligation to cooperate as laid down in the cooperation agreement between Pakistan and UNHCR.²⁷

²⁵ Art. 3 para. 1.

²⁶ See the Model Cooperation Agreement, included as Annex 2 in M.Y.A. Zieck, *UNHCR's World-wide Presence in the Field. A Legal Analysis of UNHCR's Cooperation Agreements* (2006); see also *ibid.* on the full and truncated versions of this particular obligation at 257 and following.

²⁷ See *ibid.* at 261-4.

2.4 The fourth agreement: Agreed Understandings for the Screening Process for Afghans in Jalozai makeshift camp, Nasirbagh camp and Shamshatoo camp to Determine Which Persons are in Need of International Protection and Which are Not (2001)²⁸

Earlier reference was made to the fact that *prima facie* or collective recognition of refugee status was abandoned by Pakistan. It is not clear exactly when it was abandoned,²⁹ but it would seem that it was at any rate in the summer of 2001 – on 2 August to be precise – when UNHCR and Pakistan concluded ‘Agreed Understandings for the Screening Processes for Afghans in Jalozai makeshift camp, Nasirbagh camp and Shamshatoo camp to Determine which Persons are in Need of International Protection and Which are Not’. Newly arriving refugees were to be subjected to an individual status determination procedure.³⁰ The agreement uses ‘UNHCR’s definition of a “refugee”’, that is:

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 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.³¹

It is not clear how many refugees were actually individually screened under this agreement. Its implementation was first interrupted in response to the *refoulement* of 150 Afghans by Pakistan.³² Upon resumption, it halted again fairly soon when Pakistan was confronted with a new influx of Afghan refugees following the US air strikes on Afghanistan after 9/11 when Pakistan was asked by the United States to close its borders.³³ Although it was never resumed, the screening procedure was given a new lease of life in a subsequently adopted agreement.

²⁸ Text on file with the author.

²⁹ See, above n. 8 and accompanying text.

³⁰ It should be added that the inhabitants of Nasirbagh were not newly arrived refugees but long-term residents. The fact that they were included within the scope of the Screening Agreement appears to have had a quite mundane reason, to wit, an eviction order issued by the provincial government to clear the land for a new housing development, IRIN, ‘Pakistan: Screening of Jalozai refugees set to begin’, 20 June 2001.

³¹ Art. 2 sub (a).

³² *Voice of America*, ‘Pakistan Halts Afghan Refugee Deportations’, 1 Sept. 2001.

³³ Human Rights Watch, ‘Afghanistan, Iran, and Pakistan, Closed Border Policy: Afghan Refugees in Pakistan and Iran’, Feb. 2002, 22.

2.5 The fifth agreement: Agreement Between the Government of Islamic Republic of Pakistan, the Transitional Islamic State of Afghanistan and the United Nations High Commissioner for Refugees Governing the Repatriation of Afghan Citizens Living in Pakistan (2003)³⁴

Re-enacting the sequence of events of a previous decade, a voluntary repatriation agreement was concluded after a massive return had taken place, this time as a result of the conclusion of the 'Bonn Agreement' (Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions) in December 2001.³⁵ Negotiations regarding those who were to benefit from the new agreement apparently caused the belated conclusion of the agreement.³⁶

The agreement, the third on voluntary repatriation, refers broadly to 'Afghan citizens who have sought refuge in Pakistan' unlike the previous two, which simply referred to 'Afghan refugees'. Unlike the preceding agreements, the scheduled repatriation programme was *a priori* temporally limited and in principle confined to last three years, that is, until March 2006.³⁷ It in addition prescribed the procedure that was to be applied to those who would still remain in Pakistan subsequent to the completion of the voluntary repatriation programme:

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 programme [...].³⁸

³⁴ Text available at <<http://www.unhcr.org/afghan.html>> (under the heading of UNHCR Policy papers).

³⁵ Although this return (in 2002) could be considered to fall under the 1993 agreement – it was only repealed on the day the new agreement was signed (see Art. 23 para. 2 of the 2003 agreement) – a UNHCR press release indicated that UNHCR had assisted this return despite the absence of a formal agreement, UNHCR (Islamabad), 'First Meeting of Tripartite Commission on Afghan Refugees', 13 May 2003. Tripartite agreements on voluntary repatriation of Afghan refugees were also concluded with other states: Iran (in 2002, 2003, and 2006); France (2002); Great Britain and Northern Ireland (2002); Netherlands (2003); Denmark (2004); Norway (2005); and Sweden (2007).

³⁶ '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', K. Lump, S. Shimozawa, P. Stromberg, 'Voluntary Repatriation to Afghanistan, Key Features', (2004) 23 *RSQ* 149-71 at 155.

³⁷ Art. 6 para. 2.

³⁸ *Ibid.*

The voluntary repatriation programme was extended to continue until the end of December 2006³⁹ and as a result the looming screening too. However, other agreements were meanwhile concluded.

2.6 The sixth agreement: Memorandum of Understanding Between the Government of the Islamic Republic of Pakistan and the Office of the United Nations High Commissioner for Refugees on the Census and Registration of Afghan Citizens living in Pakistan (2004)⁴⁰

The broad designation of beneficiaries of the 2003 Voluntary Repatriation Agreement – Afghan citizens who sought refuge in Pakistan – seems indicative of the perception that the Afghan population was or had become a mixed one. Both the Government of Pakistan and UNHCR were also plagued by the fact that the actual number of Afghans in Pakistan was not known. This number had for years been a matter of conjecture with widely diverging estimates, yet this information was considered to be crucial with respect to addressing the fate of those who would still remain in Pakistan upon termination of the voluntary repatriation programme. A related question concerned identification of whom bore the ultimate responsibility for the Afghans in Pakistan. These questions were to be solved by means of a census and subsequent registration of all Afghans, and an agreement to that effect was concluded on 17 December 2004. The agreement accordingly stipulates that UNHCR accept the outcome in terms of numbers, and the Government of Pakistan that not all Afghans in the country were of concern to UNHCR.⁴¹ It does not provide how those who would be of concern to UNHCR would be identified. The agreement merely refers to the screening foreseen in the 2003 Voluntary Repatriation Agreement:

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

³⁹ Press statements created some confusion in this respect since the decision to extend the voluntary repatriation programme was taken to mean a prolongation of the duration of the agreement itself beyond Mar. 2006. The duration of the former is not, however, directly linked to that of the latter: the termination of the agreement itself was left to mutual agreement amongst the parties to it at an unspecified point in time (Art. 28), and the substantive provisions of the agreement are indicative of a duration that would at least outlast the (movement phase of the) voluntary repatriation programme whatever its actual duration. A clear case in point is the provision on international access both before and *after* repatriation (Art. 12). Although an extension of the voluntary repatriation programme could in itself contribute to postponing the date when the parties would consider termination of the agreement justified, no provision warrants the inference that the termination of the agreement was to coincide with that of the voluntary repatriation programme in the limited sense of Art. 6 para. 2.

⁴⁰ Text available at <<http://www.unhcr.org/afghan.html>> (under the heading of UNHCR Policy papers): note that the agreement comprises seven annexes: the text of those annexes are unfortunately not available.

⁴¹ Art. 1 para. 3.

UNHCR and the GoP [Government of Pakistan] based on the outcome of the census and registration.⁴²

2.7 The seventh agreement: Memorandum of Understanding Between the Government of Islamic Republic of Pakistan and the Office of the United Nations High Commissioner for Refugees on the Registration of Afghan Citizens Living in Pakistan (2006)⁴³

On 19 April 2006 a sequel to the Census Agreement was concluded by the Government of Pakistan and UNHCR on the registration of Afghan citizens living in Pakistan. According to the Agreement:

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 2006.⁴⁴

All those who had been counted in 2005 – 3,049,268 Afghans⁴⁵ – were to register themselves. Actual registration, which started on 15 October 2006, proceeded slowly as many Afghans ‘appear[ed] to be suspicious of the registration drive, fearing it may be a prelude to forced repatriation’.⁴⁶ Although every Afghan who registered him or herself was given the status of Afghan citizen temporarily residing in Pakistan and provided with a proof of registration card which entitled the holder to a three-year stay in Pakistan, the fears were not allayed and were transposed to the period following the expiry of the three-year term.⁴⁷ UNHCR qualified 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 status.⁴⁸

⁴² Art. 1 para. 4.

⁴³ Text, including 9 annexes, is available at <<http://www.unhcr.org/afghan.html>> (under the heading of UNHCR Policy papers).

⁴⁴ Annex 8 ‘Information Leaflet to the Agreement’ (the 9 annexes to the Agreement form an integral part of the Agreement, Art. 1 para. 6); on the expiry of the 2003 Agreement, see, above n. 39.

⁴⁵ 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.

⁴⁶ ‘Why are Afghan refugees reluctant to register?’, *Daily Times*, 5 Nov. 2006; see also IRIN, ‘Pakistan: Unregistered Afghans to be treated as illegal immigrants’, 22 Nov. 2006.

⁴⁷ A UNHCR spokesperson reported that the Pakistani authorities require the registered Afghans to leave the country after expiry of the three-year period, ‘Pakistan tell Afghaanse vluchtelingen’, *NRC Handelsblad*, 16 Oct. 2006.

⁴⁸ *Daily Times*, 5 Nov. 2006.

Even though undoubtedly true, it is remarkable that UNHCR omitted to add that it would not detract from any (acquired) rights or status of refugee either.

2.8 The eighth agreement: Agreement Between the Government of the Islamic Republic of Pakistan, the Government of the Islamic Republic of Afghanistan, and the United Nations High Commissioner for Refugees Governing the Repatriation of Afghan Citizens Living in Pakistan (2007)⁴⁹

In early February 2007, the tripartite commission, established on the basis of the 2003 Voluntary Repatriation Agreement, decided to prolong the voluntary repatriation programme until December 2009.⁵⁰ The issue was taken up at another meeting of the tripartite commission, in June 2007,⁵¹ and it resulted not in the extension of the 2003 Agreement but in the conclusion of yet another voluntary repatriation agreement, on 2 August 2007.⁵² The new agreement, which repeals the 2003 voluntary repatriation agreement,⁵³ shall remain in force until 31 December 2009 unless it is terminated by mutual agreement amongst the parties prior to that date.⁵⁴

The agreement reaffirms the voluntary nature of repatriation, adding that 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'.⁵⁵ 'Gradualism' is a newly-coined term and should be taken to refer to the need to phase the pace of return in recognition of the limitations of the so-called 'absorption capacity' of the country of origin, which to date remains extremely limited.⁵⁶

⁴⁹ Text available at <<http://www.unhcr.org/afghan.html>> (under the heading of UNHCR Policy papers).

⁵⁰ UNHCR News Stories, 'Pakistan, Afghanistan finalise camp closure plans', 7 Feb. 2007.

⁵¹ Compare, UNHCR Kabul Press Information, 'UNHCR to Host the 13th Tripartite Commission Meeting in Dubai', 5 June 2007.

⁵² UNHCR News Stories, 'Agreement on Afghan repatriation from Pakistan extended three years', 2 Aug. 2007 (erroneously cast in terms of extension).

⁵³ Art. 23 para. 2; para. 1 of the same article provides that existing agreements, arrangements or mechanisms of cooperation between the parties will neither be affected nor derogated from.

⁵⁴ Art. 28.

⁵⁵ Art. 6. Afghans who did not register themselves in the registration exercise were given a period of grace: from 1 Mar. to 15 Apr. 2007 they could benefit from UNHCR-assisted repatriation (UNHCR News Stories, 'Top UNHCR official outlines options for camp closure in Pakistan', 21 Feb. 2007). After that date they were considered to be illegal immigrants facing expulsion. UNHCR spokesperson Vivian Tan said that 'the unregistered Afghan refugees are no more the responsibility of UNHCR as it had been announcing the deadline and providing facilities to the unregistered refugees to return home before the deadline', 'Unregistered Afghans Cry for Help', *Ohmy News*, 18 Apr. 2007.

⁵⁶ See Afghanistan Independent Human Rights Commission, Economic and Social Rights in Afghanistan II, Aug. 2007.

Unlike the voluntary repatriation agreement of 2003, however, the 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 and in that respect the agreement resembles that of 1988.

3. Concatenating the agreements with respect to the legal status of Afghan refugees

3.1 Introduction

The legal status of Afghan refugees appears, if anything, to be hidden on account of the fact that all Afghans, provided they are registered, were given leave to stay for another three years in 2006. From a practical point of view it is understandable that all Afghans have been treated on a par, simply on account of the fact that refugees among them have never been systematically registered as such with the exception of the few whose eligibility was assessed on the basis of the 2001 Screening Agreement.

The registration which followed upon the census comprised all Afghans in Pakistan irrespective of status. Both the census and the registration were not confined to a mere head count and acquisition of basic demographic data,⁵⁷ true to the intention to elicit information that could contribute to developing policies regarding those who would remain in Pakistan ‘after the expiry of the Tripartite Agreement in December 2006’.⁵⁸ However, despite this objective, neither the census nor the registration was meant to identify those who were and those who were not refugees, and the Census Agreement accordingly postponed that particular identification – screening – to a later date. UNHCR’s assistant representative in Pakistan nonetheless disclosed in early 2007 that ‘UNHCR is currently analysing information collected through the registration exercise in order to identify individual Afghans who continue to need international protection and assistance’.⁵⁹ This course of action seems to be at odds with the status and entitlements of those who had been recognized as refugees on a *prima facie* basis. However, many agreements have been concluded with a bearing on the legal status of the Afghan refugees in Pakistan, and their implications need to be entered into the analysis.

⁵⁷ Questions asked during the census included: ‘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 themselves in Pakistan?’, UNHCR Pakistan, ‘Voluntary Repatriation to Afghanistan 2004’, December 2004. 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. Similar questions were asked during the registration exercise, see Annex 3 to the 2006 Registration Agreement.

⁵⁸ Annex 8 (Information Leaflet) to the Registration Agreement, compare n. 39 and n. 44 above.

⁵⁹ V. Tan, ‘Afghan returnees from Pakistan cross 3 million mark’, 10 Apr. 2007 (<<http://www.alertnet.org>>).

3.2 Implications of the agreements

The first agreement (the 1988 Voluntary Repatriation Agreement) is ambiguous regarding the legal status of the Afghan refugees. On the one hand, it emphasizes the ‘voluntary’ nature of repatriation of Afghan ‘refugees’, a designation that is indicative of, or assumes, refugee status in the usual sense of the designation. On the other hand, the agreement, especially on account of what it omits to include, appears to shirk the legal consequences of this determination regarding those who would not opt to return, an impression that is reinforced by the successful intransigence on the part of Pakistan to accommodate UNHCR’s concerns in that respect.

The second agreement (the 1993 Voluntary Repatriation Agreement) had no practical consequences with respect to findings made under the first agreement. Its importance for the present purpose lies in the fact that it was actually concluded: the mere fact of conclusion of the agreement infers that the Afghan refugees in Pakistan, including those who did not opt to return on the basis of the 1988 Agreement, were still considered as refugees, who could only leave the country of asylum on a voluntary basis.

The third agreement (the 1993 Cooperation Agreement) is a crucial one: on the basis of the cooperation it prescribes, in particular its substantive content, it could be argued that the host state is bound to observe a substantive body of refugee law, well beyond anything that could be derived from customary international law, with regard to those who qualify as refugees on the basis of UNHCR’s extended mandate *ratione personae*.

The fourth agreement (the 2001 Screening Agreement) constitutes a watershed. First, it marked the formal end to granting *prima facie* refugee status to those who entered the country. Secondly, it reflects the perception on the part of the host state that new arrivals are not entitled to this tacit form of collective recognition: Pakistan considered the newly arriving Afghans as economic migrants and sought a way to distinguish them from those who could be deemed to be eligible for international protection. Those assessed to be eligible for international protection, however, were not given the status of refugee but were merely qualified to be ‘persons of concern’ – without disclosing whose concern – entitled to ‘temporary protection’.⁶⁰ Both the designation and the entitlement do not bode well as far as the legal status of Afghan refugees is concerned. It is, moreover, confusing: ‘temporary protection’ has been resorted to in practice when for political or other reasons host states were prepared to grant protection against *refoulement* but sought to avoid incurring the

⁶⁰ Art. 2 sub (c) 2001 Screening Agreement (‘As regards documentation for those screened, the understanding is that the ‘screened in’ will be entitled to a document [...] which would not formally confer refugee status but would acknowledge their person of concern character, in order to extend temporary protection to those in need, [...]).’)

1951 Convention obligations with respect to a particular group on the basis of a collective recognition of refugee status, whilst not excluding those obligations regarding individuals following an individual status determination.⁶¹ A complicating issue is the fact that, as far as could be ascertained, those who had been granted refugee status in the past, on the basis of a collective (*prima facie*) assessment, were never provided with tangible proof of their status. Only the few who were 'screened' and considered eligible in 2001 were provided with a document indicating they were considered to be 'of concern'. Leaving the latter few aside, this entails that in practice no distinction can be made between refugees and non-refugees.

The fifth agreement – the third voluntary repatriation agreement – does not, unlike the preceding two voluntary repatriation agreements, refer to the beneficiaries in terms of 'refugees' but in terms of 'Afghan citizens who have sought refuge in Pakistan', all of whom, regardless of status, are entitled to voluntary repatriation. By casting the net of beneficiaries so wide it could be argued that the parties erred on the safe side for it meant that all Afghans, including refugees among them, were granted the implicit entitlement to protection against forced return. It may signify recognition of the fact that circumstances prevailing in Afghanistan at the time the agreement was concluded were recognized to be such that even non-refugees should be protected against forced return by way of a supplementary form of protection. It was nonetheless only to last until the completion of the voluntary repatriation programme in March 2006, later extended to December 2006: upon termination of the voluntary repatriation programme the remaining Afghans would be screened in relation to the need for continued international protection, on the basis of the definition formulated in the Screening Agreement, and that at least meant those who would still require protection would be identified.

The sixth agreement (the 2004 Census Agreement) refers to the intended screening only to indicate that the objectives of screening will be agreed upon after the census and registration of the Afghans in Pakistan have been completed, as if those objectives were not already identified and laid down in the 2003 Voluntary Repatriation Agreement.

The seventh agreement (the 2006 Registration Agreement) neither adds nor detracts from the earlier ones.

The eighth agreement, the fourth voluntary repatriation agreement concluded in 2007, however, appears to detract from the earlier ones on account of what it does not address: the fate of those who do not opt to return before December 2009.

⁶¹ See *inter alia*, UN doc. EC/55/SC/CRP.16 (2005) at 9.

3.3 The legal status of Afghan refugees in Pakistan

The series of agreements, even though ambiguous in some respects, allow to infer that the Afghans are considered to be refugees. Both the 1993 Cooperation Agreement and the 2001 Screening Agreement buttress the inference that the initial collective recognition of refugee status proceeded from a broad definition of refugee along the lines of UNHCR's extended mandate *ratione personae*. At the same time, the agreements convey the perception that not all Afghans are similarly in need of international protection, in particular, not the economic migrants among them. Although the need to distinguish between the two groups was recognized, identifying them was put on hold by the decision to grant every (registered) Afghan citizen extended stay in the country.

Initially, that is, from 2003 onwards, the intention appears to have been to identify those in need of protection subsequent to the completion of the (movement phase of the) voluntary repatriation programme, whenever that would be. Questions regarding actual number, status of individual Afghans and corresponding responsibility for those identified as of concern to UNHCR resulted in the decision to count and register all Afghans in Pakistan. Although the question regarding the actual number was thus settled, the other questions were not (apart from the question of principle that UNHCR would bear responsibility for those of concern, a truism, basically). The question of identifying those who would actually be of concern to the UNHCR was deferred, yet, a change of policy appears to have been made subsequent to the census and registration. With hindsight, this change appears to be adumbrated in the 2006 Registration Agreement, which provides that the objectives of the foreseen screening were yet to be decided upon: all Afghans are supposed to leave the country when their three-year stay expires in December 2009. Along with it, UNHCR's focus appears to have shifted from the time after completion of the voluntary repatriation to that preceding its completion in December 2009. Identifying those of concern shifted along with this changed timing. Changes that at first glance appear to be buttressed by the agreement that was concluded in 2007 since it, unlike the preceding one (the voluntary repatriation agreement of 2003), is silent on the aftermath, seemingly freeing the host state from any particular obligations with respect to those who will still be in Pakistan at the time. Seemingly, for silence does neither mean nor can be construed to mean that the entitlements of Afghan refugees have consequently evaporated.

4. 'Profiling' and screening versus cessation

In view of the fact that the 2007 Voluntary Repatriation Agreement does not address the question of the fate of those who will still be in Pakistan following the completion of the voluntary repatriation programme,

the first question that needs to be addressed is whether it is reasonable to expect any 'residual caseload' at all. The answer is affirmative: first of all, circumstances in Afghanistan are far from ideal – they do not yet warrant a cessation of refugee status⁶² – and, secondly, UNHCR's own planning figures indicate that it expects 1.4 million Afghans to be in Pakistan in December 2009,⁶³ a number that is hardly surprising considering the fact that all Afghans have been granted leave to stay three years and one that signifies the question is far from being a merely academic one.

As far as those 1.4 million Afghans are concerned, UNHCR appears to proceed from the fact that they will have to leave Pakistan before December 2009,⁶⁴ which is also the time the period of stay granted to those who hold proof of registration expires. Rather than focusing on those it expects to be in Pakistan in December 2009, UNHCR is set on identifying those who are of concern before that time. The earlier announcement that UNHCR would use the information gathered through the registration exercise to identify individual refugees with an ongoing need for international protection has now been given a label: 'profiling'.⁶⁵ The tacit assumption seems to be that those whose data are not indicative of such need can return when their residence permit expires.

These developments are unsettling. First, the apparent acceptance of the fact that all Afghans should leave the country before or after December 2009 carries implications that fit uneasily with the notion of 'voluntary repatriation': 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.⁶⁶

⁶² UNHCR Afghanistan, 'UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers', December 2007, 12.

⁶³ UNHCR Country Operations Plan 2008 Pakistan, 1 Sept. 2007, 11 (UNHCR's voluntary repatriation planning figures for the relevant years do not exceed 500,000 Afghans (200,000 in 2008 and 300,000 in 2009)). 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 Aug. 2007.

⁶⁴ *Ibid.*, 1, 2 ('[...] we have to content [sic] with decisions that they all have to leave within three years').

⁶⁵ *Ibid.*, 3, 5, 7, 8, 10.

⁶⁶ It makes one wonder what criteria UNHCR will apply when implementing Article 15 para. 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 is the means chosen to identify those who are in need of protection preceding the termination of the voluntary repatriation agreement: 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.⁶⁷ To nonetheless 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 this profiling. ‘Profiling’ tacitly converts the registration *ex post facto* into an eligibility assessment, which it was not, nor meant to be.

Leaving aside any beneficial effects the profiling exercise may have – for example, resettlement for extremely vulnerable refugees – the assumption on which it is predicated is the third unsettling issue: the premise that all Afghans are refugees, in conformity with the *prima facie* recognition of their status by the host state, is suppressed. Instead the assumption appears to be that the Afghan refugees are no longer in need of international protection, that is, those who possibly still are – only a few according to UNHCR⁶⁸ – will be identified by means of data that was acquired for categorically different ends.

Lastly, this development raises the question as to what UNHCR will do regarding those it expects to remain in Pakistan in December 2009, bearing in mind its conviction – quoted earlier – that those who have been recognized as refugees on a *prima facie* basis are entitled to retain that status until cessation is warranted. In practice, this principled stance is often exchanged for a less principled pragmatic one in the wake of a voluntary repatriation programme, to wit, screening the ‘residual caseload’, that is, those who did not avail themselves of the possibility to return to the country of origin under a particular programme. This pragmatic sequel to a voluntary repatriation programme is hard to reconcile with the principled one to the extent that it is prone to function as a *sui generis* form of cessation of refugee status owing to the fact that it consists of an *ex nunc* rather than an *ex tunc* assessment, which suppresses the earlier recognition of refugee status and bypasses the applicable stringent conditions under

⁶⁷ Art. 1 para. 5 of the 2006 Registration Agreement.

⁶⁸ ‘Only a few suffer from genuine security issues and a fear of persecution upon return to their country’, UNHCR Country Operations Plan 2008 Pakistan, 1 Sept. 2007, 11. Apart from the fact that the applicable definition is not confined to fear of persecution, cessation is not just warranted if and when security issues have ceased to exist, the data yielded by the registration exercise are indicative of many more than only a few: 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’.

which cessation of refugee status is warranted.⁶⁹ Conditions that explain why cessation of refugee status on the basis of changed circumstances in the country of origin follows in practice only many years after the completion of a voluntary repatriation programme.⁷⁰

From a legal point of view this course of action is irreconcilable with the entitlements of refugees, in particular retention of refugee status until cessation is warranted.⁷¹ Even though Pakistan is not a party to the relevant international instruments, it could be considered bound, first of all, to the logic of cessation, that is, the objective determination that the applicable definition is no longer satisfied, and beyond that, by virtue of the cooperation to which it committed itself in the 1993 Cooperation Agreement, to the (additional) criteria developed by the Executive Committee.⁷² The more principled course of action would be to consider the possibility of a (joint Pakistan-UNHCR) collective cessation of refugee status. UNHCR has frequently resorted to applying the cessation clauses pertaining to changed circumstances in a collective manner,⁷³ invariably solely with reference to the pertinent clauses in the 1951 Convention and 1967 Protocol, inviting criticism that it thus encroaches upon the independent responsibility of states parties to the 1951 Convention and/or 1967 Protocol to apply those clauses if and when they would deem cessation warranted. In view of the fact that Pakistan is not a party to those treaties, but is bound to cooperate with UNHCR on the basis of the 1993 Cooperation Agreement, cessation must be done in the form of a joint undertaking. Cessation is cast in terms of individual refugees, and ceasing refugee status on a

⁶⁹ Compare, HCR/GIP/03/03 'Guidelines on Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees'. UNHCR applied its Guidelines on Cessation to Afghanistan, see, 'Considerations Relating to Cessation on the Basis of Article 1C(5) of the 1951 Convention With Regard to Afghan Refugees and Persons Determined in Need of International Protection', 29 Jan. 2005. Those considerations omit, however, to add the explicit requirement in the Guidelines as to the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.

⁷⁰ From a different perspective: voluntary repatriation takes place at a lower threshold of change than cessation of refugee status, see, UNHCR 'Handbook - Voluntary Repatriation: International Protection', 1996, para. 2.2. For an indication of the time required for a change of circumstances to be of a nature that warrants cessation, see the overview of (UNHCR) practice included in Part III of R. Bonoan, 'When is International Protection No Longer Necessary?', Global Consultations Paper, 2001.

⁷¹ Even when the particular circumstances leading to flight have changed only to be replaced by different circumstances, which also justify refugee status, the pertinent cessation clause cannot be invoked: 'Thus in Afghanistan, where one type of civil war was replaced by another, the cessation clause cannot be invoked despite a major political change', UN doc. EC/47/SC/CRP.30 (Note on Cessation Clauses) para. 20.

⁷² See in particular Executive Committee Conclusion no. 69 (XLIII) on Cessation of Status.

⁷³ For instance, with respect to Angolan refugees in 1979; Zimbabwean refugees in 1981; Uruguayan refugees in 1985; Equatorial-Guinean refugees in 1980; Argentine refugees in 1984, Polish refugees, Czechoslovakian and Hungarian refugees in 1991; Ethiopian refugees in 2000; Eritrean refugees in 2002, etc.

collective basis should consequently be balanced by giving room for individual refugees to contest the applicability of collective cessation.⁷⁴ In this respect collective recognition of refugee status and collective cessation of that status both revolve around general presumptions that may be rebutted at the individual level. However, as long as circumstances in the country of origin do not warrant (a collective form of) cessation, Afghan refugees are entitled to retain their refugee status.

⁷⁴ See, Executive Committee Conclusion no. 69 (XLIII) sub (d); UNHCR's 'Guidelines on Cessation', above n. 69, para. 25 sub (vii).