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Afghanistan

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Continuing need for Protection and Standards for Return of Afghan refugees

Public

Summary

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Amnesty International has serious concerns about the situation in Afghanistan. Insecurity, including ongoing areas of conflict, crime and banditry, factional fighting between warlords, human rights abuses of women, the presence of landmines and unexploded ordinance, and the continued bombing campaign by US led coalition forces, all present clear dangers to returning refugees.

Amnesty International is extremely concerned that, even following the conclusion of the *Loya Jirga* (grand council), the fluidity of the situation in Afghanistan, the current high rate of refugee returns, and the lack of absorption capacity in the country could have a destabilising effect in the course of a fragile transitional process. If the rate of refugee returns exceeds absorption capacity, then this in turn impacts on the sustainability of returns. Amnesty International therefore calls for scrupulous respect for international standards for return of any individuals to Afghanistan. The fluidity and instability of the situation mean that failure to observe these standards is likely to lead to renewed cycles of displacement.

The maintenance of international standards is critical to ensuring protection and safe and dignified return, and whatever the degree of optimism on the part of the Afghan Transitional Administration, refugees, governments, the United Nations, or the wider international community it should not take precedence over an objective analysis of the situation on the ground and to applicable international standards.

Amnesty International, of course, does not oppose voluntary repatriation by individuals making a free and informed decision to do so, but the organization calls for caution. Uneven conditions of safety continue to prevail in Afghanistan with deteriorating security in pockets of the country owing to a range of factors, including continued conflict, lack of law and order and factional fighting which have hampered the return of refugees and provoked new displacement. In June, UNHCR reported that those returning were facing a fresh crisis, with Afghanistan "dropping off the relief agenda" to the extent that the sustainability of return was threatened. In early July, returns of internally displaced persons (IDPs) were suspended by UNHCR because of the volatile security conditions in the north. This action came in the wake of reported concerns about escalating violence and a deterioration in the human rights situation in parts of northern and central Afghanistan. Abuses of ethnic minorities have reportedly been rife in some parts of Afghanistan. Outside Kabul the Afghan Transitional

Administration wields little power, and the International Security Assistance Force's (ISAF) mandate does not extend beyond Kabul.

In order to ensure that the return of refugees is truly voluntary, UNHCR, host states and donor states should collectively guarantee respect for the human rights of refugees, in particular that refugees retain access to their basic social and economic rights in their countries of asylum and do not have them denied in the name of "encouraging" or "inducing" people to return. Failure to do so may effectively result in a violation of the principle of *non-refoulement*, the forcible return of persons to a country where they may face serious human rights abuses, which is prohibited by customary international law. Treatment which has the indirect effect of forcing people to return in such circumstances would constitute a "constructive" *refoulement*.

Mindful of the continuing obstacles to sustainable return in safety and dignity, this position paper outlines standards which Amnesty International considers essential for sustainable, safe and dignified return. It covers voluntary repatriation, the problem of forced or coercive measures to return, and the cessation of refugee status. In addition, it provides guidance on requirements for maintaining legal status and access to durable solutions, assessing "substantial change" in the context of refugee status determination procedures, handling cases of persons granted complementary forms of protection and, finally, obligations in relation to rejected asylum seekers.

It concludes with a set of recommendations to a range of actors including UNHCR, other international and inter-governmental organizations, the Afghan Transitional Administration, neighbouring and non-neighbouring countries of asylum, and the international community more generally.

This report summarizes a 22-page document (7,725 words), *Afghanistan: Continuing need for Protection and Standards for Return of Afghan refugees* (AI Index: ASA 11/014/2002) issued by Amnesty International in July 2002. Anyone wishing further details or to take action on this issue should consult the full document. An extensive range of our materials on this and other subjects is available at <http://www.amnesty.org> and Amnesty International news releases can be received by email:

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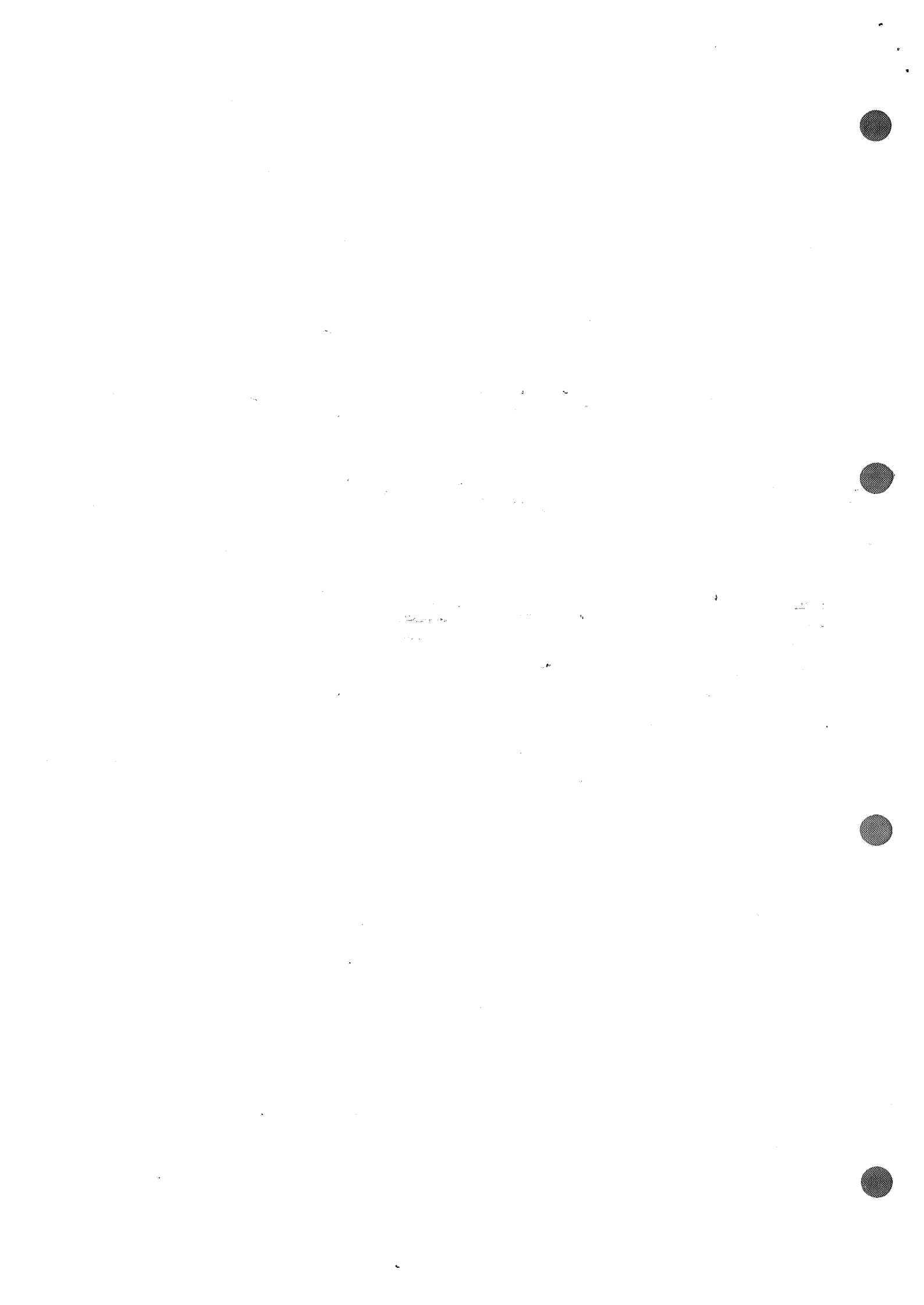


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Afghanistan

Continuing need for Protection and Standards for Return of Afghan refugees

Background

Amnesty International has serious concerns about the situation in Afghanistan. Insecurity, including ongoing areas of conflict, crime and banditry, factional fighting between warlords, human rights abuses of women, the presence of landmines and unexploded ordinance, and the continued bombing campaign by US led coalition forces, all present clear dangers to returning refugees.

Amnesty International is extremely concerned that, even following the conclusion of the *Loya Jirga* (grand council), the fluidity of the situation in Afghanistan, the current high rate of refugee returns, and the lack of absorption capacity in the country could have a destabilising effect in the course of a fragile transitional process. If the rate of refugee returns exceeds absorption capacity, then this in turn impacts on the sustainability of returns. Amnesty International therefore calls for scrupulous respect for international standards for return of any individuals to Afghanistan. The fluidity and instability of the situation mean that failure to observe these standards is likely to lead to renewed cycles of displacement.

The maintenance of international standards is critical to ensuring protection and safe and dignified return, and whatever the degree of optimism on the part of the Afghan Transitional Administration, refugees, governments, the United Nations, or the wider international community it should not take precedence over an objective analysis of the situation on the ground and to applicable international standards.

Mindful of the continuing obstacles to sustainable return in safety and dignity, this position paper outlines standards which Amnesty International considers essential for sustainable, safe and dignified return. It covers voluntary repatriation, the problem of forced or coercive measures to return, and the cessation of refugee status. In addition, it provides guidance on requirements for maintaining legal status and access to durable solutions, assessing "substantial change" in the context of refugee status determination procedures, handling cases of persons granted complementary forms of protection and, finally, obligations in relation to rejected asylum seekers.

Facilitating or promoting return

Amnesty International, of course, does not oppose voluntary repatriation by individuals making a free and informed decision to do so,¹ but the organization calls for caution. The

¹ This is reinforced by the right of all persons to return to their country. See for example article 12, *International Covenant on Civil and Political Rights*, and article 13, *Universal Declaration of Human Rights*.

2 *Return of Afghan refugees*

situation in Afghanistan remains fluid and is not conducive either to the *promotion* of voluntary repatriation or to invoking the "ceased circumstances" provisions of article 1C of the 1951 UN Convention relating to the Status of Refugees (the UN Refugee Convention), which permit the withdrawal of refugee status in limited circumstances. It is significant that the position of the Office of the UN High Commissioner for Refugees (UNHCR) has been to facilitate, but not to promote, voluntary repatriation. According to UNHCR "[p]romotion of repatriation can take place when a careful assessment of the situation shows that the conditions of "safety and dignity" can be met: in other words, when it appears that objectively, it is safe for most refugees to return and that such returns have good prospects of being durable."² Amnesty International is concerned, however, that UNHCR has recently altered its position on refugee returns to Afghanistan. While stopping short of promoting voluntary repatriation, UNHCR is encouraging states to engage in "active counselling", including of asylum seekers, reporting that "the time is now ripe for Afghans – wherever they are and at whatever stage they may be in the asylum process – to be offered the option of voluntary repatriation".³ In a *UNHCR Note on Basic Considerations Regarding Returns to Afghanistan from Non-Neighbouring States*, dated 10 July 2002, UNHCR states that:

"current changes are indeed generally conducive to the safe return of a broad spectrum of Afghans, the Office advises that asylum-seekers be actively counselled about the situation, as well as on possibilities for assisted return. Exercise of the voluntary repatriation option and/or a withdrawal of asylum applications would tangibly relieve asylum systems in a number of States, pre-empting the need to process many of the claims, especially those related to the rule of the Taliban, where international protection is no longer an issue."

Amnesty International is concerned that UNHCR's new position reflects a preoccupation with relieving asylum systems in certain refugee receiving states, which should not be a primary consideration in working towards achieving sustainable protection and security for refugees. It also sends a confusing message to the international community as to whether conditions are conducive to sustainable voluntary repatriation and it could have a destabilising effect in Afghanistan. The Australian Immigration Minister, Philip Ruddock, has been quick to capitalise on the opportunity to back the Australian government's decision to return seven Afghan asylum seekers stating that "[t]he returns follow announcements from the United Nations High Commissioner for Refugees about the appropriateness for people to return to Afghanistan. ... The UNHCR is recommending to governments that the time is now ripe for Afghans - wherever they are and whatever stage they may be in the asylum process - to be offered the option of voluntary repatriation."⁴

UNHCR's changed position comes at a time when a number of non-neighbouring states have been looking to return Afghans from their territory. At the same time, UNHCR has been issuing pleas for additional funds to support the facilitation of voluntary repatriation. UNHCR has reported that the failure on the part of the international community to respond to these pleas will force UNHCR to suspend returns. On 10 July 2002, UNHCR was reported as running on a current shortfall for the Afghan return operation of almost US\$70 million,

² See UNHCR Handbook, *Voluntary Repatriation: International Protection*, 1996, Chapter 3, Section 3.1.

³ See "Assisted Repatriation should be offered to all Afghans: UNHCR", *UNHCR Press Release*, 16 July 2002.

⁴ See Minister for Immigration, Multicultural and Indigenous Affairs, Australia, "Afghan Nationals Voluntarily Return Home", *Media Release, MPS 67/2002*, 22 July 2002.

almost 25 percent short of the organization's target figure.⁵ Subsequent reports indicate that the shortfall now stands at US\$65 million.⁶ Total planned UN activities in Afghanistan, in addition to UNHCR's work, face a shortfall of some US\$777 million affecting wider development, rehabilitation and reconstruction operations.⁷ Social and economic rights are essential to the sustainability of refugee returns, yet recent reports indicate that basic services are being cut.⁸ The reported budgetary shortfalls therefore raise compelling questions about both the sustainability of return and absorption capacity.

International responses to other crises

In the wake of refugee crises, there has been a tendency by various sectors of the international community to promote prematurely the return of refugees, asylum seekers and persons under complementary forms of protection⁹ to the relevant country or countries of origin. The most recent example of this is Afghanistan. Other high profile examples include Kosovo, where considerable attention was given to the question of returns in the wake of the NATO military intervention,¹⁰ and Bosnia and Herzegovina.

Such policies may also coincide with "donor fatigue" in protracted refugee situations, in turn leading to "erosion of protection standards and considerable pressure on the refugee population to depart".¹¹

In the face of unprecedented high rates of returns to Kosovo, however, UNHCR took a cautious approach, advising for example, continued and unhindered access to refugee status determination procedures, especially for certain groups; of the need for careful and individually considered claims for international protection; phased, coordinated, orderly and humane returns of persons not in need of international protection; access to protection for "compelling reasons" notwithstanding change, along the lines of article 1C(5) of the 1951 Refugee Convention; and that certain persons should not directly or indirectly be compelled, unduly influenced, induced or encouraged to return. This approach indicates that any assessment of the situation in Afghanistan would need to take into account assessment of the security and human rights situation by area, absorption capacity, sustainability of return, and the pressing humanitarian and protection needs of those remaining in Pakistan and Iran and other host states, as well as of those returning to Afghanistan. If such an assessment has been made, it should be published by UNHCR. Failure to proceed in this way could expose UNHCR to accusations of double standards.

⁵ UNHCR, Afghanistan Emergency Funding Overview, as at 10 July 2002.

⁶ See, for example, Kris Janowski, "Afghanistan: returns high, funds low", *UNHCR Briefing Notes*, 19 July 2002.

⁷ UNHCR News, "UN calls for more funding and security in Afghanistan", 11 July 2002.

⁸ See, for example, Kris Janowski, "Afghanistan: returns high, funds low", *UNHCR Briefing Notes*, 19 July 2002.

⁹ Complementary forms of protection is a generic term used to describe the grant of humanitarian protection, as opposed to refugee status, to individuals seeking protection in countries of asylum.

¹⁰ See *Federal Republic of Yugoslavia (Kosovo), Amnesty International's recommendations on the return of refugees to Kosovo*, July 2000, *AI Index: EUR 70/31/00*.

¹¹ UNHCR Global Consultations on International Protection, *Voluntary Repatriation*, EC/GC/02/5, 25 April 2002, paragraph 3.

Afghan refugees in non-neighbouring states

Over three and a half million Afghan refugees remain outside Afghanistan, most of them in Pakistan and Iran, countries that have financial difficulty supporting this population. By contrast, UNHCR estimates that 150,000 Afghans applied for asylum across some 90 states in the past three years.¹² Many refugees have begun returning to Afghanistan from Pakistan and Iran, and some have started returning from other countries. Some are keen to return to reconstruct their lives and their country. Others are returning because they do not have any viable alternative to doing so, given the inadequacies of protection in their countries of asylum and transit. Some remain in asylum procedures, the processing of their claims having in some cases been frozen, pending an assessment of changed conditions, and others are being asked to comment on the suggestions that it may now be safe for them to return to Afghanistan. Some have been unable to find durable protection in those countries and for others there are concerns that they may have returned because they have been unable to await the processing of their claims while being held in indefinite and arbitrary detention.¹³

After the fall of the Taliban, officials from some countries, including the United Kingdom and Australia, made statements or adopted measures indicating that they felt that the situation had changed in Afghanistan to such an extent that Afghan asylum seekers could soon return or be returned to the country. In late January 2002, in the United Kingdom, Lord Rooker (then Immigration Minister) said in an interview that Afghanistan was becoming a safe country to which asylum seekers could be returned.¹⁴ More recently, Immigration Minister Beverley Hughes concluded that Afghans in the United Kingdom should no longer be routinely granted 'Exceptional Leave to Remain' on the basis that the situation in Afghanistan had improved considerably.¹⁵

UNHCR has raised concerns about the active steps Australia has been taking to encourage the return of Afghans currently detained in Australia as asylum seekers or living under temporary protection arrangements. From late December 2001 until late January 2002, Australia

¹² See *UNHCR Note on Basic Considerations Regarding Returns to Afghanistan from Non-Neighbouring States*, 10 July 2002.

¹³ See for example Minister for Immigration, Multicultural and Indigenous Affairs, Australia, "Afghan Nationals Voluntarily Return Home", *Media Release, MPS 67/2002*, 22 July 2002. The seven individuals who were reported to have returned to Afghanistan had been in detention for between two and three years. Australia's practice of mandatory detention has been criticized, *inter alia*, by the UN Human Rights Committee as violating articles 9(1) and (4) of the *International Covenant on Civil and Political Rights*. See also UNHCR Handbook, *Voluntary Repatriation: International Protection*, Chapter 2, Section 2.3 Voluntary: "One of the most important elements in the verification of voluntariness is the legal status of the refugees in the country of asylum. If refugees are legally recognized as such, their rights are protected and if they are allowed to settle, their choice to repatriate is likely to be truly free and voluntary. If, however, their rights are not recognized, if they are subjected to pressures and restrictions and confined to closed camps, they may choose to return, but this is not an act of free will."

¹⁴ Ian Burrell, "Britain to send back Afghan refugees," *The Independent*, 28 January 2002.

¹⁵ UK Government, *Media Release, 194/2002, Government to start failed asylum seeker returns to Afghanistan*, 11 July 2002; see also Alan Travis, "Rejected Afghans to be sent home", *The Guardian*, 12 July 2002. 'Exceptional Leave to Remain' is a complementary form of protection in the United Kingdom. See also footnote 9 above.

suspended the processing of Afghan asylum seekers' claims, reportedly because many of the asylum seekers held in detention centres awaiting determination were claiming asylum based on fear of persecution by the Taliban, and the government of Australia needed time to collect information about the current situation in Afghanistan.¹⁶ In mid-May 2002, Australia's Immigration Minister Philip Ruddock told reporters that Australia would soon begin returning rejected Afghan asylum seekers who are held in detention centres in Australia.¹⁷ On 16 May 2002, Ruddock signed an agreement with Afghanistan's Interim Administration on the voluntary return of Afghan refugees and asylum seekers.¹⁸ Australia, however, failed at that time to secure agreement for the forced return of rejected asylum seekers.

Amnesty International has expressed concern about Australia's apparent plans to repatriate large numbers of Afghans from Australia. At various stages UNHCR has also cautioned against such moves. The Director of UNHCR's Department of International Protection, Erika Feller, on 17 May 2002, was reported by the Sydney Morning Herald as saying: "[t]o bring people back precipitously can only contribute to growing destabilisation of a country which is very fragile." Feller went on to say "[t]he security is not good in a very, very large part of the country...It is not at all possible to say that the situation has stabilised such as the UNHCR would be promoting repatriation." She called on Australia and other countries to help Afghanistan recover by delaying the repatriation of Afghans.¹⁹ UNHCR's spokesperson in Kabul, Yusuf Hassan, has further expanded on this recommendation:

We would like to say to countries that Afghanistan is of international concern. And countries in the world can help the Interim Administration and the process here by not putting pressure on Afghanistan at this particular moment. They should wait until such a time when promotion of returns can be a viable option to organizations like ours and people can really return to participate in the process of reconstruction.²⁰ And I think countries like Australia can help Afghanistan by sharing that burden at this particular moment rather than pressuring people to return back.²¹

Involuntary returns have already been reported from the United Arab Emirates, which flew over 1,000 Afghans, who had been held in the custody of the United Arab Emirates as illegal immigrants, to Kabul in February 2002. UNHCR protested the deportations as they had not

¹⁶ *Agence France Presse*, "Australia suspends processing of asylum claims from Afghans," 24 December 2002; and Belinda Goldsmith, "Australia lifts Afghan refugee claim freeze," *Reuters*, 24 January 2002.

¹⁷ Peter Lloyd, "Interview with Philip Ruddock," *ABC*, broadcast 13 May 2002 at 8:28 am, transcript available at <<http://www.abc.net.au/am/s554173.htm>>; and *Agence France Presse*, "Australia to begin repatriating Afghan asylum seekers," 13 May 2002.

¹⁸ Australian Ministry for Immigration and Multicultural and Indigenous Affairs, "Immigration Minister Signs Afghan Agreement," *Media Release MPS 34/2002*, 17 May 2002; and *Agence France Presse*, "Australia and Afghanistan agree on return of refugees," 17 May 2002.

¹⁹ Andrew Clennell and Mark Baker, "Ruddock's mission to repatriate Afghans," *The Sydney Morning Herald*, 17 May 2002.

²⁰ The process of reconstruction includes "[e]nsuring respect for human rights, rebuilding the infrastructure, restoring normal economic, social and political life, rehabilitating the judicial system and bringing long-term stability [all of which are] dauntingly costly, labour-intensive, and *time-consuming* tasks" (emphasis added): UNHCR Global Consultations on International Protection, *Voluntary Repatriation*, EC/GC/02/5, 25 April 2002, paragraph 4.

²¹ Yusuf Hassan, "UN Assistance Mission in Afghanistan", *UNHCR Press Briefing*, 16 May 2002.

had access to the individuals prior to the deportations so that they could determine if there were any human rights or refugee protection concerns. UNHCR's spokesperson, Peter Kessler, said "[w]e believe the situation in Afghanistan is too precarious for any such action or any large scale returns to take place...[p]eople now should only be returning voluntarily."²²

The installation of the Transitional Administration in Afghanistan does not provide sufficient grounds for concluding that asylum seekers and refugees, including those who did or could have claimed refugee status prior to the installation of the Transitional Administration, are no longer in need of protection. Indeed, the situation in Afghanistan since the commencement of the US bombing campaign on 7 October 2001, may in some cases have created or opened up new grounds for individuals to claim protection from persecution in Afghanistan.

Ongoing protection problems, including refugee returns

During over 20 years of armed conflict in Afghanistan, millions of Afghan men, women and children have sought safety as refugees, the majority to Pakistan and Iran. In the years after the Soviet withdrawal from Afghanistan, international support for the Afghan refugee population in these countries waned. In the last couple of years, the conditions for refugees in these countries have also deteriorated and borders have, from time to time, been closed to new refugees.²³

Voluntary Repatriation

Amnesty International has repeatedly expressed serious concern both about the failure of neighbouring states to provide protection to Afghan refugees and about the failure of the international community to provide adequate support to countries hosting this population.²⁴

Recent reports indicate, for example, that, in Pakistan, police harassment of Afghan refugees, which had begun before 11 September 2001, continues. In early May 2002, up to 1000 Afghan refugees were apparently arbitrarily detained following the killing of two policemen in Rawalpindi, Pakistan. Ramatullah Moosaghazi, *charge d'affaires* at the Afghan embassy in Islamabad said, "[e]very day I receive complaints from Afghans...that they are facing problems and relatives or friends have been arrested by police."²⁵ In one incident, Mohammad Jan, aged 85, was reportedly beaten by police when he went to find out about his son, one of those detained and another man, Mohammad Anwar, and was ordered to pay police or face

²² *Integrated Regional Information Network*, "Afghanistan: UNHCR slams Dubai deportations," 26 February 2002.

²³ See Amnesty International, *Afghanistan: Protect Afghan civilians and refugees*, 8 October 2001 (AI Index: ASA 11/012/2001), page 5.

²⁴ See Amnesty International, *Afghanistan: Protect Afghan civilians and refugees*, 8 October 2001 (AI Index: ASA 11/012/2001); Amnesty International, *Afghanistan: Who will assume the responsibility?*, 7 November 2001 (AI Index: ASA 11/026/2001); Amnesty International, *Afghanistan: Refugees fleeing the war are an international responsibility*, 7 December 2001 (AI Index: ASA 11/044/2001); Amnesty International, *Pakistan: Refugees must not be forced back to an unstable Afghanistan*, 14 December 2001 (AI Index: ASA 33/030/2001); and Amnesty International, *Afghanistan: Refugees situation trapped in "no man's land" escalating*, 10 January 2002 (AI Index: ASA 11/001/2002).

²⁵ Andy Soloman, "Pakistan crackdown on Afghans angers envoy," *Reuters*, 13 May 2002.

imprisonment.²⁶ Police harassment of repatriating Afghan refugees in Iran has also been reported.²⁷ Afghan refugees in Iran have faced deportations, harassment, violent attacks and exclusion from work.

UNHCR began facilitating, as opposed to promoting, voluntary repatriation programmes for Afghan refugees returning from Pakistan on 1 March 2002 and for those returning from Iran on 9 April 2002.²⁸ Between 1 March and 5 July 2002, some 1,068,000 Afghan refugees repatriated from Pakistan²⁹ and between 9 April and 5 July 2002, 90,000 repatriated from Iran with UNHCR assistance.

Refugees decide to return to their countries of origin for a range of reasons, which may include poor conditions in their country of refuge, protection of property, family or community pressure, or security. It does not follow that because a person has returned that the decision to return was truly voluntary. It is therefore critical to guard against institutional or other external pressure on refugees to return.³⁰

In order to ensure that the return of refugees is truly voluntary, UNHCR, host states and donor states should collectively guarantee respect for the human rights of refugees, in particular that refugees retain access to their basic social and economic rights in their countries of asylum³¹ and do not have them denied in the name of "encouraging" or "inducing" people to return.³² Failure to do so may effectively result in a violation of the principle of *non-refoulement*, the forcible return of persons to a country where they may face serious human rights abuses, which is prohibited by customary international law. Treatment which has the indirect effect of forcing people to return in such circumstances would constitute a "constructive" *refoulement*.

²⁶ Ibid.

²⁷ BBC World Service, "Afghan refugees report Iranian harassment," 20 May 2002.

²⁸ On 3 April 2002, a Tripartite Agreement between Afghanistan, Iran and UNHCR was signed at the Palais des Nations in Geneva, following some initial delays reported in the Afghan interim government proceeding to signature. Jon Hemming, "Iran, UNHCR to help Afghan refugees return home," *Reuters*, 3 April 2002 and *Integrated Regional Information Network*, "AFGHANISTAN: No delay expected in repatriation from Iran," 26 March 2002. For Pakistan's voluntary repatriation program see *Integrated Regional Information Network*, "AFGHANISTAN: Major repatriation drive begins," 1 March 2002

²⁹ UNHCR, Afghanistan: returns update, 5 July 2002.

³⁰ See statements of Erika Feller, above, from Andrew Clennell and Mark Baker, "Ruddock's mission to repatriate Afghans," *the Sydney Morning Herald*, 17 May 2002; and see WARIPNET and the Lawyers Committee for Human Rights, *From response to solutions - strengthening the protection of refugees through economic, social and cultural rights - a Discussion Paper on the Economic, Social and Cultural Rights of Refugees in West Africa*, October 2000.

³¹ The social and economic rights of refugees and asylum seekers are recognized in a number of instruments, including the *Universal Declaration of Human Rights*, the *Convention relating to the Status of Refugees*, *International Covenant on Economic, Social and Cultural Rights*, and the *Convention on the Rights of the Child*. Pakistan is not a party to any of these instruments, except the *Convention on the Rights of the Child*. Iran is a party to the four treaties, and Afghanistan to all but the *UN Refugee Convention*. Most non-neighbouring states which host Afghan refugees are party to these instruments, including where applicable, regional instruments such as the *European Convention on Human Rights*. Nauru and Indonesia are parties only to the *Convention on the Rights of the Child*.

³² Baldly stated, they must not be "starved out" of their countries of asylum in the name of voluntary repatriation, a strategy which could result in what has become known as "constructive refoulement". For further discussion see: WARIPNET and the Lawyers Committee for Human Rights, *ibid*.

Amnesty International is concerned that asylum states should refrain from using any forced or coercive measures, including incentives which might themselves amount to forcible or coercive measures, to return any refugee to Afghanistan. Under no circumstances should an individual or individuals be returned as a means of inducing or coercing the return of other family members. Nor should legal status be withdrawn on the basis of any expectation that voluntary repatriation will result. All such measures would amount to violations of the principle of *non-refoulement*.

Afghanistan cannot yet be described as being in a post-conflict situation. Even if it reaches that stage, voluntary repatriation should not be seen as "the only" solution. All durable solutions, including local integration and resettlement, must remain reasonably available to refugees from Afghanistan, no matter where they are located. For individuals deciding not to return it is incumbent on UNHCR to identify alternative durable solutions.

UNHCR should be primarily responsible for facilitating voluntary repatriation, whether from Iran and Pakistan or from further afield, and whether the individuals in question are individually recognised refugees, asylum seekers, *prima facie* refugees, or otherwise enjoying a complementary form of protection. In order to guard against disrupting the facilitation of orderly returns, UNHCR should have the central and leading coordination role, and implementation of returns should be in accordance with prescribed standards that are consistent with international human rights and refugee law. UNHCR's responsibility should also include monitoring and reporting on return.

Problems for returning refugees

In early May 2002, aid agencies, including UNHCR, the International Organisation for Migration (IOM) and the World Food Programme (WFP) warned that international funding was not being provided quickly enough and that programs including food distributions and voluntary repatriation were at risk of being stopped due to the lack of resources. UNHCR called on the international community to ensure that the return and reintegration of refugees and internally displaced persons remains sustainable.³³ If UNHCR is to continue facilitating the voluntary repatriation of refugees, without disruption, it is incumbent on donor states to honour their commitments to fund UNHCR to this end. Failure to do so could seriously undermine the sustainability of return, thus contributing to an increased likelihood of renewed cycles of displacement.

Other disruptions to voluntary repatriation also raise serious questions about the sustainability of returns. In early April, repatriation movements were disrupted by violence in eastern and western Afghanistan. Two incidents interrupted returns via the main Torkham crossing from Pakistan, delaying the return of some 18,000 Afghans. UNHCR said that roadblocks by angry farmers along the road from Torkham to Jalalabad caused them to recommend a halt to returns via this route during these protests. The 8 April 2002 bombing that apparently targeted the Afghan Defence Minister in Jalalabad, Nangarhar province, also temporarily disrupted repatriation as a UNHCR distribution centre was near the place that was bombed.

³³ *Agence France Presse*, "Relief agencies warn cash to help Afghan returnees running out," 7 May 2002.

At this time, fighting in western Afghanistan around Zaranj, capital of Nimrouz province, forced UNHCR to change its plans to repatriate Afghans from Iran directly to this region.³⁴

Uneven conditions of safety continue to prevail in Afghanistan with deteriorating security in areas of the country owing to a range of factors, including continued conflict, lack of law and order and factional fighting which have hampered the return of refugees and provoked new displacement. In June 2002, UNHCR reported that those returning were facing a fresh crisis, with Afghanistan "dropping off the relief agenda" to the extent that the sustainability of return was threatened.³⁵ In early July 2002, return of internally displaced persons (IDPs) were suspended by UNHCR because of the volatile security conditions in the north.³⁶ This action came in the wake of reported concerns about escalating violence and a deterioration in the human rights situation in parts of northern and central Afghanistan.³⁷ Suspension affected IDPs bound for Faryab province, Sar-i-Pul district in Jozjan province, Sholgara district in Balkh province and Samangan province. Abuses of ethnic minorities have been widely reported in some parts of Afghanistan.

In considering the sustainability of return, it is important to note that outside Kabul the Afghan Transitional Administration wields little power, while the International Security Assistance Force's (ISAF) mandate does not extend beyond Kabul. Pointing to the existence of the Transitional Administration and ISAF, independent of an analysis of their impact, would not therefore provide grounds for concluding that the situation has stabilised.

New displacement - refugees and internally displaced persons

Even as refugees have been returning to Afghanistan, tens of thousands have been seeking safety and assistance in Pakistan and in camps for internally displaced persons inside Afghanistan. Since late February 2002, tens of thousands of Afghan refugees have been stranded at Chaman, a 'no man's land' between the border of southern Pakistan and Afghanistan, where the Pakistan authorities have refused to allow them to proceed further into Pakistan or to be registered as refugees by UNHCR, which would then be able to arrange for the provision of regular food, shelter and medical care. UNHCR reports that many of these refugees are ethnic Pashtuns from northern Afghanistan and that many of them cite human rights abuses as their reason for fleeing their homes. Those waiting in this area have not received regular and adequate food assistance or shelter and 13.6 percent were reported as being malnourished.³⁸

In early May 2002, elders representing some of the communities at the Chaman border reportedly agreed to return to Afghanistan, either to their home villages or to an IDP camp near Kandahar, after meeting with a tripartite task force from the Afghan Interim Administration, the Pakistan Commissionerate for Afghan Refugees and UNHCR.³⁹ Shortly

³⁴ See Kris Janowski, "Afghanistan: Sweden sets generous funding example," *UNHCR Briefing Notes*, 9 April 2002.

³⁵ See AFP, *Afghanistan too "precarious" for returning refugees: UNHCR*, 19 June 2002.

³⁶ See UNHCR news, *UN suspends IDPs repatriation to Afghanistan's volatile north*, 2 July 2002.

³⁷ See UNHCR news, *Afghanistan: UNHCR concerned at escalating violence in north*, 2 July 2002.

³⁸ *Refugees International*, Chaman, Pakistan: A hazardous situation for refugees and relief workers, 7 June 2002.

³⁹ *Integrated Regional Information Network*, "Pakistan: Chaman refugees set to return," 10 May 2002.

after this, UNHCR began assisting IDPs from Spin Boldak, near Chaman, to return to home villages near Kandahar and helped approximately 150 refugees return to Afghanistan from the Chaman border camp.⁴⁰ Although UNHCR is advising returning IDPs and refugees on the conditions for return to home areas in Afghanistan, Amnesty International is concerned about the lack of opportunity for individuals in these makeshift border camps to seek international protection. It is not sufficient to provide them only with the option of return to home areas within Afghanistan or transfer to IDP camps without a proper interview process to establish if protection needs are being met and providing the possibility of refugee status.

Amnesty International considers that return to a place which is not the previous home of the refugee or IDP must be based on a free and informed choice, should not arise from obstacles to return to the place of origin, is sustainable and does not interfere with the rights of others.⁴¹ Return of refugees and IDPs to places other than their previous homes because their homes remain insecure leads to problems relating to reintegration, sustainability and security. Property disputes can ensue, as well as rapid and unsustainable urbanization. Meaningful prospects for earning a livelihood can be limited and political instability can be exacerbated.

The sustainability of return

Large numbers of refugees returning to Afghanistan are going to Kabul, partly because of lack of security in other parts of the country means that return to those places is not generally viable. In Kabul, the shortages of housing and inadequate infrastructure have caused concern about the spread of disease and the provision of basic services.⁴²

Food security is a major and continuing problem. There are serious concerns about the availability of food and water following three consecutive years of drought. The World Health Organisation have stated that six million people depend on food aid, and another six million people have no access to basic necessities. In northern Afghanistan, an outbreak of locusts is destroying the wheat crop.⁴³

Medicins Sans Frontieres (MSF) and the World Health Organisation (WHO) have warned of an increase in the spread of serious infectious diseases, particularly diarrhoea, tuberculosis and leishmaniasis, as Afghan refugees return to a country without a functioning health care system. Already, MSF has reported a dramatic rise in the number of patients they are treating as repatriations increase.⁴⁴

Basic infrastructure in the country has been devastated by more than two decades of armed conflict. For example, only 13 per cent of Afghanistan's road infrastructure was paved in 1991,

⁴⁰ UNHCR News Stories, "Displaced Afghans return from squalid border camps," 14 May 2002.

⁴¹ See Global Consultations on International Protection, *Voluntary Repatriation*, EC/GC/02/5, 25 April 2002, page 7.

⁴² Brian MacQuarrie, "Stream of refugees swells squalid Kabul," *The Boston Globe*, 1 May 2002; and Chris Otton, "Minister planning new satellite town to ease Kabul housing crisis," *Agence France Presse*, 15 May 2002.

⁴³ David Brough, "UN's FAO battles locust swarms in Afghan wheat area," *Reuters*, 13 May 2002.

⁴⁴ *Integrated Regional Information Network*, "Afghanistan: Threat of increasing disease as refugees return," 14 May 2002.

most of which has been further destroyed by the recent hostilities. The telephone and telegraph network that linked major towns hardly functions. Educational facilities have also been severely affected by years of conflict.⁴⁵

It is essential that return is sustainable in order to break the cycle of displacement. Although the international community, including UNHCR, cannot and should not obstruct the individual decision of a refugee or refugee family to return to Afghanistan, it is incumbent on those engaged in facilitating repatriation that refugees are fully informed about the lack of sustainability of the current situation, as a consequence both of the instability of the situation and diminishing absorption capacity.

⁴⁵ See Asian Development Bank, news release No. 052/02, 9 April 2002.

Standards for Return

A continuing need to observe international protection standards

Under international refugee law, there are two key points of departure in examining possibilities for return of refugees and asylum seekers to a country of origin. These are the concepts of voluntary repatriation and the broader concept of cessation. The legal foundation for these concepts may be found in article 1C of the UN Refugee Convention, which provides, *inter alia*, that a person ceases to be a refugee if she or he has *voluntarily* reavailed herself or himself of the protection of the country of nationality or former habitual residence.⁴⁶ Articles 1C(5) and (6) also provide, subject to certain exceptions, that a person ceases to be a refugee if she or he can no longer, because the circumstances in connection with which refugee status was recognized have *ceased to exist*, continue to refuse to avail herself or himself of the protection of the country of her or his nationality or country of former habitual residence.⁴⁷

Amnesty International is unequivocal in its view that the circumstances which led to previous refugee movements have not yet changed in a way which would attract the application of article 1C of the UN Refugee Convention. At the time of writing, it should be emphasized that there is no suggestion that UNHCR is considering the question. However, the organization is aware that at least one country hosting Afghan refugees - Australia - will begin addressing the question of whether Afghan holders of Temporary Protection Visas (TPVs) have a continuing need for protection, later in 2002.

In addition, the United Kingdom is considering limiting to 12 months the grant of Exceptional Leave to Remain to, amongst others, Afghans⁴⁸ and has indicated that it will no longer routinely grant such leave to persons from Afghanistan.⁴⁹

Amnesty International is also concerned that policies and practices in a number of countries may place refugees and asylum seekers under undue pressure to return. For example, on 23 May 2002, the Australian Government announced a proposal for the return of asylum seekers, including rejected asylum seekers, arising out of a Memorandum of Understanding between the Australian Government and the Afghan Interim Authority. The proposal provides for "incentives" to return being payment of at least AUD 2,000 (~USD 1,125) per individual adult or child to a maximum of AUD 10,000 (~USD 5,600) per family.⁵⁰

While Amnesty International recognizes that in some circumstances it may be appropriate to provide return and reintegration assistance, the organization is concerned that the offer imposes a strict time limit of 28 days within which individuals must accept it⁵¹ and that it

⁴⁶ See articles 1C(1) and (4), *1951 Convention relating to the Status of Refugees*.

⁴⁷ See articles 1C(5) and (6), *1951 Convention relating to the Status of Refugees*.

⁴⁸ Seumas Milne and Alan Travis "Blair's secret plan to crack down on asylum seekers", *The Guardian*, 23 May 2002.

⁴⁹ Alan Travis, "Rejected Afghans to be sent home", *The Guardian*, 12 July 2002.

⁵⁰ Australian Minister for Immigration, Multicultural and Indigenous Affairs, Ministerial Press Release MPS 38/2002, 23 May 2002.

⁵¹ *Ibid.* The Press Release suggests that the 28 days starts running for a rejected asylum seeker as soon as she or he is notified of the offer, and for asylum seekers whose cases are yet to be decided, as soon

applies only to those asylum seekers and rejected asylum seekers who are in detention, namely the persons least able to make a truly voluntary decision to return with or without financial "incentives".⁵² The offer includes persons currently detained on Nauru and on Christmas Island. Amnesty International notes that in the past those who decided not to take up such opportunities to leave Australia have been blamed for their continuing detention and the consequential cost to the taxpayer.

Likewise, Amnesty International is concerned by proposals, however tentative, to return rejected asylum seekers from countries such as the United Kingdom and Australia,⁵³ and emphasises that safe and dignified return of rejected asylum seekers should be guided by certain benchmarks for determining whether there is a real risk that such returns would be disruptive to implementation of any continued voluntary repatriation.

This position paper therefore sets out the standards which Amnesty International considers essential in order to ensure respect for the rights, safety and dignity of refugees and asylum seekers, including rejected asylum seekers. These standards are underpinned by international refugee and human rights law.

as they are notified that their application has been rejected. It is not clear whether time would start running for asylum seekers with cases pending from the date of the decision at first instance or the decision on appeal.

⁵² Ibid.

⁵³ See for example the UK proposal to carry out bulk deportations, possibly including to Afghanistan, on RAF aeroplanes: Seumas Milne and Alan Travis "Blair's secret plan to crack down on asylum seekers", *The Guardian*, 23 May 2002. In addition, although Australia has not indicated that it has any current plans to forcibly return anyone to Afghanistan, the Australian Immigration Minister has made a number of public statements to the effect that this is being considered. See for example, "Ruddock cash offer to get rid of Afghans", *The Sydney Morning Herald*, 24 May 2002: "There may be people who say they don't want to accept the offer," he said. "I understand that. They may think that, if they wait, in some way we will allow them to stay, and that won't be happening."; "Go home, Ruddock tells Afghan protesters", *The Sydney Morning Herald*, 21 January 2002: "Protesting Afghan asylum seekers could go home if they did not like conditions in Woomera detention centre, the Immigration Minister, Philip Ruddock, said yesterday. ... Mr Ruddock said conditions in Afghanistan were now suitable for people to return to their homeland. He was reacting to a worsening protest in the camp, with people on a hunger strike and some sewing their lips together."

Standards

Voluntary Repatriation

1. **Voluntary repatriation** is a durable solution which, in order to be sustainable, **requires the resumption of national protection**,⁵⁴
2. The requirement that **repatriation must be voluntary** applies to recognized refugees, asylum seekers whose status has not been finally determined,⁵⁵ and *prima facie* refugees.⁵⁶ Repatriation should also be voluntary for those who enjoy complementary forms of protection. (*Note:* For the sake of brevity, all such individuals will be referred to in these standards as “refugees”);
3. Although the **voluntary repatriation of asylum seekers** may be facilitated, it should not be *promoted*.
4. For repatriation to be voluntary, the individual’s **decision must be free and informed**; This means that the decision must:
 - (a) Be based on objective information concerning conditions in the country of origin; and
 - (b) Arise out of a situation in the country of origin which is sufficiently secure as to permit free choice. This would include legal status, protection of rights, absence of pressures to return and restrictions on rights, including freedom of movement;⁵⁷
5. The **assessment of conditions for return** must satisfy requirements set out by UNHCR’s Executive Committee, including EXCOM Conclusion 40 which stipulates that return should be in “absolute safety”. Voluntary repatriation should not include return to so-called “safe areas” or situations of internal displacement.⁵⁸ The assessment of whether conditions are conducive to return must be independent of collateral political objectives

⁵⁴ See for example UNHCR Global Consultations on International Protection, *Voluntary Repatriation*, EC/GC/02/5, 25 April 2002, paragraph 5: “The return phase cannot be approached primarily as a question of logistics or numbers but is an integral part of a solution whose durability must be in reach from the outset.”

⁵⁵ It is a fundamental principle of international refugee law, on account of refugee status being a declaratory rather than constitutive status, that an asylum seeker must be treated as a refugee unless or until she or he is finally determined to be otherwise. In this instance, final determination would of course presuppose that the refugee status determination procedure was fair and satisfactory, and implemented accordingly.

⁵⁶ The protection of *prima facie* refugees is also covered by the UN Refugee Convention. See Global Consultations on International Protection, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, EC/GC/01/4, 19 February 2001, paragraph 8.

⁵⁷ See UNHCR Handbook, *Voluntary Repatriation: International Protection*, Chapter 2, Section 2.3 Voluntariness: “One of the most important elements in the verification of voluntariness is the legal status of the refugees in the country of asylum. If refugees are legally recognized as such, their rights are protected and if they are allowed to settle, their choice to repatriate is likely to be truly free and voluntary. If, however, their rights are not recognized, if they are subjected to pressures and restrictions and confined to closed camps, they may choose to return, but this is not an act of free will.”

⁵⁸ See *The Cessation Clauses: Guidelines on their Application*, UNHCR Geneva, April 1999, paragraph 29. Note that these Cessation Guidelines are currently under review, in light of the outcomes of the Lisbon Expert Roundtable on Cessation, May 2001, held as part of UNHCR’s Global Consultations on International Protection. However, this point is consistent with the Conclusions arising out of that meeting.

- and place the safety, security and dignity of refugees at the centre of its sphere of concern and interest;⁵⁹
6. All durable solutions must remain reasonably available to refugees from Afghanistan, including local integration and resettlement, regardless of the country in which they find themselves;
 7. Return in safety and dignity must be sustainable. Safety must be sustainable and includes legal, physical and material security.⁶⁰ Dignity imports the requirement of full and sustainable restoration of and respect for human rights, including economic, social and cultural rights.⁶¹ The requirement to assure and to maintain voluntary return in safety and dignity and with full respect for human rights should apply equally to the country of asylum, any period of transit, and in the country of origin;
 8. In reaching a decision to return voluntarily, individuals and/or families should be entitled to make "go and see" or "go and work"⁶² visits in order to determine for themselves whether conditions are conducive to return.⁶³ As no specific duration can be set for such visits, provision for them should be sufficiently flexible to accommodate short visits as well as visits of longer duration. The same principle should apply to persons granted protection in countries of asylum other than neighbouring countries, that is that individuals or families making such visits should be able to do so without prejudice to their continuing right to protection in their country of asylum.⁶⁴
 9. All individuals, including women and children, who express a wish not to return should have access to a fair, satisfactory and individual asylum determination procedure in the host state, including independent appeal procedures;
 10. Voluntary repatriation should not take place in any way which has or may have the effect of obstructing, undermining or otherwise interfering with the right to family unity.⁶⁵

⁵⁹ See for example the reliance by the Australian Minister for Immigration and Multicultural Affairs, Philip Ruddock, on the view of the head of the Afghan Interim Authority as a basis for concluding that it is safe to return: "Chairman Karzai made it very clear to me, that the view of the Government is, that Afghanistan is safe and secure for any Afghan who wishes to return." see *Government offers Afghans \$2,000 to return home*, Lateline, Australian Broadcasting Corporation, 23 May 2002.

⁶⁰ See UNHCR Handbook, *Voluntary Repatriation: International Protection*, Chapter 2, Section 2.4 *Ensuring Return in Safety and with Dignity*.

⁶¹ See EXCOM Conclusion No. 40 (XXXVI) – 1985, *Voluntary Repatriation*.

⁶² See UNHCR Global Consultations on International Protection, *Voluntary Repatriation*, EC/GC/02/5, 25 April 2002.

⁶³ Such measures may also serve as tools for reconciliation and confidence-building which can be crucial to the sustainability of return. See UNHCR Global Consultations on International Protection, *Voluntary Repatriation*, *ibid.*, paragraph 28.

⁶⁴ In practice, the voluntary return cessation provisions (articles 1C(1), (2) and (4)) are not automatically invocable upon repatriation, because the circumstances which provoked the original flight often still subsist. See UNHCR Handbook, *Voluntary Repatriation: International Protection*, Chapter 2, Section 2.2, *Cessation of Status and Fundamental Changes in the Country of Origin*.

⁶⁵ See Global Consultations on International Protection, Geneva Expert Roundtable, Summary Conclusions on Family Unity, paragraph 2: "The right to family unity is derived from, inter alia, Article 16 of the Universal Declaration of Human Rights 1948, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Article 16 of the European Social Charter 1961, Articles 17 and 23 of the International Covenant on Civil and Political Rights 1966, Article 17 of the American Convention on Human Rights 1969, Article 74 of Additional Protocol I of 1977 to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War 1949, Article 18 of the African Charter on Human and Peoples' Rights 1981, Articles 9, 10, and 22 of the Convention on the Rights of the Child 1989, and Articles XXIII and XXV of the African Charter on the Rights and Welfare of the Child 1990."

11. The voluntariness and sustainability of return should be **independently evaluated**.

Cessation of refugee status

At present, the article 1C(5) and (6) "ceased circumstances" cessation provisions do not apply to Afghanistan.⁶⁶

1. As a minimum, changes in the country of origin must be demonstrated to be **fundamental, durable and effective** to the point that there is no longer a risk of serious human rights abuses against returnees for reasons including but not limited to those which gave rise to an earlier grant of protection;
2. Fundamental, durable and effective change must characterise both the **overall assessment of the general human rights situation in the country as well as the circumstances of the individual**;
3. Even where cessation may result, it does not exclude the possibility that an individual may be able to sustain **new claims for protection**. They should be given a reasonable opportunity to present such claims;
4. Cessation should not normally be invoked in the absence of a **declaration of cessation by UNHCR** which may create a rebuttable presumption that persons to whom it applies are no longer in need of international protection. This approach ensures that cessation cannot be used selectively and is consistent with the view that a refugee's status should not in principle be subject to frequent review to the detriment of his or her sense of security, which international protection is intended to provide.⁶⁷
5. In the unlikely event of cessation in Afghanistan in the reasonably foreseeable future, persons able to invoke **compelling reasons** arising out of previous persecution for refusing to avail themselves of the protection of their country of nationality or former habitual residence should not be expected to do so.⁶⁸ Compelling reasons include persons who have compelling reasons arising out of previous persecution not to re-avail themselves of the protection of their country.⁶⁹ Compelling reasons might also include those persons who cannot be expected to leave their country of asylum, due to a long stay in that country resulting in strong family, social and economic links there.⁷⁰
6. The cessation clauses are negative in character and are **exhaustively enumerated**. They should therefore be **interpreted restrictively**, and no other reasons may be adduced by

⁶⁶ If the transitional process goes ahead according to the timetable, that is with elections taking place within 18 months of the *Loya Jirga*, and if the elections are independently found to be free and fair, and if in light of this fundamental and durable changes, as required by UNHCR's Cessation Guidelines, can be said to have taken place, then it may be open to UNHCR to declare cessation.

⁶⁷ See UNHCR Handbook, *Voluntary Repatriation: International Protection*, Chapter 2, Section 2.2, *Cessation of Status and Fundamental Changes in the Country of Origin*.

⁶⁸ Note that articles 1C(5) and (6) were originally intended to apply only to refugees pursuant to article 1A(1) of the 1951 Convention, that is persons considered to be refugees under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization. Most recently, an Expert Roundtable held in Lisbon in May 2001 as part of UNHCR's Global Consultations on International Protection concluded that application of the "compelling reasons" exception extends beyond the actual words of the provision to refugees falling outside the scope of article 1A(2). "This reflects a general humanitarian principle that is now well-grounded in State practice." See Paragraph 18.

⁶⁹ See EXCOM Conclusions 65 (XLII) of 1991 and 69 (XLIII) of 1992.

⁷⁰ See EXCOM Conclusion 69 (XLIII) of 1992.

way of analogy to justify the withdrawal of refugee status.⁷¹ The expiry of temporary protection granted to a recognized refugee does not, for example, provide a reason to revisit or justify the withdrawal of refugee status on grounds other than cessation.

7. A decision-maker, seeking to invoke the cessation clauses, bears the burden of proof.

Substantial change in circumstances

Substantial change requires a higher threshold of change in the country of origin than is applicable to the promotion of voluntary repatriation, viz. conditions conducive to return. **Substantial and material change** that is structural, systemic, and sustainable, as opposed to transitional developments, is required;

1. "Substantial change" should be understood as requiring a **standard of proof** analogous to fundamental and durable change applicable to articles 1C(5) and (6) of the UN Refugee Convention;
2. Cessation standards should therefore inform the assessment of "substantial change" with some specific provisos:
 - (a) there should be **no rebuttable presumption** that a person is not deserving of refugee status;
 - (b) the use of **manifestly unfounded or other accelerated procedures** would be wholly inappropriate;
 - (c) examination of the question of substantial change must be **relevant** in individual cases and there must be **reasonable grounds for initiating** the question;
 - (d) the **burden of proof** in the context of substantial change should be borne by the decision-maker;⁷²
3. The applicant must be afforded a **reasonable opportunity to comment** on all documentation said to provide a basis for concluding substantial change. Such documents must be made available to the applicant in full, avoiding any risk of selective use of information;
4. If there is any doubt about the evidence supporting a conclusion of substantial change, the applicant should be afforded the **benefit of the doubt**;
5. Asylum seekers should also have the opportunity to have their cases assessed on the basis of **possible new claims** as well as continuing protection needs.⁷³
6. Current and updated **independent and impartial information** about the human rights situation in Afghanistan must be provided to the asylum seeker and her or his counsel.

⁷¹ See UNHCR Handbook on Voluntary Repatriation, *ibid.*

⁷² See Global Consultations on International Protection, Lisbon Expert Roundtable, 3-4 May 2001, *Summary Conclusions – Cessation of Refugee Status*, paragraph 27.

⁷³ It might be necessary to conduct new asylum interviews. If the asylum seeker has new information or evidence to present orally or in writing, this should be allowed in all stages of the process.

Persons granted other complementary forms of protection

Complementary forms of protection include Exceptional Leave to Remain, B status, and special humanitarian status. The grant of a complementary form of protection presupposes that the individual has been denied refugee status pursuant to a fair and satisfactory refugee status determination procedure. While it may include temporary forms of protection, it does not include the grant of temporary protection which flows from recognition of refugee status;⁷⁴

1. Given that complementary forms of protection have the **central purpose of protection**, it follows that the withdrawal of such protection should not be taken lightly;
2. The **same basic principles as for termination of refugee status** should therefore apply, which should be applied restrictively and make provision for the compelling reasons exceptions.⁷⁵
3. As a minimum all individuals enjoying complementary forms of protection, including women and children, and who express a wish not to return should have access to a **fair, satisfactory and individual procedure** for determining a continuing need or new claims for protection. Such a procedure should also include independent appeal procedures.
4. Those found to have a **continuing need for protection** should enjoy the same basic human rights as those who have been recognized as refugees either under the UN Refugee Convention or pursuant to UNHCR's mandate.

Rejected asylum seekers

1. Rejected asylum seekers are persons rejected following the proper implementation of a fair and satisfactory asylum procedure, including an independent appeal procedure;
2. Where there is not a risk that a rejected asylum seeker would face grave human rights abuses upon return to their country of origin, such persons may normally be returned;
3. Return remains subject to the requirements of return in safety and dignity and with full respect for their human rights;
4. Given the complexities and challenges in ensuring the sustainability of return, the timing of returns should be informed by human rights standards, and guided by UNHCR.

⁷⁴ For example, this section should not apply to holders of Temporary Protection Visas in Australia.

⁷⁵ It is, of course, likely that "compelling reasons" of one kind or another motivated the grant of complementary forms of protection in the first place.

Recommendations for implementation of standards

To UNHCR

1. UNHCR should, in accordance with its mandate, ensure that a comprehensive and independent assessment is made before concluding that conditions are conducive to the promotion of voluntary repatriation;⁷⁶ UNHCR should set up independent mechanisms for the dissemination to refugees and asylum seekers of reliable, objective and impartial information on the situation on the ground in the whole country, including but not limited to areas of prospective return;
2. UNHCR should maintain pressure on states to ensure their commitment to keep the durable solutions of local integration and resettlement open, notwithstanding current levels of voluntary repatriation;
3. UNHCR should maintain pressure on the international community to provide support for neighbouring countries, in particular Iran and Pakistan, to provide effective protection to those refugees not wishing to return;
4. UNHCR should ensure that all possible measures are taken to identify appropriate durable solutions for refugees in other countries where effective protection in their country of asylum is not available;
5. UNHCR should, in particular, urge states to facilitate family reunification through proceeding with or initiating requests for resettlement based on the obligation to give effect to the right to family unity;⁷⁷
6. UNHCR's responsibility should include monitoring and reporting on return.
7. UNHCR should ensure that safety and dignity and full respect for human rights are monitored and maintained in the country of asylum, during any period of transit, and in the country of origin;
8. UNHCR should initiate an independent evaluation of the voluntariness of return to Afghanistan from neighbouring as well as non-neighbouring states;
9. UNHCR should initiate an independent evaluation of the sustainability of return to Afghanistan including, but not limited to, voluntary return;
10. UNHCR should also ensure that UNHCR and government officials with responsibility for refugee status decision-making in countries of asylum are kept fully and objectively informed of the human rights situation in the country of origin;
11. Although rejected asylum seekers are not technically of concern under its mandate, in order to ensure the sustainability of returns, UNHCR should maintain central responsibility for guiding the timing of non-voluntary returns.

⁷⁶ This would include the requirements set out in EXCOM Conclusion 40 which stipulates, inter alia, the requirement that return should be in "absolute safety".

⁷⁷ See Global Consultations on International Protection, Geneva Expert Roundtable, Summary Conclusions on Family Unity, paragraph 2, *ibid.*

To other international and inter-governmental organizations

1. International and inter-governmental organizations engaged in any manner whatsoever in the return of Afghan refugees, asylum seekers or rejected asylum seekers, should be guided by the international human rights and refugee law standards.

To the Afghan Transitional Administration

The Afghan Transitional Administration should:

1. Take all possible steps to assure the safety, dignity and security of returnees, including full respect for their human rights;
2. Take all possible steps to ensure that returnees are able to return to their previous homes;
3. Take all possible steps to ensure the sustainability of returns, including respect for economic, social and cultural rights, including property rights.⁷⁸

To neighbouring host states, in particular the Governments of Pakistan and the Islamic Republic of Iran

Neighbouring host states, in particular the Governments of Pakistan and the Islamic Republic of Iran, should ensure that:

1. Safety and dignity and full respect for human rights of all refugees and asylum seekers in their respective countries are maintained as an essential element of ensuring that return is voluntary;
2. The right to seek and enjoy asylum is fully respected and maintained, even while voluntary repatriation continues;
3. "Go and see" visits are managed and facilitated in such a way as to enable individuals and/or their families to make such visits for the purposes of determining for themselves whether conditions are conducive to return.

To other governments hosting Afghan refugees, asylum seekers, and rejected asylum seekers

1. States should ensure that safety and dignity and full respect for human rights is maintained in the country of asylum, and during any period of transit in the course of return. This would include refraining from introducing or implementing any measures which would have the effect, directly or indirectly, of forcing, coercing, inducing or otherwise compromising the voluntariness of return;⁷⁹
2. States should continue to grant access to local integration to those Afghans recognised as refugees in their countries;
3. States should as a minimum maintain resettlement commitments. In particular, states should give favourable consideration to reunification, including of rejected asylum seekers, with family members recognized as refugees in other countries;

⁷⁸ See for example Annex II, Global Consultations on International Protection, *Voluntary Repatriation*, EC/GC/02/5, 25 April 2002, which sets out recommended standards for addressing property restitution rights.

⁷⁹ "The involuntary return of refugees would in practice amount to *refoulement*." UNHCR Handbook, *Voluntary Repatriation: International Protection*, Chapter 2, Section 2.3, *Voluntariness*.

4. States should refrain from adopting unilateral, or agreeing any bilateral or multilateral, programmes or arrangements for return which are not objectively and transparently consistent with principles of international refugee and human rights law. States should also ensure that such programmes or arrangements do not or could not have the effect of undermining the principle of voluntary repatriation, the sustainability of return, return in safety and dignity with full respect for human rights, or otherwise destabilizing voluntary repatriation programmes;
5. Current legal status should not be withdrawn with the objective that "voluntary" repatriation will result;
6. In the implementation of the cessation clauses, and in keeping with its supervisory function under article 35 of the UN Refugee Convention, states should be guided by UNHCR as regards both timing and applicable standards;
7. States should ensure that all individuals, including women and children, who express a wish not to return, and regardless of status, should have access to a fair, satisfactory and individual asylum determination procedure in the host state, including independent appeal procedures;
8. While voluntary repatriation may be facilitated if it is request, states should refrain from promoting, or otherwise encouraging, voluntary repatriation of asylum seekers;
9. States should ensure that applications for refugee status that have not been finally determined should not be frozen either in anticipation of, or in the hope or expectation that, changes have or will have taken place such as would establish that there is no ongoing need for protection.⁸⁰ In particular, asylum states should refrain from any administrative, judicial or other measure, whether formal or informal, designed to or having the effect of freezing or otherwise delaying processing of asylum applications from Afghan asylum seekers, irrespective of their ethnicity, civil, political or other status, including their status in the country of asylum;
10. States should ensure that government officials with responsibility for refugee status decision-making in countries of asylum are kept fully and objectively informed of the human rights situation in Afghanistan. States should also ensure that politicians and other public figures should be kept fully and objectively informed of the human rights situation in Afghanistan and that they refrain from making generalized statements about conditions in Afghanistan which may improperly influence asylum decisions.
11. States should be guided by UNHCR in considering the timing of return of rejected asylum seekers;
12. If return of rejected asylum seekers cannot be effected in safety and dignity and with full respect for their human rights, it should be delayed in a manner consistent with basic human rights principles. If, after a reasonable period of time, it becomes clear that a rejected asylum seeker cannot be returned, she or he should be permitted to have her or his application for protection revisited, including consideration of new claims;
13. States should ensure that rejected asylum seekers are not subject to periods of indefinite detention, pending their return.

⁸⁰ Amnesty International's concerns stem both from the adverse impact that this may have on individual asylum seekers arising from the uncertainty of their status, as well as the organization's view that conditions are far from conducive to such a conclusion being drawn in the context of Afghanistan. The adverse impact of freezing processing is well illustrated by the hunger strikes and unrest that took place in the Woomera Detention Centre in Australia in the course of January 2002.

To the international community

1. The international community should ensure that UNHCR has sufficient funds to continue facilitating return in a manner which is consistent with its obligations to ensure that such return is safe, dignified and sustainable;
2. The international community should ensure that neighbouring states, in particular the governments of Pakistan and Iran have sufficient resources to provide effective protection to those refugees remaining in their respective countries and who do not wish to return to Afghanistan;
3. The international community should ensure that individual states deliver on the financial commitments they have made to the reconstruction of Afghanistan, in particular the sustainable reintegration of returned refugees.⁸¹

⁸¹ Although this position paper is primarily focused on the return of Afghan refugees, it should be borne in mind that many of the recommendations in it are also applicable to the return of the internally displaced.