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“Voluntary Return” from Sweden  
to Afghanistan:  
the legality of UNHCR's participation in a  
tripartite Memorandum of Understanding

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>PREFACE</b>	<b>2</b>
<b>ABBREVIATIONS</b>	<b>3</b>
<b>1 INTRODUCTION</b>	<b>5</b>
<b>2 THE SITUATION IN AFGHANISTAN</b>	<b>7</b>
<b>3 SWEDEN AND THE MOU</b>	<b>12</b>
3.1 Negotiations Between Sweden and Afghanistan	13
3.2 Reactions to the MoU	14
<b>4 INTRODUCTION OF UNHCR</b>	<b>15</b>
4.1 <i>Modus operandi</i>	15
4.2 <i>Mandate ratio personae</i>	16
4.3 <i>Mandated activities</i>	17
<b>5 UNHCR'S STATUS UNDER INTERNATIONAL LAW</b>	<b>20</b>
5.1 The indicators of an international organisation	20
5.2 Evaluation of UNHCR against the indicators	22
5.2.1 <i>Members</i>	22
5.2.2 <i>Separate will</i>	23
5.2.3 <i>Constituent instruments</i>	23
5.2.4 <i>Conclusion</i>	23
<b>6 THE MOU</b>	<b>26</b>
6.1 International agreement	26
6.2 Normative system	26
6.3 Treaty law	28
6.3.1 <i>Contextual interpretation of the treaty</i>	29
6.4 Conclusion	30
<b>7 CAN UNHCR LEGALLY CONCLUDE 'A' TREATY?</b>	<b>31</b>
7.1 Conclusion	33
<b>8 CAN UNHCR CONCLUDE 'THIS' TREATY?</b>	<b>34</b>

8.1	Internal rules	34
8.2	Compliance with internal rules	35
8.2.1	<i>Grounds for involvement</i>	36
8.2.2	<i>The voluntariness criteria</i>	37
8.2.3	<i>Conclusion</i>	38
9	<b>COMPLIANCE WITH THE ‘OBJECT AND PURPOSE’</b>	39
9.1	Organisational perspective	39
9.1.1	<i>Conclusion</i>	43
9.2	Legal protection perspective	44
9.2.1	<i>Provisions of the MoU</i>	44
9.2.2	<i>Asylum seekers access to protection</i>	45
9.2.3	<i>UNHCR’s ability to provide protection</i>	47
9.3	Humanitarian protection perspective	50
9.4	Conclusion, ‘object and purpose’ evaluation	51
10	<b>ILLEGAL ACTS BY INTERNATIONAL ORGANISATIONS</b>	53
11	<b>SUMMARY AND CONCLUSION</b>	55
	<b>ANNEX A</b>	57
	<b>ANNEX B</b>	58
	<b>ANNEX C</b>	60
	<b>BIBLIOGRAPHY</b>	68

# Summary

This thesis evaluates the conduct of the United Nations High Commissioner for Refugees in relation to a tripartite Memorandum of Understanding with Sweden and Afghanistan, which aims to facilitate voluntary return of Afghan asylum seekers from Sweden to Afghanistan. The Memorandum was concluded in the context of deteriorating security in Afghanistan and the vocal opposition of a community of asylum seekers opposed to return. The thesis establishes that the High Commissioner's purpose include *inter alia* the protection of asylum seekers' rights and welfare. It is also determined that the High Commissioner possesses sufficient international personality to conclude treaties, and that the Memorandum is a treaty. But after establishing the source and content of rules governing the High Commissioners activities, this thesis concludes that the Commissioner has breached said rules since its participation in the Memorandum is detrimental to the rights of asylum seekers. The Author argues that such a violation of internal rules is an illegal act, for which those that the High Commissioner is supposed to protect are left without recourse to a remedy. For this reason the High Commissioner should revive its focus on strict adherence to legal norms.

# Preface

Nog finns det mål och mening i vår färd -  
men det är vägen, som är mödan värd.<sup>1</sup>

To Jessica Yeh, who made this thesis possible  
To UNHCR's hardworking staff in Stockholm whom I admire  
And to all other who provided me with invaluable insight and inspiration

Lund, 18 August 2008  
Victor Lengquist

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<sup>1</sup> K. Boye, 'I rörelse', in D. Hjorth (ed.), *Dikter Kallocain Kris* (Bonniers, Falun, 1992) pp. 301-02.

# Abbreviations

AIHRC	–	Afghanistan Independent Human Rights Commission
CAT	–	Convention Against Torture
CNN	–	Cable News Network
ECOSOC	–	United Nations Economic and Social Council
ExCom	–	UNHCR Executive Committee
HRW	–	Human Rights Watch
ICCPR	–	International Covenant on Civil and Political Rights
ICESCR	–	International Covenant on Economic, Social and Cultural Rights
ICJ	–	International Court of Justice
iDMC	–	Internal Displacement Monitoring Centre
IDP	–	Internally Displaced Person
ILC	–	International Law Commission
IOM	–	International Organisation for Migration
IRIN	–	Integrated Regional Information Networks
IRO	–	International Refugee Organisation
ISAF	–	International Security Assistance Force
IWPR	–	Institute for War and Peace Reporting
MoU	–	Memorandum of Understanding
NOAS	–	Norwegian Organisations for Asylum Seekers
OAU	–	Organisation of African Unity
RSD	–	Refugee Status Determination
SCB	–	(Swedish) Statistical Central Bureau
SFS	–	Swedish Collection of Statutes (Svensk Författnings Samling)
SMB	–	Swedish Migration Board
TT	–	Swedish News Agency (Tidningarnas Telegrambyrå)
UNAMA	–	United Nations Assistance Mission in Afghanistan
UNCTAD	–	UN Conference on Trade and Development
UNDSS	–	UN Department of Safety and Security
UNGA	–	UN General Assembly
UN-HABITAT	–	UN Human Settlements Programme
UNHCHR	–	UN High Commissioner for Human Rights
UNHCR	–	UN High Commissioner for Refugees
UNMIK	–	UN Interim Administration Mission in Kosovo
UNSC	–	UN Security Council
UNSG	–	UN Secretary General
UNTS	–	UN Treaty Series
VCLT69	–	Vienna Convention on the Law of Treaties

VCLT86	–	Vienna Convention on Treaties Between States and International Organizations or International Organizations
WHO	–	World Health Organisation

# 1 Introduction

On the 7<sup>th</sup> of October 2001, the United States launched an invasion of Afghanistan with reference to the right of self-defence contained in the United Nations Charter Article 51. Afghanistan had been ravaged by war for ages and neighbouring countries were already home to many Afghans who had fled earlier perils. But following 2001, for the first time Afghan Refugees also reached Western countries *en masse*. Sweden was one of their destinations.

In connection to the increased inflow of Afghans, Sweden concluded a Memorandum of Understanding with Afghanistan and the United Nations High Commissioner for Refugees (UNHCR) in June 2007. The purpose was to facilitate the orderly return of Afghans determined as not qualifying for Refugee status. A month earlier, the Afghan asylum seeker community had clearly shown its opposition to signals from the government that the time to go home had come for those with temporary residence permits.

Based on the cynical notion that everyone is her own best friend, it is easy to formulate theories why the two States involved would be interested in the return of Afghans. For Sweden as a host State, return of those rejected by its national Refugee Status Determination procedure is a question of defending the integrity of that system and keeping the inflow of asylum seekers at a manageable level. The Afghan government's stake in return is its need to prove its worth and avert the loss of invaluable human capital. The accuracy of these theories is not important. Their importance lies in the Author's inability to derive any similar theory of self-serving purpose for UNHCR's involvement with the Memorandum of Understanding (MoU).

UNHCR is an entity whose self-stated primary purpose is the protection of Refugee's "rights and welfare". Assuming that Afghans who left their homes to seek asylum in Sweden did not do so for reasons of leisure, can UNHCR participate in an agreement the purpose of which is to return them to whence they fled? The purpose of this thesis is twofold: to demonstrate that this question is of a legal character, and to produce an answer to that question.

The thesis will first describe the general situation in Afghanistan so that the reader can form her own opinion about the Afghans' reasons for flight (Chapter 2). Then follows a brief description of the impact of the Afghan's flight in Sweden and events surrounding the negotiation of the MoU (Chapter 3). The above provides a basic understanding of the document and the context within which it operates. Next, UNHCR is introduced with a view to describe its functioning and purpose (Chapter 4). Then its place in relation to international law is assessed to ascertain that it is the proper normative order within which to evaluate UNHCR's behaviour (Chapter 5). A similar analysis is carried out regarding the MoU (Chapter 6). When the foundation is laid accordingly, the Author will determine whether UNHCR

was *legally* justified to participate in the conclusion of the MoU (Chapters 7 to 9). A few words will be devoted to the effect of illegal acts under international law (Chapter 10) before the thesis is summarised and a conclusion presented (Chapter 11).

## 2 The Situation in Afghanistan

Afghanistan is an arid and mountainous country, entirely landlocked with a distinctly continental climate. Summers are warm and without rain. Winters are cold, windy and snow filled. The last population census in Afghanistan together with later estimates reveal that 26 million people call the country their home.<sup>2</sup> But conditions are undoubtedly harsh. Afghans can expect to grow no older than 42 years, as compared to 82 for Swedes.<sup>3</sup>

To blame the climate for low life expectancy would be to simplify the problems that face Afghanistan. With a mere glance at its history, one easily acquires a better understanding of the reasons. The lasting impression is that there have not been any extended periods of continuous peace since the emergence of Afghanistan as a State sometime in the mid 1800s. Civil wars and foreign invasions have taken turns to destroy the lives of those who are unfortunate enough to dwell between the mountains. British (three times), Soviet, American, and “International” troops have replaced each other over the course of time.<sup>4</sup>

The last invasion was launched by the United States on 7 October 2001.<sup>5</sup> It was explained both as a response to the Afghan Government's refusal to hand over suspect terrorist elements residing in the country,<sup>6</sup> and as an act of self defence in accordance with Article 51 of the United Nations (UN) Charter.<sup>7</sup> Initially, the American engagement was largely by proxy through air support to domestic players opposed to the Taliban regime.<sup>8</sup> American troops arrived on the scene in November 2001.<sup>9</sup> Before long, victory was declared as the Taliban regime lost control over the last major city within a month.<sup>10</sup> Plans that had already been drawn up for the material and political

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<sup>2</sup> National Encyclopaedia of Sweden, *Afghanistan* (2008)

<[www.ne.se/jsp/search/article.jsp?i\\_art\\_id=108845](http://www.ne.se/jsp/search/article.jsp?i_art_id=108845)>, visited on 10 June 2008; WHO, *World Health Statistics 2008* (2008) p. 26,

<[www.who.int/entity/whosis/whostat/EN\\_WHS08\\_Full.pdf](http://www.who.int/entity/whosis/whostat/EN_WHS08_Full.pdf)>, visited on 10 June 2008.

<sup>3</sup> WHO, *Afghanistan – Mortality Country Fact Sheet 2006* (2006) p. 1,

<[www.who.int/whosis/mort/profiles/mort\\_emro\\_afg\\_afghanistan.pdf](http://www.who.int/whosis/mort/profiles/mort_emro_afg_afghanistan.pdf)>, visited on 6 June 2008; SCB, *Statistisk årsbok 2008* (2008) p. 668.

<sup>4</sup> UNAMA, *Afghanistan and UN, A Historical Perspective*, <[www.unama-afg.org/about/info.htm](http://www.unama-afg.org/about/info.htm)>,

visited on 10 June 2008; E. O'Ballance, *Afghan Wars - 1839 to the Present* (Brassey's, London, 2002) pp. xv-xix.

<sup>5</sup> 'US-led military strikes against Afghanistan', 47 *Keesing's Record of World Events* (2001) p. 44391.

<sup>6</sup> CNN, *Transcript of President Bush's address to a joint session of Congress on Thursday night*, 20 September 2001, <[archives.cnn.com/2001/US/09/20/gen.bush.transcript/](http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/)>, visited on 10 June 2008; HRW, 'Lessons in Terror', 6(C) *Human Rights Watch* (2006) p. 13, <>, visited on 25 July 2008.

<sup>7</sup> 'International Response to Military Action', 47 *Keesing's Record of World Events* (2001) p. 44393.

<sup>8</sup> O'Ballance, *supra* note 4, p. 249.

<sup>9</sup> O'Ballance, *supra* note 4, p. 257.

<sup>10</sup> T. Shanker and E. Schmitt, 'A Nation Challenged: Military Campaign; Taliban Defeated, Pentagon Asserts, But War Goes On', *New York Times*, 11 December 2001,

reconstruction of the country were put in motion.<sup>11</sup> However, the old regime did not leave the stage willingly. After two more years of continued hostilities the invaders decided to declare themselves victorious again, hopeful that the end had come to all major combat operations.<sup>12</sup>

Eight thousand American soldiers still remained in Afghanistan, supported by the International Community through an additional 35,460 soldiers enrolled in the International Security Assistance Force (ISAF).<sup>13</sup> This is far less than what military experts have called for,<sup>14</sup> and the results can be seen in the deteriorating security situation and the former regime's regained strength.<sup>15</sup> The southern parts of Afghanistan were pushed back into open war by the insurgency in the end of 2006.<sup>16</sup> A year later, all but a few northern provinces were ravaged by open conflict and the Taliban have extended their reach to provinces hitherto beyond their capacity.<sup>17</sup>

In 2006 and 2007, the insurgents carried out one suicide attack every third day in average.<sup>18</sup> Though the majority of attacks were aimed at military targets, 70 percent of them carried higher civilian than military casualties.<sup>19</sup> In all, there were 566 violent insurgency related incidents per month in 2007, killing 1500 civilians.<sup>20</sup> Private security guards, government and international forces were to blame for a little less than half of these deaths.<sup>21</sup>

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[query.nytimes.com/gst/fullpage.html?res=9B0DE3DC173FF932A25751C1A9679C8B63&sec=&spn=&pagewanted=all](http://query.nytimes.com/gst/fullpage.html?res=9B0DE3DC173FF932A25751C1A9679C8B63&sec=&spn=&pagewanted=all), visited 11 June 2008.

<sup>11</sup> Copy of the "Bonn Agreement" detailing the political reconstruction of Afghanistan: UNSG, *Letter dated 5 December 2001 from the Secretary-General addressed to the President of the Security Council* (S/2001/1154) pp. 2-12.

<sup>12</sup> Donald Rumsfeld reports, during a joint press conference in Kabul, that major combat operations have ended as of 1 May 2003: 'May 2003 Afghanistan', 49 *Keesing's Record of World Events* (2003) p. 45403.

<sup>13</sup> Troops deployed as of 7 February 2007: UNSG, *The situation in Afghanistan and its implications for international peace and security* (A/61/799) p. 8.

<sup>14</sup> HRW, *World Report 2007* (2007) p. 241, <[www.hrw.org/wr2k7/wr2007master.pdf](http://www.hrw.org/wr2k7/wr2007master.pdf)>, visited 7 June 2008.

<sup>15</sup> UNDSG, *Afghanistan; Topic Assessment 02/07 (Half Year Review of the Security Situation in Afghanistan)* (2007) pp. 1-2, <[media.mcclatchydc.com/smedia/2007/10/01/16/UNAMA\\_2007\\_Afghanistan.source.prod.affiliate.91.pdf](http://media.mcclatchydc.com/smedia/2007/10/01/16/UNAMA_2007_Afghanistan.source.prod.affiliate.91.pdf)>, visited on 7 June 2008.

<sup>16</sup> UNSG, *The Situation in Afghanistan and its Implications for International Peace and Security* (A/61/326) p. 2.

<sup>17</sup> The Taliban are believed to have a hand in incidents in provinces they never conquered (Balkh, Jawzjan, Sar-i Pul, and Badakhshan): IWPR, 'A Long, Bloody Summer Ahead', 219 *Afghan Recovery Report* (2006) <[www.iwpr.net/?p=arr&s=f&o=321615&apc\\_state=heniarr1f22aa935c1e7b3b15bf3a868e539ad0](http://www.iwpr.net/?p=arr&s=f&o=321615&apc_state=heniarr1f22aa935c1e7b3b15bf3a868e539ad0)>, visited on 8 June 2008.

<sup>18</sup> UNSG, *The Situation in Afghanistan and its Implications for International Peace and Security* (A/62/722) p. 5.

<sup>19</sup> UNHCHR, *Report of the High Commissioner for Human Rights on the Situation of Human Rights and on the Achievements of Technical Assistance in the Field of Human Rights* (A/HRC/7/27) p. 4.

<sup>20</sup> UNSG, *supra* note 18, p. 4.

<sup>21</sup> UNHCHR, *supra* note 19, p. 9.

Most civilian deaths could have been averted if military action by both sides was not so largely indiscriminate by nature.<sup>22</sup>

In addition to the lives claimed by the insurgency, 2000 civilians met a violent death for other reasons in 2006.<sup>23</sup> Perhaps this should not come as a surprise in a country where drug production accounts for 50 percent of all national income,<sup>24</sup> and local warlords guilty of serious *human rights* transgressions continue to hold positions of power in many regions.<sup>25</sup> The prevalence of land disputes, many times a matter of life and death, also constitute a major source of insecurity. Their explosiveness is worsened by the absence of regulations that might render it possible to resolve such disputes in court.<sup>26</sup> The situation is aggravated by the government's inability to deliver justice and security to the people, much less access many provinces in the southern, southeastern and eastern parts of the country.<sup>27</sup>

In those areas where the government is in control, corruption is rampant and the justice system is without accountability.<sup>28</sup> It is weak on its delivery of justice and more generous on its delivery of arbitrary, illegal and incommunicado detention. People are detained and convicted for breaches of customary rules, Sharia law, and restrictions on their freedom of speech, all in contravention to Afghan statute.<sup>29</sup> There are also allegations of forced confessions and torture, in particular against the secret police from the National Directorate of Security.<sup>30</sup> This lack of legality is worrisome, especially with a prison population that is growing exponentially in overcrowded facilities.<sup>31</sup> As a result of the government's impotence, most of those who seek justice turn to traditional fora such as village elders.<sup>32</sup> This is to the detriment of women, who are traditionally of low value in Afghan society and used as goods of reparation in disputes.<sup>33</sup>

Economic growth is hampered or reversed in most parts of Afghanistan by the prevailing insecurity and lawlessness, which is a serious situation for a country that is already the fifth poorest in the world, with 60 percent of the

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<sup>22</sup> HRW, 'The Human Cost', 6(C) *Human Rights Watch* (2007) pp. 3-4, <[www.hrw.org/reports/2007/afghanistan0407/afghanistan0407web.pdf](http://www.hrw.org/reports/2007/afghanistan0407/afghanistan0407web.pdf)>, visited on 7 June 2008.

<sup>23</sup> HRW, *supra* note 14, p. 238.

<sup>24</sup> HRW, *supra* note 14, p. 236.

<sup>25</sup> HRW, *supra* note 14, p. 238.

<sup>26</sup> UNHCHR, *supra* note 19, pp. 5-6.

<sup>27</sup> UNHCHR, *supra* note 19, p. 4; UNSG, *supra* note 18, p. 1; UNDSS, *supra* note 15, figure 2.

<sup>28</sup> HRW, *supra* note 14, p. 238.

<sup>29</sup> Amnesty International, *USA: Amnesty International's supplementary briefing to the UN Committee against Torture* (AMR 51/061/2006) p. 8; UNHCHR, *supra* note 19, pp. 14 and 16; UNSG, *supra* note 18, p. 10.

<sup>30</sup> UNSG, *supra* note 18, p. 7.

<sup>31</sup> UNHCHR, *supra* note 19, p. 15.

<sup>32</sup> AIHRC, *Economic and Social Rights in Afghanistan* (2006) pp. 40-42, <[www.aihrc.org.af/rep\\_economic\\_socail\\_may\\_2006.pdf](http://www.aihrc.org.af/rep_economic_socail_may_2006.pdf)>, visited on 8 June 2008.

<sup>33</sup> UNHCHR, *supra* note 19, p. 7.

population living on less than a dollar per day.<sup>34</sup> Positive economic development is confined to urban areas, especially Kabul,<sup>35</sup> and indirectly attributable to drug trade or international aid.<sup>36</sup> This makes many Afghans, who are unable to support themselves in the countryside flock to the cities, which currently grow by five percent each year.<sup>37</sup> The 120,000 long-term Internally Displaced Persons (IDP) who exist in Afghanistan can be assumed to follow largely the same pattern although they are hard to distinguish from other urban poor.<sup>38</sup> In 2007, their ranks were joined by 37,000 freshly displaced individuals, mainly from southern Afghanistan.<sup>39</sup>

With prohibitive rents and more than 70 percent of all urban infrastructure destroyed, new urban arrivals have little choice but to settle in self constructed slums or ruins.<sup>40</sup> In Kabul alone roughly 2.4 million people, or 80 percent of the population, dwell in immense informal settlements that cover more than two thirds of the city.<sup>41</sup> An additional 15,000 people are wholly homeless, living in tents or ruins.<sup>42</sup> Common to both groups is their lack of safe access to clean water, sewerage, electricity and drainage.<sup>43</sup> Even this kind of life can be hard to sustain with unemployment figures, estimated by the Afghan government, at 33 percent.<sup>44</sup> Research also shows that a slight majority of those who are “employed” rely on non-skilled day labour to sustain themselves and their families.<sup>45</sup> The many that are unable to find work are forced to rely on their extended family, or clan affiliations, to

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<sup>34</sup> UNHCHR, *supra* note 19, p. 5.

<sup>35</sup> HRW, *supra* note 14, p. 236.

<sup>36</sup> UNSG, *supra* note 18, pp. 12-13.

<sup>37</sup> UN-HABITAT, 'Afghanistan: From Kabul to Vancouver, a common thread to vastly different cities', *ReliefWeb*, 21 Jun 2006, <[reliefweb.int/rw/RWB.NSF/db900SID/EGUA-6QZPP7?OpenDocument](http://reliefweb.int/rw/RWB.NSF/db900SID/EGUA-6QZPP7?OpenDocument)>, visited on 8 June 2008.

<sup>38</sup> IDMC, *Afghanistan: Fighting in the south sets off new wave of displacement* (2006) p. 62, <[www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/56E4BDEA45F3A679C125724C003CFD1B/\\$file/Afghanistan+-December+2006.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/56E4BDEA45F3A679C125724C003CFD1B/$file/Afghanistan+-December+2006.pdf)>, visited on 18 June 2008.

<sup>39</sup> UNHCHR, *supra* note 19, p. 10.

<sup>40</sup> A.H. Irfan *et al.*, *Action Contre Le Faim, Kabul Vulnerability Mapping* (2004) pp. 24-26, <[www.aah-usa.org/sites/default/files/upload/Kabul\\_report.pdf](http://www.aah-usa.org/sites/default/files/upload/Kabul_report.pdf)>, visited on 13 June 2008;

UN-HABITAT, 'Afghanistan: From Kabul to Vancouver, a common thread to vastly different cities', *ReliefWeb*, 21 Jun 2006, <[reliefweb.int/rw/RWB.NSF/db900SID/EGUA-6QZPP7?OpenDocument](http://reliefweb.int/rw/RWB.NSF/db900SID/EGUA-6QZPP7?OpenDocument)>, visited on 8 June 2008.

<sup>41</sup> World Bank, 'Kabul urban land crisis: A summary of issues and recommendations', 1 *Kabul Urban Policy Notes Series* (2006) p. 2, <[siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1150905429722/Policy\\_Note\\_1.pdf](http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1150905429722/Policy_Note_1.pdf)>, visited on 9 June 2008.

<sup>42</sup> *Ibid.*, p. 1.

<sup>43</sup> World Bank, 'Why and how should Kabul upgrade its informal settlements?', 2 *Kabul Urban Policy Notes Series* (2006) p. 3, <[siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1150905429722/PolicyNote2.pdf](http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1150905429722/PolicyNote2.pdf)>, visited on 9 June 2008.

<sup>44</sup> IWPR, 'Jobless Face Grim Future', 222 *Afghan Recovery Report* (2006) <[www.iwpr.net/?p=arr&s=f&o=322263&pc\\_state=heniarr2006](http://www.iwpr.net/?p=arr&s=f&o=322263&pc_state=heniarr2006)>, visited on 8 June 2008.

<sup>45</sup> AIHRC, *Economic and Social Rights in Afghanistan II* (2007) p. 12, <[www.aihrc.org.af/Rep\\_ESRII\\_Eng\\_Full\\_Text\\_30\\_Aug\\_2007.pdf](http://www.aihrc.org.af/Rep_ESRII_Eng_Full_Text_30_Aug_2007.pdf)>, visited on 13 June 2008.

survive.<sup>46</sup> In urban areas this tends to meet with difficulty, even for those who have extended family close, as traditional forms of wealth distribution is limited or non-existent in such settings.<sup>47</sup>

Despite the precarious situation in Kabul, there is not much that could motivate anyone who sought shelter there to leave the city again. The fact that land allocation to those returning from abroad and who are landless will only take place in their province of origin could work as an incentive.<sup>48</sup> But with a general freeze of land allocation due to uncertainty of who owns what deprives the measure of all effect.<sup>49</sup> Furthermore, national and international assistance programs in the south and southeast remain largely suspended since two years ago.<sup>50</sup> With the insurgents' increased targeting of aid workers, more provinces are at risk of being left without humanitarian aid before long.<sup>51</sup> UNHCR itself has access only to 55 percent of Afghanistan.<sup>52</sup> Insurgency related violence, criminality, impunity, land mines and poverty is what awaits most that dare set their foot outside Kabul.

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<sup>46</sup> S. Schütte, Afghanistan Research and Evaluation Unit, *Urban Vulnerability in Afghanistan: Case Studies From Three Cities* (2004) p. 12, <[www30.a2hosting.com/~areuorg?option=com\\_docman&Itemid=&task=doc\\_download&gid=340](http://www30.a2hosting.com/~areuorg?option=com_docman&Itemid=&task=doc_download&gid=340)>, visited 13 June 2008.

<sup>47</sup> *Ibid.*, p. 30.

<sup>48</sup> IRIN-Asia, 'Afghanistan: Returnees Should Return to Their Provinces', *Reliefweb*, 30 September 2005, <[reliefweb.int/rw/rwb.nsf/f303799b16d2074285256830007fb33f/36c97300e43a2abdc125708c004233c4?OpenDocument](http://reliefweb.int/rw/rwb.nsf/f303799b16d2074285256830007fb33f/36c97300e43a2abdc125708c004233c4?OpenDocument)>, visited on 18 June 2008.

<sup>49</sup> UNHCR, *UNHCR's Eligibility Guidelines For Assessing the International Protection Needs of Afghan Asylum-Seekers* (2007) p. 56, <[www.unhcr.org/refworld/docid/477ce70a2.html](http://www.unhcr.org/refworld/docid/477ce70a2.html)>, visited on 27 July 2008.

<sup>50</sup> HRW, *supra* note 14, p. 77.

<sup>51</sup> UNSG, *supra* note 18, p. 5.

<sup>52</sup> UNHCHR, *supra* note 19, p. 10.

### 3 Sweden and the MoU

As a likely consequence of how things unfolded in Afghanistan after the “US-led” invasion in 2001,<sup>53</sup> Sweden received unprecedented numbers of Afghan asylum seekers. For the first time, a serious crisis in Afghanistan produced asylum seekers all over the world.<sup>54</sup>

In the six years that followed the invasion, 4919 applications for asylum were lodged by Afghans in Sweden. This is not a stunning number in itself, considering that Sweden received 189,116 applications in total during the same period. However, the number speaks more clearly in relation to previous figures on arrivals from Afghanistan. A comparison reveals that the present crisis has produced more than twice as many Afghans who seek asylum in Sweden as the previous 12 years together.<sup>55</sup> Together with unusually large arrivals from Iraq, one would imagine that this could have strained public acceptance and willingness in Sweden to host all those who arrive. Some argue that an increase in asylum seekers generally result in more restrictive asylum policy.<sup>56</sup> However, there seems to be no conclusive evidence suggesting that public support for the right to seek refuge faltered in Sweden.<sup>57</sup> Nevertheless, the large arrivals do coincide with novel efforts by Sweden to conclude return agreements with countries outside Europe, the purpose of which is to ease the return of individuals who are found not to

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<sup>53</sup> Although the established phrase indicates that several other countries actively participated in the invasion of Afghanistan there is no support for involvement by any other country than the United Kingdom on 31 October 2001. UK's involvement was largely limited to a supportive role, save firing some cruise missiles. In fact, the first mentioning in concrete terms of an additional State being involved occurs, in March, only after the Taliban “lost”: International Affairs & Defence Section, 'Operation Enduring Freedom and the Conflict in Afghanistan: An Update', 82 *House of Commons Library Research Paper* (2001) p. 26, <[www.parliament.uk/publications/research/cfm](http://www.parliament.uk/publications/research/cfm)>, visited on 6 August 2008; M.E. O'Hanlon, 'A Flawed Masterpiece', 3 *Foreign Affairs* (2002) pp. 49-50.

<sup>54</sup> K. Lumppp *et al.*, 'Voluntary Repatriation to Afghanistan: Key Features', 3 *Refugee Survey Quarterly* (2006) p. 155.

<sup>55</sup> Swedish official statistics: Migrationsverket, *Asylsökande till Sverige under 1984-2007* (2008) <[www.migrationsverket.se/pdf/verket/statistik/tabs2.pdf](http://www.migrationsverket.se/pdf/verket/statistik/tabs2.pdf)>, visited on 6 June 2008.

<sup>56</sup> J.P. Brekke and G. Brochmann, Institute for Social Research, *Trends in Scandinavian asylum policies* (ISF Paper 2005:102) pp. 14-15, <[www.samfunnsforskning.no/files/P\\_2005\\_102.pdf](http://www.samfunnsforskning.no/files/P_2005_102.pdf)>, visited on 18 July 2008.

<sup>57</sup> The ever increasing frequency of reported hate crimes actually show a dip in the two years following 2001 and public acceptance of immigration actually improves slightly: Brottsförebyggande Rådet (BRÅ), *Hatbrott 2007: En Sammanställning Av Anmälningar Med Främlingsfientliga, Islamofobiska, Antisemitiska och Homofobiska Motiv* (Rapport 2008:15) pp. 52-53; Integrationsverket, *Fickfakta: Statistik Om Integration* (2006) pp. 89-99, <[www.temaasyl.se/Documents/Statistik/Fickfakta%20Statistik%20om%20integration%20006.pdf](http://www.temaasyl.se/Documents/Statistik/Fickfakta%20Statistik%20om%20integration%20006.pdf)>, visited on 27 July 2008.

However in the 2006 elections, a party with a clearly racist agenda managed to secure seats in 144 out of 290 municipalities. Maybe larger parties are trying to pre-empt wider support by quietly making asylum policy more strict: Valmyndigheten, *Kommunfullmäktigvalen 2006 - mandat för Sverigedemokraterna* (2007) <[www.val.se/val/val2006/slutlig\\_ovrigt/statistik/sd\\_2006.pdf](http://www.val.se/val/val2006/slutlig_ovrigt/statistik/sd_2006.pdf)>, visited 27 July 2008.

qualify for asylum.<sup>58</sup> In relation to Afghanistan, the result was a tripartite agreement between Afghanistan, UNHCR and Sweden.

### 3.1 Negotiations Between Sweden and Afghanistan

On 22 May 2006, Sweden, Afghanistan and UNHCR signed a document in Kabul with the title:

*“Agreed Minutes of the Negotiations on the Tripartite Memorandum of Understanding (the MoU) between the Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan, and UNHCR”*<sup>59</sup>

The Memorandum of Understanding (the MoU) itself, attached to the minutes, was signed without changes on the 23 of June 2007 by all Parties.<sup>60</sup> It entered into effect upon signature and remained valid until 31 December the same year.<sup>61</sup> The MoU was extended before its expiry through the signing of a new identical agreement on 26 of December 2007.<sup>62</sup> The renewed MoU was signed by the Second Secretary of Political Affairs, Robert Peszkowski, on behalf of the Swedish Government, Deputy Minister of Refugees and Repatriation, Abdul Qader, on behalf of the Afghanistan Government and Senior Protection Officer, Aurvasi Patel, on behalf of UNHCR.<sup>63</sup> It remains valid until 31 December 2008.<sup>64</sup>

The MoU stipulates as its objective “to lay the basis for a [...] coordinated, phased and humane process of assisted return of Afghans in Sweden”.<sup>65</sup> The MoU targeted Afghan asylum seekers awaiting a final decision as well as those who have had their asylum claims finally rejected.<sup>66</sup> In exchange for their voluntary departure from Sweden to Afghanistan they can volunteer

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<sup>58</sup> Previous return agreements listed by the Swedish Ministry of Foreign Affairs include European states only: Database of Swedish international agreements online, search term 'återtagande', <[www.regeringen.se/sb/d/108](http://www.regeringen.se/sb/d/108)>, visited on 18 July 2008;

However, EU wide agreements exist with Hong Kong, Sri Lanka and Macao: 'Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation', L 17 *Official Journal of the European Union* (2004) p. 25;

'Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation – Declarations', L 124 *Official Journal of the European Union* (2005) p. 43;

'Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation', L 143 *Official Journal of the European Union* (2004) p. 99.

<sup>59</sup> See annex A.

<sup>60</sup> See annex B. Henceforth 'MoU06'.

<sup>61</sup> MoU06, paras. 25 and 27.

<sup>62</sup> See annex C. Henceforth 'MoU07'.

<sup>63</sup> MoU07, closing page.

<sup>64</sup> MoU07, para. 27.

<sup>65</sup> MoU07, para. 2.

<sup>66</sup> MoU07, para. 3.

for the return programme laid out in the MoU and will receive direct monetary aid from Sweden.<sup>67</sup>

### 3.2 Reactions to the MoU

The MoU might have come as a surprise to many; it certainly did to the Author of this paper. All through 2006, and well into the summer of 2007, Afghan protests against the Norwegian government's decision to send many of them back to Afghanistan dominated Norwegian refugee news.<sup>68</sup> In the summer of 2007, protests spread to Sweden. Afghan asylum seekers took to the streets of Stockholm after it became clear that the Swedish government would cease to grant many of them temporary asylum.<sup>69</sup> News coverage painted a picture of a determined community of asylum seekers, without any interest to return to a country in turmoil.

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<sup>67</sup> MoU07, para. 19; Swedish Government, *Förordning (2007:640) om återetableringsstöd för vissa utlänningar* (SFS 2007:640).

<sup>68</sup> Survey of: NOAS, *News clips*, <[www.noas.no/?p=archive&cat\\_id=8](http://www.noas.no/?p=archive&cat_id=8)>, visited on 14 June 2008; and UNHCR, *Baltic Nordic Headlines*, <[www.unhcr.se/en/News/baltic\\_nordic\\_en.html](http://www.unhcr.se/en/News/baltic_nordic_en.html)>, visited on 14 June 2008.

<sup>69</sup> K.V. Olsson, TT, 'Möjligt avvisa till Afghanistan', *Svenska Dagbladet*, 16 May 2007, <[www.svd.se/dynamiskt/inrikes/did\\_15471052.asp](http://www.svd.se/dynamiskt/inrikes/did_15471052.asp)>, visited on 18 July 2008; Executive rejection decision of one Afghan male with temporary residence permit: Swedish Migration Board (Lifos no. 16669) <[www.migrationsverket.se/include/lifos/dokument/www/070515201.pdf](http://www.migrationsverket.se/include/lifos/dokument/www/070515201.pdf)>, visited on 18 July 2008; TT, 'Sju till sjukhus efter protestmarsch', *Dagens Nyheter*, 1 August 2007, <[www.dn.se/DNet/jsp/polopoly.jsp?a=676302](http://www.dn.se/DNet/jsp/polopoly.jsp?a=676302)>, visited on 14 June 2008.

## 4 Introduction of UNHCR

This Chapter will provide a preliminary introduction to UNHCR through a historical description of how it functions, with whom it concerns itself and in what way. Basic refugee terminology used throughout the study will also be introduced as a part of the description of UNHCR.

### 4.1 *Modus operandi*

Through the adoption of Resolution 319(IV) in 1949, the United Nations General Assembly (UNGA) decided to establish a High Commissioner's Office for Refugees as the entity principally responsible for international refugee issues.<sup>70</sup> One year later, the UNHCR was created as a subsidiary organ to the UNGA through Resolution 428(V).<sup>71</sup> UNHCR's Statute was annexed to the resolution and describes how the High Commissioner is supposed to function.<sup>72</sup>

According to its Statute, UNHCR's work is supposed to be completely apolitical.<sup>73</sup> To ensure this, and to isolate UNHCR from the politicised work of the UN Secretariat, it was to follow policy directives given directly by the UNGA and the Economic and Social Council (ECOSOC).<sup>74</sup> However, the UN Secretariat maintained important means of influence over UNHCR as it was given the right to nominate candidates to the post as High Commissioner and allocate funds from the UN budget.<sup>75</sup> Though once elected by the UNGA, the High Commissioner can freely choose a Deputy (provided that the person is of a different nationality than herself) and staff within budgetary limits.<sup>76</sup>

To help the High Commissioner cope more effectively with controversies that might arise in her work, UNHCR's Statute allows ECOSOC to establish an advisory committee as aide.<sup>77</sup> Such a committee, of 15 State representatives, was first established in 1951 and instructed to provide the High Commissioner with advice upon her request.<sup>78</sup> The Advisory Committee was replaced by the UN Refugee Fund Executive Committee in 1955, which in turn was replaced with the Executive Committee of the High Commissioner's Programme (ExCom) in 1958. The latter included

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<sup>70</sup> UNGA, *Refugees and Stateless Persons* (A/RES/319(IV)); G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford University Press, New York, 2007) p. 20.

<sup>71</sup> UNGA, *1950 Statute of the Office of the United Nations High Commissioner for Refugees* (A/RES/428(V)).

<sup>72</sup> *Ibid.*, annex. Henceforth, 'UNHCR Statute'.

<sup>73</sup> UNHCR Statute, para. 2.

<sup>74</sup> UNHCR Statute, para. 3; G.S. Goodwin-Gill and J. McAdam, *supra* note 70, footnote 44.

<sup>75</sup> UNHCR Statute, paras. 13 and 18.

<sup>76</sup> UNHCR Statute, paras. 14 and 15.

<sup>77</sup> UNHCR Statute, para. 4.

<sup>78</sup> ECOSOC, *Establishment of an Advisory Committee on Refugees* (E/RES/393(XIII)B).

representatives from 24 States at the time, but has since swelled to 70 (2007). ExCom organised itself around one annual plenary session in 1995 and established a 'Standing Committee of the Whole' to carry on work in between sessions.<sup>79</sup>

## 4.2 Mandate *ratio personae*

Through its Statute, UNHCR is responsible for refugees as they are defined in the Statute:

“Any [...] person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of his country of nationality [...] or [...] habitual residence.”<sup>80</sup>

In addition, those who have been classified as refugees by precursory arrangements, as far back as 1926, are also considered the responsibility of UNHCR.<sup>81</sup> Persons who can receive protection from another State, who receive protection from another branch of the UN or has committed a crime contrary to the purpose and principles of the UN (such as war crimes), are on the other hand excluded from UNHCR's responsibility.<sup>82</sup>

The definition of who is to be considered a refugee and deserving UNHCR's assistance requires an individual assessment. As a consequence, those who are part of a group too large for each member to be individually assessed are deprived of protection.<sup>83</sup> Yet it was always intended that the High Commissioner's work should relate to groups.<sup>84</sup> Over the years, this incongruence was corrected through a number of sequential steps. To begin with, the UNGA extended UNHCR's mandate, in 1959, to include those who “do not come within the competence of the United Nations”. Initially the mandate was only extended as far as transfer of aid was concerned, then in 1966, also including a right to provide protection and permanent solutions in general.<sup>85</sup> Thus, UNHCR's competence today extends to all whom cross

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<sup>79</sup> Goodwin-Gill and McAdam, *supra* note 70, pp. 429-30.

<sup>80</sup> UNHCR Statute, para. 6(B).

<sup>81</sup> UNHCR Statute, para. 6(A).

<sup>82</sup> UNHCR Statute, para. 7; UNGA, *Universal Declaration of Human Rights* [UDHR] (A/RES/217(III)/A) Article 14; USA *et al.*, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*. London, 8 August 1945, charter Article 6 <[www.icrc.org/ihl.nsf/FULL/350?OpenDocument](http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument)>, visited on 4 July 2008.

<sup>83</sup> B.S. Aga Khan, 'Lectures on Legal Problems Relating to Refugees and Displaced Persons Delivered at the Hague Academy of International Law, 4-6 August 1976, pp. 44-50' in B.S. Chimni, *International Refugee Law: A reader* (Sage Publications, New Delhi, 2000) p. 239.

<sup>84</sup> UNHCR Statute, para. 2.

<sup>85</sup> UNGA, *Report of the United Nations High Commissioner for Refugees* (A/RES/1399(XIV)) para 2; UNGA, *Reports of the United Nations High Commissioner for Refugees* (A/RES/2039(XX)) para 1.

an international border fleeing persecution and man-made disasters.<sup>86</sup> The broad responsibility begins with the asylum seeker as a presumptive refugee and extends beyond the refugees' return with a duty to provide protection and assistance.<sup>87</sup>

At the same time as UNHCR's mandate expanded to include virtually all those who had fled across an international border, a more novel and unpredictable extension of the mandate took place. Dealing with victimised Sudanese in 1972, who had fled inside their own country, ECOSOC for the first time ever mentioned "displaced persons" as a category of concern to UNHCR.<sup>88</sup> Applicability of the concept beyond specific cases was endorsed by the UNGA in 1975.<sup>89</sup> In 1980 it was confirmed that both protection and assistance could be extended to Internally Displaced Persons (IDP).<sup>90</sup> However, three prerequisites need to be fulfilled in each situation before any steps can be taken by UNHCR on behalf of IDPs. The UN Secretary General (UNSG) needs to make a request, the State concerned needs to consent, and UNHCR's special expertise needs to be called for.<sup>91</sup>

Throughout the rest of the thesis, the term 'Refugee' will be used to describe all those within UNHCR's mandate without distinction. The same word used without capitalisation should be read as referring to the original group of Statute Refugees.

### 4.3 Mandated activities

Through its Statute, UNHCR is tasked primarily with the duty of providing international protection and to seek permanent solutions for those who are within its mandate *personae*. Permanent solutions originally envisioned include the voluntary repatriation and assimilation of Refugees.<sup>92</sup> International protection include the supervision of international conventions for the protection of Refugees and the promotion of similar new instruments; conclusion of agreements with governments to improve the situation of Refugees and reduce their numbers; coordination of assistance to private Refugee aid endeavours; promotion of the admission of Refugees and monitoring of their situation.<sup>93</sup>

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<sup>86</sup> V. Türk, 'The Role of UNHCR in the Development of International Refugee Law', in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, Cambridge, 1999) p. 156; UNGA, *Report of the United Nations High Commissioner for Refugees (A/RES/31/35)* para. 1.

<sup>87</sup> Türk, *supra* note 86, pp. 157-58.

<sup>88</sup> ECOSOC, *Assistance in the Relief, Rehabilitation and Resettlement of Sudanese Refugees (E/RES/1655(LII))* preamble.

<sup>89</sup> Aga Khan, *supra* note 83, p. 242; UNGA, *Report of the United Nations High Commissioner for Refugees (A/RES/3454(XXX))* preamble.

<sup>90</sup> Goodwin-Gill and McAdam, *supra* note 70, p. 29; UNGA, *Report of the United Nations High Commissioner for Refugees (A/RES/35/41/A)* para. 1; For a different opinion about the definitive year, see: Türk, *supra* note 86, p. 159.

<sup>91</sup> Goodwin-Gill and McAdam, *supra* note 70, p. 33; Türk, *supra* note 86, p. 159.

<sup>92</sup> UNHCR Statute, para. 1.

<sup>93</sup> UNHCR Statute, para. 2.

Among the solutions that UNHCR is mandated to strive for, repatriation may be the hardest to grasp fully. 'Repatriation' is the voluntary return of a Refugee to his or her country of origin. UNHCR is supposed to do its best to make sure that Refugees can, and want to, take this step voluntarily.<sup>94</sup>

When it comes to the protection aspect of UNHCR's mandate, there are several things that need to be pointed out already at this stage. The duty to supervise international conventions for Refugee protection will be considered first, followed by the increasingly operational character of UNHCR's work.

Many of the instruments that UNHCR was to supervise did not exist at the creation of the Organisation, though the same year as the first High Commissioner took up office in 1951 the instrument that would become the legal backbone of refugee protection was adopted.<sup>95</sup> The *1951 Convention Relating to the Status of Refugees* was ratified by the first State in 1952, and entered into force two years later.<sup>96</sup> Among other things, it binds the participating States to respect the same refugee definition as the one contained in UNHCR's Statute, though limited in time and space to those who had fled because of the Second World War in Europe.<sup>97</sup> The 1951 Convention also created a legal obligation for the contracting States to cooperate with the High Commissioner in her work for Refugees, in particular the High Commissioners supervision of the 1951 Convention, through *inter alia* the sharing of information relating to Refugees.<sup>98</sup>

The second instrument which was brought into existence to be monitored by UNHCR, was by large an extension of the 1951 Convention. This was the *1967 Protocol Relating to the Status of Refugees* which removed the differences between the definition contained in UNHCR's Statute and that which legally bind States.<sup>99</sup> The 1951 Convention and the 1967 Protocol will be mostly referred to as one throughout this thesis under the term 'Refugee Convention'.

Beyond legal advocacy and intervention activities there was not much room for protection activity on behalf of UNHCR initially. Commentators note that the disbandment of the International Refugee Organisation (IRO) was supposed to mean the end to large-scale assistance efforts to Refugees on

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<sup>94</sup> UNHCR Statute, para. 1. Others have noted that there is an inherent paradox in working to protect the right to be a refugee while at the same time working towards ending this status: Goodwin-Gill and McAdam, *supra* note 70, p. 492.

<sup>95</sup> P. Collins, *A Mandate to Protect and Assist Refugees: 20 Years of Service in the Cause of Refugees 1951–1971* (Editions Rencontre, Lausanne, 1971) p. 131.

<sup>96</sup> *1951 Convention Relating to the Status of Refugees* [1951 Convention](189 UNTS 150).

<sup>97</sup> *Ibid.*, Article 1.

<sup>98</sup> 1951 Convention, para. 35.

<sup>99</sup> Nevertheless, States who were already members of the 1951 Convention, and had made explicit declarations to that extent could maintain the temporal and geographical limitations: *1967 Protocol Relating to the Status of Refugees* (606 UNTS 267) Articles 1 and 7(4).

behalf of the international community.<sup>100</sup> Moreover, judging by the Statute as well as operations before any changes to the Mandate, UNHCR was not envisioned as a highly operative organisation.<sup>101</sup> Budgetary means was only provided for administrative expenses, and involvement with the welfare of Refugees included only assistance to coordinate efforts made by others.<sup>102</sup> As a bleak remnant of IRO's capacity to provide both legal and material assistance to those under its responsibility,<sup>103</sup> only one clause remained that allowed UNHCR to funnel voluntary donations to public or private entities for assistance purposes.<sup>104</sup> However UNHCR's mandate was broadened when States realised that the plight of refugees might require material humanitarian assistance after all. UNHCR was authorised to operate programmes as a first step,<sup>105</sup> and eventually the ban on appeals for voluntary contributions from States was dropped.<sup>106</sup> This paved the way for UNHCR as the key provider of legal as well as material safety to those many who were left without protection by their respective States.

Throughout the thesis, the word 'Mandate' refers to UNHCR's responsibility, through its Statute; UNGA Resolutions; ExCom Conclusions and the Refugee Convention, for the protection and material assistance of Refugees.

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<sup>100</sup> Goodwin-Gill and McAdam, *supra* note 70, p. 20.

<sup>101</sup> P.D. Maynard, 'The Legal Competence of the United Nations High Commissioner for Refugees', 31 *International and Comparative Law Quarterly* (1982) p. 423; P. Collins, *supra* note 95, pp. 13, 17 and 35.

<sup>102</sup> UNHCR Statute, paras. 20 and 8(i).

<sup>103</sup> *Constitution of the International Refugee Organization and Agreement on interim measures to be taken in respect of refugees and displaced persons. Opened for signature on 15 December 1946* (18 UNTS 3) Articles 1 and 2.

<sup>104</sup> UNHCR Statute, para. 10.

<sup>105</sup> In 1954 according to Aga Khan, *supra* note 83, p. 243; But in 1955 according to UNGA, *International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees* (A/RES/832(IX)) preamble and para. 2.

<sup>106</sup> In 1958: UNGA, *International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees* (A/RES/1166(XII)) para. 1(b).

# 5 UNHCR's status under international law

Any effort towards an evaluation of UNHCR's behaviour requires knowledge of its status under international law. Its status will determine which acts can be legally carried out and whether responsibility can be demanded for actions taken. Hence, this Chapter will clarify UNHCR's status under international law.

The assumption is that UNHCR, in addition to being a subsidiary organ of the UNGA, is an international organisation.<sup>107</sup> In the absence of a universally accepted definition of what constitutes an international organisation, the task of classifying UNHCR may appear difficult at best.<sup>108</sup> But even scholars who claim that it is “structurally impossible” to construct a set of criteria by which one can determine whether something is an international organisation or not, acknowledge the existence of useful indicators to that end.<sup>109</sup> What is more, there seems to be a general consensus on at least some of these indicators.

## 5.1 The indicators of an international organisation

The most uncontroversial indicator is that an international organisation requires its members to be either States or other international organisations.<sup>110</sup> In relation to this criterion, it is noted that the International Law Commission's (ILC) most recent draft articles relating to international organisations exclude organisations without any States as members. Given that the commentaries to the draft articles explicitly mention the existence of international organisations without State members, this should not be taken as non-recognition of such organisations.<sup>111</sup> The omission is likely due to the special focus of the draft articles on international responsibility.<sup>112</sup>

A second requirement is that the entity has a goal, or will, separate from those of its individual members.<sup>113</sup> This need not always be practically so,

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<sup>107</sup> Personality is pragmatically assumed in international law and rebutted with enough evidence: J. Klabbbers, *An introduction to International Institutional Law* (Cambridge University Press, Cambridge, 2002) p. 57.

<sup>108</sup> H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity Within diversity* (Kluwer Law International, the Hague, 1995) p. 22.

<sup>109</sup> Klabbbers, *supra* note 107, pp. 7-8.

<sup>110</sup> P. Sands and P. Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell, London, 2001) p. 278; Klabbbers, *supra* note 107, pp. 9-10.

<sup>111</sup> ILC, *Report of the International Law Commission (A/58/10(SUPP))* pp. 38 and 44.

<sup>112</sup> ILC, *First Report on Responsibility of International Organisations (A/CN.4/532)* para.

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<sup>113</sup> Sands and Klein, *supra* note 110, p. 16.

but that it is legally true remains a prerequisite.<sup>114</sup> According to ILC, international legal personality is necessary to fulfil this criterion, but little guidance is offered on how to proceed with that determination.<sup>115</sup> But ever since 1949, and the International Court of Justice's (ICJ) *Reparations for Injuries* advisory opinion, it is known that entities other than States are able to possess legal personality.<sup>116</sup> Established theory among scholars, supported by the ICJ, presents two theories to determine legal personality. Either it is apparent from the statute of the entity in question that it has been conferred with legal personality, or the same can be inferred from the tasks the entity has been obligated to fulfil. In order to be able to conclude treaties, for example, the entity would have to possess legal personality for that purpose.<sup>117</sup> Some scholars make the reservation that unless an intention of the entity's creators to imbue it with legal personality can be determined, no such capacity can exist.<sup>118</sup> ILC added the weight of its authority to dispute this theory when it explained that the ICJ has tended *not* to emphasise intent when determining the existence of legal personality.<sup>119</sup>

A third, more disputed quality of an international organisation is the manner in which it was created. Some scholars deny all entities status as international organisations except those who have been created through a treaty.<sup>120</sup> Others go as far as to say that uniform practice over a period of time is sufficient for the creation of an international organisation.<sup>121</sup> This seems less far-fetched considering how the Organization for Security and Cooperation in Europe (OSCE) came into existence. It gradually grew forth through its members' practice, despite an initial agreement that it would not constitute an international organisation.<sup>122</sup> There are also several examples of organisations that have been created through resolutions, both by the United Nations Security Council (UNSC) and other organisations.<sup>123</sup> Seeing

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<sup>114</sup> Regarding the difficulty for an international organisation to pursue goals other than those of its members, see Schermers and Blokker, *supra* note 108, p. 30.

<sup>115</sup> ILC, *supra* note 111, pp. 41-42.

<sup>116</sup> ICJ, 'Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations', 3 *United Nations International Court of Justice Yearbook* (1948-1949) p. 67.

<sup>117</sup> Sands and Klein, *supra* note 110, pp. 471-72; D. Akande, 'International Organizations', in M.D. Evans (ed.), *International Law* (Oxford University Press, New York, 2006) pp. 281-82.

<sup>118</sup> Akande, *supra* note 117, p. 282.

<sup>119</sup> ILC, *supra* note 111, pp. 41-42.

<sup>120</sup> Sands and Klein, *supra* note 110, p. 16.

<sup>121</sup> I. Brownlie, *Principles of Public International Law* (Oxford University Press, New York, 2003) p. 650.

<sup>122</sup> Schermers and Blokker, *supra* note 108, p. 21.

<sup>123</sup> For example, UNMIK, created through Security Council Resolution 1244, has the capacity to conclude treaties: B. Knoll, 'From Benchmarking or Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate', 16 *European Journal of International Law* (2005) p. 644;

Examples of other international organisations created through resolutions: Klabbers, *supra* note 107, footnote 35; D.J. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte', 36 *Virginia Journal of International Law* (1996) footnote 404; W.S. Penfield, 'The Legal Status of the Pan American Union', 20 *American Journal of International Law* (1926) and J. Basdevant, 'La

as how this is the case, claims that international organisations can be created by means other than treaties appear justified. The common criterion seems to be that an organisation is created through an act governed by international law.<sup>124</sup>

## 5.2 Evaluation of UNHCR against the indicators

As the means to determine whether UNHCR is an international organisation are mere persuasive indicators, compliance with each one of them does not establish with full certainty the status of UNHCR. The opposite is also true. Less than full compliance in some aspect can still mean that UNHCR is an international organisation. This gives an admittedly speculative air to the research, but absent a verdict by the ICJ on the status of UNHCR, a determination based on the totality of circumstances is the best solution available.

### 5.2.1 Members

To begin with, there is no doubt that UNHCR's members are States. The question is rather which ones. As UNHCR was created by a UNGA resolution, it is tempting to stop at that and conclude that the two bodies must share the same members. However, things are not that simple. As previously described, the UNGA ceded part of its control over UNHCR to the much smaller ECOSOC already at the time of UNHCR's creation.<sup>125</sup> Consequently, States who are not members of ECOSOC enjoy less knowledge and control over UNHCR's activities. ECOSOC in turn has ceded part of its control to ExCom.<sup>126</sup> Thus it can be said that only members of the ExCom full control and insight in UNHCR's activities. This limit the absolute members of UNHCR to 70, compared to the 192 members of the UN.<sup>127</sup> It sets UNHCR somewhat aside from the UN in terms of effective membership, even though it should be acknowledged that UNHCR lacks its own rules of membership. However, that UNHCR was to operate with separate membership from the UN in general is further emphasised by the original reason for the establishment of a type of executive committee -- to facilitate the participation of non UN members.<sup>128</sup>

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Conference de Rio-de-Janaeiro de 1906', 15 *Revue Générale de Droit International Public* (1908).

<sup>124</sup> Schermers and Blokker, *supra* note 108, pp. 23-24; Klabbers, *supra* note 107, p. 11.

<sup>125</sup> Power ceded from UNGA to ECOSOC *see at supra* note 74; Members number 54 States as of 2008: Goodwin-Gill and McAdam, *supra* note 70, p. 282; ECOSOC, *ECOSOC members*, <[www.un.org/ecosoc/about/members.shtml](http://www.un.org/ecosoc/about/members.shtml)>, visited on 8 July 2008.

<sup>126</sup> *See* Chapter 4.1 and for further details *see* Chapter 8.1.

<sup>127</sup> Goodwin-Gill and McAdam, *supra* note 70, p. 741; UN, *Press Release* (ORG/1469) <[www.un.org/News/Press/docs/2006/org1469.doc.htm](http://www.un.org/News/Press/docs/2006/org1469.doc.htm)>, visited on 8 July 2008.

<sup>128</sup> M. Zieck, 'Vanishing Points of the Refugee Law Regime: Response to James Hathaway', 20 *Ohio State Journal on Dispute Resolution* (2005) footnote 108.

## 5.2.2 Separate will

To determine whether UNHCR has a will separate from that of its individual members, the question of legal personality has to be addressed. Though there is no paragraph in the Statute which explicitly states that UNHCR is to enjoy international legal personality, it can be inferred from the tasks that it is charged to carry out. The duty to protect Refugees is a prime example. As a surrogate for something typically provided to individuals by a State, this duty is indicative of legal personality.<sup>129</sup> Included in the concept of protection are interventions on behalf of individual Refugees threatened with *refoulement*, supervision of Refugees' access to asylum procedures and issuance of travel documents. Neither of these tasks would be possible without legal personality.<sup>130</sup> According to the ICJ, this is sufficient to establish the existence of international legal personality for an entity.<sup>131</sup> In addition, UNHCR carries responsibility for the supervision of treaties concluded for the protection of refugees.<sup>132</sup> States who are members to the 1951 Convention on the Status of Refugees or the 1967 Protocol, have given their explicit recognition of UNHCR's capacity in this regard.<sup>133</sup> And as a matter of law it would be impossible for UNHCR to effectively undertake this task unless it enjoys a separate legal personality from those whom it is to supervise.<sup>134</sup>

## 5.2.3 Constituent instruments

The third indicator which needs testing is that an international organisation has to be created through an act governed by international law. UNHCR was created through a resolution by the UNGA. Such resolutions are often considered as mere political acts. Yet they have to conform to the UN Charter, which undoubtedly is a legal document establishing the UN as an international organisation in the most traditional of ways between States. The Charter regulates the operation of the UN, in particular its right to create subsidiary organs.<sup>135</sup> Thus, the creation of UNHCR is undoubtedly an act governed by international law.

## 5.2.4 Conclusion

Since UNHCR does not fulfil the three indicators established for determination of its status as an international organisation to the fullest, some uncertainty could remain regarding its status. To the sceptic it might seem as UNHCR's close ties to the UN would bar it from separate

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<sup>129</sup> Goodwin-Gill and McAdam, *supra* note 70, pp. 9-10.

<sup>130</sup> Goodwin-Gill and McAdam, *supra* note 70, pp. 447 and 432.

<sup>131</sup> ICJ, *supra* note 116, p. 180.

<sup>132</sup> UNHCR Statute, para. 8(a).

<sup>133</sup> 1951 *Convention Relating to the Status of Refugees* (189 UNTS 150) para. 35; 1967 *Protocol Relating to the Status of Refugees* (606 UNTS 267) Article 2.

<sup>134</sup> R. Wilde, 'Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should Be Subject To International Human Rights Law', 1 *Yale Human Rights and development Law Journal* (1998) p. 114.

<sup>135</sup> UN Charter, Article 22.

recognition as an international organisation. Nevertheless, considering that other subsidiary organs such as United Nations Conference on Trade and Development (UNCTAD)<sup>136</sup> are regarded, by some of the most influential scholars, as international organisations, any doubts regarding UNHCR status should be dispelled.<sup>137</sup> Unlike UNHCR, the secretariat of UNCTAD is not formally separated from that of the UN.<sup>138</sup> And while UNCTAD shares its entire budget with the parent organisation,<sup>139</sup> the larger part of UNHCR's budget is its own.<sup>140</sup> UNHCR also chooses its own staff and appoints representatives around the world who answer only to the High Commissioner, though the same terms of employment as the UN in general are used.<sup>141</sup> Both UNHCR and UNCTAD have offices separate from that of the UN in New York.<sup>142</sup> It could be further argued that UNHCR's clearly stipulated duty to report to the UNGA about its operations every year would tie it closer to the UN.<sup>143</sup> What this does not fully consider is that UNCTAD also produces reports to the UNGA with some regularity.<sup>144</sup> That they are not dealt with as separate agenda items does not have to be interpreted as a lesser desire on behalf of the UNGA to exert control. It could just as well be that the need to repeatedly offer support to its activities is less than in relation to UNHCR. The UN regularly lends its persuasive authority to activities carried out by its organs as well as clearly separate organisations.<sup>145</sup>

Though UNHCR is undoubtedly subject to somewhat greater political control from the UN than UNCTAD, this is countered by greater responsibilities, more extensive institutional machinery and independent control over larger resources.<sup>146</sup> All of these circumstances warrants the

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<sup>136</sup> UNCTAD include all States members of UN as members: UNGA, *Establishment of the United Nations Conference on Trade and Development as an Organ of the General Assembly (A/RES/1995(XIX))* section II, para. (1).

<sup>137</sup> Schermers and Blokker, *supra* note 108, p. 26.

<sup>138</sup> UNGA, *supra* note 136, section II, para. 26.

<sup>139</sup> Schermers and Blokker, *supra* note 108, p. 26.

<sup>140</sup> This is a necessary implication based on the fact that ExCom budgeted USD 1,058 million for 2007, out of which regular UN budget contributions amounted to USD 34 million: UNGA, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees Fifty-eighth session (1-5 October 2007)* (A/62/12/Add.1) para. 16(e).

<sup>141</sup> UNHCR Statute, paras. 15(a)-(c), 16.

<sup>142</sup> Schermers and Blokker, *supra* note 108, p. 26; UNHCR Statute, para. 19.

<sup>143</sup> UNHCR Statute, para. 11.

<sup>144</sup> UNGA, *supra* note 136, section II, para. 25(1); examples of UNCTAD reports: *Activity Report 2007* (UNCTAD/DITC/2008/1), *ECESA Trade Cluster Annual Report 2006: Work Progress and Challenges Ahead* (UNCTAD/DITC/TAB/2007/1), *Challenges and opportunities for developing countries in producing biofuels* (UNCTAD/DITC/COM/2006/15).

<sup>145</sup> Schermers and Blokker, *supra* note 108, p. 28.

<sup>146</sup> UNHCR is responsible for some 32.9 million individuals, a staff of some 6,200 people around the globe, and manages a budget separate from the UN at approximately USD 1 billion: *supra* note 140; UNHCR, *Protecting Refugees and the Role of UNHCR* (UNHCR, Geneva, 2007) pp. 28 and 30.

UNCTAD, according to its webpage, has a staff of 400 people and operates with a budget of USD 75 million: Online resource, [www.unctad.org/Templates/Page.asp?intItemID=1931&lang=1](http://www.unctad.org/Templates/Page.asp?intItemID=1931&lang=1), visited on 9 July 2008.

final conclusion that UNHCR, in addition to being a subsidiary organ of the UN, is an international organisation with some separate degree of legal personality.<sup>147</sup>

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<sup>147</sup> On the existence of intermediates between international organisations and organs: *see* Schermers and Blokker, *supra* note 108, p. 28.

## 6 The MoU

The Memorandum of Understanding (MoU) is easy to describe in non-legal terminology. It is a document that contains a text and bears three different signatures. To determine the exact legal meaning of the text and signatures, on the other hand, takes more of an effort but is necessary none the less for an understanding of its significance in relation to UNHCR's involvement.

### 6.1 International agreement

The MoU bears insignia that all would recognise as typical for an agreement through a basic textual analysis. It contains language outlining a common understanding and signatures to confirm this.<sup>148</sup> Without more closely specifying the normative nature of the agreement at this point, it is further possible to conclude that it must be an international agreement. This is a logic consequence of two facts. To begin with, the agreement was created through the involvement of international actors. No doubt can exist that States are international actors, as the very notion of international law rests on the presumption that they possess that quality.<sup>149</sup> As for UNHCR, its international legal personality was established in the previous Chapter. Secondly, the agreement was created to function within the international sphere. This is proven by the subject matter of the agreement, which undoubtedly concerns inter state relations beyond the scope of private actors.<sup>150</sup> Because, it would make no more sense for a State to agree with itself to readmit its nationals, than it would to agree upon that with a private entity.<sup>151</sup>

### 6.2 Normative system

That an agreement creates some kind of relationship between those involved is self evident and inherent in the English language itself. What kind of relationship, on the other hand, is far from undisputed. The most rigid, and perhaps most meaningful, form of agreement creates binding rights and obligations. Hence it would make sense to attempt to determine if the present agreement belongs to that category. But what it means to create binding rights and obligations is not clear either, because the meaning of the word 'binding' depends on a normative context that must first be established.

While some scholars, like Kelvin Widdows, seem to take for granted that a binding international agreement equals a treaty, which is governed by

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<sup>148</sup> Especially: MoU, paras. 2, 25 and closing page.

<sup>149</sup> States are the original sources of customary law as well as treaty law: M.N. Shaw, *International Law* (Cambridge University Press, Cambridge, 2003) pp. 65-103 and 107-15.

<sup>150</sup> As is the case with treaties: Brownlie, *supra* note 121, p. 581.

<sup>151</sup> MoU07, para. 4.

international law per definition,<sup>152</sup> others claim that there is a distinction to be made between binding legal, political and moral agreements.<sup>153</sup> The latter assertion, which would force a categorisation of the MoU into one of three normative systems before any conclusion could be made regarding its binding nature, is disputed by Jan Klabbers. He claims, in a well-received work published in 1996,<sup>154</sup> that “agreements are either *legally* binding, or not binding at all”.<sup>155</sup> Klabbers builds his thesis on five problems that the notion of non-legally binding agreements faces.<sup>156</sup> Some of these merit more attention than others. To begin with, Klabbers point to the fact that a method to resolve conflicts among a multitude of normative systems would be needed, but is lacking.<sup>157</sup> He then goes on to observe that there is a lack of judicial as well as customary support for normative regimes other than the legal.<sup>158</sup> However, his most convincing argument is perhaps the assertion that intentional creation of morally and politically binding agreements is theoretically impossible.<sup>159</sup> Morally binding agreements cannot be a sound construct for at least one of two reasons. One, because of a lack of correlation between moral rights and obligations, as the latter can be fulfilled without the moral rights being honoured.<sup>160</sup> Or, because morality is something that crystallises over time, from judgement passed on a number of acts, which renders instant creation of moral obligations impossible.<sup>161</sup> Politically binding agreements as an idea is flawed because law is inherently political and widely accepted as the normative order which facilitates politics. Also, when it proves impossible to create any kind of an agreement without being politically bound, it is irrelevant to discuss politics as a separate normative order.<sup>162</sup>

If one accept Klabbers' thesis as sound, it is possible to act according to the same assumption that Kelvin Widdows would make. That is, if the MoU is an internationally binding agreement, it also has to be an international legal agreement. Thus, it is possible to make use of rules in international law relating to binding international legal agreements, to ascertain whether the MoU is binding upon those involved.

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<sup>152</sup> K. Widdows, 'What is an Agreement in International Law?\*', 50 *British Year Book of International Law* (1979) pp. 117-49.

<sup>153</sup> A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, New York, 2007) pp. 20-21.

<sup>154</sup> I. Sinclair, 'Book Review and Note: The Concept of Treaty in International Law. By Jan Klabbers. The Hauge, London, Boston: Kluwer Law International, 1996. pp. XX, 302. Index. F1 165; \$110; £74.25', 91 *American Journal of International Law* (1997) p. 748.

<sup>155</sup> J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, Hauge, 1996) p. 217 (emphasis added by the author).

<sup>156</sup> *Ibid.*, p. 121.

<sup>157</sup> *Ibid.*, p. 138.

<sup>158</sup> *Ibid.*, pp. 123-28, 146-47, 216.

<sup>159</sup> *Ibid.*, p. 122.

<sup>160</sup> *Ibid.*, p. 149.

<sup>161</sup> *Ibid.*, pp. 150-51.

<sup>162</sup> *Ibid.*, pp. 154-55.

## 6.3 Treaty law

Rules relating to binding international legal agreements exist primarily through customary law, where such agreements in general are referred to as “treaties”. However, these rules have also been formalised through written accord.<sup>163</sup> The *Vienna Convention on the Law of Treaties* (VCLT69), adopted in 1969, defines a treaty as:

[...] an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;<sup>164</sup>

Through the definition of a treaty (and elsewhere) the Vienna Convention of 1969 excludes international agreements concluded between States and international organisations from its scope.<sup>165</sup> However, that should not be taken as a rejection of their validity as the Convention does not aspire to be an exhaustive definition of what a treaty is.<sup>166</sup> Nor is there a lack of customary acceptance of treaties that involve international organisations as parties.<sup>167</sup> This was even explicitly recognised in 1986 when the *Vienna Convention on Treaties Between States and International Organizations* was opened for signature.<sup>168</sup> It still awaits its thirty-fifth signature by a State, which is needed for it to enter into force, but is considered applicable law none the less.<sup>169</sup> Hence, the MoU is not necessarily barred from status as a Treaty due to an international organisation's participation.

It has already been concluded in Chapter 6.1 above in a manner that conforms with the test to which one would subject a potential treaty, that the MoU is an international agreement.<sup>170</sup> Thus, the one criterion which remains to be fulfilled is that it should be “governed by international law”. Although unnecessarily ambiguous, the phrase reveals, after a reading of the 1969 Vienna Convention's drafting history, that a treaty has to create legal obligations between the parties to be regarded as such.<sup>171</sup> Whether the MoU does that, is dependent on the intent of the Parties,<sup>172</sup> which can only be ascertained through an examination of all the MoU's actual terms and the

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<sup>163</sup> Aust, *supra* note 153, p. 6; Shaw, *supra* note 149, p. 811.

<sup>164</sup> *Vienna Convention on the Law of Treaties* [VCLT69] (1155 UNTS 331) Article 2(1)a.

<sup>165</sup> VCLT69, Articles 2 and 3.

<sup>166</sup> VCLT69, Article 3.

<sup>167</sup> Aust, *supra* note 153, pp. 392-93.

<sup>168</sup> *Vienna Convention on Treaties Between States and International Organizations or International Organizations* [VCLT86] (A/CONF.129/15).

<sup>169</sup> UN Treaty Collection Online, *Vienna Convention on Treaties Between States and International Organizations or International Organizations*, <[untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty3.asp](http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty3.asp)>, visited on 22 March 2008; M. Fitzmaurice, 'The Practical Working of the Law of Treaties', in M.D. Evans (ed.), *International Law* (Oxford University Press, New York, 2006) p. 189.

<sup>170</sup> Aust, *supra* note 153, pp. 17-20.

<sup>171</sup> K. Widdows, 'What is an Agreement In International Law?', 50 *British Yearbook of International Law* (1979) pp. 126-36.

<sup>172</sup> *Ibid.*, p. 121.

circumstances surrounding its creation.<sup>173</sup> Interpretation of its terms should be based primarily on their natural meaning in the context in which the MoU was created and in the light of its object and purpose. Any expression of intent recognised by all the Parties, such as preambles or annexes, and any relevant international law applicable between them, constitute the context.<sup>174</sup> Widely used supplementary means of interpretation include preparatory works and circumstances, other than those that constitute the context, surrounding the MoU's conclusion.<sup>175</sup>

### 6.3.1 Contextual interpretation of the treaty

Many paragraphs of the MoU state that one or both Parties 'will' act in certain ways. "The Parties will take special measures", "[...] Sweden will [...] meet the costs of Afghans covered by this MoU", and "Afghanistan will inform UNHCR about any case of arrest, detention and penal proceedings". The usage of the word 'will' has to be interpreted as a serious, and binding, wording in most of its occurrences. Whereas Widdows would agree with this statement, Aust believes that the stronger word 'shall' is the preferred terminology when States intend to bind themselves legally.<sup>176</sup> Though the latter is possible, but disputed, the natural meaning of the phrase 'I will' is hardly interpreted by most people as anything other than an absolute commitment. It is also equally true that many less committing phrases could have been used, for example, 'with an aim to', 'shall attempt to', or 'to their best capacity'.

That the Parties agree to solve any dispute through consultations between themselves is ambiguous.<sup>177</sup> It could be interpreted as proof of the intent not to be legally bound since it aims to avoid that disputes are brought before, and adjudicated by, a competent legal authority such as the ICJ. However, the paragraph is worded as a commitment not to seek adjudication of disputes, rather than a statement to the effect that the MoU is unfit for adjudication. This also provides a good explanation why neither of the Parties has registered the MoU with the UNSG. A registration is not only an indication that the Parties consider it a treaty,<sup>178</sup> but a prerequisite for dispute settlement through adjudication within the UN system.<sup>179</sup> As such it would naturally appear unfriendly in light of the commitment to solve any dispute through dialogue. This effectively counters the assumption, that unregistered documents are not legally binding, which would otherwise

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<sup>173</sup> Shaw, *supra* note 149, p. 814.

<sup>174</sup> VCLT69, Article 31; Shaw, *supra* note 149, p. 840.

<sup>175</sup> VCLT69, Article 32.

<sup>176</sup> Widdows, *supra* note 171, p. 137; Aust, *supra* note 153, p. 33.

<sup>177</sup> MoU07, para. 24.

<sup>178</sup> According to Article 102.1 of the UN Charter members of the organisation have a duty to register treaties they enter into, as soon as possible, with the Secretariat: 'Charter of the United Nations' [UN Charter] in G. Melander *et al.*, *The Raoul Wallenberg Institute Compilation of Human Rights Instruments* (Koninklijke Brill NV, Leiden, 2004) p. 653

<sup>179</sup> Widdows, *supra* note 171, p. 143; Aust, *supra* note 153, p. 36; UN Charter, Article 102(2).

prevail.<sup>180</sup> Beyond that, registration does not affect the status of the MoU.<sup>181</sup> Quite opposite to what Aust seems to believe, registration in the Treaty Series by the UN secretariat does not entail any value judgement at all on its behalf.<sup>182</sup>

Examination of other instruments that the Parties have chosen to register with the UNSG strengthens the view that the words used in the present MoU are considered by them as conferrers of legal obligations. Similar terminology is used in a 'memorandum of understanding' between Sweden and Hungary, as well as in a 'letter of understanding' between UNHCR and Jordan.<sup>183</sup>

## 6.4 Conclusion

As a final remark, it can be said that one would have to agree with Widdows that States who choose to make use of the form of written agreement should be presumed to have intended to create a legal bond between themselves, and that they have an obligation to make any other intent apparent.<sup>184</sup> Although all formalities concerning the creation of a treaty have not been adhered to in relation to the MoU, acceptance of more informal legally binding instruments have a long history.<sup>185</sup> Based on all the facts at hand the conclusion must be that the MoU should be regarded as creating legal rights and obligations between the Parties.

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<sup>180</sup> Widdows, *supra* note 171, p. 144.

<sup>181</sup> ICJ, 'Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain', 87 *International Court of Justice* (1994) p. 14.

<sup>182</sup> Aust, *supra* note 153, pp. 26 and 51; UN, *Statement of Treaties and International Agreements: Registered or Filed and Recorded With the Secretariat During the Month of November 2004* (ST/LEG/SER.A/693) p. 5.

<sup>183</sup> *Memorandum of Understanding Between the Government of the Kingdom of Sweden and the Government of the Republic of Hungary on Defence Industrial Co-operation and Exchange of Views Concerning Certain Defence Matters* (2087 UNTS 324); *Letter of Understanding Between the Government of the Hashemite Kingdom of Jordan and the United Nations High Commissioner for Refugees* (2222 UNTS 213).

<sup>184</sup> Widdows, *supra* note 171, p. 139.

<sup>185</sup> According to Lauterpacht, acting in the capacity of Special Rapporteur on Treaties, there was acceptance of more informal instruments already in 1952: Widdows, *supra* note 171, p. 127 footnote 2.

## 7 Can UNHCR legally conclude 'a' treaty?

The mere existence of international legal personality is not enough for an international organisation to claim that it can conclude treaties. Unlike States, which automatically enjoy complete international legal personality, international organisations are ruled by the principle of speciality.<sup>186</sup> This means that only powers which are explicitly given the organisation, or necessary for fulfilment of its mandate, can be claimed.<sup>187</sup> The answer to whether an organisation has been given such powers must be sought in the organisation's constituent instruments.<sup>188</sup>

As with treaties, the rules in VCLT69 can be used for interpretation of constituent instruments.<sup>189</sup> However, formal use of said rules is prevented by the fact that UNHCR's Statute was established through a UNGA resolution before the adoption of VCLT69. But in light of the common use of VCLT69 for interpretation of UNSC resolutions by scholars and other international organs, analogous use of the principles contained in VCLT69 should be possible.<sup>190</sup>

The point of departure, in determining UNHCR's mandate, is a context interpretation of the natural meaning of the Statute. Paragraph 8(a) in UNHCR's statute explicitly gives the Organisation a role to play in relation to international conventions, though it is uncertain how far this role extends. To 'promote' the conclusion of conventions can mean anything from 'urge' the adoption of, to 'help' to establish.<sup>191</sup> Since the paragraph also allows UNHCR to propose amendments to conventions, the more active of the two roles must be presumed to have been the intended. Proposing amendments would naturally include drafting of such amendments, which would naturally extend to drafting of whole treaties. States' later acquiescence of UNHCR's "instrumental" role in the drafting of the 1967 Protocol confirms

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<sup>186</sup> Shaw, *supra* note 149, p. 1195.

<sup>187</sup> Brownlie, *supra* note 121, p. 581.

<sup>188</sup> Klabbers, *supra* note 107, p. 46.

<sup>189</sup> VCLT69, Article 5.

<sup>190</sup> Theoretical arguments for application of principles contained in VCLT69 for interpretation of UNSC resolutions can be found in E. Papastavridis, 'Interpretation of Security Council resolutions under Chapter VII in the aftermath of the Iraqi crisis', 56 *International & Comparative Law Quarterly* (2007) pp. 99, 100-06 and 118;

UNCC use of VCLT69 for interpretation of UNSC resolutions, and ICTY use of VCLT69 for interpretation of *sui generis* instruments can be found in D.D. Caron, 'The United Nations Compensation Commission for Claims Arising Out Of the Gulf War: The "Arising Prior To" Decision', 14 *Journal of Transnational Law and Policy* (2005) pp. 327-28 and footnote 101.

<sup>191</sup> The definition of "promote" can be found in *The American Heritage Dictionary of the English Language* (Houghton Mifflin Company, 2004)

<[dictionary.reference.com/browse/promote](http://dictionary.reference.com/browse/promote)>, visited on 10 July 2008.

the view that the Organisation is indeed competent to actively help in the establishment of international agreements.<sup>192</sup>

Paragraph 8(a) does not go so far as to allow UNHCR to become party to treaties, but the active role it mandates UNHCR to play in the creation of these instruments forms part of the context in which other paragraphs will have to be understood, Paragraph 8(b) in particular. This Paragraph clearly allows UNHCR to be a party to 'special agreements'. The difference in terminology indicates that Paragraph 8(b) does not refer to the same kind of instruments as Paragraph 8(a), but does not in itself say anything about their status under international law. Since 'agreement' is commonly used to describe binding international instruments in much the same way as 'treaty' and 'convention' are, it could be that some capacity to enter into international binding agreements was intended in Paragraph 8(b),<sup>193</sup> even if the multilateral law-making agreements in Paragraph 8(a) was not the intended. However, the text of the resolution by which the Statute was adopted, which is the closest thing to a preamble that there is, does not reveal anything further about Paragraph 8(b).<sup>194</sup>

To better understand Paragraph 8(a), recourse can be had to an interpretation in light of the Organisation's object, purpose and practice.<sup>195</sup> As the primary object and purpose of UNHCR is to provide international protection to those within its mandate, the claim of a capacity to conclude binding international agreements is strengthened.<sup>196</sup> For in much the same way as States feel the need to conclude treaties to protect their citizen, so must UNHCR have a right to act in accordance with the sovereign function of providing protection that it assumes in relation to Refugees.<sup>197</sup> The intention of those who drafted UNHCR's Statute, that the Organisation would enjoy "tremendous authority" also support that some kind of treaty making capacity was intended.<sup>198</sup> Furthermore, UNHCR has been concluding internationally binding headquarters agreements for years and State acceptance of, nay participation in, these agreements acts as ample evidence

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<sup>192</sup> Türk, *supra* note 86, pp. 161-62; *1967 Protocol Relating to the Status of Refugees* (606 UNTS 267).

<sup>193</sup> Shaw, *supra* note 149, p. 88.

<sup>194</sup> Just like the preamble of a treaty, it expresses the aggregate will of those adopting the constituent instrument itself: UNGA, *supra* note 71.

<sup>195</sup> Goodwin-Gill and McAdam, *supra* note 70, p. 1194-95; ICJ, 'Legality of the Use by a State of Nuclear Weapons In Armed Conflict', *ICJ Reports* (1996) pp. 66, 74-75. Klabbers cautions careful usage of the teleological method of textual interpretation: J. Klabbers, *supra* note 107, p. 96-100.

<sup>196</sup> G. Gilbert, 'Right, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order', 10 *International Journal of Refugee Law* (1998) p. 355.

<sup>197</sup> For a discussion on the role of treaties as a way to protect citizen, see Goodwin-Gill and McAdam, *supra* note 70, p. 22; UNHCR's sovereign role is especially clear in camps: Wilde, *supra* note 134, p. 128.

<sup>198</sup> C. Lewis, 'UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution', 17 *International Journal of Refugee Law* (2005) p. 75.

that UNHCR has the capacity to conclude binding international agreements.<sup>199</sup>

To dispel any uncertainty regarding the textual interpretation of UNHCR's capacity to conclude treaties, subsidiary means of interpretation can be used as a supplement. Hopefully they should support the same interpretation of 'special agreements' as above. The Secretary Generals' report on the creation of UNHCR constitutes a part of the *travaux préparatoires* to the Statute. In that capacity it is a typical subsidiary means of interpretation. As examples of 'special agreements', the report uses “resettlement agreements”, “agreements with governments willing to receive Refugees”, and agreements concerning the domestic status of UNHCR and its offices.<sup>200</sup> Agreements concerning the establishment of national offices are typically of a “contractual character, creating rights and obligations”.<sup>201</sup> And rules regarding immunities frequently contained therein are clearly belonging to the sphere of international law.<sup>202</sup> Thus, a capacity to conclude some form of binding international agreements seems to have been envisioned.

## 7.1 Conclusion

As explained in this Chapter, UNHCR's treaty making capacity is beyond doubt. It is confirmed both by a textual interpretation of its Statute and an examination of the *travaux préparatoires*.

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<sup>199</sup> Headquarters agreements are treaty like instruments: D.B. Hollis, 'Why State Consent Still Matters: Non State Actors, Treaties, and the Changing Sources of Law' 23 *Berkeley Journal of International Law* (2005) p. 163;

J. McDowell, 'The International Committee of the Red Cross as a Witness Before International Criminal Tribunals', 1 *Chinese Journal of International Law* (2002) p. 166; Klabbers, *supra* note 107, p. 248;

Examples of binding treaty language in headquarters agreements: *Agreement regarding the office of the United Nations High Commissioner for Refugees representative for Nordic countries to be situated in Stockholm* (1558 UNTS 323) Article 4 in particular; *Agreement on the establishment of a United Nations High Commissioner for Refugees field office in Georgia* (1935 UNTS 137);

*Cooperation Agreement between the United Nations High Commissioner for Refugees and the Gabonese Republic* (2020 UNTS 12) Article 9 in particular.

<sup>200</sup> Lewis, *supra* note 198, pp. 71-72.

<sup>201</sup> Schermers and Blokker, *supra* note 108, p. 1123.

<sup>202</sup> Klabbers, *supra* note 107, p. 146; Goodwin-Gill and McAdam, *supra* note 70, p. 1205.

## 8 Can UNHCR conclude ‘this’ treaty?

It is one thing to establish that UNHCR *can* participate in the conclusion of binding legal agreements, and another to say that it is allowed to participate in the specific agreement at hand. The former is dependent on UNHCR's legal status in international law, while the latter relates to internal rules regulating the operation of UNHCR.<sup>203</sup> This Chapter will attempt to determine whether UNHCR's conclusion of the MoU was in compliance with internal rules.

### 8.1 Internal rules

To determine what the internal rules are and who provides them, one should look to UNHCR's Statute and institutional practice.<sup>204</sup> According to the Statute, UNHCR is to follow orders given by the UNGA as well as ECOSOC. This is a potential source of confusion since neither UNGA “policy directives”, nor those of ECOSOC enjoy any clear hierarchical primacy in UNHCR's Statute.<sup>205</sup> In the eventuality that the two institutions would issue conflicting directives, which one should UNHCR follow?

In Chapter 5.2.4 it was concluded that UNHCR can operate as an international organisation in relation to States. However, in its relations with the UNGA and ECOSOC, UNHCR is best understood as a subsidiary organ. In that capacity UNHCR should regard policy directives from the UNGA as superior to those from ECOSOC.<sup>206</sup> While both are established as principal organs, there are many rules in the UN Charter, which places one before the other in importance.<sup>207</sup> For one, the UNGA has the power to elect ECOSOC's members.<sup>208</sup> Furthermore, the UNGA also has to review many of the decisions that ECOSOC can take that would have external effects.<sup>209</sup> Finally, ECOSOC has a duty to perform tasks which the UNGA might assign to it.<sup>210</sup> Together these rules clearly establish that the UNGA is superior to ECOSOC. Hence, UNHCR should follow policy directives by the former if there is a clash.

Presumably there should be very few cases where ECOSOC and UNGA directives clearly conflict. In the less than apparent cases, which would be

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<sup>203</sup> Schermers and Blokker, *supra* note 108, pp. 741-42.

<sup>204</sup> Shaw, *supra* note 149, p. 1198; Sands and Klein, *supra* note 110, p. 441; VCLT86, para. 2(1)(j)

<sup>205</sup> UNHCR Statute, para. 3.

<sup>206</sup> Generally, the hierarchy between organs decides the hierarchy of institutional acts: Sands and Klein, *supra* note 110, p. 455.

<sup>207</sup> UN Charter, Article 7.

<sup>208</sup> UN Charter, Articles 18(2) and 61(1).

<sup>209</sup> UN Charter, Articles 63 and 66(2).

<sup>210</sup> UN Charter, Articles 66(1) and 66(3).

more frequent, institutional practice indicates that UNHCR should follow ECOSOC directives. When ExCom was created in 1958, ECOSOC was called upon by the UNGA to establish an Executive Committee to “advise” UNHCR “at his request” on how to exercise his statutory functions and “approve projects”.<sup>211</sup> This seemed to outline a largely passive role. But ECOSOC went further and granted ExCom broad authority to make policy determinations on how UNHCR was to plan and develop projects.<sup>212</sup> This established a clearly active role for ExCom. ECOSOC did not contravene the UNGA, but expanded the powers of ExCom beyond what the UNGA had envisioned. Since the arrangement remains, it can be concluded that ECOSOC's practice was accepted by the UNGA. Thus, one can conclude that UNHCR remains bound by all directives from ECOSOC except those that clearly contravene UNGA directives.

The observant reader will have realised that ECOSOC transferred some of its own control over to UNHCR through the progressive interpretation it made of the UNGA's request when creating ExCom. UNHCR's Statute only mentions a duty to take orders from ECOSOC and the UNGA, but through its actions ECOSOC created an intermediary that inherited some of its powers. The importance of ExCom was further enhanced when the UNGA decided to do the same as ECOSOC a few years later (1962).<sup>213</sup> This brings us to the present, where ExCom is capable of issuing binding rules for UNHCR on behalf of both the UNGA and ECOSOC. Some commentators argue that the UNGA only gave ExCom legal power regarding material assistance issues and that it is only competent to offer 'advice' on protection matters.<sup>214</sup> However, UNHCR's institutional practice shows that it has regarded ExCom's instructions on protection as binding. This establishes that ExCom conclusions bind UNHCR, on behalf of the UNGA and ECOSOC, in both protection and assistance matters.<sup>215</sup>

## 8.2 Compliance with internal rules

Generally it is easier to determine whether something complies with a rule the more precise that particular rule is. ExCom conclusions ought to be the most precise rules governing UNHCR's conduct as they are issued within boundaries set by the superior organs. Therefore UNHCR's conduct in relation to the MoU will be measured against ExCom conclusions first. Although one may argue that this method incorrectly takes for granted that

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<sup>211</sup> UNGA, *International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees* (A/RES/1166(XII)) paras. 5(b), (c) and (e).

<sup>212</sup> ECOSOC, *Establishment of the Executive committee of the Programme of the United Nations High Commissioner for Refugees* (E/RES/672(XXV)) para. 2(a).

<sup>213</sup> UNGA, *Report of the United Nations High Commissioner for Refugees* (A/RES/1673(XVI)) para. 1; UNGA, *Continuation of the Office of the United Nations High Commissioner for Refugees* (A/RES/1783(XVII)) para. 2.

<sup>214</sup> L.W. Holborn, *A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees 1951-1972* (Metuchen, New Jersey, 1975) p. 328.

<sup>215</sup> J. Sztucki, 'The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme', 1 *International Journal of Refugee Law* (1989) pp. 298-99.

ExCom conclusions are in compliance with UNHCR's mandate, this is not the authors intention, and the method is arguable more efficient. Only if the MoU complies with rules given by ExCom would one need to proceed to check it against rules laid down by superior organs as well.

## 8.2.1 Grounds for involvement

Repatriation is one of the original solutions to the situation of Refugees which UNHCR is to work towards. The Statute speaks of facilitation, a word whose meaning has been explained and changed over time. Through ExCom Conclusion 18 in 1980, it was declared that facilitation means that UNHCR will give its full support to Refugees who have already decided to repatriate.<sup>216</sup> In 1985 the Mandate was broadened through ExCom Conclusion 40, to include a duty for UNHCR to promote repatriation movements when appropriate in the Organisation's view.<sup>217</sup> Promotion was to include active involvement in planning, implementation and actual repatriation. Tripartite commissions were pointed out as useful tools.<sup>218</sup> Eighteen years later, in 2003, UNHCR was recommended to involve itself indirectly with States' efforts to return "persons found not to be in need of international protection". It was also stated that UNHCR could be more closely involved upon a State's request, as long as it does not conflict with the Organisation's duty to provide protection.<sup>219</sup> Further more, individuals found not in need of international protection were not to benefit from UNHCR's obligations according to ExCom resolutions 18 and 40.<sup>220</sup>

Since the MoU involves asylum seekers who have not been rejected, as well as those who have, the validity of UNHCR's involvement depends on either one of the two above-mentioned criteria being fulfilled. Either Refugees as a group must have shown an interest in repatriating from Sweden to Afghanistan, or UNHCR must believe that the situation in Afghanistan is conducive to repatriation. It is safe to say that Afghan Refugees in Sweden have not voiced any public interest in repatriation. In fact, the community has been very vocal in its opposition against any return to Afghanistan.<sup>221</sup> This rules out a facilitating role for UNHCR and leaves the role of a promoter of repatriation. In other words, UNHCR's opinion about the situation in Afghanistan is the sole remaining valid reason for the Organisation's involvement in the MoU.

The grave physical and material security situation in Afghanistan has been commented upon in Chapter 2. UNHCR has been an important source of information about the situation since well before the MoU was concluded,

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<sup>216</sup> UNHCR ExCom, Conclusion on *Voluntary Repatriation*, No. 18 (XXXI) para. d.

<sup>217</sup> UNHCR ExCom, Conclusion on *Voluntary Repatriation*, No. 40 (XXXVI) para. e.

<sup>218</sup> *Ibid.*, paras. g and j.

<sup>219</sup> UNHCR ExCom, *Conclusion on the Return of Persons Found Not To Be In Need of International Protection*, No. 96 (LIV) paras. j and k.

<sup>220</sup> UNHCR ExCom, *Conclusion on Legal Safety Issues In the Context of Voluntary Repatriation of Refugees*, No. 101(LV) para. 3.

<sup>221</sup> See Chapter 3.2.

and it must have been fully aware of the situation at the time. In their latest guidelines, published in December 2007, UNHCR acknowledge that the security situation has been constantly deteriorating since 2006 and that the sustainability of voluntary repatriation might be questionable.<sup>222</sup> Keeping this in mind, it seems odd that UNHCR would have considered the situation in Afghanistan “appropriate” for promotion of voluntary return in 2006, and even more strange that UNHCR continues to consider the situation “appropriate” in 2007. However questionable UNHCR's involvement might be from an appropriateness perspective, it remains impossible to prove the Organisation objectively wrong on this account. It boils down to a question of UNHCR's opinion on the matter. Opinions can be more or less well founded, but not wrong. Thus UNHCR's actions must be presumed in compliance with internal rules, i.e. legal.

## 8.2.2 The voluntariness criteria

While the promotion of return to Afghanistan may not meet any legal problems, the actual degree of voluntariness envisioned in the MoU could. The MoU promises to respect “the primacy of voluntary return” and delineates who can opt for such return. At the same time it permits forcible returns as an option for those rejected asylum seekers who choose not to cooperate.<sup>223</sup> In effect this recognises Sweden's right to exert positive and negative pressure on rejected asylum seekers with the purpose of making them return home. In national law, those who are rejected have an obligation to quit Swedish territory within two to four weeks of their final negative decision. Failure to comply will result in forcible removal.<sup>224</sup> Since this is what rejected asylum seekers have to face, their choice to “voluntarily” return can hardly be regarded as truly voluntary.

Over the years, ExCom conclusions have stressed repeatedly that repatriation must be voluntary.<sup>225</sup> However, when UNHCR was given a green light to cooperate with States' efforts to return rejected asylum seekers, the requirement that such returns be voluntary was dropped. That the rejected persons had been duly tried in a “fair” Refugee Status Determination (RSD) procedure replaced voluntariness as the necessary criterion for UNHCR's involvement.<sup>226</sup> Thus it does not necessarily pose a legal problem that rejected Afghan asylum seekers in Sweden are pressured to “voluntarily” return to Afghanistan under the MoU. But the legality of the MoU, and UNHCR's involvement, depends on Swedish RSD procedures being “fair”. This naturally entails compliance with internationally accepted standards. Though other international institutions may at times offer opinion on individual cases, the Swedish system as a whole is evaluated authoritatively only by UNHCR. That forces us to assume that UNHCR is acting according to the rules.

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<sup>222</sup> UNHCR, *UNHCR's Eligibility Guidelines* [...], *supra* note 49, p. 81.

<sup>223</sup> MoU07, para 2 and 2(IV).

<sup>224</sup> Swedish Aliens Act: *Utlänningslagen* (SFS 2005:716) Chapter 12, paras. 15 .2 and 3.

<sup>225</sup> UNHCR ExCom, Conclusions No. 41 (XXXVII), 62 (XLI) and 89 (L) to name a few.

<sup>226</sup> UNHCR ExCom, Conclusion, No. 96 (LIV).

### **8.2.3 Conclusion**

All in all, it proves impossible to pronounce a convincing legal verdict against UNHCR's conclusion of the MoU based on a simple comparison of its actions and internal rules laid down by ExCom. These rules often require interpretation that is dependent on authority within the Refugee field. Whenever that is the case, there is an apparent problem since UNHCR is that sole authority. This leads to a catch 22 situation where the Organisation cannot be proven wrong. Since UNHCR's actions do not breach the more narrow rules, the thesis will now move on to evaluate their compliance with the broader rules in the next Chapter.

## 9 Compliance with the 'object and purpose'

The treaty making capacity of UNHCR is not limited to certain kind of agreements by its Statute. Thus it appears as if the high standing enjoyed by the High Commissioner would allow the Organisation to enter into any category of agreement. As seen in the previous Chapter this is not the case. The room for manoeuvre is limited by rules from UNHCR's superior organs. However, these rules often rely on assessments of compliance with international refugee law that UNHCR has the ultimate authority to make. In such cases, it is impossible to confront UNHCR with conduct in violation of its internal rules.<sup>227</sup> Would it not be possible nevertheless, to offer some convincing arguments on the permissibility of UNHCR's conduct in relation to the MoU?

I believe this is the case. UNHCR's behaviour could, despite the problem outlined above, be measured against the 'object and purpose' of its Mandate: the protection of Refugees' "rights and welfare".<sup>228</sup>

To determine the permissibility of UNHCR's involvement in the MoU, based on its effects on Refugee protection, is not an easy task. One reason for its complicated nature is that UNHCR's work, as a rule, relates to Refugees as a group.<sup>229</sup> Since UNHCR's duty to protect goes beyond the individual, it is not certain that what is negative for one Refugee, or even a smaller group, is wrong for the whole group overall. It is imaginable that UNHCR may even be right to pursue avenues that harm Refugees in order to uphold respect for the refugee system as a whole. How then, can a method to evaluate the MoU in light of the 'object and purpose' of UNHCR's Mandate be constructed?

I believe that it is necessary to look at the MoU from multiple perspectives and draw conclusions based on a balancing of the sum total of the positive and negative aspects that can be distinguished. Thus, the thesis proceeds with evaluating UNHCR's involvement in the MoU from an organisational, legal protection and humanitarian perspective.

### 9.1 Organisational perspective

It has already been mentioned previously in the thesis that UNHCR is the only international institution dedicated to the rights of Refugees. The

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<sup>227</sup> See Chapter 8.2.3.

<sup>228</sup> UNHCR, *UNHCR Strategy Towards 2000*, para. 1, <[www.unhcr.org/refworld/docid/3ae6b31c38.html](http://www.unhcr.org/refworld/docid/3ae6b31c38.html)>, visited on 20 July 2008; J.C. Hathaway, 'Forced Migration Studies: Could we Agree Just to Date', 20 *Journal of Refugee Studies* (2007) footnote 10.

<sup>229</sup> UNHCR Statute, para. 2.

obvious theoretical implication is that the more power and influence UNHCR has on the international political and legal scene, the better it is for Refugees' rights and welfare. So what is best for UNHCR?

It is the Author's belief that the answer is best found through an examination of what made UNHCR become what it is. Hence, a brief exposé in UNHCR's organisational history follows.

Through UNHCR's establishment, the IRO was replaced as the principal UN agency dealing with Refugees after only a few years of operation.<sup>230</sup> Unlike its predecessor UNHCR, had only a small budget and limited staff resources, which were suited only for advocacy and coordination work in the absence of voluntary contributions.<sup>231</sup> Consecutively, UNHCR enjoyed only limited legal and political influence despite the founders' proclamations of its high standing and importance. Moreover, due to the temporary nature of the mandate, its continued existence was constantly threatened in much the same way as its mightier predecessor had been.<sup>232</sup> Should the High Commissioner have pursued unpopular or controversial goals opposed by those few Western States that were in control of the UN at the time, they could easily have forgone to renewing its Mandate.

The first High Commissioners perceived an urgent need to prove the Organisation's worth in the eyes of Western donors and made choices accordingly.<sup>233</sup> To promote UNHCR's political relevance, its role in emergency relief and economic development was pushed aggressively.<sup>234</sup> One of the first steps in this direction was providing relief to East-Europeans fleeing to Berlin, despite insufficient mandate *ratio personae* at the time (1953).<sup>235</sup> After that, the renewal of UNHCR's mandate and continued operations for an additional five years, beyond the initial three-year mandate (which ended in 1954) was successfully lobbied.<sup>236</sup> The strategy bore additional fruit in 1958, as the High Commissioner secured the right to appeal for voluntary contributions to the Organisation's work. This further strengthened the Organisation since it enabled the establishment of a larger and more permanent budget. In turn the Organisation was made less

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<sup>230</sup> UNGA, *Agreement between the United Nations and the International Refugee Organization* (A/RES/205(III)); Goodwin-Gill and McAdam, *supra* note 70, p. 20.

<sup>231</sup> UNHCR operated its first year with a budget of USD 300,000 and 33 staff members: Collins, *supra* note 95, p. 13; UNHCR Statute, Article 21; *Constitution of the International Refugee Organization* (18 UNTS 3) Article 10 and Annex III.

<sup>232</sup> J.L. Carlin, 'Significant Refugee Crises Since World War II and the Response of the International Community', 3 *Michigan Yearbook of International Legal Studies* (1982) p. 6; *Constitution of the International Refugee Organization* (18 UNTS 3) Preamble; M-F. Cuéllar, 'Refugee Security and the Organizational Logic of Legal Mandates', 37

*Georgetown Journal of International Law* (2006) p. 654.

<sup>233</sup> Cuéllar, *supra* note 232, pp. 692 and 675.

<sup>234</sup> Cuéllar, *supra* note 232, p. 662.

<sup>235</sup> S.E. Davies, 'Redundant or Essential? How Politics Shaped the Outcome of The 1967 Protocol', 19 *International Journal of Refugee Law* (2007) p. 710; Cuéllar, *supra* note 232, p. 656.

<sup>236</sup> UNGA, *Prolongation of the Office of the United Nations High Commissioner for Refugees* (A/RES/727(VIII)) para. 1; Cuéllar, *supra* note 232, p. 656.

sensitive to political context in general.<sup>237</sup> Proven by the fact that UNHCR was able to engage in activities that somewhat challenged its creators. The Organisation's involvement with the plight of Algerian Refugees despite French concerns in 1957 act as an example.<sup>238</sup>

Cold War politics increasingly hampered the efficiency of UNHCR's classic protection work, such as RSD, and kept the Organisation relying on other means to stay relevant.<sup>239</sup> When States sought to manage their influence and instabilities in the Third World through humanitarian aid, among other things, UNHCR offered its services in delivering that aid.<sup>240</sup> The political capital thus earned was invested in expanding legal protection for Refugees, through *inter alia* the advocacy work that resulted in two new refugee conventions: the 1967 Protocol and the 1969 Organisation of African Unity (OAU) Convention on Refugees.<sup>241</sup> This further raised UNHCR's international prestige and political influence.

Through its focus on relief work UNHCR managed to expand its operational budget like no other UN organisation. Even though there was a dip in funds due to the decreased geopolitical interest in Refugees at the end of the Cold War,<sup>242</sup> UNHCR's core expenditures grew by 16,000 percent between 1975 and 1995.<sup>243</sup> Attempts to quail the establishment of rival agencies and promote UNHCR at the cost of the UN Office for Coordination of Humanitarian Affairs have also been successful.<sup>244</sup> The mutual dependence created by UNHCR's relief work seems to have been a very good recipe for success. States will have fewer Refugees to cope with if outflows are limited by relief, and UNHCR can be sure to remain in existence while alleviating the suffering of even more individuals than those qualifying under the original refugee definition.<sup>245</sup> Though funds aimed towards durable solutions make up a proportionally smaller sum of UNHCR's budget now than initially, they have remained largely constant in absolute numbers.<sup>246</sup> The fact that UNHCR still enjoys a substantial budget has silenced concerns voiced over the risk of overextending the Organisation's reach and the consequent loss of government interest to provide funding.<sup>247</sup>

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<sup>237</sup> Cuéllar, *supra* note 232, p. 658.

<sup>238</sup> Cuéllar, *supra* note 232, pp. 691 and 695.

<sup>239</sup> J. Mertus, 'The State and the Post-Cold War refugee Regime: New Models, New Questions', 20 *Michigan Journal of International Law* (1998) pp. 64-67; Cuéllar, *supra* note 232, p. 664.

<sup>240</sup> Cuéllar, *supra* note 232, pp. 662-63.

<sup>241</sup> Cuéllar, *supra* note 232, p. 666.

<sup>242</sup> J.F. Hollifield, 'Reconsidering Immigration in an Integrating World', 3 *UCLA Journal of International Law and Foreign Affairs* (1998-1999) p. 602; UNHCR, *The State of The World's Refugees 1995: In Search of Solutions* (Oxford University Press, 1995) p. 16, <[www.unhcr.org/publ/3ef99a814.html](http://www.unhcr.org/publ/3ef99a814.html)>, visited on 12 March 2008.

<sup>243</sup> Cuéllar, *supra* note 232, p. 694.

<sup>244</sup> Cuéllar, *supra* note 232, pp. 694-95.

<sup>245</sup> Cuéllar, *supra* note 232, pp. 589-90, 666.

<sup>246</sup> R. Hofmann, 'Voluntary Repatriation and UNHCR', 44 *Zeitschrift für ausländisches öffentliches Recht* (1984) p. 328.

<sup>247</sup> UNHCR's income was 1151 million dollars in 2006: UNGA, *Report of the Board of Auditors on the Financial Statements of the Voluntary Funds Administered by the United*

From an organisational viewpoint, the MoU fits well into a proven approach to survival for UNHCR, which is, as outlined above, to stay relevant by getting involved. By having UNHCR with its good name on board in the “voluntary returns” program, Sweden assures that the coerced returns to Afghanistan look good domestically as well as internationally. UNHCR's involvement is a symbolic guarantee that events take place in accordance with international law and increase the willingness of asylum seekers to return.<sup>248</sup> UNHCR on the other hand assure its access to funds which Sweden is willing to spend in returning Afghans. That limits competition by other organisations, such as the International Organisation for Migration (IOM), which typically assists in the return of rejected asylum seekers.<sup>249</sup> It also allows UNHCR to supervise for free the Swedish part of returns in a qualitative manner, since Sweden pays the bill, and coordinate them with the already ongoing humanitarian work in Afghanistan.<sup>250</sup>

Sweden's importance as a donor could also make the scales tip in favour of participation in the MoU. If one excludes the European Community which is not a State, Sweden has been UNHCR's fourth largest donor in absolute figures since 1995. Even more spectacular is that Sweden, together with USA, provides 77 percent of UNHCR's lightly earmarked funds.<sup>251</sup> These funds are crucial to UNHCR's ability to conduct itself as it sees best in regards to its Mandate. While most Western States use earmarking to steer UNHCR's operations in a way designed to avert Refugee flows to their borders from States which they have some affiliation with, Sweden has a history of not forcing UNHCR's hand in such manner.<sup>252</sup> However, Swedish donation practice has already changed in a more restrictive direction as it did not use to put any limitations at all on its donations.<sup>253</sup> Thus, from UNHCR's viewpoint it would be undesirable to risk alienating Sweden by refusing to participate in returns to Afghanistan, at least as long as there is no good reason for taking that risk.

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*Nations High Commissioner for Refugees for the Year Ended 31 December 2006* (A/AC.96/1039/REV.1) p. 10;

J.A. Scanlan, 'A View From the United States – Social, Economic, and Legal Change, the Persistence of the State, and Immigration Policy in the Coming Century', *2 Indiana Journal of Global Legal Studies* (1994) p. 122.

<sup>248</sup> M. Bhatia, 'Repatriation Under a Peace Process: Mandated Return in the Western Sahara', *15 International Journal of Refugee Law* (2003) p. 789; Hofmann, *supra* note 246, p. 334.

<sup>249</sup> G.S. Goodwin-Gill, 'Towards a Comprehensive Regional Policy approach: The Case for Inter-Agency Co-Operation', *5 International Journal of Refugee Law* (1993) pp. 366-67.

<sup>250</sup> After the MoU was renewed in the end of 2007, UNHCR has been granted funds for supervising the returns. The initial contract ran from January and July 2008 and is pending renewal as of 6 August 2008: K. Ränner, Swedish Migration Board (*Migrationsverket*), 8 August 2008, e-mail.

<sup>251</sup> UNHCR, *Global Report 2006* (2007) pp. 54 and 77,

[www.unhcr.org/publ/PUBL/4666d25b0.pdf](http://www.unhcr.org/publ/PUBL/4666d25b0.pdf), visited on 27 July 2008.

<sup>252</sup> J.C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', *31 Harvard International Law Journal* (1990) p. 182.

<sup>253</sup> A. Betts, 'Public Goods Theory and the Provision of Refugees Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', *16 Journal of Refugee Studies* (2003) pp. 88-89.

One reason to risk Sweden's goodwill may be UNHCR's dependence on its own high moral standing and authority. This is what UNHCR has to rely on in order to provide effective protection in the absence of any other means to make Western States abide by its assessment of what refugee law stipulates. Public shaming is of course an imaginable avenue as well, but the confrontational nature would risk the close relations with host States on which UNHCR depends.<sup>254</sup> Sweden's continued unresponsiveness to UNHCR's public statements on how returns of rejected asylum seekers should take place risk undermining the Organisation's authority. All returns of Afghans from Sweden have been to Kabul, regardless of whether the returnee has any ties to the area.<sup>255</sup> Those who would have to travel onwards to reach their home area are provided only with a cash grant for that purpose.<sup>256</sup> Sweden does not appear to give any regard to whether the returnee's home area is safe or even possible to return to. UNHCR's opinion on the other hand, is that the legality of returns depends on whether the rejected asylum seeker can be returned to her place of former residence.<sup>257</sup> Sweden's rejection of this claim is especially harmful since it promised, by signing of the MoU, to carry out only sustainable returns.<sup>258</sup> Thus, the Swedish returns to Kabul not only display blatant disregard for UNHCR's authority to pronounce what a sustainable return is, but UNHCR's continued participation in the MoU also makes it seem like the Organisation yields to the Swedish interpretation and has gone back on its own. This erodes UNHCR's authority, and by extension reduces its hard fought influence on global refugee policy, thus undermining its relevance as an independent international organisation.

### 9.1.1 Conclusion

UNHCR's successful strategy for increased influence and secured survival as an organisation has been to broaden its Mandate and expand its budget. Involvement in the MoU fits well within this strategy. Though the additional funds made directly available to UNHCR by Sweden as a result of its participation in the MoU may be insignificant from a global perspective, for UNHCR to be perceived as active and involved might be more important in the larger scheme of things. Sweden is also one of the more important sources of high quality funding, provided on time as pledged and only lightly, or not at all, restricted. This is the kind of funding that enables UNHCR to act independently. On the other hand, Sweden has already dropped from the number one provider of completely unrestricted funding in 2000, to 20<sup>th</sup> place in 2006.<sup>259</sup> Nevertheless, the level of funds donated by

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<sup>254</sup> M. Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination', 18 *International Journal of Refugee Law* (2006) p. 28.

<sup>255</sup> UNHCR, Regional Office Baltic and Nordic Countries, 4 August 2008, Telephone conversation.

<sup>256</sup> Phone conversation with Mr. Hans Pont at the Swedish Central Police Authority (Rikspolisstyrelsen); MoU07, para. 19.

<sup>257</sup> UNHCR, *UNHCR Eligibility Guidelines* [...], *supra* note 49, pp. 60-61.

<sup>258</sup> MoU07, para. 2.

<sup>259</sup> *See supra* note 251 and 253.

Sweden remains largely the same over time. This indicates that Swedish policy is changing towards a more instrumental character, but remains favourable to UNHCR in general. In such situation it can neither be expected with certainty that participation is going to win UNHCR any favours, nor that abstention will bring any retaliation. Thus, from an organisational perspective Sweden's disregard for UNHCR's opinion might actually do more damage than any benefits which UNHCR could derive from participating in the MoU.

## 9.2 Legal protection perspective

Another core question is how UNHCR's participation in the MoU influences the availability of legal protection to asylum seekers, especially those from Afghanistan. To determine this, it is not enough to simply read through the MoU. How the document interacts with factual and legal circumstances must also be taken into consideration. Nonetheless, the provisions of the MoU are a good start; which will be followed by an inquiry into how the MoU affects rejected asylum seekers' access to protection, as well as UNHCR's ability to provide protection.

### 9.2.1 Provisions of the MoU

For the most part, it seems as if through the MoU UNHCR has only secured assurances from Sweden and Afghanistan, that they will abide by what they are already legally bound to under international law. Afghanistan promise to readmit its nationals, not harass them on return and allow them to settle where they want.<sup>260</sup> These promises have already been made to the international community at large through ratification of the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT).<sup>261</sup> It is uncertain what UNHCR has to gain by Afghanistan's repetition of these commitments, especially since promises made through the MoU cannot presently be enforced through international legal dispute resolution mechanism within the UN.<sup>262</sup> Afghanistan also promises to allow foreign spouses, of returning Afghans, to enter and reside in the country.<sup>263</sup> The *carte blanche* nature of the promise is a potential gain for UNHCR in State acceptance of the principle of family unity.<sup>264</sup>

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<sup>260</sup> MoU07, paras. 4, 5 and 6.

<sup>261</sup> Right to return and move freely: *International Covenant on Civil and Political Rights* [ICCPR] (999 UNTS 171) Articles 12(4) and 12(1).

Right to freedom from harassment: ICCPR, Articles 7, 9(1) and 17, for example; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [CAT] (1465 UNTS 85) Article 2.

<sup>262</sup> See Chapter 6.3.1.

<sup>263</sup> MoU07, para. 11(2).

<sup>264</sup> ICCPR, paras. 17 and 23; *International Covenant on Economic, Social and Cultural Rights* [ICESCR] (993 UNTS 3) para. 10; Goodwin-Gill and McAdam, *supra* note 70, p. 319.

Both Sweden and Afghanistan promise to allow UNHCR unhindered access to Afghans within the scope of the MoU.<sup>265</sup> Considering that both countries are Parties to the 1951 Convention and thus obligated to cooperate with UNHCR in its work on behalf of Refugees, this seems mostly like another empty repetition,<sup>266</sup> as is the Swedish and Afghan assertion that UNHCR's right to monitor returns of rejected asylum seekers will be respected.<sup>267</sup> The common commitment to ease customs formalities with regards to returning Afghans' property, on the other hand, is a positive step towards recognition of their right to property.<sup>268</sup>

Sweden's assurances that returns will be carried out in compliance with international law does not break any new ground, but the promise not to return any children without successful family tracing is a positive recognition of UNHCR's guidelines in relation to the issue.<sup>269</sup>

Based on the above, it can be concluded that provisions in the MoU do not further the rights of Refugees in any significant way. For the most part, the promises made are merely affirmations that the State Parties will abide by rules they already accepted. Since the MoU is non-enforceable within the UN system absent a registration with the UNSG, UNHCR's legal position remains the same as before its involvement in the MoU, though there are marginal but observable gains in acceptance of UNHCR's progressive interpretation of refugee law.

## 9.2.2 Asylum seekers access to protection

It is convenient to assume that once an Afghan asylum seeker has been rejected by the final instance of the Swedish asylum system, her status is conclusively determined. There are two reasons why this is an inaccurate view. For one, 'refugee' is something a person becomes the instant an international border is crossed due to a well-founded fear of persecution on the grounds specified in the 1951 Refugee Convention. National RSD procedures mislead by name since they merely declare someone a Refugee and they do not create Refugees then and there.<sup>270</sup> Secondly, Swedish RSD procedures are constructed, for better or worse, in such a way that an asylum seeker can have her case tried repeatedly. The only requirement is that the asylum seeker produces evidence of new circumstances that she was unable to present the last time the case was tried. However the rule is quite strict,

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<sup>265</sup> MoU07, para. 13.

<sup>266</sup> 1951 Convention, para. 35.

<sup>267</sup> MoU07, para. 8.

<sup>268</sup> MoU07 para. 16.

<sup>269</sup> MoU07, paras. 3(2) and 12; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997) paras. 9(2)-(4), <[www.unhcr.org/refworld/docid/3ae6b3360.html](http://www.unhcr.org/refworld/docid/3ae6b3360.html)>, visited on 5 August 2008.

<sup>270</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992) para. 28; J.C. Hathaway and R.A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', 10 *Harvard Human Rights Journal* (1997) pp. 158-59; G.S. Goodwin-Gill and J. McAdam, *supra* note 70, pp. 121 and 141.

requiring that the new evidence did not exist or that trauma prevented the asylum seeker from presenting the evidence before.<sup>271</sup> Nevertheless, an asylum seeker can theoretically have her claim tried again and again an indefinite number of times. Thus the chance to have a valid claim for refugee status recognised cease to exist only once the claimant leaves Sweden.

Before the MoU was adopted there were two principal measures designed to help sever the connection between the rejected asylum seeker and Sweden. To begin with the asylum seeker would be at risk of forceful deportation if she did not leave voluntarily after a final rejection. Secondly, subsidies that every asylum seeker receives could be cut partially or completely, save a right to food and shelter within a designated reception centre, for reasons of non-cooperation in a deportation.<sup>272</sup> What constitutes uncooperative behaviour is interpreted broadly, and a refusal to seek out one's embassy to acquire a passport, for example, will result in a partial denial of subsidies.<sup>273</sup>

In effect, the MoU is an additional measure to help sever the link between the asylum seeker and Sweden. It adds a pull-factor to the previously described push-factors in that the rejected asylum seeker will be financially compensated if she quits Sweden voluntarily. Thus, the MoU increases the probability that a rejected asylum seeker will elect to give up and depart from Sweden.<sup>274</sup> Hence, the MoU decreases the chance that an individual asylum seeker will be recognised, which is undesirable from a legal protection perspective. However, the MoU helps Sweden come to terms with a problem which, if left uncorrected, might seriously diminish Sweden's wish to let asylum seekers enter in the first place. If those who have been through the RSD procedures once refuse to leave after being denied refugee status, the whole asylum system will become swamped. Absent an increase in funds, the quality of RSD procedures will most likely drop. If one looks at the state of other already underfunded national asylum systems, the conclusion must be that this will not result in a more generous asylum policy in Sweden either.<sup>275</sup> Needless to say, this would also be negative from a protection perspective. The potentially negative long-term

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<sup>271</sup> Swedish Aliens Act, *supra* note 224, Chapter 12, paras. 19, 2 or 3.

<sup>272</sup> Swedish Parliament, *Lag om mottagande av asylsökande m.fl.* (SFS 1994:137) paras. 10 and 12.

<sup>273</sup> *Nedsättning av dagersättning till asylsökande (M.S. v. Migrationsverket)*, 20 May 2005, Länsrätten i Värmlands Län, no. 3537/05, <[www.karnov.se](http://www.karnov.se)>, visited on 28 July 2008.

<sup>274</sup> Between January 2006 and June 2008, asylum seekers have been successfully persuaded to leave "voluntarily" in 17.3 percent (136 individuals) of the rejected cases. The police on the other hand has only been successful in returning 6.7 percent (33 individuals) of those handed over for return by force: Louise Utter, Swedish Migration Board, 26 June 2008, e-mail; Hans Pont, Swedish Central Police Authority (*Rikspolisstyrelsen*), 31 July 2008, e-mail.

<sup>275</sup> UNHCR, *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"* (2008) pp. 4-6, <[www.unhcr.org/refworld/docid/4805bde42.html](http://www.unhcr.org/refworld/docid/4805bde42.html)>, visited on 31 July 2008; M. Sperl, 'Fortress Europe and the Iraqi 'intruders': Iraqi Asylum-Seekers and the EU, 2003-2007', 144 *UNHCR New Issues in Refugee Research* (2007) pp. 5-7 and 11, <[www.unhcr.org/research/RESEARCH/470c9be92.pdf](http://www.unhcr.org/research/RESEARCH/470c9be92.pdf)>, visited on 31 July 2008.

effects of an overburdened asylum system may thus overshadow the short term, and largely individual, positive effects of the MoU's non-existence.

### 9.2.3 UNHCR's ability to provide protection

As explained in Chapter 8.2.3, there is nothing illegal *per se* with UNHCR's involvement in a State's exertion of pressure to make rejected asylum seekers leave "voluntarily".<sup>276</sup> However, a prerequisite for UNHCR's lawful involvement is that the rejected asylum seekers have been tried in fair RSD procedures.<sup>277</sup> Thus the legal correctness of UNHCR's initial, as well as continued, involvement in the MoU depends on whether Swedish RSD procedures conform to international standards. This dependence makes UNHCR a captive of its own policy and has a negative impact on the Organisation's general ability to protect the rights of Refugees. For one, UNHCR's willingness to critique Swedish conduct will be diminished. Critique which might imply that events incompatible with a fair RSD system took place before the MoU was initially signed, or renewed in 2007, cannot be brought forth. Because this would imply that UNHCR has acted in violation of its Mandate when it initially signed, or when it renewed, the MoU. Naturally this applies regardless of whether Afghans were those victimised or not.

Since there is reason to believe that events incompatible with fair RSD procedures take place in Sweden, the above is not merely a theoretical issue. Though UNHCR is the only international institution solely concerned with Refugees there are others with international responsibilities that sometimes coincide with the protection of Refugees' rights. The Committee Against Torture<sup>278</sup>, the European Court of Human Rights<sup>279</sup> and the Human Rights Committee<sup>280</sup> are all examples of institutions that act as guardians of rights which benefit Refugees.<sup>281</sup> Unlike UNHCR, they do not have a distinguished operational character but enjoy a judicial capacity to determine breaches of norms they are set to guard.<sup>282</sup> Refugees in Sweden

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<sup>276</sup> A.k.a., promoting voluntary return.

<sup>277</sup> UNHCR ExCom, *Conclusion on Legal Safety Issues In the Context of Voluntary Repatriation of Refugees*, No. 101 (LV), second paragraph; UNHCR ExCom, *Conclusion No. 96 (LIV)*.

<sup>278</sup> CAT, Articles 17 and 21.

<sup>279</sup> 'Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)' [ECHR] Articles 19, 33 and 34 in G. Melander (ed.) *et al.*, *The Raoul Wallenberg Institute Compilation of Human rights Instruments* (Koninklijke Brill NV, Leiden, 2004) p. 61.

<sup>280</sup> ICCPR, Articles 28 and 41; *Optional Protocol to the International Covenant on Civil and Political Rights* [ICCPR OP-1] (999 UNTS 171) Article 1.

<sup>281</sup> CAT, Article 3; ECHR, Article 3; *Soering v. the United Kingdom*, 7 July 1989, European Court of Human Rights, para. 111, <[www.echr.coe.int/echr/en/hudoc](http://www.echr.coe.int/echr/en/hudoc)>, visited 1 August 2008; ICCPR, Article 7.

<sup>282</sup> Since Sweden has ratified the respective instruments and communicated its acceptance of each institution's judicial capacity: CAT, acceptance upon ratification in January 1986. ICCPR, acceptance in November 1971: Bayefsky, <[www.bayefsky.com/html/sweden\\_t1\\_ratifications.php](http://www.bayefsky.com/html/sweden_t1_ratifications.php)> and <[www.bayefsky.com/html/sweden\\_t2\\_cat.php](http://www.bayefsky.com/html/sweden_t2_cat.php)>, visited on 1 August 2008;

have sought their rightful recognition through these institutions on several occasions after being denied asylum by Sweden. Though there are several instances where the claims have been recognised by the international institutions, this does not always mean that Sweden has failed to honour its obligations under the 1951 Convention.<sup>283</sup> The reason is that cases before the international institutions mentioned often concern rights under an extended refugee definition. But since all Refugees are tried within the same national system, the flaws exposed affect all equally, convention refugees or not.

There are several cases where Sweden has been proven to have decided erroneously on the claims of asylum seekers. Some cases have concerned denial of effective appeal,<sup>284</sup> though most cases involved an inappropriately high demand for consistency on the claimant's story and disregard for material evidence.<sup>285</sup> The most recent example concerned a Rwandan woman who claimed that she would face torture upon return to her home country. After being denied Refugee status in Sweden, she complained to the Committee Against Torture, which found that evidence to her advantage had been blatantly disregarded by Swedish authorities.<sup>286</sup> The Committee also found that Sweden had dismissed her credibility too easily as there existed no material discrepancies in her story.<sup>287</sup> With regards to the rarity of asylum seekers who have resources at their disposal to successfully bring their case all the way to the international level, it can be assumed that there are many more gravely erroneous decisions that are never brought to adjudication. However, even without taking those potential cases into consideration, those observed raise doubt whether Swedish RSD procedures

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ECHR, acceptance in February 1952: Council of Europe Treaty Section, <[conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=3&DF=8/1/2008&CL=ENG](http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=3&DF=8/1/2008&CL=ENG)>, visited on 1 August 2008.

<sup>283</sup> *M. Alzery v. Sweden*, 10 November 2006, Human Rights Committee (CCPR/C/88/D/1416/2005).

<sup>284</sup> *M. Alzery v. Sweden*, 10 November 2006, Human Rights Committee (CCPR/C/88/D/1416/2005) para. 11(8); *A. Agiza v. Sweden*, 24 May 2005, Committee Against Torture (CAT/C/34/D/233/2003) para. 13(8).

<sup>285</sup> *Bader and Others v. Sweden*, 8 February 2006, European Court of Human Rights, para. 45; *T.A. and S.T. v. Sweden*, 27 May 2005, Committee Against Torture (CAT/C/34/D/226/2003) para. 7(3);

*Karoui v. Sweden*, 8 May 2002, Committee Against Torture (CAT/C/34/D/185/2001) para. 10; *A.S. v. Sweden*, 24 November 2000, Committee Against Torture (CAT/C/25/D/149/1999) paras. 8(6)-9; *Haydnin v. Sweden*, 20 November 1998, Committee Against Torture (CAT/C/21/D/101/1997) para. 6(7);

*Ayas v. Sweden*, 12 November 1998, Committee Against Torture (CAT/C/21/D/97/1997) para. 6(5); *A.F. v. Sweden*, 8 May 1998, Committee Against Torture (CAT/C/20/D/89/1997) para. 6(5); *Tala v. Sweden*, 15 November 1996, Committee Against Torture (CAT/C/17/D/43/1996) paras. 10(3) and 10(4);

*Muzonzo v. Sweden*, 8 May 1996, Committee Against Torture (CAT/C/16/D/41/1996) para. 9(4) and 9(5).

<sup>286</sup> *C.T. and K.M. v. Sweden*, 7 December 2006, Committee Against Torture (CAT/C/37/D/279/2005) paras. 7(5) and 7(7).

<sup>287</sup> *Ibid.*, para. 7(6).

live up to international standards.<sup>288</sup> The strength of evidence that an asylum seeker is required to provide seems particularly questionable and might very well exceed the internationally accepted “reasonable degree”.<sup>289</sup>

A look at how the Swedish Aliens Act is interpreted indicates that Sweden does not intend to fully conform to international verdicts on its asylum procedures. Through its recent practice, the Swedish Migration Court of Appeal raised the bar for what Refugees need to prove. No longer is it sufficient to prove a reasonable (“*rimlig*”) risk of persecution, but a probable (“*sannolik*”) risk is needed.<sup>290</sup> Within Swedish administrative law practice the latter is often said to signify a probability of approximately 75 percent.<sup>291</sup> This is well beyond the level agreed on in international law, which would be better described as somewhat less than 50 percent, or slightly above for the asylum seeker who does not provide a generally credible story.<sup>292</sup> Naturally these figures lack independent value, but they are significant for the relationship they illustrate between national and international requirements on probability within RSD procedures.

Based on the above, it appears as if there are good reasons for UNHCR to avoid a lock-in that could limit its capacity to provide legal protection to asylum seekers. Participation in the MoU will impede UNHCR's ability to take as critical a stand as could be needed on asylum law issues. Because any critique by UNHCR that would seem to counter its assessment of the quality of Swedish RSD procedures would risk raising doubts of the legality of the Organisation's involvement in the promotion of returns to Afghanistan. In addition, Swedish RSD procedures arguably do not comply fully with international standards.

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<sup>288</sup> Although it should be noted that the Committee Against Torture generally requires less evidence from a claimant than required by other international human rights treaties, such as the 1951 Refugee Convention, to hold that a State has failed to honour its obligations.

<sup>289</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* [the Handbook] (1992) para. 42; The Handbook is an authoritative interpretation of the 1951 Refugee Convention: J. Moore, 'From Nation State To Failed State: International Protection From Human Rights Abuses By Non-State Agents', 31 *Columbia Human Rights Law Review* (1999) footnote 51;

J. Fitzpatrick, 'The International Dimension of U.S. Refugee Law', 15 *Berkeley Journal of International Law* (1997) p. 25. Within the context of Vietnamese boat refugees, but with general applicability: UNHCR, *International Conference on Indo-Chinese Refugees* (A/44/523) annex, pt. II, para. 6(c).

<sup>290</sup> *Fråga om förfarandet vid prövning av skyddsskäl. Tillika fråga om begreppet välgrundad fruktan och bedömningen av beviskravet för risk för förföljelse*, Swedish Migration Court of Appeal, 27 June 2007 (MIG 2007:37): The Court even referred to the applicable paragraphs in the Handbook but failed to make an accurate interpretation.

<sup>291</sup> C. Diesen *et al.*, *Bevisprövning i Förvaltningsmål* (Norstedts Juridik, Stockholm, 2003) p. 177.

<sup>292</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* [the Handbook] (1992) paras. 203 and 204.

## 9.3 Humanitarian protection perspective

As previously stated, the MoU increases the probability that an asylum seeker will return to Afghanistan. But the negative impact on the humanitarian situation for those of concern to UNHCR does not necessarily begin only after they have returned to Afghanistan. Already while the rejected asylum seekers, or shall we say potential Refugees, are still in Sweden, the Swedish Migration Board (SMB) could attempt to use the MoU as an additional ground for limiting access to material assistance. Refusal to return “voluntarily” could be interpreted by SMB as obstruction of a deportation decision, and that would legally empower the Board to cut sustenance.<sup>293</sup> Thus the MoU could lead to adverse humanitarian consequences.

Upon return to Afghanistan, the asylum seeker does not only move from one physical location to another, she is transferred from one legal category to another -- most likely from the status of a potential Refugee to that of an IDP.<sup>294</sup> More importantly however, she is transferred from one humanitarian situation to another. While asylum seekers can be forced to live under harsh conditions in Sweden, especially if they have been rejected, they remain largely safe from material harm. Once in Afghanistan as an IDP, that changes drastically. While those who return are not targeted by anyone because they have fled Afghanistan,<sup>295</sup> it is safe to assume that they run a larger risk because of their status as IDP. As previously stated, Afghanistan is a clan based society where there are presently no other mechanisms to secure material safety.<sup>296</sup> The conclusion must be that return to Afghanistan is something negative from a humanitarian perspective. Since the MoU is likely to increase the probability of return, by extension, the agreement is negative from a humanitarian perspective.

Although the risk of being forcefully returned to Afghanistan is relatively small should one refuse to return voluntarily under the MoU, the risk is there nevertheless. If the voluntary return program had not existed, a number of rejected asylum seekers who did return under the MoU between 2006 and 2008 would have been forcefully returned instead. Granted that their return was statistically unavoidable, the MoU has served as a mitigating factor of their humanitarian situation upon return. Without the MoU, and the financial support provided by Sweden under its terms, these individuals would have been left even more helpless in Afghanistan. To better understand the significance of Swedish direct aid to returning Afghans one need only to compare the sums that UNHCR is able to provide Afghans returning from Iran or Pakistan. While an Afghan family returning from Sweden can secure a maximum of SEK 50,000, a family returning

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<sup>293</sup> See Chapter 9.2.2.

<sup>294</sup> See Chapter **Fel! Hittar inte referenskölla..**

<sup>295</sup> K. Lumpp *et al.*, *supra* note 54, p. 161.

<sup>296</sup> *UNHCR Eligibility Guidelines* [...], *supra* note 49, p. 60; Chapter **Fel! Hittar inte referenskölla.Fel! Hittar inte referenskölla..**

from a neighbouring country can only expect a sum equal to SEK 650 to 740 from UNHCR.<sup>297</sup>

## 9.4 Conclusion, 'object and purpose' evaluation

After careful consideration of the MoU from an organisational, protection and humanitarian perspective, the time has come to weigh the advantages and disadvantages against each other and present a conclusion. Does UNHCR's participation in the MoU contradict the 'object and purpose' of its Mandate -- the protection of Refugees' "rights and welfare"?

The text of the MoU does not promise many advantages in terms of strengthened Refugee rights. Most commitments that the State Parties make have already been made before or amount to marginal improvements, and in practice these commitments may not even be worth as much as those involved might have hoped. Sweden made a promise, to fully respect UNHCR's right to monitor the compliance of returns with international law, which amply illustrates this.<sup>298</sup> Since the MoU also calls for all returns to take place in conformity with international law,<sup>299</sup> one would think that returns against UNHCR's recommendations would not occur. But as a matter of fact, Sweden has returned Afghans against UNHCR recommendations.<sup>300</sup> This nullifies the theoretical protection advantages contained in text.

Sweden's disregard for UNHCR's opinion is perhaps most alarming due to the risk it poses for more far-reaching consequences -- ultimately the erosion of UNHCR's highly respected standing in international law and the ensuing loss of protection potential. If a wealthy country like Sweden does not adhere to international refugee law as pronounced by UNHCR, why should less wealthy countries do so? Arguably this could not have been predicted at the time of signature and only act as an argument against UNHCR's continued participation. Flaws in Swedish RSD procedures, on the other hand, should have been something that UNHCR was well aware of before signing the MoU. The consequence of these flaws is that UNHCR limits its own ability to critique Sweden after signing the MoU, because critique that raise doubts about Swedish RSD standards' conformity with international law can make UNHCR's choice to participate in the MoU seem legally questionable. While this decreases protection *available* to Refugees, their *access* to protection is also limited through the increased probability

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<sup>297</sup> Based on the now obsolete exchange rate between SEK and USD mentioned in the MoU (SEK 100 = USD 14.30). UNHCR, *Repatriation From Pakistan: Frequently Asked Questions* (2007) <[www.unhcr.org/home/SUBSITES/470b80402.pdf](http://www.unhcr.org/home/SUBSITES/470b80402.pdf)>, visited on 8 August 2008; Swedish Government, *Förordning (2007:640) om återetableringsstöd för vissa utlänningar* (SFS 2007:640) para. 6.

<sup>298</sup> MoU07, para. 8.

<sup>299</sup> MoU07, para. 3(2).

<sup>300</sup> UNHCR, Regional Office Baltic and Nordic Countries, 4 August 2008, Telephone conversation.

that they will return which results from the MoU. However, the increased probability of return might ironically also act to secure access for all Refugee in the long run since it alleviates Swedish RSD procedures from becoming overburdened with rejected asylum seekers.

Another prerequisite for UNHCR's ability to act independently from States and take firm stands on protection issues, is access to unrestricted funds. Though Sweden is one of the more important sources of such funding, there is little reason to think that participation in the MoU will have any significant effect on Swedish funding patterns. However, the importance of the financial support that Sweden provides directly to those Afghans who return under the terms of the MoU should not be underestimated. The humanitarian gain is somewhat cast in shadow by the risk that non-cooperation in “voluntary” returns under the MoU might serve as an additional basis on which Swedish authorities could make the life miserable for those Afghans who refuse to seize the “opportunity”.

In light of the kind of negative effects that the MoU could have on UNHCR's organisational integrity, one would expect to find something that was clearly worth the gamble. However, the manner in which the MoU has been implemented has produced a net negative effect on protection available or provided to Refugees. Any positive protection effects remain nothing more than future potential. The clearly positive humanitarian effects that can be observed could perhaps have outweighed the Organisational and protection related uncertainties. But seeing as how the humanitarian benefits could come at the expense of well deserved protection – since asylum seekers might choose to leave Sweden and Swedish RSD procedures “prematurely” – they do not sufficiently influence the evaluation enough for a positive verdict. If not initially, then at least by the end of 2007, when it should have been clear to UNHCR that Sweden did not abide by its guidelines, the negative aspect of participating in the MoU outweighed the positive. The conclusion must be that UNHCR has acted in a manner detrimental to the 'object and purpose' of its Mandate. By doing so, the Organisation has acted illegally.

# 10 Illegal acts by international organisations

It was concluded in Chapter 9.4 that UNHCR had acted in a manner which could be regarded as illegal. While such a statement answers one question, it naturally produces other questions. Since the illegality of UNHCR's involvement stems from the adverse effects its participation in the MoU has on the rights of Refugees, will this fact force the Organisation to cease its participation? Will those whose rights are infringed upon have access to some form of redress?

UNHCR member States could potentially bring its participation in the MoU to an end. It has long been recognised within the international sphere that member States of international organisations have an inherent right to protest against decisions that are detrimental to their interests. This right applies regardless of the availability of provisions to that effect.<sup>301</sup> However, as discussed before there good reasons to believe that Sweden and Afghanistan share a mutual interest in the return of Afghan citizens. Therefore chances are virtually non-existent that any of them would challenge the MoU's validity. Though Afghan officials *have* publicly voiced their concern over the validity of the MoU, they have not acted on that statement.<sup>302</sup>

If neither Sweden, nor Afghanistan is likely to overturn the MoU, there is not much hope for any action from other UNHCR members either. For one, States generally show reluctance to overturn decisions of international organisations out of political considerations.<sup>303</sup> Secondly, in abstaining from protesting at the time when UNHCR concluded the MoU, they have given their silent consent.<sup>304</sup>

To hope that the *Parties* would simply give the MoU up is also a futile thought, though scholars have voiced the idea that acts which are contrary to the 'object and purpose' of an international organisation could be regarded as "manifestly ultra vires" and thus without legal effect *per se*.<sup>305</sup> The idea was discarded but received some recognition of later date, with the additional remark that international organisations should be liable for damages incurred by such acts.<sup>306</sup> Yet again this takes for granted that one of the concluding Parties wishes not to be bound. It also overlooks that damages

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<sup>301</sup> E. Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations', 77 *American Journal of International Law* (1983) p. 240.

<sup>302</sup> B. Ceballos, Miljöpartiet, *Nytt läge för afghanska återvändare*, 12 March 2008, parliamentary question in writing No. 2007/08:889.

<sup>303</sup> Osieke, *supra* note 301, p. 240.

<sup>304</sup> Klabbers, *supra* note 107, p. 135.

<sup>305</sup> Osieke, *supra* note 301, p. 249.

<sup>306</sup> Sands and Klein, *supra* note 110, p. 514.

can only be claimed by injured States. The individuals who are the potential victims in the present case would be left without any remedy.

The immunity of international organisations to claims by individuals is a legacy from times when no one perceived that their actions would ever seriously affect the lives of individuals directly.<sup>307</sup> But in a world where peacekeeping missions and individualised sanctions by the UNSC are commonplace, there is reason to believe that conflicts between international organisations and individuals are going to increase. But currently, apart from claims by employees, the international veil of immunity is only breached with any regularity on an *ad hoc* basis through arbitration commissions.<sup>308</sup> This means that individuals are barred from effective remedies to which they are entitled under international human rights law.<sup>309</sup>

Of the solutions that Klabbers proposes to the correction of illegal acts by international institutions, only the highly progressive idea to grant the ICJ *ex officio* power to monitor their decisions would have any chance to see the MoU terminated under the present circumstances.<sup>310</sup> Alternatively, *locus standi* before the court could be extended to non-governmental organisations (NGO), who could be expected to be more proactive than States. However, there is not much to say that States would abide by rulings where a claim was brought against their will by an NGO.

In conclusion, regardless of the illegality of UNHCR's participation in the MoU, there is nothing within the realm of international law that can force the Organisation to terminate its participation. In addition, there is no readily available avenue for those whose rights have been infringed upon to seek redress.

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<sup>307</sup> M. Bothe, 'Security Council's Targeted Sanctions Against Presumed Terrorists', 6 *Journal of International Criminal Justice* (2008) p. 541.

<sup>308</sup> *Ibid.*, pp. 543 and 546.

<sup>309</sup> UDHR, Articles 8 and 10; ICCPR, Article. 14.

<sup>310</sup> Klabbers, *supra* note 107, p. 251.

# 11 Summary and Conclusion

The purpose of this thesis was to prove that the permissibility of UNHCR's participation in the MoU is a question of law and then answer that question.

First it was established that UNHCR displays sufficient independence to be regarded as an international organisation in addition to its status as a subsidiary organ of the UNGA. An examination of UNHCR's constituent instrument and institutional practice revealed that it possesses sufficient personality to conclude binding international agreements. It was further established that the MoU could be regarded as such an agreement. Hence UNHCR's actions in relation to the MoU were placed firmly within the legal sphere.

In order to determine UNHCR's ability to legally participate in the MoU, the source and substance of internal rules governing the Organisation's actions were sought. It was laid down who possesses the authority to establish rules that govern UNHCR's operations beyond the limits imposed by its Mandate. The internal rules were then closely scrutinized to determine whether UNHCR could legally participate in the MoU. An evaluation of UNHCR's conduct against the more narrow rules provided by ExCom revealed that they were of limited value for an assessment of the Organisation's actions. Thus an answer had to be sought through an evaluation of UNHCR's conduct against its 'object and purpose' as an international organisation. Through this method it was established, with a narrow margin, that UNHCR had acted contrary to its 'object and purpose'. For an international organisation this amounts to an illegal act.

The serious nature of UNHCR's breach of law cannot be underestimated. As the sole guardian of refugees' rights, the Organisation does not only deprive Refugees of protection, it leaves them without access to a remedy. This is a result of the lack of other international subjects who has an interest in correcting UNHCR's behaviour. Since the Organisation can act with impunity, stringency in its internal application of refugee law is all the more important. Unfortunately there are tell-tale signs that the Organisation is placing less emphasis on strict compliance with the law. UNHCR's recent history has not only been filled with dubious repatriation activities,<sup>311</sup> internal structures established to ensure rigorous conformity with law have also shown signs of weakening.<sup>312</sup>

I would argue that the time has come for UNHCR to revive its past and return to a focus on legal protection. UNHCR might have felt a need once upon a time to involve itself in humanitarian assistance as a means to ensure

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<sup>311</sup> B.S. Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation', 3 *International Journal of Refugee Law* (1993) p. 455.

<sup>312</sup> A. Helton, 'The UNHCR Note on International Protection You Won't See', 9 *International Journal of Refugee Law* (1997) p. 272.

its survival. However, the Organisation is a institution today and not likely to disappear. It is time UNHCR remembered that humanitarian assistance was supposed to be a 'means' not an 'end'. There are numerous other actors that are capable of alleviating the suffering of the millions displaced, but only one organisation with a mandate to protect their legal rights. UNHCR should honour this obligation, because that is what sets the Organisation apart. That is what Refugees need.

# Annex A

## Agreed Minutes of the Negotiations on the Tripartite Memorandum of Understanding (MoU) between the Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan, and UNHCR

21 – 22 May, 2006  
Kabul, Afghanistan

The delegations of the Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan and the UNHCR met in Kabul on 21 and 22 May 2006.

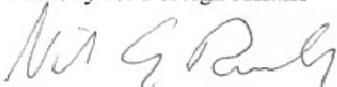
The three delegations agreed to the following text of the Tripartite Memorandum of Understanding (MoU) to be submitted to the respective Governments and Organisation for approval and signature.

The delegations of the Government of the Islamic Republic of Afghanistan and UNHCR urged the Swedish delegation to convey to the Government of the Kingdom of Sweden their strong request that the Government of the Kingdom of Sweden consider the possibility of allocating cash grant for the initial reintegration of Afghans upon return, either directly or through existing multilateral channels. They noted that from all the European countries with whom a tripartite agreement has been signed, only Afghans returning from Sweden would not receive such return package.

The agreed text of the MoU and a list of participants in the negotiations are attached.

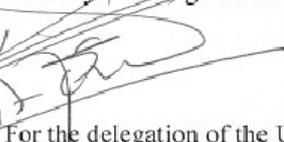
For the delegation of the Government of Kingdom of Sweden:

Mr. Nils G. Rosenberg  
Ambassador  
Ministry for Foreign Affairs



For the delegation of the Government of the Islamic Republic of Afghanistan:

Mr. Abdul Qadir Ahadi  
Deputy Minister  
Ministry of Refugees and Repatriation



For the delegation of the United Nations High Commissioner for Refugees, Afghanistan:

Mr. Jacques Mouchet  
Representative



# Annex B

## **Tripartite Memorandum of Understanding (the MoU) between, the Government of the Islamic Republic of Afghanistan, the Government of the Kingdom of Sweden and the United Nations High Commissioner for Refugees (UNHCR)**

The Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan and UNHCR, hereinafter referred to as "the Parties",

- (a) Recognizing that the right of all citizens to leave and to return to their country is a basic human right enshrined, inter alia, in Article 13(2) of the 1948 Universal Declaration of Human Rights and Article 12 of the 1966 International Covenant on Civil and Political Rights;
  - (b) Recalling that the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions signed, under the auspices of the United Nations, in Bonn on 5 December 200j (the Bonn Agreement) has laid the foundation for achieving lasting peace, national unity, reconciliation and social and economic development in Afghanistan and noting the progress made towards this end;
  - (c) Welcoming the fact that large numbers of Afghan citizens have already returned to their homeland and that many more are in the process of doing so bringing back valuable experiences and skills;
  - (d) Resolved to cooperate in order to assist the voluntary, dignified, safe and orderly return to and successful reintegration in Afghanistan of Afghans now in Sweden;
  - (e) Noting the desire of the Parties to work with each other to achieve full observance of international human rights and humanitarian standards;
  - (f) Recognizing the need to establish a framework for such co-operation, to ensure proper planning as well as to agree on specific procedures and modalities of return and reintegration programmes, as may be supported, where appropriate, by other Intergovernmental and nongovernmental organizations;
- [...]

### **PARAGRAPH 25 Coming Into effect**

This MoU will come into effect upon signature by the Parties.

### **PARAGRAPH 26 Amendment**

This MoU may be amended by mutual consent in writing between the Parties.

**PARAGRAPH 27**

**Termination**

This MoU will be valid until 31 December 2007.

# Annex C

## **Tripartite Memorandum of Understanding (the MoU) between, the Government of the Islamic Republic of Afghanistan, the Government of the Kingdom of Sweden and the United Nations High Commissioner for Refugees (UNHCR)**

The Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan and UNHCR, hereinafter referred to as "the Parties",

(a) Recognizing that the right of all citizens to leave and to return to their country is a basic human right enshrined, inter alia, in Article 13(2) of the 1948 Universal Declaration of Human Rights and Article 12 of the 1966 International Covenant on Civil and Political Rights;

(b) Recalling that the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions signed, under the auspices of the United Nations, in Bonn on 5 December 2001 (the Bonn Agreement) has laid the foundation for achieving lasting peace, national unity, reconciliation and social and economic development in Afghanistan and noting the progress made towards this end;

(c) Welcoming the fact that large numbers of Afghan citizens have already returned to their homeland and that many more are in the process of doing so bringing back valuable experiences and skills;

(d) Resolved to cooperate in order to assist the voluntary, dignified, safe and orderly return to and successful reintegration in Afghanistan of Afghans now in Sweden;

(e) Noting the desire of the Parties to work with each other to achieve full observance of international human rights and humanitarian standards;

(f) Recognizing the need to establish a framework for such co-operation, to ensure proper planning as well as to agree on specific procedures and modalities of return and reintegration programmes, as may be supported, where appropriate, by other Intergovernmental and nongovernmental organizations;

**Have reached the following understandings:**

### **PARAGRAPH 1**

#### **Scope**

This MoU will cover any Afghan citizen, as defined in Afghan Law, who is staying in Sweden, irrespective of his or her legal status,

### **PARAGRAPH 2**

#### **Objectives**

With this MoU, the Parties wish to lay the basis for a closely coordinated, phased and humane process of assisted return of Afghans in Sweden which respects the primacy of voluntary return and which takes account of the conditions in Afghanistan, of the importance of safe, dignified and sustainable return, and of return programmes for Afghans from other host countries.

**PARAGRAPH 3**  
**Modalities of Return**

The Parties hereby accept that the return of all Afghans will, subject to the proper operation of this paragraph, take place at their freely expressed wish, based on their knowledge of the situation in Intended places of return and of any options for continued stay in Sweden:

I Afghans holding a permanent residence permit in Sweden, will return to Afghanistan on the basis of their freely expressed wish in accordance with the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

II Afghans with pending applications for asylum who decide of their own free will to return to Afghanistan can opt for voluntary return.

III Afghans, who are found not to have protection needs or humanitarian reasons in accordance with the regulations in the Swedish Aliens Act could opt for voluntary return after a final negative decision on their asylum claim.

In compliance with the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and relevant national law of Sweden, alternatives to voluntary Return recognized as being acceptable under international law may be examined with regard to Afghans and who have no protection or compelling humanitarian needs justifying prolongation of their stay in Sweden, but who nevertheless, after the passage of reasonable time, continue to refuse to avail themselves of the Voluntary Return Programme set forth in this MoU. Prior to considering such alternatives for the persons concerned, all humanitarian aspects of their situation will be given fair consideration, during the asylum process in accordance with the Swedish Aliens Act, adequate notification will be provided, and they will be encouraged to opt for voluntary return. The Government of the Kingdom of Sweden will take into consideration the situation in Afghanistan when considering the application for asylum.

IV. Return may include - based exclusively on decisions in accordance with Swedish legislation - alternatives to voluntary return of Afghans ordered to leave Sweden, as an option of last resort.

The return process of Afghans found through this process not to have protection or compelling humanitarian needs will be phased, orderly and humane and accomplished in manageable numbers.

**PARAGRAPH 4**  
**Re-admission**

The Government of the Islamic Republic of Afghanistan will readmit its nationals and will assist, where necessary, in determining the Afghan nationality of persons intending to benefit from assistance under this MoU, within the shortest possible time and in any case no later than within four months. The Government of the Islamic Republic of Afghanistan and the Government of the Kingdom of Sweden will cooperate closely in this respect in order also to avoid any cases of statelessness.

**PARAGRAPH 5**  
**Commitments upon Return**

The Government of the Islamic Republic of Afghanistan will, together with other relevant bodies carry out the necessary measures to ensure that Afghans abroad can return without any fear of harassment, intimidation, persecution, discrimination prosecution or any punitive measures whatsoever. These safeguards do not preclude the right of the competent authorities of Afghanistan to prosecute individuals on account of war crimes and crimes against humanity, as defined In international instruments, or very serious common crimes involving death or severe bodily harm in accordance with established human rights standards.

The Government of the Islamic Republic of Afghanistan recalls in this respect the guarantees contained in Decree No. 297, dated 13.03.1380 (3 June 2002) on the dignified return of Afghan refugees, which fully applies to Afghans returning from Sweden under this MoU.

#### **PARAGRAPH 6**

##### **Freedom of Choice of Destination**

The Government of the Islamic Republic of Afghanistan accepts that Afghans returning from abroad will be free to settle in their former place of residence or any other place of their choice in Afghanistan.

#### **PARAGRAPH 7**

##### **Juridical Status and Equivalency**

The Government of the Islamic Republic of Afghanistan accepts, in accordance with Afghan law, to recognize the legal status, including changes thereto, of Afghans returning from Sweden, including births, deaths, adoptions, marriages and divorces. The Government of the Islamic Republic of Afghanistan will also seek to recognize, as appropriate and in cooperation with the Swedish authorities, the equivalency of academic and vocational skills diplomas and certificates obtained by Afghans while in Sweden.

#### **PARAGRAPH 8**

##### **UNHCR's Role**

The role of UNHCR in assisting, facilitating and monitoring the return of Afghans, in order to ensure that it is carried out in a manner consistent with its mandate and with the terms of this MoU, will be fully respected by the two other Parties. In close co-operation with its partners UNHCR will co-operate with the Swedish authorities on a programme for Afghans including the provision of Information, counseling and registration in Sweden.

#### **PARAGRAPH 9**

##### **Information and Sensitization**

The Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan and UNHCR will cooperate closely to ensure, with the assistance if necessary of other partners, that Afghans covered by this MoU are provided with objective and accurate information relevant to their return and reintegration in Afghanistan, to allow for decisions to return to be taken in full knowledge of the facts. To this effect, UNHCR will in co-operation with the Swedish authorities and partners provide information targeted at Afghans in Sweden.

The Government. of the Islamic Republic of Afghanistan will, with a view to creating conditions conducive to the reintegration of returnees in safety and with dignity, with the assistance of UNHCR and other relevant partners carry out all necessary measures to sensitize the population.

## **PARAGRAPH 10**

### **Counseling, Registration and Documentation**

In accordance with its mandated responsibility to ensure the voluntary character of the decision to return, UNHCR will, in consultation and co-operation with the Government of the Kingdom of Sweden, provide the most appropriate means for the counseling and registration of Afghans contemplating return, if necessary, with the assistance of other inter-governmental or nongovernmental organizations.

Duly completed Voluntary Return Forms (VRFs), issued in Sweden by the Swedish authorities in co-operation with UNHCR, signed by each adult male and female Afghan, will be recognized by the Parties as valid travel documents for the purpose of the return to their final destinations in Afghanistan of Afghans returning under this MoU. VRFs will be signed by a representative of UNHCR to attest to the voluntary character of the decision to return.

The Government of the Islamic Republic of Afghanistan will, in cases in which Afghans wishing to return do not hold documents establishing their identity, issue identity documents without delay through their diplomatic representations, after going through the legal procedures of the Afghan Government. The Government of the Kingdom of Sweden will contribute towards the costs of the issuance of identity documents to Afghans returning under this MoU.

For Afghans who have no protection or humanitarian needs justifying prolongation of their stay in Sweden and who nevertheless, after a passage of reasonable time following the communication of a final negative decision, continue to refuse to avail themselves to the Voluntary Return Program set forth in this MoU, the relevant Swedish authority will issue a valid travel document, EU Laissez-Passer.

## **PARAGRAPH 11**

### **Preservation of Family Unity**

In accordance with the principle of family unity, the Government of the Kingdom of Sweden, in cooperation with the other Parties will, in cases where all members of a family, who are all Afghans covered by the MoU, decide to return to Afghanistan, make every effort to ensure that families are returned as units and that involuntary separation is avoided. Family reunification, shall in all cases, take place in accordance with the respective national and international laws.

In order to preserve the unity of the family, spouses and/or children of returning Afghans who are themselves not citizens of Afghanistan will be permitted to enter and remain in Afghanistan. This commitment will also apply to non-Afghan spouses as well as children of deceased Afghans who may wish to enter and remain in Afghanistan, in order to ensure preservation of family links. Accordingly, the Islamic Republic of Afghanistan will regularize the entry and stay in Afghanistan of such persons in accordance with the provisions under its national laws on the entry and stay of foreigners and will consider favorably their naturalization. Visas to this effect will be issued within the shortest possible time by the relevant diplomatic or consular representation of Afghanistan.

## **PARAGRAPH 12**

### **Special Measures for Vulnerable Groups**

The Parties will take special measures to ensure that vulnerable groups receive adequate protection, assistance and care throughout the Return and reintegration process. In particular, measures will be taken to ensure that unaccompanied minors

are not returned prior to successful tracing of family members or without specific and adequate reception and care-taking arrangements having been put in place in Afghanistan.

### **PARAGRAPH 13**

#### **International Access Before and After Return**

In order to be able to carry out effectively its international protection and assistance functions and to facilitate the implementation of this MoU, UNHCR will, in accordance with national legislation including data-protection, be permitted free and unhindered access to all Afghans in Sweden falling under the scope of this MoU. Likewise, UNHCR will be permitted free and unhindered access to all returnees wherever they may be located in Afghanistan, including at airports, in accordance with the Afghan law, and Afghans will be permitted free and unhindered access to UNHCR.

The Government of the Islamic Republic of Afghanistan will extend full cooperation to UNHCR staff to allow them to monitor the treatment of returnees in accordance with humanitarian and human rights standards, including the implementation of the commitments contained in this MoU and in Decree No. 297 of 13.03.1380 (3 June 2002).

In this context, the Government of the Islamic Republic of Afghanistan will inform UNHCR about any case of arrest, detention and penal proceedings involving returnees. It will make relevant legal documentation on such cases, if any, available upon request and permit UNHCR staff prompt and unhindered access to such returnees.

The access permitted to UNHCR under this paragraph will, as appropriate, extend to intergovernmental or non-governmental organizations with which UNHCR, in consultation with the respective Party, may enter into agreements for the implementation of one or more components of the voluntary return programme covered by this MoU.

### **PARAGRAPH 14**

#### **Safe Nature of Return Travel**

In implementing this MoU, the Government of the Kingdom of Sweden will retain responsibility for the safety of Afghans who return under the provisions of this MoU until their departure at a border-crossing point. The responsibility for the safety of the returnees and responsibility for their personal property during travel will rest with the carrier and, if applicable, the international organization implementing travel. The Government of the Islamic Republic of Afghanistan will be responsible for their safety within the territory of Afghanistan.

### **PARAGRAPH 15**

#### **Health Precautions**

The Government of the Kingdom of Sweden will ensure that all Afghans returning under this MoU are provided, when considered necessary, with a basic medical examination and vaccinations prior to their return and given the opportunity of access in cases of emergency, to necessary medical care in Sweden.

### **PARAGRAPH. 16**

#### **Immigration and Customs Formalities**

To ensure the expeditious return of Afghans and their belongings, the Government of the Islamic Republic of Afghanistan and the Government of the Kingdom of

Sweden will, in respect to such persons, simplify and streamline their respective immigration, customs, health and other formalities usually carried out at border crossing points.

The returnees' personal property, including household and electronic items, hard currency, and food, will be exempted from all customs duties, charges and tariffs, provided that such property is not prohibited for exportation under the relevant national laws and rules and not prohibited for importation under the relevant Afghan national laws and rules. Lists specifying such items will be submitted by the two respective Parties as soon as possible following the signing of the MoU.

#### **PARAGRAPH 17**

##### **Airport Arrival and Transit Arrangements**

The Parties decide that the appropriate mode of return from Sweden to Afghanistan is by air and that arrival will take place at Kabul Airport. UNHCR and the organization implementing return travel will, if applicable, be permitted unhindered access to receive returnees at the airport. With the assistance of the other Parties and financial support provided by the Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan will ensure that appropriate reception facilities are in place to receive returnees, particularly those belonging to vulnerable groups, in transit to their intended destination, to the extent this is considered necessary by the Parties.

Where necessary and appropriate, the Parties may seek the understanding and acceptance of neighboring countries to permit returnees to transit through their territory to reach their places of origins in Afghanistan by the most direct and safe route.

#### **PARAGRAPH 18**

##### **Mine-Awareness**

The Parties will cooperate to ensure, with financial support provided by the Government of the Kingdom of Sweden, the provision of adequate mine awareness counseling to returning Afghans regarding risks of mines and unexploded ordnances.

#### **PARAGRAPH 19**

##### **Return Transportation Assistance**

The Government of the Kingdom of Sweden will, according to the Swedish legislation, meet the costs of travel for Afghans covered by this MoU up to the final destination in Afghanistan and in accordance with Swedish regulations of their luggage - including administrative costs to arrange for travel.

In addition, in order to facilitate re-integration, the Government of the Kingdom of Sweden will also offer a return package to Afghans returning to Afghanistan under the provisions of this MoU. Allowances will be regulated by the Swedish return programmes.

#### **PARAGRAPH 20**

##### **Reintegration Assistance**

The Government of the Kingdom of Sweden will continue to consider favorably the provision of support to reconstruction and rehabilitation projects with a view to facilitating the re-establishment of livelihoods in Afghanistan of returnees taking into account the broader reconstruction needs of Afghanistan,

## **PARAGRAPH 21**

### **Co-ordination Mechanisms**

In implementing this MoU, the Parties are committed to coordinating and consulting closely with each other. In this regard, relevant information except person-specific information related to the content of asylum-claims - will regularly be shared between the Parties, in particular between the respective diplomatic missions of the Government of the Kingdom of Sweden and the Government of the Islamic Republic of Afghanistan and with the respective UNHCR offices and other relevant partners in both countries.

Designated representatives of the Parties will form a Working Group to monitor and discuss the implementation of this MoU. The Working Group will meet when necessary. The Working Group may, whenever it considers it useful and appropriate, invite representatives of relevant organizations to participate in its deliberations in an advisory capacity. Decisions of the Working Group will be based on the mutual consent of the designated representatives or their designated alternates,

## **PARAGRAPH 22**

### **Personnel**

The Government of the Kingdom of Sweden and the Government of the Islamic Republic of Afghanistan will facilitate the entry and stay, through issuance of visas as necessary, in accordance with their applicable national immigration laws, of their officials and personnel as well as of UNHCR staff and of staff of organizations assisting UNHCR in facilitating the implementation of the MoU.

## **PARAGRAPH 23**

### **Continued Validity of other Agreements**

This MoU will not affect the validity of or derogate from any existing instruments, agreements, arrangements or mechanisms of cooperation between the Parties. To the extent necessary or applicable, such instruments agreements, arrangements or mechanisms may be relied upon and applied as if they formed part of this MoU to assist in the pursuit of the objectives of this MoU, namely the return and reintegration of Afghans.

## **PARAGRAPH 24**

### **Resolution of disputes**

Any question arising out of the interpretation or application of this MoU. or for which no provision is expressly made herein will be resolved amicably through consultations between the Parties.

In particular, the Parties accept to address possible questions of statelessness with a view to avoid its occurrence and to seek solutions to address the hardships entailed for those affected,

## **PARAGRAPH 25**

### **Coming Into effect**

This MoU will come into effect upon signature by the Parties.

## **PARAGRAPH 26**

### **Amendment**

This MoU may be amended by mutual consent in writing between the Parties.

## PARAGRAPH 27

### Termination

This MoU will be valid until 31 December 2008.

In witness, whereof, the representatives of the Parties have signed this MoU.

DONE at this in three original copies

For the Government of the Kingdom of Sweden

Mr. Robert Peszkowski  
Second Secretary, Political Affairs  
Embassy of Sweden Islamabad, Section Office in Kabul

For the Government of the Islamic Republic of Afghanistan

Mr. Abdul Qader "Ahadi"  
Deputy Minister  
Ministry of Refugees and Repatriation

For the United Nations High Commissioner for Refugees (UNHCR)

Ms. Aurvasi Patel  
Senior Protection Officer,  
UNHCR Representation Kabul

### Annex

Paragraph 19 of this MoU refers to return programmes available for Afghan nationals returning from Sweden to Afghanistan.

First there is one repatriation programme for persons who have been granted residence permit and have decided themselves to return. Such persons can apply for an allowance to move back to their native country. The allowance covers travel expenses from Sweden plus a cash amount to facilitate resettling. The cash amount is maximum 10 000 Swedish Crowns (SEK) for each adult and 5 000 Swedish Crowns (SEK) for each child under 18 years of age. The maximum allowance for one family is 40 000 Swedish Crowns (SEK).

Secondly there is a programme for persons whose application for residence permit has been rejected and who intend to return voluntarily to their country of origin. In order to facilitate their return, such persons will be able to apply, as of 1 August 2007, for a special allowance.

The allowance amounts to 20 000 Swedish Crowns (SEK) per adult and 10 000 Swedish Crowns (SEK) per child, with a maximum limit per family of 50 000 Swedish Crowns (SEK).

The exchange rate between Swedish Crowns (SEK) and United States Dollar (USD) is approximately at present: 100 SEK= 14,30 USD

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